

# Withdrawn/Redacted Material

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| DOCUMENT NO. | FORM   | SUBJECT/TITLE                                                                                                                | PAGES | DATE | RESTRICTION(S) |
|--------------|--------|------------------------------------------------------------------------------------------------------------------------------|-------|------|----------------|
| 001          | Report | Victims Compensation Fund Issues for Decision [with attachment] [12 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS] | 12    | N.D. |                |
| 002          | Report | OMB Approach [with attachments] [15 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS]                                 | 15    | N.D. |                |

### COLLECTION TITLE:

Counsel's Office, White House

### SERIES:

Kavanaugh, Brett - Subject Files

### FOLDER TITLE:

09/11/2001 Victims Compensatory Funds Regulations [1]

### FRC ID:

9702

### RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

#### Deed of Gift Restrictions

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- b(1) National security classified information [(b)(1) of the FOIA]
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

#### Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

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**SUPERSEDED**

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## **Victims Compensation Fund Issues for Decision**

### **1. Economic Loss**

#### **How detailed should the regulations be?**

Should the regulations spell out in great detail the methodology the Special Master will use? This would assure that claimants are able to predict what they will receive. But it could also expose DOJ to legal challenge on some of the economic assumptions it makes.

If the regulations are not detailed, however, claimants may be surprised by their awards and the Special Master may be subject to having to do individualized determinations.

One option would be to include a detailed chart with sample awards for most categories of victims. We would likely have to spell out what assumptions went into the chart for APA purposes, but this might give the Special Master flexibility to make individualized determinations.

#### **Which model to use?**

OMB has prepared an approach that caps income at \$360,000 (based on assumption that victims would remain in top 1% of income for the remainder of their work lives). OMB model also splits income into two tiers (assumption is that income under \$145,000 will increase annually at a higher rate than will income over \$145,000.)

Price Waterhouse has prepared a model that assumes income will increase annually at a rate that is consistent with that for a given profession (based on NY State data). It is not clear the results that would be generated using this model for higher-income earners (all in the Price Waterhouse materials had incomes below \$100,000).

**"Replacement services loss"** Should "replacement services loss" (i.e., value of work spent on household chores) be compensated? If so, for how long and should there be variations based on sex, hours worked outside the home, and so on?

**How much can awards be?** Under our current approach, it is possible that some young victims (25-35) who had very high earnings (\$250,000 plus) could wind up with economic losses calculated at \$5-7 million. If these victims did not have life insurance or other collateral source compensation, their awards could be very high relative to other victims with lower salaries.

### **2. Noneconomic loss**

**Amount of compensation.** We believe that it may be fairest **not** to distinguish among the victims who died on September 11 for purposes of assessing their noneconomic loss. What should be the amount they receive? Our model currently assumes \$100,000 for decedents'

pain and suffering and \$50,000 for each immediate family member (spouse, minor children) for loss of society.

3. **Compensation of same-sex partners and "de facto" children.** How should this issue be handled? By the Special Master on a case by case basis? By regulation?
4. **Collateral Sources.** Should charitable contributions be included as collateral sources that would offset a claimant's award? The New York Times on Sunday noted that many funds have been set up to compensate the families of public service officers who died in the attacks, and there may be as much as \$800,000 already available to each of these families. Should the awards made from the Fund be adjusted to reflect these awards?



Total program cost   \$ 3,823,824,284

[illegible]



NEWEST

| Tranche 1 retire | 65 |

Tranche 2 retire 62

Tranche 1 max at 95%: ~~\$ 131,000~~

Total program cost (\$ 3,823,824,284

### Average Net Economic Loss

**Average economic loss plus non-economic loss of:**

[illegible]



# Summary of Model, by Age and Income

Lifetime Income Max of: \$ 237,000 IRS 97% for 2000  
 For 25/75 mix of singles and families  
 Non-Economic loss at \$250K + \$50K per immediate family member  
 Min payment: \$ 100,000

Tranche 1 retire 65  
 Tranche 2 retire 62  
 Tranche 1 max at 95%: \$ 131,000  
 Total program cost \$ 4,525,424,853

| Age                              | Income     |              |              |              |              |              |              |
|----------------------------------|------------|--------------|--------------|--------------|--------------|--------------|--------------|
|                                  | \$ 30,000  | \$ 50,000    | \$ 70,000    | \$ 100,000   | \$ 175,000   | \$ 250,000   | \$ 1,000,000 |
| <b>Average Net Economic Loss</b> |            |              |              |              |              |              |              |
| 25                               | \$ 816,567 | \$ 1,390,823 | \$ 1,897,404 | \$ 2,727,782 | \$ 4,522,604 | \$ 4,987,036 | \$ 5,444,821 |
| 35                               | \$ 493,973 | \$ 841,362   | \$ 1,147,812 | \$ 1,650,139 | \$ 2,748,523 | \$ 3,126,127 | \$ 3,498,326 |
| 45                               | \$ 344,773 | \$ 587,236   | \$ 801,126   | \$ 1,151,730 | \$ 1,919,012 | \$ 2,187,575 | \$ 2,452,294 |
| 55                               | \$ 175,411 | \$ 298,769   | \$ 407,590   | \$ 585,968   | \$ 974,844   | \$ 1,100,039 | \$ 1,223,442 |

## Average economic loss plus non-economic loss of: \$ 362,500

|    |              |              |              |              |              |              |              |
|----|--------------|--------------|--------------|--------------|--------------|--------------|--------------|
| 25 | \$ 1,179,067 | \$ 1,753,323 | \$ 2,259,904 | \$ 3,090,282 | \$ 4,885,104 | \$ 5,349,536 | \$ 5,807,321 |
| 35 | \$ 856,473   | \$ 1,203,862 | \$ 1,510,312 | \$ 2,012,639 | \$ 3,111,023 | \$ 3,488,627 | \$ 3,860,826 |
| 45 | \$ 707,273   | \$ 949,736   | \$ 1,163,626 | \$ 1,514,230 | \$ 2,281,512 | \$ 2,550,075 | \$ 2,814,794 |
| 55 | \$ 537,911   | \$ 661,269   | \$ 770,090   | \$ 948,468   | \$ 1,337,344 | \$ 1,462,539 | \$ 1,585,942 |

for Married victims with three immediate family members (including spouse)

|    |              |              |              |              |              |              |              |
|----|--------------|--------------|--------------|--------------|--------------|--------------|--------------|
| 25 | \$ 1,440,137 | \$ 2,066,780 | \$ 2,649,003 | \$ 3,455,375 | \$ 5,465,746 | \$ 5,985,955 | \$ 6,498,717 |
| 35 | \$ 1,029,219 | \$ 1,408,299 | \$ 1,760,508 | \$ 2,248,313 | \$ 3,478,608 | \$ 3,901,560 | \$ 4,318,458 |
| 45 | \$ 839,169   | \$ 1,103,751 | \$ 1,349,579 | \$ 1,690,047 | \$ 2,549,476 | \$ 2,850,292 | \$ 3,146,802 |
| 55 | \$ 623,437   | \$ 758,049   | \$ 883,119   | \$ 1,056,340 | \$ 1,491,918 | \$ 1,632,149 | \$ 1,770,371 |

for Single victims

|    |            |              |              |              |              |              |              |
|----|------------|--------------|--------------|--------------|--------------|--------------|--------------|
| 25 | \$ 638,557 | \$ 1,022,679 | \$ 1,434,335 | \$ 2,212,316 | \$ 3,503,478 | \$ 3,837,583 | \$ 4,166,904 |
| 35 | \$ 485,053 | \$ 717,423   | \$ 966,450   | \$ 1,437,080 | \$ 2,227,237 | \$ 2,498,879 | \$ 2,766,632 |
| 45 | \$ 414,057 | \$ 576,242   | \$ 750,053   | \$ 1,078,533 | \$ 1,630,502 | \$ 1,823,702 | \$ 2,014,135 |
| 55 | \$ 333,468 | \$ 415,983   | \$ 504,413   | \$ 671,535   | \$ 951,285   | \$ 1,041,348 | \$ 1,130,122 |

## Average Payment, Net of Collateral Sources, with min payment

|                           | \$ 30,000  | \$ 50,000    | \$ 70,000    | \$ 100,000   | \$ 175,000   | \$ 250,000   | \$ 1,000,000 |
|---------------------------|------------|--------------|--------------|--------------|--------------|--------------|--------------|
| <b>For Average Victim</b> |            |              |              |              |              |              |              |
| 25                        | \$ 960,280 | \$ 1,447,912 | \$ 1,920,063 | \$ 2,660,838 | \$ 4,313,279 | \$ 4,647,196 | \$ 4,609,932 |
| 35                        | \$ 556,290 | \$ 762,792   | \$ 994,617   | \$ 1,336,543 | \$ 2,213,280 | \$ 2,487,707 | \$ 2,132,891 |
| 45                        | \$ 385,753 | \$ 473,105   | \$ 601,833   | \$ 773,476   | \$ 1,275,537 | \$ 1,400,981 | \$ 517,873   |
| 55                        | \$ 195,291 | \$ 193,211   | \$ 219,978   | \$ 241,771   | \$ 315,778   | \$ 244,853   | \$ 100,000   |

for Married victims with three immediate family members (including spouse)

|    |              |              |              |              |              |              |              |
|----|--------------|--------------|--------------|--------------|--------------|--------------|--------------|
| 25 | \$ 1,171,745 | \$ 1,698,385 | \$ 2,246,178 | \$ 2,953,293 | \$ 4,821,284 | \$ 5,210,977 | \$ 5,228,691 |
| 35 | \$ 679,431   | \$ 904,245   | \$ 1,181,829 | \$ 1,499,579 | \$ 2,508,226 | \$ 2,828,002 | \$ 2,517,885 |
| 45 | \$ 468,045   | \$ 564,136   | \$ 724,801   | \$ 876,655   | \$ 1,470,863 | \$ 1,628,561 | \$ 777,243   |
| 55 | \$ 222,741   | \$ 213,488   | \$ 250,005   | \$ 262,911   | \$ 364,940   | \$ 303,035   | \$ 100,000   |

for Single Victims

|    |            |            |              |              |              |              |              |
|----|------------|------------|--------------|--------------|--------------|--------------|--------------|
| 25 | \$ 568,836 | \$ 906,478 | \$ 1,283,704 | \$ 2,001,041 | \$ 3,149,822 | \$ 3,465,927 | \$ 3,655,061 |
| 35 | \$ 333,937 | \$ 465,563 | \$ 639,964   | \$ 979,152   | \$ 1,547,662 | \$ 1,807,608 | \$ 1,636,864 |
| 45 | \$ 241,604 | \$ 288,820 | \$ 377,469   | \$ 555,948   | \$ 842,696   | \$ 957,840   | \$ 205,648   |
| 55 | \$ 162,066 | \$ 159,565 | \$ 174,097   | \$ 206,512   | \$ 215,044   | \$ 141,237   | \$ 100,000   |



# VICTIM'S COMPENSATION FUND

Max Compensable Income equal to top 3 percentile for 2000, based on IRS data

|                                          |           |                   |                            |      |
|------------------------------------------|-----------|-------------------|----------------------------|------|
| High Benefits Persons: Life Insurance* = | 8         | times base salary | ratio with high benefits = | 0.40 |
| Low Benefits Persons: Life Insurance* =  | 2         | times base salary | ratio with low benefits =  | 0.60 |
| Maximum Amount of Life Insurance =       | 1,000,000 |                   |                            |      |

\* victims under 35 have half this amount

TOTAL GOVERNMENT LIABILITY = \$ 4,525,424,853

## Multiple of Annual salary (to equal career earnings)

| Present Value Factors 1st Tranche, Income up to: \$ 131,000 |      |      |      |                         |                          |
|-------------------------------------------------------------|------|------|------|-------------------------|--------------------------|
| Age at Death                                                | 62   | 65   | 65   | Annual Salary Increase* | Annual Interest Increase |
| 25                                                          | 37.5 | 40.5 | 40.5 | 6.60%                   | 6.25%                    |
| 35                                                          | 22.5 | 24.5 | 24.5 | 5.10%                   | 6.25%                    |
| 45                                                          | 14.9 | 17.1 | 17.1 | 5.10%                   | 6.25%                    |
| 55                                                          | 6.3  | 8.7  | 8.7  | 4.20%                   | 6.25%                    |

| Present Value Factors 2nd Tranche, income from \$ 131,000 up to \$237,000 |      |      |      |                         |                          |
|---------------------------------------------------------------------------|------|------|------|-------------------------|--------------------------|
| Age at Death                                                              | 62   | 62   | 62   | Annual Salary Increase* | Annual Interest Increase |
| 25                                                                        | 23.0 | 23.0 | 23.0 | 3.50%                   | 6.25%                    |
| 35                                                                        | 18.7 | 18.7 | 18.7 | 3.50%                   | 6.25%                    |
| 45                                                                        | 13.3 | 13.3 | 13.3 | 3.50%                   | 6.25%                    |
| 55                                                                        | 6.2  | 6.2  | 6.2  | 3.50%                   | 6.25%                    |

### Calculation of Net Earnings

|                             |           |           |           |            |            |            |              |
|-----------------------------|-----------|-----------|-----------|------------|------------|------------|--------------|
| Base salary                 | \$ 30,000 | \$ 50,000 | \$ 64,815 | \$ 90,909  | \$ 152,174 | \$ 208,333 | \$ 800,000   |
| Variable earnings           | \$ -      | \$ -      | \$ 5,185  | \$ 9,091   | \$ 22,826  | \$ 41,667  | \$ 200,000   |
| Gross Pretax                | \$ 30,000 | \$ 50,000 | \$ 70,000 | \$ 100,000 | \$ 175,000 | \$ 250,000 | \$ 1,000,000 |
| Max compensable             | \$ 30,000 | \$ 50,000 | \$ 70,000 | \$ 100,000 | \$ 175,000 | \$ 237,000 | \$ 237,000   |
| x tax factor                | 13.6%     | 18.0%     | 20.1%     | 26.0%      | 28.2%      | 37.8%      | 37.8%        |
| Post-Tax Compensable        | \$ 25,920 | \$ 41,025 | \$ 55,930 | \$ 74,050  | \$ 125,650 | \$ 147,414 | \$ 147,414   |
| + employer pension contrib. | \$ 1,200  | \$ 2,000  | \$ 2,593  | \$ 3,636   | \$ 6,087   | \$ 8,333   | \$ 32,000    |
| + employer medical premium  | \$ 2,400  | \$ 2,400  | \$ 2,400  | \$ 2,400   | \$ 2,400   | \$ 2,400   | \$ 2,400     |
| Total compensable earnings  | \$ 29,520 | \$ 45,425 | \$ 60,923 | \$ 80,086  | \$ 134,137 | \$ 158,147 | \$ 181,814   |

|                      |           |           |           |           |            |            |            |
|----------------------|-----------|-----------|-----------|-----------|------------|------------|------------|
| 1st Earnings Tranche | \$ 29,520 | \$ 45,425 | \$ 60,923 | \$ 80,086 | \$ 131,000 | \$ 131,000 | \$ 131,000 |
| 2nd Tranche          | \$ -      | \$ -      | \$ -      | \$ -      | \$ 3,137   | \$ 27,147  | \$ 50,814  |

### Gross Economic Loss

| Gross Earnings First Tranche | 30,000    | 50,000    | 70,000    | 100,000   | 175,000   | 250,000   | 1,000,000 |
|------------------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| Age at Death                 |           |           |           |           |           |           |           |
| 25                           | 1,195,560 | 1,839,713 | 2,467,365 | 3,243,498 | 5,305,500 | 5,305,500 | 5,305,500 |
| 35                           | 723,240   | 1,112,913 | 1,492,604 | 1,962,116 | 3,209,500 | 3,209,500 | 3,209,500 |
| 45                           | 504,792   | 776,768   | 1,041,776 | 1,369,477 | 2,240,100 | 2,240,100 | 2,240,100 |
| 55                           | 256,824   | 395,198   | 530,027   | 696,751   | 1,139,700 | 1,139,700 | 1,139,700 |
| Second Tranche               |           |           |           |           |           |           |           |
| Age at Death                 |           |           |           |           |           |           |           |
| 25                           | 0         | 0         | 0         | 0         | 72,150    | 624,389   | 1,168,722 |
| 35                           | 0         | 0         | 0         | 0         | 58,661    | 507,655   | 950,222   |
| 45                           | 0         | 0         | 0         | 0         | 41,722    | 361,060   | 675,826   |
| 55                           | 0         | 0         | 0         | 0         | 19,449    | 168,313   | 315,047   |
| Total both tranches          |           |           |           |           |           |           |           |
| Age at Death                 |           |           |           |           |           |           |           |
| 25                           | 1,195,560 | 1,839,713 | 2,467,365 | 3,243,498 | 5,377,650 | 5,929,889 | 6,474,222 |
| 35                           | 723,240   | 1,112,913 | 1,492,604 | 1,962,116 | 3,268,161 | 3,717,155 | 4,159,722 |
| 45                           | 504,792   | 776,768   | 1,041,776 | 1,369,477 | 2,281,822 | 2,601,160 | 2,915,926 |
| 55                           | 256,824   | 395,198   | 530,027   | 696,751   | 1,159,149 | 1,308,013 | 1,454,747 |

|                      |            |              |              |              |              |              |              |
|----------------------|------------|--------------|--------------|--------------|--------------|--------------|--------------|
| Adjustments          |            |              |              |              |              |              |              |
| x consumption factor | 31.7%      | 24.4%        | 23.1%        | 15.9%        | 15.9%        | 15.9%        | 15.9%        |
| Net Economic Loss    |            |              |              |              |              |              |              |
| 25                   | \$ 816,567 | \$ 1,390,823 | \$ 1,897,404 | \$ 2,727,782 | \$ 4,522,604 | \$ 4,987,036 | \$ 5,444,821 |
| 35                   | \$ 493,973 | \$ 841,362   | \$ 1,147,812 | \$ 1,650,139 | \$ 2,748,523 | \$ 3,126,127 | \$ 3,498,326 |
| 45                   | \$ 344,773 | \$ 587,236   | \$ 801,126   | \$ 1,151,730 | \$ 1,919,012 | \$ 2,187,575 | \$ 2,452,294 |
| 55                   | \$ 175,411 | \$ 298,769   | \$ 407,590   | \$ 585,968   | \$ 974,844   | \$ 1,100,039 | \$ 1,223,442 |



|                                                 |              |                   |              |              |              |              |              |  |
|-------------------------------------------------|--------------|-------------------|--------------|--------------|--------------|--------------|--------------|--|
| Gross Loss, including<br>avg non-economic loss: |              | <u>\$ 362,500</u> |              |              |              |              |              |  |
| 25                                              | \$ 1,179,067 | \$ 1,753,323      | \$ 2,259,904 | \$ 3,090,282 | \$ 4,885,104 | \$ 5,349,536 | \$ 5,807,321 |  |
| 35                                              | \$ 856,473   | \$ 1,203,862      | \$ 1,510,312 | \$ 2,012,639 | \$ 3,111,023 | \$ 3,488,627 | \$ 3,860,826 |  |
| 45                                              | \$ 707,273   | \$ 949,736        | \$ 1,163,626 | \$ 1,514,230 | \$ 2,281,512 | \$ 2,550,075 | \$ 2,814,794 |  |
| 55                                              | \$ 537,911   | \$ 661,269        | \$ 770,090   | \$ 948,468   | \$ 1,337,344 | \$ 1,462,539 | \$ 1,585,942 |  |

### Collateral Sources

#### High Benefit Persons

|                       |                |                |                |                |                  |                  |                  |
|-----------------------|----------------|----------------|----------------|----------------|------------------|------------------|------------------|
| Gross Salary          | 30,000         | 50,000         | 70,000         | 100,000        | 175,000          | 250,000          | 1,000,000        |
| Variable Income       | 0%             | 0%             | 8%             | 10%            | 15%              | 20%              | 25%              |
| Base Earnings         | 30,000         | 50,000         | 64,815         | 90,909         | 152,174          | 208,333          | 800,000          |
| Employer Life Ins.    | Factor =       | 8              |                |                | maximum=         | 1,000,000        |                  |
| Under age 35          | 120,000        | 200,000        | 259,259        | 363,636        | 608,696          | 833,333          | 1,000,000        |
|                       | 240,000        | 400,000        | 518,519        | 727,273        | 1,000,000        | 1,000,000        | 1,000,000        |
| Social Security Death | 149,067        | 189,209        | 189,209        | 218,169        | 218,169          | 218,169          | 218,169          |
| Workman's Comp        |                |                |                |                |                  |                  |                  |
| Veterans Benefits     |                |                |                |                |                  |                  |                  |
| <b>Subtotal</b>       | <b>389,067</b> | <b>589,209</b> | <b>707,728</b> | <b>945,441</b> | <b>1,218,169</b> | <b>1,218,169</b> | <b>1,218,169</b> |
| Pension-Death at age: |                |                |                |                |                  |                  |                  |
| 25                    | 3,721          | 6,201          | 8,039          | 11,275         | 18,873           | 25,839           | 99,220           |
| 35                    | 19,116         | 31,860         | 41,300         | 57,928         | 96,966           | 132,752          | 509,766          |
| 45                    | 40,453         | 67,422         | 87,399         | 122,586        | 205,198          | 280,925          | 1,078,753        |
| 55                    | 70,025         | 116,708        | 151,288        | 212,196        | 355,198          | 486,283          | 1,867,327        |

#### Lump Sum Payment With Collateral Sources, with min of: \$100,000

|              |         |           |           |           |           |           |           |
|--------------|---------|-----------|-----------|-----------|-----------|-----------|-----------|
| Gross Salary | 30,000  | 50,000    | 70,000    | 100,000   | 175,000   | 250,000   | 1,000,000 |
| Age at Death |         |           |           |           |           |           |           |
| 25           | 906,280 | 1,357,912 | 1,803,397 | 2,497,202 | 4,039,366 | 4,272,196 | 4,489,932 |
| 35           | 448,290 | 582,792   | 761,284   | 1,009,270 | 1,795,889 | 2,137,707 | 2,132,891 |
| 45           | 277,753 | 293,105   | 368,499   | 446,203   | 858,146   | 1,050,981 | 517,873   |
| 55           | 100,000 | 100,000   | 100,000   | 100,000   | 100,000   | 100,000   | 100,000   |

#### Low Benefit Persons

|                       |                |                |                |                |                |                |                  |
|-----------------------|----------------|----------------|----------------|----------------|----------------|----------------|------------------|
| Gross Salary          | 30,000         | 50,000         | 70,000         | 100,000        | 175,000        | 250,000        | 1,000,000        |
| Variable Income       | 0%             | 0%             | 8%             | 10%            | 15%            | 20%            | 25%              |
| Base Earnings         | 30,000         | 50,000         | 64,815         | 90,909         | 152,174        | 208,333        | 800,000          |
| Employer Life Ins.    | Factor =       | 2              |                |                |                |                |                  |
| Under age 35          | 30,000         | 50,000         | 64,815         | 90,909         | 152,174        | 208,333        | 800,000          |
|                       | 60,000         | 100,000        | 129,630        | 181,818        | 304,348        | 416,667        | 1,000,000        |
| Social Security Death | 149,067        | 189,209        | 189,209        | 218,169        | 218,169        | 218,169        | 218,169          |
| Workman's Comp        |                |                |                |                |                |                |                  |
| Veterans Benefits     |                |                |                |                |                |                |                  |
| <b>Subtotal</b>       | <b>209,067</b> | <b>289,209</b> | <b>318,839</b> | <b>399,987</b> | <b>522,516</b> | <b>634,835</b> | <b>1,218,169</b> |
| Pension-Death at age: |                |                |                |                |                |                |                  |
| 25                    | 3,721          | 6,201          | 8,039          | 11,275         | 18,873         | 25,839         | 99,220           |
| 35                    | 19,116         | 31,860         | 41,300         | 57,928         | 96,966         | 132,752        | 509,766          |
| 45                    | 40,453         | 67,422         | 87,399         | 122,586        | 205,198        | 280,925        | 1,078,753        |
| 55                    | 70,025         | 116,708        | 151,288        | 212,196        | 355,198        | 486,283        | 1,867,327        |

#### Lump Sum Payment With Collateral Sources, with min of: \$100,000

|                |         |           |           |           |           |           |           |
|----------------|---------|-----------|-----------|-----------|-----------|-----------|-----------|
| Gross Earnings | 30,000  | 50,000    | 70,000    | 100,000   | 175,000   | 250,000   | 1,000,000 |
| Age at Death   |         |           |           |           |           |           |           |
| 25             | 996,280 | 1,507,912 | 1,997,841 | 2,769,929 | 4,495,888 | 4,897,196 | 4,689,932 |
| 35             | 628,290 | 882,792   | 1,150,173 | 1,554,725 | 2,491,541 | 2,721,041 | 2,132,891 |
| 45             | 457,753 | 593,105   | 757,388   | 991,658   | 1,553,798 | 1,634,315 | 517,873   |
| 55             | 258,819 | 255,352   | 299,964   | 336,285   | 459,630   | 341,421   | 100,000   |



## Weighted Average of All Persons

Percent Lower Benefit Victims:

60%

Percent Higher Benefit Victims:

40%

### Lump Sum Payment With Collateral Sources

|              | 30,000     | 50,000       | 70,000       | 100,000      | 175,000      | 250,000      | 1,000,000    |
|--------------|------------|--------------|--------------|--------------|--------------|--------------|--------------|
| Age at Death |            |              |              |              |              |              |              |
| 25           | \$ 960,280 | \$ 1,447,912 | \$ 1,920,063 | \$ 2,660,838 | \$ 4,313,279 | \$ 4,647,196 | \$ 4,609,932 |
| 35           | \$ 556,290 | \$ 762,792   | \$ 994,617   | \$ 1,336,543 | \$ 2,213,280 | \$ 2,487,707 | \$ 2,132,891 |
| 45           | \$ 385,753 | \$ 473,105   | \$ 601,833   | \$ 773,476   | \$ 1,275,537 | \$ 1,400,981 | \$ 517,873   |
| 55           | \$ 195,291 | \$ 193,211   | \$ 219,978   | \$ 241,771   | \$ 315,778   | \$ 244,853   | \$ 100,000   |

## Demographics of Fatalities, SSA data extrapolated to latest total

| Earnings     | 30,000 | 50,000 | 70,000 | 100,000 | 175,000 | 250,000 | 1,000,000 |
|--------------|--------|--------|--------|---------|---------|---------|-----------|
| Age at Death |        |        |        |         |         |         |           |
| 25           | 216    | 174    | 188    | 107     | 79      | 67      | 44        |
| 35           | 119    | 123    | 230    | 149     | 126     | 81      | 51        |
| 45           | 172    | 151    | 398    | 270     | 147     | 137     | 100       |
| 55           | 156    | 86     | 170    | 160     | 86      | 49      | 42        |
| TOTAL        | 663    | 535    | 986    | 686     | 437     | 335     | 237       |

3,879

## Total Amount Due

### Average Payment Times Number of Victims by Category

| Earnings     | 30,000         | 50,000         | 70,000         | 100,000        | 175,000        | 250,000        | 1,000,000      |
|--------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|
| Age at Death |                |                |                |                |                |                |                |
| 25           | \$ 207,684,658 | \$ 252,538,310 | \$ 361,679,854 | \$ 284,642,663 | \$ 341,043,837 | \$ 313,409,898 | \$ 203,691,008 |
| 35           | \$ 65,977,351  | \$ 94,016,911  | \$ 228,989,188 | \$ 198,923,739 | \$ 277,941,767 | \$ 202,484,161 | \$ 109,122,714 |
| 45           | \$ 66,384,145  | \$ 71,514,607  | \$ 239,329,213 | \$ 208,654,848 | \$ 186,877,649 | \$ 192,224,217 | \$ 51,786,325  |
| 55           | \$ 30,428,575  | \$ 16,624,868  | \$ 37,344,467  | \$ 38,795,101  | \$ 27,171,103  | \$ 11,957,702  | \$ 4,185,971   |
| TOTAL        | \$ 370,474,730 | \$ 434,694,697 | \$ 867,342,722 | \$ 731,016,351 | \$ 833,034,356 | \$ 720,075,979 | \$ 368,786,019 |

**TOTAL DEATH LIABILITY FOR ECONOMIC LOSSES =** \$ 4,325,424,853

**ESTIMATED PHYSICAL INJURY LOSSES =** \$ 200,000,000

**TOTAL GOVERNMENT LIABILITY =** \$ 4,525,424,853

J:\VictimComp\LifetimeScenarios\IRS.xls\97th%

## Average Gross Econ and Non Economic Loss times number of victims by category (no collateral sources)

| Earnings     | 30,000         | 50,000         | 70,000           | 100,000          | 175,000          | 250,000          | 1,000,000      |
|--------------|----------------|----------------|------------------|------------------|------------------|------------------|----------------|
| Age at Death |                |                |                  |                  |                  |                  |                |
| 25           | \$ 255,003,031 | \$ 305,806,590 | \$ 425,695,131   | \$ 330,582,317   | \$ 386,257,062   | \$ 360,776,196   | \$ 256,597,927 |
| 35           | \$ 101,579,845 | \$ 148,380,303 | \$ 347,716,766   | \$ 299,550,256   | \$ 390,679,642   | \$ 283,952,942   | \$ 197,527,082 |
| 45           | \$ 121,714,549 | \$ 143,562,197 | \$ 462,735,970   | \$ 408,482,608   | \$ 334,262,011   | \$ 349,887,742   | \$ 281,474,331 |
| 55           | \$ 83,812,500  | \$ 56,898,894  | \$ 130,733,929   | \$ 152,193,274   | \$ 115,071,752   | \$ 71,425,055    | \$ 66,387,078  |
| TOTAL        | \$ 562,109,925 | \$ 654,647,984 | \$ 1,366,881,796 | \$ 1,190,808,455 | \$ 1,226,270,467 | \$ 1,066,041,935 | \$ 801,986,418 |

\$ 6,868,746,980

**ESTIMATED PHYSICAL INJURY LOSSES =** \$ 200,000,000

Maximum Government Liability \$ 7,068,746,980



# Summary of Model, by Age and Income, revised non-economic loss

Compensable Income Max: \$ 291,000 IRS 98% for 2000

For 25/75 mix of singles and families

Non-Economic loss at \$250K + \$50K per immediate family member

Min payment: \$ 100,000

Tranche 1 retire: 65

Tranche 2 retire: 62

Tranche 1 max at 95%: \$ 131,000

Total program cost: \$4,653,269,121

|                   |    | Income Range |    |           |    |           |    |           |    |           |    |           |    |           |
|-------------------|----|--------------|----|-----------|----|-----------|----|-----------|----|-----------|----|-----------|----|-----------|
| Age               | \$ | 30,000       | \$ | 50,000    | \$ | 70,000    | \$ | 100,000   | \$ | 175,000   | \$ | 250,000   | \$ | 1,000,000 |
| Net Economic Loss |    |              |    |           |    |           |    |           |    |           |    |           |    |           |
| 25                | \$ | 816,567      | \$ | 1,390,823 | \$ | 1,897,404 | \$ | 2,727,782 | \$ | 4,522,604 | \$ | 5,143,444 | \$ | 6,094,513 |
| 35                | \$ | 493,973      | \$ | 841,362   | \$ | 1,147,812 | \$ | 1,650,139 | \$ | 2,748,523 | \$ | 3,253,294 | \$ | 4,026,554 |
| 45                | \$ | 344,773      | \$ | 587,236   | \$ | 801,126   | \$ | 1,151,730 | \$ | 1,919,012 | \$ | 2,278,020 | \$ | 2,827,986 |
| 55                | \$ | 175,411      | \$ | 298,769   | \$ | 407,590   | \$ | 585,968   | \$ | 974,844   | \$ | 1,142,201 | \$ | 1,398,577 |

|                                                  |    |           |    |           |    |           |         |           |    |           |    |           |    |           |
|--------------------------------------------------|----|-----------|----|-----------|----|-----------|---------|-----------|----|-----------|----|-----------|----|-----------|
| Average economic loss plus non-economic loss of: |    |           |    |           |    | \$        | 362,500 |           |    |           |    |           |    |           |
| 25                                               | \$ | 1,179,067 | \$ | 1,753,323 | \$ | 2,259,904 | \$      | 3,090,282 | \$ | 4,885,104 | \$ | 5,505,944 | \$ | 6,457,013 |
| 35                                               | \$ | 856,473   | \$ | 1,203,862 | \$ | 1,510,312 | \$      | 2,012,639 | \$ | 3,111,023 | \$ | 3,615,794 | \$ | 4,389,054 |
| 45                                               | \$ | 707,273   | \$ | 949,736   | \$ | 1,163,626 | \$      | 1,514,230 | \$ | 2,281,512 | \$ | 2,640,520 | \$ | 3,190,486 |
| 55                                               | \$ | 537,911   | \$ | 661,269   | \$ | 770,090   | \$      | 948,468   | \$ | 1,337,344 | \$ | 1,504,701 | \$ | 1,761,077 |

for Married victims with three immediate family members (including spouse)

|    |              |              |              |              |              |              |              |
|----|--------------|--------------|--------------|--------------|--------------|--------------|--------------|
| 25 | \$ 1,440,137 | \$ 2,066,780 | \$ 2,649,003 | \$ 3,455,375 | \$ 5,517,459 | \$ 6,391,936 | \$ 7,457,225 |
| 35 | \$ 1,029,219 | \$ 1,408,299 | \$ 1,760,508 | \$ 2,248,313 | \$ 3,495,747 | \$ 4,120,489 | \$ 4,986,614 |
| 45 | \$ 839,169   | \$ 1,103,751 | \$ 1,349,579 | \$ 1,690,047 | \$ 2,560,705 | \$ 3,001,713 | \$ 3,617,727 |
| 55 | \$ 623,437   | \$ 758,049   | \$ 883,119   | \$ 1,056,340 | \$ 1,499,306 | \$ 1,712,344 | \$ 1,999,509 |

for Single victims

|    |            |              |              |              |              |              |              |
|----|------------|--------------|--------------|--------------|--------------|--------------|--------------|
| 25 | \$ 638,557 | \$ 1,022,679 | \$ 1,434,335 | \$ 2,212,316 | \$ 3,503,478 | \$ 3,950,099 | \$ 4,634,281 |
| 35 | \$ 485,053 | \$ 717,423   | \$ 966,450   | \$ 1,437,080 | \$ 2,227,237 | \$ 2,590,360 | \$ 3,146,630 |
| 45 | \$ 414,057 | \$ 576,242   | \$ 750,053   | \$ 1,078,533 | \$ 1,630,502 | \$ 1,888,766 | \$ 2,284,401 |
| 55 | \$ 333,468 | \$ 415,983   | \$ 504,413   | \$ 671,535   | \$ 951,285   | \$ 1,071,679 | \$ 1,256,110 |

|                                                               |           |           |            |            |            |              |  |
|---------------------------------------------------------------|-----------|-----------|------------|------------|------------|--------------|--|
| Average Net Payment minus Collateral Sources, with minimum of |           |           |            |            |            | \$ 100,000   |  |
| \$ 30,000                                                     | \$ 50,000 | \$ 70,000 | \$ 100,000 | \$ 175,000 | \$ 250,000 | \$ 1,000,000 |  |
| For 'Average' Victim                                          |           |           |            |            |            |              |  |

|    |            |              |              |              |              |              |              |
|----|------------|--------------|--------------|--------------|--------------|--------------|--------------|
| 25 | \$ 960,280 | \$ 1,447,912 | \$ 1,920,063 | \$ 2,660,838 | \$ 4,313,279 | \$ 4,803,603 | \$ 5,259,625 |
| 35 | \$ 556,290 | \$ 762,792   | \$ 994,617   | \$ 1,336,543 | \$ 2,213,280 | \$ 2,614,873 | \$ 2,661,120 |
| 45 | \$ 385,753 | \$ 473,105   | \$ 601,833   | \$ 773,476   | \$ 1,275,537 | \$ 1,491,426 | \$ 893,564   |
| 55 | \$ 195,291 | \$ 193,211   | \$ 219,978   | \$ 241,771   | \$ 315,778   | \$ 270,150   | \$ 100,000   |

for Married victims with three immediate family members (including spouse)

|    |              |              |              |              |              |              |              |
|----|--------------|--------------|--------------|--------------|--------------|--------------|--------------|
| 25 | \$ 1,171,745 | \$ 1,698,385 | \$ 2,246,178 | \$ 2,953,293 | \$ 4,872,997 | \$ 5,616,958 | \$ 6,187,198 |
| 35 | \$ 679,431   | \$ 904,245   | \$ 1,181,829 | \$ 1,499,579 | \$ 2,525,365 | \$ 3,046,931 | \$ 3,186,042 |
| 45 | \$ 468,045   | \$ 564,136   | \$ 724,801   | \$ 876,655   | \$ 1,482,092 | \$ 1,779,981 | \$ 1,248,168 |
| 55 | \$ 222,741   | \$ 213,488   | \$ 250,005   | \$ 262,911   | \$ 369,372   | \$ 351,153   | \$ 100,000   |

for Single Victims

|    |            |            |              |              |              |              |              |
|----|------------|------------|--------------|--------------|--------------|--------------|--------------|
| 25 | \$ 568,836 | \$ 906,478 | \$ 1,283,704 | \$ 2,001,041 | \$ 3,149,822 | \$ 3,465,927 | \$ 3,655,061 |
| 35 | \$ 333,937 | \$ 465,563 | \$ 639,964   | \$ 979,152   | \$ 1,547,662 | \$ 1,807,608 | \$ 1,636,864 |
| 45 | \$ 241,604 | \$ 288,820 | \$ 377,469   | \$ 555,948   | \$ 842,696   | \$ 957,840   | \$ 205,648   |
| 55 | \$ 162,066 | \$ 159,565 | \$ 174,097   | \$ 206,512   | \$ 215,044   | \$ 141,237   | \$ 100,000   |



# VICTIM'S COMPENSATION FUND

Max Compensable Income equal to top 2 percentile

|                                          |           |                   |                            |      |
|------------------------------------------|-----------|-------------------|----------------------------|------|
| High Benefits Persons: Life Insurance* = | 8         | times base salary | ratio with high benefits = | 0.40 |
| Low Benefits Persons: Life Insurance* =  | 2         | times base salary | ratio with low benefits =  | 0.60 |
| Maximum Amount of Life Insurance =       | 1,000,000 |                   |                            |      |

\* victims under 35 have half this amount

TOTAL GOVERNMENT LIABILITY = \$ 4,653,269,121

## Multiple of Annual salary (to equal career earnings)

| Present Value Factors 1st Tranche, income up to: |      | \$ 131,000     |      | IRS 95th percentile |                   |
|--------------------------------------------------|------|----------------|------|---------------------|-------------------|
|                                                  |      | Retirement Age |      | Annual              | Annual            |
| Age at Death                                     |      |                |      | Salary Increase*    | Interest Increase |
| 25                                               | 37.5 | 65             | 65   | 6.60%               | 6.25%             |
| 35                                               | 22.5 | 40.5           | 40.5 | 5.10%               | 6.25%             |
| 45                                               | 14.9 | 24.5           | 24.5 | 5.10%               | 6.25%             |
| 55                                               | 6.3  | 17.1           | 17.1 | 4.20%               | 6.25%             |
|                                                  |      | 8.7            | 8.7  |                     |                   |

| Present Value Factors 2nd Tranche, income from |  | \$ 131,000     |  | up to \$291,000  |                   | IRS 98th percentile |  |
|------------------------------------------------|--|----------------|--|------------------|-------------------|---------------------|--|
|                                                |  | Retirement Age |  | Annual           | Annual            |                     |  |
| Age at Death                                   |  |                |  | Salary Increase* | Interest Increase |                     |  |
| 25                                             |  | 62             |  | 3.50%            | 6.25%             |                     |  |
| 35                                             |  | 23.0           |  | 3.50%            | 6.25%             |                     |  |
| 45                                             |  | 18.7           |  | 3.50%            | 6.25%             |                     |  |
| 55                                             |  | 13.3           |  | 3.50%            | 6.25%             |                     |  |
|                                                |  | 6.2            |  |                  |                   |                     |  |

### Calculation of Net Earnings

|                             |           |           |           |            |            |            |              |
|-----------------------------|-----------|-----------|-----------|------------|------------|------------|--------------|
| Base salary                 | \$ 30,000 | \$ 50,000 | \$ 64,815 | \$ 90,909  | \$ 152,174 | \$ 208,333 | \$ 800,000   |
| Variable earnings           | \$ -      |           | \$ 5,185  | \$ 9,091   | \$ 22,826  | \$ 41,667  | \$ 200,000   |
| Gross Pretax                | \$ 30,000 | \$ 50,000 | \$ 70,000 | \$ 100,000 | \$ 175,000 | \$ 250,000 | \$ 1,000,000 |
| Max compensable             | \$ 30,000 | \$ 50,000 | \$ 70,000 | \$ 100,000 | \$ 175,000 | \$ 250,000 | \$ 291,000   |
| x tax factor                | 13.6%     | 18.0%     | 20.1%     | 26.0%      | 28.2%      | 37.8%      | 37.8%        |
| Post-Tax Compensable        | \$ 25,920 | \$ 41,025 | \$ 55,930 | \$ 74,050  | \$ 125,650 | \$ 155,500 | \$ 181,002   |
| + employer pension contrib. | \$ 1,200  | \$ 2,000  | \$ 2,593  | \$ 3,636   | \$ 6,087   | \$ 8,333   | \$ 32,000    |
| + employer medical premium  | \$ 2,400  | \$ 2,400  | \$ 2,400  | \$ 2,400   | \$ 2,400   | \$ 2,400   | \$ 2,400     |
| Total compensable earnings  | \$ 29,520 | \$ 45,425 | \$ 60,923 | \$ 80,086  | \$ 134,137 | \$ 166,233 | \$ 215,402   |

|                      |           |           |           |           |            |            |            |
|----------------------|-----------|-----------|-----------|-----------|------------|------------|------------|
| 1st Earnings Tranche | \$ 29,520 | \$ 45,425 | \$ 60,923 | \$ 80,086 | \$ 131,000 | \$ 131,000 | \$ 131,000 |
| 2nd Tranche          | \$ -      | \$ -      | \$ -      | \$ -      | \$ 3,137   | \$ 35,233  | \$ 84,402  |

### Gross Economic Loss

| Gross Earnings First Tranche | 30,000    | 50,000    | 70,000    | 100,000   | 175,000   | 250,000   | 1,000,000 |
|------------------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| Age at Death                 |           |           |           |           |           |           |           |
| 25                           | 1,195,560 | 1,839,713 | 2,467,365 | 3,243,498 | 5,305,500 | 5,305,500 | 5,305,500 |
| 35                           | 723,240   | 1,112,913 | 1,492,604 | 1,962,116 | 3,209,500 | 3,209,500 | 3,209,500 |
| 45                           | 504,792   | 776,768   | 1,041,776 | 1,369,477 | 2,240,100 | 2,240,100 | 2,240,100 |
| 55                           | 256,824   | 395,198   | 530,027   | 696,751   | 1,139,700 | 1,139,700 | 1,139,700 |
| Second Tranche               |           |           |           |           |           |           |           |
| Age at Death                 |           |           |           |           |           |           |           |
| 25                           | 0         | 0         | 0         | 0         | 72,150    | 810,367   | 1,941,246 |
| 35                           | 0         | 0         | 0         | 0         | 58,661    | 658,863   | 1,578,317 |
| 45                           | 0         | 0         | 0         | 0         | 41,722    | 468,603   | 1,122,547 |
| 55                           | 0         | 0         | 0         | 0         | 19,449    | 218,447   | 523,292   |
| Total both tranches          |           |           |           |           |           |           |           |
| Age at Death                 |           |           |           |           |           |           |           |
| 25                           | 1,195,560 | 1,839,713 | 2,467,365 | 3,243,498 | 5,377,650 | 6,115,867 | 7,246,746 |
| 35                           | 723,240   | 1,112,913 | 1,492,604 | 1,962,116 | 3,268,161 | 3,868,363 | 4,787,817 |
| 45                           | 504,792   | 776,768   | 1,041,776 | 1,369,477 | 2,281,822 | 2,708,703 | 3,362,647 |
| 55                           | 256,824   | 395,198   | 530,027   | 696,751   | 1,159,149 | 1,358,147 | 1,662,992 |

|                            |            |              |              |              |              |              |              |
|----------------------------|------------|--------------|--------------|--------------|--------------|--------------|--------------|
| Adjustments                |            |              |              |              |              |              |              |
| x consumption factor (PWC) | 31.7%      | 24.4%        | 23.1%        | 15.9%        | 15.9%        | 15.9%        | 15.9%        |
| Net Economic Loss          |            |              |              |              |              |              |              |
| 25                         | \$ 816,567 | \$ 1,390,823 | \$ 1,897,404 | \$ 2,727,782 | \$ 4,522,604 | \$ 5,143,444 | \$ 6,094,513 |
| 35                         | \$ 493,973 | \$ 841,362   | \$ 1,147,812 | \$ 1,650,139 | \$ 2,748,523 | \$ 3,253,294 | \$ 4,026,554 |
| 45                         | \$ 344,773 | \$ 587,236   | \$ 801,126   | \$ 1,151,730 | \$ 1,919,012 | \$ 2,278,020 | \$ 2,827,986 |
| 55                         | \$ 175,411 | \$ 298,769   | \$ 407,590   | \$ 585,968   | \$ 974,844   | \$ 1,142,201 | \$ 1,398,577 |



Gross Loss, including  
avg non-economic loss:

\$ 362,500

|    |              |              |              |              |              |              |              |
|----|--------------|--------------|--------------|--------------|--------------|--------------|--------------|
| 25 | \$ 1,179,067 | \$ 1,753,323 | \$ 2,259,904 | \$ 3,090,282 | \$ 4,885,104 | \$ 5,505,944 | \$ 6,457,013 |
| 35 | \$ 856,473   | \$ 1,203,862 | \$ 1,510,312 | \$ 2,012,639 | \$ 3,111,023 | \$ 3,615,794 | \$ 4,389,054 |
| 45 | \$ 707,273   | \$ 949,736   | \$ 1,163,626 | \$ 1,514,230 | \$ 2,281,512 | \$ 2,640,520 | \$ 3,190,486 |
| 55 | \$ 537,911   | \$ 661,269   | \$ 770,090   | \$ 948,468   | \$ 1,337,344 | \$ 1,504,701 | \$ 1,761,077 |

### Collateral Sources

#### High Benefit Persons

| Gross Salary          | 30,000         | 50,000         | 70,000         | 100,000        | 175,000          | 250,000          | 1,000,000        |
|-----------------------|----------------|----------------|----------------|----------------|------------------|------------------|------------------|
| Variable Income       | 0%             | 0%             | 8%             | 10%            | 15%              | 20%              | 25%              |
| Base Earnings         | 30,000         | 50,000         | 64,815         | 90,909         | 152,174          | 208,333          | 800,000          |
| Employer Life Ins.    | Factor =       | 8              |                |                | maximum=         | 1,000,000        |                  |
| Under age 35          | 120,000        | 200,000        | 259,259        | 363,636        | 608,696          | 833,333          | 1,000,000        |
|                       | 240,000        | 400,000        | 518,519        | 727,273        | 1,000,000        | 1,000,000        | 1,000,000        |
| Social Security Death | 149,067        | 189,209        | 189,209        | 218,169        | 218,169          | 218,169          | 218,169          |
| Workman's Comp        |                |                |                |                |                  |                  |                  |
| Veterans Benefits     |                |                |                |                |                  |                  |                  |
| <b>Subtotal</b>       | <b>389,067</b> | <b>589,209</b> | <b>707,728</b> | <b>945,441</b> | <b>1,218,169</b> | <b>1,218,169</b> | <b>1,218,169</b> |
| Pension-Death at age: |                |                |                |                |                  |                  |                  |
| 25                    | 3,721          | 6,201          | 8,039          | 11,275         | 18,873           | 25,839           | 99,220           |
| 35                    | 19,116         | 31,860         | 41,300         | 57,928         | 96,966           | 132,752          | 509,766          |
| 45                    | 40,453         | 67,422         | 87,399         | 122,586        | 205,198          | 280,925          | 1,078,753        |
| 55                    | 70,025         | 116,708        | 151,288        | 212,196        | 355,198          | 486,283          | 1,867,327        |

#### Lump Sum Payment With Collateral Sources, with min of:

\$100,000

| Gross Salary | 30,000  | 50,000    | 70,000    | 100,000   | 175,000   | 250,000   | 1,000,000 |
|--------------|---------|-----------|-----------|-----------|-----------|-----------|-----------|
| Age at Death |         |           |           |           |           |           |           |
| 25           | 906,280 | 1,357,912 | 1,803,397 | 2,497,202 | 4,039,366 | 4,428,603 | 5,139,625 |
| 35           | 448,290 | 582,792   | 761,284   | 1,009,270 | 1,795,889 | 2,264,873 | 2,661,120 |
| 45           | 277,753 | 293,105   | 368,499   | 446,203   | 858,146   | 1,141,426 | 893,564   |
| 55           | 100,000 | 100,000   | 100,000   | 100,000   | 100,000   | 100,000   | 100,000   |

#### Low Benefit Persons

| Gross Salary          | 30,000         | 50,000         | 70,000         | 100,000        | 175,000        | 250,000        | 1,000,000        |
|-----------------------|----------------|----------------|----------------|----------------|----------------|----------------|------------------|
| Variable Income       | 0%             | 0%             | 8%             | 10%            | 15%            | 20%            | 25%              |
| Base Earnings         | 30,000         | 50,000         | 64,815         | 90,909         | 152,174        | 208,333        | 800,000          |
| Employer Life Ins.    | Factor =       | 2              |                |                |                |                |                  |
| Under age 35          | 30,000         | 50,000         | 64,815         | 90,909         | 152,174        | 208,333        | 800,000          |
|                       | 60,000         | 100,000        | 129,630        | 181,818        | 304,348        | 416,667        | 1,000,000        |
| Social Security Death | 149,067        | 189,209        | 189,209        | 218,169        | 218,169        | 218,169        | 218,169          |
| Workman's Comp        |                |                |                |                |                |                |                  |
| Veterans Benefits     |                |                |                |                |                |                |                  |
| <b>Subtotal</b>       | <b>209,067</b> | <b>289,209</b> | <b>318,839</b> | <b>399,987</b> | <b>522,516</b> | <b>634,835</b> | <b>1,218,169</b> |
| Pension-Death at age: |                |                |                |                |                |                |                  |
| 25                    | 3,721          | 6,201          | 8,039          | 11,275         | 18,873         | 25,839         | 99,220           |
| 35                    | 19,116         | 31,860         | 41,300         | 57,928         | 96,966         | 132,752        | 509,766          |
| 45                    | 40,453         | 67,422         | 87,399         | 122,586        | 205,198        | 280,925        | 1,078,753        |
| 55                    | 70,025         | 116,708        | 151,288        | 212,196        | 355,198        | 486,283        | 1,867,327        |

#### Lump Sum Payment With Collateral Sources, with min of:

\$100,000

| Gross Earnings | 30,000  | 50,000    | 70,000    | 100,000   | 175,000   | 250,000   | 1,000,000 |
|----------------|---------|-----------|-----------|-----------|-----------|-----------|-----------|
| Age at Death   |         |           |           |           |           |           |           |
| 25             | 996,280 | 1,507,912 | 1,997,841 | 2,769,929 | 4,495,888 | 5,053,603 | 5,339,625 |
| 35             | 628,290 | 882,792   | 1,150,173 | 1,554,725 | 2,491,541 | 2,848,207 | 2,661,120 |
| 45             | 457,753 | 593,105   | 757,388   | 991,658   | 1,553,798 | 1,724,759 | 893,564   |
| 55             | 258,819 | 255,352   | 299,964   | 336,285   | 459,630   | 383,583   | 100,000   |



## Weighted Average of All Persons

Percent Lower Benefit Victims:  
Percent Higher Benefit Victims:

60%  
40%

### Lump Sum Payment With Collateral Sources

|              | 30,000     | 50,000       | 70,000       | 100,000      | 175,000      | 250,000      | 1,000,000    |
|--------------|------------|--------------|--------------|--------------|--------------|--------------|--------------|
| Age at Death |            |              |              |              |              |              |              |
| 25           | \$ 960,280 | \$ 1,447,912 | \$ 1,920,063 | \$ 2,660,838 | \$ 4,313,279 | \$ 4,803,603 | \$ 5,259,625 |
| 35           | \$ 556,290 | \$ 762,792   | \$ 994,617   | \$ 1,336,543 | \$ 2,213,280 | \$ 2,614,873 | \$ 2,661,120 |
| 45           | \$ 385,753 | \$ 473,105   | \$ 601,833   | \$ 773,476   | \$ 1,275,537 | \$ 1,491,426 | \$ 893,564   |
| 55           | \$ 195,291 | \$ 193,211   | \$ 219,978   | \$ 241,771   | \$ 315,778   | \$ 270,150   | \$ 100,000   |

## Demographics of Fatalities, SSA data extrapolated to latest total

| Earnings     | 30,000 | 50,000 | 70,000 | 100,000 | 175,000 | 250,000 | 1,000,000 |
|--------------|--------|--------|--------|---------|---------|---------|-----------|
| Age at Death |        |        |        |         |         |         |           |
| 25           | 216    | 174    | 188    | 107     | 79      | 67      | 44        |
| 35           | 119    | 123    | 230    | 149     | 126     | 81      | 51        |
| 45           | 172    | 151    | 398    | 270     | 147     | 137     | 100       |
| 55           | 156    | 86     | 170    | 160     | 86      | 49      | 42        |
| TOTAL        | 663    | 535    | 986    | 686     | 437     | 335     | 237       |
|              |        |        |        |         |         |         | 3,879     |

## Total Amount Due

### Average Payment Times Number of Victims by Category

| Earnings     | 30,000         | 50,000         | 70,000         | 100,000        | 175,000        | 250,000        | 1,000,000      |
|--------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|
| Age at Death |                |                |                |                |                |                |                |
| 25           | \$ 207,684,658 | \$ 252,538,310 | \$ 361,679,854 | \$ 284,642,663 | \$ 341,043,837 | \$ 323,958,121 | \$ 232,397,843 |
| 35           | \$ 65,977,351  | \$ 94,016,911  | \$ 228,989,188 | \$ 198,923,739 | \$ 277,941,767 | \$ 212,834,703 | \$ 136,147,867 |
| 45           | \$ 66,384,145  | \$ 71,514,607  | \$ 239,329,213 | \$ 208,654,848 | \$ 186,877,649 | \$ 204,633,798 | \$ 89,354,835  |
| 55           | \$ 30,428,575  | \$ 16,624,868  | \$ 37,344,467  | \$ 38,795,101  | \$ 27,171,103  | \$ 13,193,126  | \$ 4,185,971   |
| TOTAL        | \$ 370,474,730 | \$ 434,694,697 | \$ 867,342,722 | \$ 731,016,351 | \$ 833,034,356 | \$ 754,619,748 | \$ 462,086,516 |

**TOTAL DEATH LIABILITY =** \$ 4,453,269,121

**ESTIMATED PHYSICAL INJURY LOSSES =** \$ 200,000,000

**TOTAL GOVERNMENT LIABILITY =** \$ 4,653,269,121

J:\VictimComp\LifetimeScenarios\IRS.xls]97th%

## Average Gross Econ and Non Economic Loss times number of victims by category (no collateral)

| Earnings     | 30,000         | 50,000         | 70,000            | 100,000          | 175,000          | 250,000          | 1,000,000      |
|--------------|----------------|----------------|-------------------|------------------|------------------|------------------|----------------|
| Age at Death |                |                |                   |                  |                  |                  |                |
| 25           | \$ 255,003,031 | \$ 305,806,590 | \$ 425,695,131    | \$ 330,582,317   | \$ 386,257,062   | \$ 371,324,419   | \$ 285,304,762 |
| 35           | \$ 101,579,845 | \$ 148,380,303 | \$ 347,716,765.68 | \$ 299,550,256   | \$ 390,679,642   | \$ 294,303,485   | \$ 224,552,235 |
| 45           | \$ 121,714,549 | \$ 143,562,197 | \$ 462,735,970.42 | \$ 408,482,608   | \$ 334,262,011   | \$ 362,297,323   | \$ 319,042,841 |
| 55           | \$ 83,812,500  | \$ 56,898,894  | \$ 130,733,929    | \$ 152,193,274   | \$ 115,071,752   | \$ 73,484,093    | \$ 73,718,160  |
| TOTAL        | \$ 562,109,925 | \$ 654,647,984 | \$ 1,366,881,796  | \$ 1,190,808,455 | \$ 1,226,270,467 | \$ 1,101,409,320 | \$ 902,617,998 |

\$ 7,004,745,945

**ESTIMATED PHYSICAL INJURY LOSSES =** \$ 200,000,000

Maximum Government Liability \$ 7,204,745,945



## OMB Approach



## (Alternative) Assumptions Used in Victim Compensation Awards

### Annual Future Economic Assumptions:

*The economic assumptions below were derived by analyzing the assumptions used by the Board of Actuaries for both the Civil Service and the Military retirement systems, and making slight changes for private sector purposes. The exact numbers are not as important as the relative differences between them.*

|                                                           |                                                                                                                                                                                                                                                                                                                   |
|-----------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Inflation</b>                                          | 3.0 %                                                                                                                                                                                                                                                                                                             |
| <b>General Salary Scale Increase</b>                      | 3.5 %                                                                                                                                                                                                                                                                                                             |
| <b>Promotion and Merit Increase</b>                       | First Tranche:<br>3.0% (lower ages over remaining employment)<br>1.5% (medium ages over remaining employment)<br>0.7% (higher ages over remaining employment)<br>Second Tranche:<br>0.0% (all ages - this amount is dependant on economic conditions and could be positive or negative; averaging zero over time) |
| <b>Total Salary</b><br>(General and Promotion from above) | First Tranche:<br>6.6% (lower ages over remaining employment)<br>5.1% (medium ages over remaining employment)<br>4.2% (higher ages over remaining employment)<br>Second Tranche:<br>3.5 % (all ages)                                                                                                              |
| <b>Interest</b>                                           | 6.25%                                                                                                                                                                                                                                                                                                             |
| <b>Mortality Table:</b>                                   | GAM94 – most recent table used by actuaries to evaluate pension plans. Under consideration by IRS and PBGC for adoption as official table.                                                                                                                                                                        |
| <b>Annual Employer Pension Contribution:</b>              | 4.0% - Derived from Hay Group Employee Benefit Survey of over 1,000 employers (152 in the financial sector).                                                                                                                                                                                                      |
| <b>Annual Employer Medical Premium:</b>                   | \$2,400 (indexed into the future)                                                                                                                                                                                                                                                                                 |
| <b>Consumption Factors:</b>                               | See Table 3. Based on 1999 BLS data.                                                                                                                                                                                                                                                                              |
| <b>Tax Factors:</b>                                       | See Table 2. Based on IRS data for selected states, including Fed., state and local taxes. Not applied to employer-provided benefits.                                                                                                                                                                             |
| <b>Age at Retirement:</b>                                 | 65 (for portion of salary in the first tranche)<br>62 (for portion of salary in the second tranche)<br>However, all are expected to work at least five years unless they are over age 60 – where it is assumed that they will retire at 65.                                                                       |

**Social Security Death Benefit:**

Based on data from SSA website of approximate monthly survivor benefit, based on family size, age, and income at death. Shown as present value lump sum of future payments adjusted for inflation.

**Pension Payout:**

Assumes balance of 401K retirement fund is paid as a death benefit, with 9% return on contributions.



## Hay Benefits Report (The Hay Group)

The annual Hay Benefit Report is composed of data received from over 1,000 organizations. These participants include a representative portion of large and medium-sized employers, from a broad perspective of industry groupings throughout the United States. It includes 152 Financial organizations. We used the 1999 edition (which we have). We have been informed that the Life and Pension benefit results do not fluctuate annually - hence findings still accurate.

### Pension Plans: (page 3 of executive summary)

98% of employers offer defined contribution (DC) plans

58% of employers offer a defined benefit (DB) plan that supplements the DC plan

### Average Annual Employer Contribution:

4% Defined Contribution (pg I-24)

4% Defined Benefit (pg -23)

*Victim Comp Model Assumption for Pension Collateral Earnings: 4%*

*Pretty conservative as it does not include anything for DB plans or anything for employee contributions. DB plans do not pay much to employees who leave before retirement and mobile workforce has eliminated long-career employees.*

### Life Insurance:

99% Employers offer basic life insurance coverage (pg III-2)

81% Employers offer supplemental life insurance coverage (pg III-2)

86% Employers offer basic accidental death (pg III-2)

### Basic Life Coverage - Financial Industry (pg III-7):

| Multiple Salary  | % Employers    |
|------------------|----------------|
| 0.5              | 1%             |
| 1                | 42%            |
| 1.75             | 10%            |
| 2                | 31%            |
| 2.25             |                |
| 3                | 16%            |
| Total            | 100%           |
| Weighted Average | 2 times salary |

### Supplemental Life Coverage- Financial Industry (pg III-13):

| Multiple Salary  | % Employers    |
|------------------|----------------|
| 1                | 0%             |
| 2                | 21%            |
| 2.5              | 1%             |
| 3                | 21%            |
| 3.5              | 26%            |
| 4.5              | 28%            |
| 6                | 3%             |
| Total            | 100%           |
| Weighted Average | 3 times salary |

**Accidental Life Coverage - Financial Industry (pg III-22):**

| Multiple Salary  | % Employers |                                    |
|------------------|-------------|------------------------------------|
| 0.5              | 1%          |                                    |
| 1                | 39%         |                                    |
| 1.75             | 11%         |                                    |
| 2                | 30%         |                                    |
| 2.38             | 2%          |                                    |
| 3                | 12%         |                                    |
| 5                | 5%          |                                    |
| Total            | 100%        |                                    |
| Weighted Average | 2           | times basic life insurance benefit |

**Victim Comp Model Assumption for Life Insurance:**

**AVERAGE AS SHOWN ABOVE:** 2 times salary for basic, plus  
3 times salary for supplemental, plus 2 times salary for accidental  
equals 7 times salary in total

To be conservative (despite the prevalence above):

Use 8 for high benefit employers; 2 for low benefit employers.

Assume 40% of employers of victims were high benefit employers;

Assume 60% of employers of victims were low benefit employers;



Table 2

Portion of Adjusted Gross Income paid in taxes, for selected states  
From IRS Statistics of Income Table 2, Income taxes by AGI bracket, by state, 1997 (dollars in thousands)

| New York State       |               |               |               |               |               |                |
|----------------------|---------------|---------------|---------------|---------------|---------------|----------------|
| AGI bracket          | 20-30K        | 30-50K        | 50-75K        | 75-100K       | 100-200K      | 200K+          |
| Total AGI            | \$ 28,927,044 | \$ 58,561,979 | \$ 61,500,310 | \$ 38,803,807 | \$ 54,630,021 | \$ 106,574,458 |
| Fed tax liability \$ | \$ 2,441,702  | \$ 6,274,291  | \$ 7,681,586  | \$ 5,862,672  | \$ 9,980,911  | \$ 29,818,271  |
| Fed Income tax as %  | 8.4%          | 10.7%         | 12.5%         | 14.7%         | 18.3%         | 28.0%          |
| S&L Taxes Paid       | \$ 845,664    | \$ 2,950,388  | \$ 4,705,506  | \$ 3,581,004  | \$ 5,418,425  | \$ 10,487,626  |
| S&L Taxes as %       | 2.9%          | 5.0%          | 7.7%          | 9.0%          | 9.9%          | 9.8%           |
| Total tax burden %   | 11.4%         | 15.8%         | 20.1%         | 23.7%         | 28.2%         | 37.8%          |

| New Jersey           |               |               |               |               |               |               |
|----------------------|---------------|---------------|---------------|---------------|---------------|---------------|
| AGI bracket          | 20-30K        | 30-50K        | 50-75K        | 75-100K       | 100-200K      | 200K+         |
| Total AGI            | \$ 12,668,806 | \$ 27,388,511 | \$ 33,089,261 | \$ 24,920,493 | \$ 37,557,615 | \$ 48,156,701 |
| Fed tax liability \$ | \$ 1,100,599  | \$ 3,043,985  | \$ 4,205,551  | \$ 3,694,557  | \$ 6,871,614  | \$ 13,689,554 |
| Fed Income tax as %  | 8.7%          | 11.1%         | 12.7%         | 14.8%         | 18.3%         | 28.4%         |
| S&L Taxes Paid       | \$ 412,539    | \$ 1,221,709  | \$ 2,043,415  | \$ 1,753,638  | \$ 2,923,775  | \$ 3,811,400  |
| S&L Taxes as %       | 3.3%          | 4.5%          | 6.2%          | 7.0%          | 7.8%          | 7.9%          |
| Total tax burden %   | 11.9%         | 15.6%         | 18.9%         | 21.9%         | 28.1%         | 36.3%         |

| Virginia             |               |               |               |               |               |               |
|----------------------|---------------|---------------|---------------|---------------|---------------|---------------|
| AGI bracket          | 20-30K        | 30-50K        | 50-75K        | 75-100K       | 100-200K      | 200K+         |
| Total AGI            | \$ 10,972,955 | \$ 22,108,278 | \$ 24,417,881 | \$ 15,732,213 | \$ 22,059,555 | \$ 20,533,092 |
| Fed tax liability \$ | \$ 942,705    | \$ 2,352,653  | \$ 3,018,590  | \$ 2,333,142  | \$ 4,027,692  | \$ 5,624,816  |
| Fed Income tax as %  | 8.6%          | 10.6%         | 12.4%         | 14.8%         | 18.3%         | 27.4%         |
| S&L Taxes Paid       | \$ 181,352    | \$ 709,280    | \$ 1,210,932  | \$ 961,545    | \$ 1,470,147  | \$ 1,266,756  |
| S&L Taxes as %       | 1.7%          | 3.2%          | 5.0%          | 6.1%          | 6.7%          | 6.2%          |
| Total tax burden %   | 10.2%         | 13.8%         | 17.3%         | 20.9%         | 24.9%         | 33.6%         |

| Massachusetts        |               |               |               |               |               |               |
|----------------------|---------------|---------------|---------------|---------------|---------------|---------------|
| AGI bracket          | 20-30K        | 30-50K        | 50-75K        | 75-100K       | 100-200K      | 200K+         |
| Total AGI            | \$ 10,680,234 | \$ 22,683,584 | \$ 25,128,595 | \$ 17,070,618 | \$ 23,143,376 | \$ 34,367,225 |
| Fed tax liability \$ | \$ 1,008,068  | \$ 2,557,265  | \$ 3,197,991  | \$ 2,549,015  | \$ 4,274,951  | \$ 9,558,490  |
| Fed Income tax as %  | 9.4%          | 11.3%         | 12.7%         | 14.9%         | 18.5%         | 27.8%         |
| S&L Taxes Paid       | \$ 243,652    | \$ 922,058    | \$ 1,626,955  | \$ 1,327,209  | \$ 1,900,387  | \$ 2,451,439  |
| S&L Taxes as %       | 2.3%          | 4.1%          | 6.5%          | 7.8%          | 8.2%          | 7.1%          |
| Total tax burden %   | 11.7%         | 15.3%         | 19.2%         | 22.7%         | 26.7%         | 34.8%         |

**Table 3**

Personal consumption by pretax income range  
Based on 1999 BLS survey data

| Family status: Single        | \$30-39K | \$40-49K | \$50-69K | \$70-89K | \$90K+ |
|------------------------------|----------|----------|----------|----------|--------|
| Single                       | 67.5%    | 59.8%    | 58.0%    | 52.0%    | 39.5%  |
| Single, 1 dependent child    | 22.4%    | 19.7%    | 18.3%    | 16.3%    | 11.9%  |
| Single, 2 dependent children | 15.4%    | 13.5%    | 12.4%    | 11.0%    | 8.1%   |
| Single, 3 dependent children | 11.7%    | 10.3%    | 9.4%     | 8.3%     | 6.1%   |
| Single, 4 dependent children | 9.5%     | 8.3%     | 7.5%     | 6.7%     | 4.9%   |
| Single, 5 dependent children | 8.0%     | 7.0%     | 6.3%     | 5.6%     | 4.1%   |

| Family status: Married        | \$30-39K | \$40-49K | \$50-69K | \$70-89K | \$90K+ |
|-------------------------------|----------|----------|----------|----------|--------|
| Married, no children          | 27.4%    | 22.8%    | 18.3%    | 16.3%    | 10.9%  |
| Married, 1 dependent child    | 17.6%    | 14.9%    | 12.4%    | 11.0%    | 7.6%   |
| Married, 2 dependent children | 13.0%    | 11.1%    | 9.4%     | 8.3%     | 5.8%   |
| Married, 3 dependent children | 10.3%    | 8.8%     | 7.5%     | 6.7%     | 4.7%   |
| Married, 4 dependent children | 8.5%     | 7.3%     | 6.3%     | 5.6%     | 4.0%   |
| Married, 5 dependent children | 7.3%     | 6.3%     | 5.4%     | 4.8%     | 3.4%   |

Housing included as consumption for singles without children, excluded for all others

|                                      |       |       |       |       |       |
|--------------------------------------|-------|-------|-------|-------|-------|
| Weighted Average                     | 31.7% | 27.4% | 24.4% | 21.8% | 15.9% |
| 25% singles + 75% 'Average' families |       |       |       |       |       |



# Social Security Benefits

## Approximate Monthly Survivor Benefits For Your Family If You Had Steady Lifetime Earnings And Die In 2001

| Your Age<br>In 2001 | Family<br>Composition            | Low<br>Earnings <sup>1</sup> | Average<br>Earnings <sup>2</sup> | High<br>Earnings <sup>3</sup> | Maximum<br>Earnings <sup>4</sup> |
|---------------------|----------------------------------|------------------------------|----------------------------------|-------------------------------|----------------------------------|
| 35                  | Spouse-one child <sup>5</sup>    | \$1,036                      | \$1,706                          | \$2,264                       | \$2,760                          |
|                     | Spouse-two children <sup>6</sup> | \$1,036                      | \$2,076                          | \$2,640                       | \$3,219                          |
|                     | One child                        | \$518                        | \$853                            | \$1,132                       | \$1,380                          |
|                     | Spouse aged 60 <sup>7</sup>      | \$493                        | \$813                            | \$1,079                       | \$1,315                          |
| 45                  | Spouse-one child <sup>5</sup>    | \$1,036                      | \$1,706                          | \$2,264                       | \$2,728                          |
|                     | Spouse-two children <sup>6</sup> | \$1,036                      | \$2,076                          | \$2,640                       | \$3,182                          |
|                     | One child                        | \$518                        | \$853                            | \$1,132                       | \$1,364                          |
|                     | Spouse aged 60 <sup>7</sup>      | \$493                        | \$813                            | \$1,079                       | \$1,300                          |
| 55                  | Spouse-one child <sup>5</sup>    | \$1,036                      | \$1,706                          | \$2,260                       | \$2,606                          |
|                     | Spouse-two children <sup>6</sup> | \$1,036                      | \$2,076                          | \$2,636                       | \$3,040                          |
|                     | One child                        | \$518                        | \$853                            | \$1,130                       | \$1,303                          |
|                     | Spouse aged 60 <sup>7</sup>      | \$493                        | \$813                            | \$1,077                       | \$1,242                          |

<sup>1</sup> Low earnings are determined to be \$13,711.43 for 1999 and later.

<sup>2</sup> Average earnings are determined to be \$30,469.84 for 1999 and later.

<sup>3</sup> High earnings are determined to be \$48,751.74 for 1999 and later.

<sup>4</sup> Maximum earnings are greater than or equal to the OASDI wage base, the maximum earnings subject to the Social Security tax, and are determined to be \$76,200 for 2000.

<sup>5</sup> Amounts shown also represent benefits payable to two children, if no parent survives or if no payment is paid because the surviving parent has substantial earnings..

<sup>6</sup> Maximum family benefit amount.

<sup>7</sup> Spouse is assumed to be age 60 in the year of worker's death.

**Note:** The accuracy of the illustrated amounts depends on your pattern of actual earnings, which may vary significantly from those shown here.



Sample Cases for Victims Compensation  
Max Compensable Salary with Two Tranches

|                                   | Mr. A        | Mr. AB       | Mr. B        | Mr. C      | Mrs. D        | Mr. E        | Mr. F        | Mr. G      | Comment                                                                        |
|-----------------------------------|--------------|--------------|--------------|------------|---------------|--------------|--------------|------------|--------------------------------------------------------------------------------|
| Age at death                      | 45           | 3            | 24           | 55         | 35            | 39           | 47           | 57         |                                                                                |
| Married                           | TRUE         | TRUE         | FALSE        | TRUE       | TRUE          | TRUE         | TRUE         | FALSE      |                                                                                |
| # of Dependent children           | 3            | 3            | 0            | 1          | 2             | 0            | 1            | 1          | Dependent children only                                                        |
| Place of residence                | NY           | NY           | NY           | Mass.      | NY            | NJ           | NY           | VA         |                                                                                |
| Base Salary                       | \$ 250,000   | \$ 250,000   | \$ 70,000    | \$ 50,000  | \$ 30,000     | \$ 100,000   | \$ 150,000   | \$ 70,000  | TBD individual                                                                 |
| Variable Earnings                 | \$ 500,000   | \$ 500,000   | \$ 20,000    | \$ 10,000  | \$ -          | \$ 45,000    | \$ 100,000   | \$ -       | Bonus pay                                                                      |
| Gross Pre-tax Salary              | \$ 750,000   | \$ 750,000   | \$ 90,000    | \$ 60,000  | \$ 30,000     | \$ 145,000   | \$ 250,000   | \$ 70,000  | Max pre-tax income recognized by program                                       |
| Compensable Salary                | \$ 360,000   | \$ 360,000   | \$ 83,000    | \$ 60,000  | \$ 30,000     | \$ 145,000   | \$ 250,000   | \$ 70,000  | 15% Federal, state, and local taxes                                            |
| x tax factor (1-x)                | 35%          | 38%          | 25%          | 19%        | 13%           | 28%          | 33%          | 33%        |                                                                                |
| Post Tax Compensable Salary       | \$ 224,208   | \$ 224,208   | \$ 66,768    | \$ 48,480  | \$ 25,971     | \$ 104,270   | \$ 166,750   | \$ 57,624  |                                                                                |
| Employer Pension Contribution     | \$ 10,000    | \$ 10,000    | \$ 2,800     | \$ 2,000   | \$ 1,200      | \$ 4,000     | \$ 8,000     | \$ 2,800   | 4% max/yr. TBD individually                                                    |
| Employer Medical Premium          | \$ 2,400     | \$ 2,400     | \$ 2,400     | \$ 2,400   | \$ 2,400      | \$ 2,400     | \$ 2,400     | \$ 2,400   | TBD individually                                                               |
| Total Post-Tax Salary & Earnings  | \$ 236,608   | \$ 236,608   | \$ 71,968    | \$ 52,680  | \$ 29,871     | \$ 110,670   | \$ 175,150   | \$ 62,824  |                                                                                |
| 1st Earnings Tranche up to \$145K | \$ 145,000   | \$ 145,000   | \$ 71,998    | \$ 71,880  | \$ 29,571     | \$ 110,670   | \$ 145,000   | \$ 62,824  |                                                                                |
| 2nd Tranche: \$145K-\$550K        | \$ 91,608    | \$ 91,608    | \$ -         | \$ -       | \$ -          | \$ -         | \$ 30,150    | \$ -       |                                                                                |
| Annual PV deficit                 | 6.25%        | 6.25%        | 6.25%        | 6.25%      | 6.25%         | 8.26%        | 8.25%        | 8.25%      | PV discount rate on future earnings                                            |
| Multiple of 1st Earnings Tranche  | 17.1         | 37           | 40.6         | 8.7        | 24.5          | 21.1         | 13.1         | 8.3        | Based on GAI 1994 mortality table                                              |
| Lump sum present value            | \$ 2,479,500 | \$ 6,365,000 | \$ 2,073,119 | \$ 450,956 | \$ 724,489.50 | \$ 2,335,126 | \$ 1,978,500 | \$ 395,791 |                                                                                |
| Multiple of 2nd Earnings Tranche  | 13.2         | 21.8         | 22.9         | 6.2        | 18.7          | 18.7         | 12           | 4.6        | Based on GAI 1994 mortality table                                              |
| Lump sum present value            | \$ 1,209,726 | \$ 1,997,054 | \$ -         | \$ -       | \$ -          | \$ -         | \$ 361,800   | \$ -       |                                                                                |
| Gross Economic Loss               | \$ 3,689,226 | \$ 7,362,054 | \$ 2,873,119 | \$ 450,956 | \$ 724,490    | \$ 2,335,126 | \$ 2,290,300 | \$ 395,791 |                                                                                |
| x cost multiplier (1-x)           | 4.7%         | 4.7%         | 52.0%        | 18.3%      | 13.0%         | 10.9%        | 7.6%         | 16.3%      | Based on BLS data. Housing consumption excluded for singles, but not families. |
| Net Economic Loss                 | \$ 3,515,256 | \$ 7,016,038 | \$ 1,403,097 | \$ 375,866 | \$ 630,447    | \$ 2,080,541 | \$ 2,116,268 | \$ 331,277 |                                                                                |
| Non-Economic Loss                 | \$ 300,000   | \$ 300,000   | \$ 100,000   | \$ 250,000 | \$ 250,000    | \$ 150,000   | \$ 200,000   | \$ 150,000 | \$100K + \$50K per survivor                                                    |
| Gross Loss                        | \$ 3,815,256 | \$ 7,316,038 | \$ 1,503,097 | \$ 575,866 | \$ 880,447    | \$ 2,230,541 | \$ 2,316,268 | \$ 481,277 |                                                                                |
| Collateral Offsets                | \$ 1,000,000 | \$ 1,000,000 | \$ 280,000   | \$ 200,000 | \$ 120,000    | \$ 400,000   | \$ 600,000   | \$ 292,000 | Base income x 4                                                                |
| Life Insurance                    | \$ 304,378   | \$ 307,915   | \$ -         | \$ 218,257 | \$ 198,871    | \$ 255       | \$ 250,987   | \$ 15,681  | Assumes children are 10, except for those 55+                                  |
| Social Security                   | \$ -         | \$ -         | \$ -         | \$ -       | \$ -          | \$ -         | \$ -         | \$ -       |                                                                                |
| Workers Comp                      | \$ -         | \$ -         | \$ -         | \$ -       | \$ -          | \$ -         | \$ -         | \$ -       |                                                                                |
| Veterans Benefits                 | \$ 679,619   | \$ 67,530    | \$ 6,039     | \$ 110,708 | \$ 19,118     | \$ 90,257    | \$ 206,158   | \$ 151,258 | examples based on model                                                        |
| Pension Payout                    | \$ 1,584,217 | \$ 1,370,444 | \$ 289,039   | \$ 532,955 | \$ 337,787    | \$ 430,512   | \$ 1,066,185 | \$ 446,549 |                                                                                |
| Total Collateral Sources          | \$ 1,881,138 | \$ 6,946,594 | \$ 1,215,068 | \$ 50,000  | \$ 542,660    | \$ 1,740,019 | \$ 1,290,083 | \$ 50,000  |                                                                                |
| Net Payment*                      |              |              |              |            |               |              |              |            |                                                                                |
| * with \$50K min                  |              |              |              |            |               |              |              |            |                                                                                |

11/50/2001



# VICTIM'S COMPENSATION FUND

Aggregate Model with Seven Income Categories

High Benefits Persons: Life Insurance =

Low Benefits Persons: Life Insurance =

Maximum Amount of Life Insurance =

\* victims under 36 have half this amount



times base salary  
times base salary

ratio with high benefits =

ratio with low benefits =

0.60

TOTAL GOVERNMENT LIABILITY = \$ 4,545,477,438

## Multiple of Annual salary (to equal career earnings)

| Present Value Factors 1st Tranche, Income up to: |      | \$ 145,000     |      | Annual Salary Increase* | Annual Interest Increase |
|--------------------------------------------------|------|----------------|------|-------------------------|--------------------------|
|                                                  |      | Retirement Age |      |                         |                          |
| Age at Death                                     | 62   | 85             | 65   | 6.80%                   | 8.25%                    |
| 25                                               | 37.5 | 40.6           | 40.6 | 5.10%                   | 6.25%                    |
| 35                                               | 22.5 | 24.3           | 24.5 | 5.10%                   | 8.25%                    |
| 45                                               | 14.9 | 17.1           | 17.1 | 4.20%                   | 6.25%                    |
| 55                                               | 6.3  | 8.7            | 8.7  |                         |                          |

| Present Value Factors 2nd Tranche, income from |      | \$ 145,000 up to \$360,000 |  | Annual Salary Increase* | Annual Interest Increase |
|------------------------------------------------|------|----------------------------|--|-------------------------|--------------------------|
|                                                |      | Retirement Age             |  |                         |                          |
| Age at Death                                   | 82   |                            |  | 3.50%                   | 8.25%                    |
| 25                                             | 23.0 |                            |  | 3.50%                   | 6.25%                    |
| 35                                             | 18.7 |                            |  | 3.50%                   | 6.25%                    |
| 45                                             | 13.3 |                            |  | 3.50%                   | 6.25%                    |
| 55                                             | 6.2  |                            |  |                         |                          |

## Calculation of Net Earnings

|                             |           |           |           |            |            |            |              |
|-----------------------------|-----------|-----------|-----------|------------|------------|------------|--------------|
| Base salary                 | \$ 30,000 | \$ 50,000 | \$ 64,815 | \$ 80,909  | \$ 152,174 | \$ 208,333 | \$ 800,000   |
| Variable earnings           | \$ -      | \$ -      | \$ 5,185  | \$ 9,091   | \$ 22,826  | \$ 41,667  | \$ 200,000   |
| Gross Pretax                | \$ 30,000 | \$ 50,000 | \$ 70,000 | \$ 100,000 | \$ 175,000 | \$ 250,000 | \$ 1,000,000 |
| Max compensable             | \$ 30,000 | \$ 50,000 | \$ 70,000 | \$ 100,000 | \$ 175,000 | \$ 250,000 | \$ 360,000   |
| x tax factor                | 13.6%     | 18.0%     | 20.1%     | 26.0%      | 28.2%      | 37.8%      | 37.8%        |
| Post-Tax Compensable        | \$ 25,920 | \$ 41,025 | \$ 55,830 | \$ 74,050  | \$ 125,850 | \$ 155,500 | \$ 223,920   |
| + employer pension contrib. | \$ 1,200  | \$ 2,000  | \$ 2,593  | \$ 3,636   | \$ 6,087   | \$ 8,333   | \$ 32,000    |
| + employer medical premium  | \$ 2,400  | \$ 2,400  | \$ 2,400  | \$ 2,400   | \$ 2,400   | \$ 2,400   | \$ 2,400     |
| Total compensable earnings  | \$ 29,520 | \$ 45,425 | \$ 60,823 | \$ 80,086  | \$ 134,137 | \$ 166,233 | \$ 258,320   |

|                      |           |           |           |           |            |            |            |
|----------------------|-----------|-----------|-----------|-----------|------------|------------|------------|
| 1st Earnings Tranche | \$ 29,520 | \$ 45,425 | \$ 60,823 | \$ 80,086 | \$ 134,137 | \$ 145,000 | \$ 145,000 |
| 2nd Tranche          | \$ -      | \$ -      | \$ -      | \$ -      | \$ -       | \$ 21,233  | \$ 113,320 |

|                              |  | Gross Economic Loss |           |           |           |           |           |           |
|------------------------------|--|---------------------|-----------|-----------|-----------|-----------|-----------|-----------|
|                              |  | 30,000              | 50,000    | 70,000    | 100,000   | 175,000   | 250,000   | 1,000,000 |
| Gross Earnings First Tranche |  |                     |           |           |           |           |           |           |
| Age at Death                 |  |                     |           |           |           |           |           |           |
| 25                           |  | 1,198,512           | 1,844,255 | 2,473,457 | 3,251,506 | 5,445,980 | 5,887,000 | 5,887,000 |
| 35                           |  | 723,240             | 1,112,913 | 1,492,604 | 1,982,118 | 3,286,355 | 3,552,500 | 3,552,500 |
| 45                           |  | 504,792             | 776,768   | 1,041,776 | 1,369,477 | 2,293,742 | 2,479,500 | 2,479,500 |
| 55                           |  | 256,824             | 395,198   | 530,027   | 696,751   | 1,166,992 | 1,261,500 | 1,261,500 |
| Second Tranche               |  |                     |           |           |           |           |           |           |
| Age at Death                 |  |                     |           |           |           |           |           |           |
| 25                           |  | 0                   | 0         | 0         | 0         | 0         | 488,367   | 2,606,360 |
| 35                           |  | 0                   | 0         | 0         | 0         | 0         | 397,083   | 2,110,084 |
| 45                           |  | 0                   | 0         | 0         | 0         | 0         | 282,403   | 1,507,156 |
| 55                           |  | 0                   | 0         | 0         | 0         | 0         | 131,647   | 702,584   |
| Total both tranches          |  |                     |           |           |           |           |           |           |
| Age at Death                 |  |                     |           |           |           |           |           |           |
| 25                           |  | 1,198,512           | 1,844,255 | 2,473,457 | 3,251,506 | 5,445,980 | 6,375,367 | 8,493,360 |
| 35                           |  | 723,240             | 1,112,913 | 1,492,604 | 1,982,118 | 3,286,355 | 3,949,583 | 5,671,584 |
| 45                           |  | 504,792             | 776,768   | 1,041,776 | 1,369,477 | 2,293,742 | 2,761,803 | 3,886,656 |
| 55                           |  | 256,824             | 395,198   | 530,027   | 696,751   | 1,166,992 | 1,393,147 | 1,964,084 |

|                      |            |              |              |              |              |              |              |  |
|----------------------|------------|--------------|--------------|--------------|--------------|--------------|--------------|--|
| Adjustments          |            |              |              |              |              |              |              |  |
| x consumption factor | 31.7%      | 24.4%        | 23.1%        | 15.9%        | 15.9%        | 15.9%        | 15.9%        |  |
| Net Economic Loss    |            |              |              |              |              |              |              |  |
| 25                   | \$ 818,584 | \$ 1,394,257 | \$ 1,902,089 | \$ 2,734,517 | \$ 4,580,053 | \$ 5,361,683 | \$ 7,142,916 |  |
| 35                   | \$ 493,973 | \$ 841,362   | \$ 1,147,812 | \$ 1,650,139 | \$ 2,783,825 | \$ 3,321,583 | \$ 4,769,802 |  |
| 45                   | \$ 344,773 | \$ 587,236   | \$ 801,126   | \$ 1,151,730 | \$ 1,929,037 | \$ 2,322,761 | \$ 3,352,778 |  |
| 55                   | \$ 175,411 | \$ 298,769   | \$ 407,590   | \$ 585,968   | \$ 981,440   | \$ 1,171,636 | \$ 1,851,795 |  |



| Gross Loss, Including<br>avg non-economic loss: |  | \$ 287,500   |              |              |              |              |              |              |
|-------------------------------------------------|--|--------------|--------------|--------------|--------------|--------------|--------------|--------------|
|                                                 |  | \$ 1,108,084 | \$ 1,681,757 | \$ 2,189,589 | \$ 3,022,017 | \$ 4,867,553 | \$ 5,649,183 | \$ 7,430,416 |
| 25                                              |  | \$ 781,473   | \$ 1,128,862 | \$ 1,435,312 | \$ 1,937,639 | \$ 3,051,325 | \$ 3,809,083 | \$ 5,057,302 |
| 35                                              |  | \$ 632,273   | \$ 874,738   | \$ 1,088,626 | \$ 1,439,230 | \$ 2,216,537 | \$ 2,610,261 | \$ 3,840,278 |
| 45                                              |  | \$ 462,911   | \$ 586,269   | \$ 685,090   | \$ 873,468   | \$ 1,268,940 | \$ 1,459,136 | \$ 1,939,295 |
| 55                                              |  |              |              |              |              |              |              |              |

## Collateral Sources

|                       |  | High Benefit Persons |         |         |         |           |           |           |
|-----------------------|--|----------------------|---------|---------|---------|-----------|-----------|-----------|
| Gross Salary          |  | 30,000               | 50,000  | 70,000  | 100,000 | 175,000   | 250,000   | 1,000,000 |
| Variable Income       |  | 0%                   | 0%      | 8%      | 10%     | 15%       | 20%       | 25%       |
| Base Earnings         |  | 30,000               | 50,000  | 84,815  | 90,909  | 152,174   | 208,333   | 800,000   |
| Employer Life Ins.    |  | Factor =             | 8       |         |         | maximum = | 1,000,000 | 1,000,000 |
| Under age 35          |  | 120,000              | 200,000 | 259,259 | 363,836 | 606,696   | 833,333   | 1,000,000 |
|                       |  | 240,000              | 400,000 | 518,519 | 727,273 | 1,000,000 | 1,000,000 | 1,000,000 |
| Social Security Death |  | 149,067              | 189,209 | 189,209 | 218,169 | 218,169   | 218,169   | 218,169   |
| Workman's Comp        |  |                      |         |         |         |           |           |           |
| Veterans Benefits     |  |                      |         |         |         |           |           |           |
| Subtotal              |  | 389,067              | 589,209 | 707,728 | 945,441 | 1,218,169 | 1,218,169 | 1,218,169 |
| Pension-Death at age: |  |                      |         |         |         |           |           |           |
| 25                    |  | 3,721                | 6,201   | 8,039   | 11,275  | 18,873    | 25,839    | 99,220    |
| 35                    |  | 19,116               | 31,880  | 41,300  | 57,928  | 86,966    | 132,752   | 509,766   |
| 45                    |  | 40,453               | 67,422  | 87,399  | 122,588 | 205,198   | 280,925   | 1,078,753 |
| 55                    |  | 70,025               | 116,708 | 151,288 | 212,196 | 355,198   | 488,283   | 1,887,327 |

|              |  | Lump Sum Payment With Collateral Sources, with min of: |           |           |           |           |           |           |
|--------------|--|--------------------------------------------------------|-----------|-----------|-----------|-----------|-----------|-----------|
| Gross Salary |  | 30,000                                                 | 50,000    | 70,000    | 100,000   | 175,000   | 250,000   | 1,000,000 |
| Age at Death |  |                                                        |           |           |           |           |           |           |
| 25           |  | 833,296                                                | 1,286,348 | 1,733,082 | 2,428,937 | 4,021,815 | 4,571,843 | 6,113,027 |
| 35           |  | 373,290                                                | 507,792   | 686,284   | 934,270   | 1,736,180 | 2,258,163 | 3,329,368 |
| 45           |  | 202,753                                                | 218,105   | 293,499   | 371,203   | 793,171   | 1,111,187 | 1,343,356 |
| 55           |  | 50,000                                                 | 50,000    | 50,000    | 50,000    | 50,000    | 50,000    | 50,000    |

|                       |  | Low Benefit Persons |         |         |         |         |         |           |
|-----------------------|--|---------------------|---------|---------|---------|---------|---------|-----------|
| Gross Salary          |  | 30,000              | 50,000  | 70,000  | 100,000 | 175,000 | 250,000 | 1,000,000 |
| Variable Income       |  | 0%                  | 0%      | 8%      | 10%     | 15%     | 20%     | 25%       |
| Base Earnings         |  | 30,000              | 50,000  | 64,815  | 90,909  | 152,174 | 208,333 | 800,000   |
| Employer Life Ins.    |  | Factor =            | 2       |         |         |         |         |           |
| Under age 35          |  | 30,000              | 50,000  | 64,815  | 90,909  | 152,174 | 208,333 | 800,000   |
|                       |  | 60,000              | 100,000 | 129,630 | 181,818 | 304,348 | 416,667 | 1,000,000 |
| Social Security Death |  | 149,067             | 189,209 | 189,209 | 218,169 | 218,169 | 218,169 | 218,169   |
| Workman's Comp        |  |                     |         |         |         |         |         |           |
| Veterans Benefits     |  |                     |         |         |         |         |         |           |
| Subtotal              |  | 209,067             | 289,209 | 318,838 | 399,987 | 522,516 | 634,835 | 1,218,169 |
| Pension-Death at age: |  |                     |         |         |         |         |         |           |
| 25                    |  | 3,721               | 6,201   | 8,039   | 11,275  | 18,873  | 25,839  | 99,220    |
| 35                    |  | 19,116              | 31,880  | 41,300  | 57,928  | 86,966  | 132,752 | 509,766   |
| 45                    |  | 40,453              | 67,422  | 87,399  | 122,588 | 205,198 | 280,925 | 1,078,753 |
| 55                    |  | 70,025              | 116,708 | 151,288 | 212,196 | 355,198 | 488,283 | 1,887,327 |

|                |  | Lump Sum Payment With Collateral Sources, with min of: |           |           |           |           |           |           |
|----------------|--|--------------------------------------------------------|-----------|-----------|-----------|-----------|-----------|-----------|
| Gross Earnings |  | 30,000                                                 | 50,000    | 70,000    | 100,000   | 175,000   | 250,000   | 1,000,000 |
| Age at Death   |  |                                                        |           |           |           |           |           |           |
| 25             |  | 923,296                                                | 1,436,346 | 1,927,528 | 2,701,664 | 4,478,337 | 5,196,843 | 6,913,027 |
| 35             |  | 553,290                                                | 807,792   | 1,075,173 | 1,479,725 | 2,431,842 | 2,841,486 | 3,329,368 |
| 45             |  | 382,753                                                | 518,105   | 682,388   | 916,658   | 1,488,823 | 1,694,500 | 1,343,356 |
| 55             |  | 183,819                                                | 180,352   | 224,964   | 261,285   | 391,225   | 338,018   | 50,000    |



# Weighted Average of All Persons

Percent Lower Benefit Victims:  
Percent Higher Benefit Victims:

60%  
40%

Lump Sum Payment With Collateral Sources

|              | 30,000     | 50,000       | 70,000       | 100,000      | 175,000      | 250,000      | 1,000,000    |
|--------------|------------|--------------|--------------|--------------|--------------|--------------|--------------|
| Age at Death |            |              |              |              |              |              |              |
| 25           | \$ 887,296 | \$ 1,376,348 | \$ 1,349,748 | \$ 2,592,573 | \$ 4,295,728 | \$ 4,948,843 | \$ 6,233,027 |
| 35           | \$ 481,290 | \$ 887,792   | \$ 919,817   | \$ 1,281,543 | \$ 2,153,581 | \$ 2,608,163 | \$ 3,328,368 |
| 45           | \$ 310,753 | \$ 398,105   | \$ 526,833   | \$ 888,478   | \$ 1,210,562 | \$ 1,481,187 | \$ 1,343,356 |
| 55           | \$ 130,281 | \$ 128,211   | \$ 154,978   | \$ 176,771   | \$ 254,735   | \$ 222,811   | \$ 50,000    |

## Demographics of Fatalities, SSA data extrapolated to latest total

|              | 30,000 | 50,000 | 70,000 | 100,000 | 175,000 | 250,000 | 1,000,000 |
|--------------|--------|--------|--------|---------|---------|---------|-----------|
| Earnings     |        |        |        |         |         |         |           |
| Age at Death |        |        |        |         |         |         |           |
| 25           | 218    | 174    | 188    | 107     | 79      | 67      | 44        |
| 35           | 119    | 123    | 230    | 149     | 126     | 81      | 51        |
| 45           | 172    | 151    | 398    | 270     | 147     | 137     | 100       |
| 55           | 156    | 86     | 170    | 180     | 86      | 49      | 42        |
| TOTAL        | 683    | 535    | 986    | 686     | 437     | 335     | 237       |

## Total Amount Due

Average Payment Times Number of Victims by Category

|              | 30,000         | 50,000         | 70,000         | 100,000        | 175,000        | 250,000        | 1,000,000      |
|--------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|
| Earnings     |                |                |                |                |                |                |                |
| Age at Death |                |                |                |                |                |                |                |
| 25           | \$ 191,900,077 | \$ 240,058,116 | \$ 348,434,699 | \$ 277,340,055 | \$ 339,655,115 | \$ 335,618,286 | \$ 275,407,872 |
| 35           | \$ 57,082,163  | \$ 84,772,891  | \$ 211,722,057 | \$ 187,761,149 | \$ 270,444,874 | \$ 212,288,485 | \$ 170,336,670 |
| 45           | \$ 53,477,401  | \$ 60,177,602  | \$ 209,504,168 | \$ 186,422,654 | \$ 177,358,240 | \$ 200,482,084 | \$ 134,333,217 |
| 55           | \$ 20,300,850  | \$ 11,031,945  | \$ 26,309,782  | \$ 28,365,056  | \$ 21,918,663  | \$ 10,881,262  | \$ 2,092,986   |
| TOTAL        | \$ 322,760,490 | \$ 398,038,554 | \$ 795,970,706 | \$ 681,888,914 | \$ 809,377,912 | \$ 757,270,117 | \$ 582,170,744 |

**TOTAL DEATH LIABILITY FOR ECONOMIC LOSS** \$ 4,345,477,438  
**ESTIMATED PHYSICAL INJURY LOSSES** \$ 200,000,000

**TOTAL GOVERNMENT LIABILITY** \$ 4,545,477,438



# VICTIM'S COMPENSATION FUND

Aggregate Model with Six Income Categories

High Benefits Persons: Life Insurance\* =

Low Benefits Persons: Life Insurance\* =

Maximum Amount of Life Insurance =

\* victims under 35 have half this amount

TOTAL GOVERNMENT LIABILITY =

\$ 4,402,862,902

Multiple of Annual salary (to equal career earnings)

| Present Value Factors 1st Tranche, Income up to: |    |      |      | \$ 145,000 | Annual Salary Increase* | Annual Interest Increase |
|--------------------------------------------------|----|------|------|------------|-------------------------|--------------------------|
| Retirement Age:                                  | 62 | 65   | 65   | 65         | 6.60%                   | 6.25%                    |
| Age at Death                                     | 25 | 37.5 | 40.6 | 40.6       | 5.10%                   | 6.25%                    |
|                                                  | 35 | 22.5 | 24.5 | 24.5       | 5.10%                   | 6.25%                    |
|                                                  | 45 | 14.9 | 17.1 | 17.1       | 4.20%                   | 6.25%                    |
|                                                  | 55 | 6.3  | 8.7  | 8.7        |                         |                          |

| Present Value Factors 2nd Tranche, Income fr \$ 145,000 up to \$360,000 |    |      |      | Annual Salary Increase* | Annual Interest Increase |
|-------------------------------------------------------------------------|----|------|------|-------------------------|--------------------------|
| Retirement Age:                                                         | 62 | 65   | 65   | 3.50%                   | 6.25%                    |
| Age at Death                                                            | 25 | 23.0 | 23.0 | 3.50%                   | 6.25%                    |
|                                                                         | 35 | 18.7 | 18.7 | 3.50%                   | 6.25%                    |
|                                                                         | 45 | 13.3 | 13.3 | 3.50%                   | 6.25%                    |
|                                                                         | 55 | 8.2  | 8.2  |                         |                          |

## Calculation of Net Earnings

|                             |           |           |           |            |            |              |
|-----------------------------|-----------|-----------|-----------|------------|------------|--------------|
| Base salary                 | \$ 30,000 | \$ 50,000 | \$ 64,815 | \$ 90,908  | \$ 208,333 | \$ 800,000   |
| Variable earnings           | \$ -      | \$ -      | \$ 5,185  | \$ 9,091   | \$ 41,667  | \$ 200,000   |
| Gross Pre-tax               | \$ 30,000 | \$ 50,000 | \$ 70,000 | \$ 100,000 | \$ 250,000 | \$ 1,000,000 |
| Max compensable             | \$ 30,000 | \$ 50,000 | \$ 70,000 | \$ 100,000 | \$ 250,000 | \$ 360,000   |
| x tax factor                | 13.6%     | 18.0%     | 20.1%     | 26.0%      | 37.8%      | 37.8%        |
| Post-Tax Compensable        | \$ 25,920 | \$ 41,025 | \$ 55,930 | \$ 74,050  | \$ 155,500 | \$ 223,920   |
| + employer pension contrib. | \$ 1,200  | \$ 2,000  | \$ 2,593  | \$ 3,636   | \$ 8,333   | \$ 32,000    |
| + employer medical premium  | \$ 2,400  | \$ 2,400  | \$ 2,400  | \$ 2,400   | \$ 2,400   | \$ 2,400     |
| Total compensable earnings  | \$ 29,520 | \$ 45,425 | \$ 60,923 | \$ 80,086  | \$ 166,233 | \$ 258,320   |

|                      |           |           |           |           |            |            |
|----------------------|-----------|-----------|-----------|-----------|------------|------------|
| 1st Earnings Tranche | \$ 29,520 | \$ 45,425 | \$ 60,923 | \$ 80,086 | \$ 145,000 | \$ 145,000 |
| 2nd Tranche          | \$ -      | \$ -      | \$ -      | \$ -      | \$ 21,233  | \$ 113,320 |

## Gross Economic Loss

|                     |  | 30,000    | 50,000    | 70,000    | 100,000   | 250,000   | 1,000,000 |
|---------------------|--|-----------|-----------|-----------|-----------|-----------|-----------|
| Gross Earnings      |  |           |           |           |           |           |           |
| First Tranche       |  |           |           |           |           |           |           |
| Age at Death        |  |           |           |           |           |           |           |
| 25                  |  | 1,198,512 | 1,844,255 | 2,473,457 | 3,251,506 | 5,987,000 | 5,887,000 |
| 35                  |  | 723,240   | 1,112,913 | 1,492,604 | 1,962,116 | 3,552,500 | 3,552,500 |
| 45                  |  | 504,792   | 778,768   | 1,041,776 | 1,369,477 | 2,478,500 | 2,479,500 |
| 55                  |  | 258,824   | 395,198   | 530,027   | 696,751   | 1,261,500 | 1,261,500 |
| Second Tranche      |  |           |           |           |           |           |           |
| Age at Death        |  |           |           |           |           |           |           |
| 25                  |  | 0         | 0         | 0         | 0         | 488,367   | 2,606,360 |
| 35                  |  | 0         | 0         | 0         | 0         | 397,063   | 2,119,084 |
| 45                  |  | 0         | 0         | 0         | 0         | 282,403   | 1,507,156 |
| 55                  |  | 0         | 0         | 0         | 0         | 131,647   | 702,584   |
| Total both tranches |  |           |           |           |           |           |           |
| Age at Death        |  |           |           |           |           |           |           |
| 25                  |  | 1,198,512 | 1,844,255 | 2,473,457 | 3,251,506 | 6,375,367 | 8,493,360 |
| 35                  |  | 723,240   | 1,112,913 | 1,492,604 | 1,962,116 | 3,949,583 | 5,671,584 |
| 45                  |  | 504,792   | 778,768   | 1,041,776 | 1,369,477 | 2,761,903 | 3,986,658 |
| 55                  |  | 258,824   | 395,198   | 530,027   | 696,751   | 1,393,147 | 1,984,084 |

|                      |  |            |              |              |              |              |              |
|----------------------|--|------------|--------------|--------------|--------------|--------------|--------------|
| Adjustments          |  |            |              |              |              |              |              |
| x consumption factor |  | 31.7%      | 24.4%        | 23.1%        | 15.9%        | 15.9%        | 15.9%        |
| Net Economic Loss    |  |            |              |              |              |              |              |
| 25                   |  | \$ 818,584 | \$ 1,394,257 | \$ 1,902,080 | \$ 2,734,517 | \$ 5,361,683 | \$ 7,142,816 |
| 35                   |  | \$ 493,973 | \$ 841,362   | \$ 1,147,812 | \$ 1,650,139 | \$ 3,321,583 | \$ 4,769,802 |
| 45                   |  | \$ 344,773 | \$ 587,236   | \$ 801,126   | \$ 1,151,730 | \$ 2,322,761 | \$ 3,352,778 |
| 55                   |  | \$ 175,411 | \$ 298,769   | \$ 407,590   | \$ 585,968   | \$ 1,171,636 | \$ 1,651,795 |



|                             |    |              |              |              |              |             |              |
|-----------------------------|----|--------------|--------------|--------------|--------------|-------------|--------------|
| plus avg non-economic loss: |    | \$ 287,500   |              |              |              |             |              |
| Gross Loss                  | 25 | \$ 1,108,084 | \$ 1,881,757 | \$ 2,189,589 | \$ 3,022,017 | \$5,649,183 | \$ 7,430,416 |
|                             | 35 | \$ 781,473   | \$ 1,128,862 | \$ 1,435,312 | \$ 1,937,639 | \$3,809,083 | \$ 5,057,302 |
|                             | 45 | \$ 632,273   | \$ 874,736   | \$ 1,088,626 | \$ 1,439,230 | \$2,610,261 | \$ 3,640,278 |
|                             | 55 | \$ 462,911   | \$ 586,289   | \$ 695,090   | \$ 873,468   | \$1,459,138 | \$ 1,939,295 |

## Collateral Sources

## High Benefit Persons

|                       |    |          |         |         |           |           |           |
|-----------------------|----|----------|---------|---------|-----------|-----------|-----------|
|                       |    | 30,000   | 50,000  | 70,000  | 100,000   | 250,000   | 1,000,000 |
| Gross Earnings        |    | 0%       | 0%      | 8%      | 10%       | 20%       | 25%       |
| Variable Income       |    | 30,000   | 50,000  | 64,815  | 90,909    | 208,333   | 800,000   |
| Base Earnings         |    | Factor = | 8       |         | maximum = | 1,000,000 | 1,000,000 |
| Employer Life Ins.    |    | 120,000  | 200,000 | 259,259 | 363,636   | 833,333   | 1,000,000 |
| Under age 35          |    | 240,000  | 400,000 | 518,519 | 727,273   | 1,000,000 | 1,000,000 |
|                       |    | 148,548  | 188,854 | 227,586 | 227,586   | 227,586   | 227,586   |
| Social Security Death |    |          |         |         |           |           |           |
| Workman's Comp        |    |          |         |         |           |           |           |
| Veterans Benefits     |    |          |         |         |           |           |           |
| Subtotal              |    | 388,548  | 588,854 | 746,105 | 954,859   | 1,227,586 | 1,227,586 |
| Pension-Death at age: |    |          |         |         |           |           |           |
|                       | 25 | 3,721    | 6,201   | 8,039   | 11,275    | 25,839    | 99,220    |
|                       | 35 | 19,116   | 31,860  | 41,300  | 57,928    | 132,752   | 509,766   |
|                       | 45 | 40,453   | 67,422  | 87,399  | 122,586   | 280,925   | 1,078,753 |
|                       | 55 | 70,025   | 116,708 | 151,268 | 212,196   | 486,283   | 1,867,327 |

## Lump Sum Payment With Collateral Sources, with min of:

|                |    |         |           |           |           |           |           |           |
|----------------|----|---------|-----------|-----------|-----------|-----------|-----------|-----------|
|                |    | 30,000  | 50,000    | 70,000    | 100,000   | \$50,000  | 250,000   | 1,000,000 |
| Gross Earnings |    |         |           |           |           |           |           |           |
| Age at Death   |    |         |           |           |           |           |           |           |
|                | 25 | 833,815 | 1,286,702 | 1,694,705 | 2,419,519 | 4,562,425 | 6,103,610 |           |
|                | 35 | 373,809 | 508,148   | 647,907   | 924,853   | 2,248,745 | 3,319,950 |           |
|                | 45 | 203,272 | 218,460   | 255,123   | 361,788   | 1,101,750 | 1,333,939 |           |
|                | 55 | 50,000  | 50,000    | 50,000    | 50,000    | 50,000    | 50,000    |           |

## Low Benefit Persons

|                       |    |          |         |         |         |         |           |
|-----------------------|----|----------|---------|---------|---------|---------|-----------|
|                       |    | 30,000   | 50,000  | 70,000  | 100,000 | 250,000 | 1,000,000 |
| Gross Earnings        |    | 0%       | 0%      | 8%      | 10%     | 20%     | 25%       |
| Variable Income       |    | 30,000   | 50,000  | 64,815  | 90,909  | 208,333 | 800,000   |
| Base Earnings         |    | Factor = | 2       |         |         |         |           |
| Employer Life Ins.    |    | 30,000   | 50,000  | 64,815  | 90,909  | 208,333 | 800,000   |
| Under age 35          |    | 60,000   | 100,000 | 129,630 | 181,818 | 416,667 | 1,000,000 |
|                       |    | 148,067  | 189,209 | 189,209 | 218,108 | 218,169 | 218,169   |
| Social Security Death |    |          |         |         |         |         |           |
| Workman's Comp        |    |          |         |         |         |         |           |
| Veterans Benefits     |    |          |         |         |         |         |           |
| Subtotal              |    | 208,067  | 289,209 | 318,839 | 399,987 | 634,835 | 1,218,169 |
| Pension-Death at age: |    |          |         |         |         |         |           |
|                       | 25 | 3,721    | 6,201   | 8,039   | 11,275  | 25,839  | 99,220    |
|                       | 35 | 19,116   | 31,860  | 41,300  | 57,928  | 132,752 | 509,766   |
|                       | 45 | 40,453   | 67,422  | 87,399  | 122,586 | 280,925 | 1,078,753 |
|                       | 55 | 70,025   | 116,708 | 151,268 | 212,196 | 486,283 | 1,867,327 |

## Lump Sum Payment With Collateral Sources, with min of:

|                |    |         |           |           |           |           |           |           |
|----------------|----|---------|-----------|-----------|-----------|-----------|-----------|-----------|
|                |    | 30,000  | 50,000    | 70,000    | 100,000   | \$50,000  | 250,000   | 1,000,000 |
| Gross Earnings |    |         |           |           |           |           |           |           |
| Age at Death   |    |         |           |           |           |           |           |           |
|                | 25 | 923,296 | 1,436,346 | 1,927,526 | 2,701,664 | 5,196,843 | 6,313,027 |           |
|                | 35 | 553,290 | 807,792   | 1,075,173 | 1,479,725 | 2,841,496 | 3,328,368 |           |
|                | 45 | 382,753 | 518,105   | 682,388   | 916,858   | 1,694,500 | 1,343,358 |           |
|                | 55 | 183,819 | 180,352   | 224,964   | 261,285   | 338,018   | 50,000    |           |

### Weighted Average of All Persons

|              |          | Percent Lower Benefit Victims:<br>Percent Higher Benefit Victims: |           |           |           |           |           |
|--------------|----------|-------------------------------------------------------------------|-----------|-----------|-----------|-----------|-----------|
|              |          | Lump Sum Payment With Collateral Sources                          |           |           |           |           |           |
|              |          | 30,000                                                            | 50,000    | 70,000    | 100,000   | 250,000   | 1,000,000 |
| Age at Death | Earnings |                                                                   |           |           |           |           |           |
| 25           |          | 887,504                                                           | 1,376,489 | 1,834,398 | 2,588,806 | 4,943,076 | 8,229,260 |
| 35           |          | 481,487                                                           | 687,935   | 904,267   | 1,257,776 | 2,604,398 | 3,325,601 |
| 45           |          | 310,960                                                           | 398,247   | 511,482   | 694,709   | 1,457,400 | 1,339,589 |
| 55           |          | 130,291                                                           | 128,211   | 154,978   | 176,771   | 222,811   | 50,000    |

### Demographics of Fatalities, SSA data extrapolated to latest total

|              |          | 30,000 | 50,000 | 70,000 | 100,000 | 250,000 | 1,000,000 |
|--------------|----------|--------|--------|--------|---------|---------|-----------|
| Age at Death | Earnings |        |        |        |         |         |           |
| 25           |          | 216    | 174    | 188    | 149     | 105     | 44        |
| 35           |          | 119    | 123    | 230    | 228     | 130     | 51        |
| 45           |          | 172    | 151    | 398    | 351     | 202     | 100       |
| 55           |          | 156    | 86     | 170    | 202     | 93      | 42        |
| TOTAL        |          | 663    | 534    | 986    | 928     | 530     | 3,878     |

### Total Amount Due

|              |          | Average Payment Times Number of Victims by Category |             |             |             |             |             |
|--------------|----------|-----------------------------------------------------|-------------|-------------|-------------|-------------|-------------|
|              |          | 30,000                                              | 50,000      | 70,000      | 100,000     | 250,000     | 1,000,000   |
| Age at Death | Earnings |                                                     |             |             |             |             |             |
| 25           |          | 191,700,758                                         | 239,509,017 | 344,866,740 | 385,732,135 | 519,022,870 | 274,087,446 |
| 35           |          | 57,298,174                                          | 84,615,950  | 207,981,320 | 284,257,366 | 338,571,432 | 169,805,629 |
| 45           |          | 53,485,167                                          | 80,135,336  | 203,568,852 | 243,842,822 | 294,394,788 | 133,958,937 |
| 55           |          | 20,325,456                                          | 11,026,181  | 26,346,298  | 35,707,725  | 20,721,405  | 2,100,000   |
| TOTAL        |          | 322,809,554                                         | 395,286,483 | 782,764,208 | 949,540,040 | *****       | 579,752,013 |

**TOTAL DEATH LIABILITY FOR ECONOMIC LOSSES: \*\*\*\*\***  
**ESTIMATED PHYSICAL INJURY LOSSES = \*\*\*\*\***

**TOTAL GOVERNMENT LIABILITY = \*\*\*\*\***

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107 P.L. 42, \*; 115 Stat. 230;  
2001 Enacted H.R. 2926; 107 Enacted H.R. 2926

UNITED STATES PUBLIC LAWS  
107th Congress -- 1st Session  
(c) 2001, LEXIS-NEXIS, A DIVISION OF REED ELSEVIER INC. AND REED ELSEVIER  
PROPERTIES INC.

PUBLIC LAW 107-42 [H.R. 2926]  
SEPT. 22, 2001

107 P.L. 42; 115 Stat. 230; 2001 Enacted H.R. 2926; 107 Enacted H.R. 2926

RELATED NEWS SEARCH: ♦ 107 P.L. 42  
BILL TRACKING REPORT: ♦ 107 Bill Tracking H.R. 2926  
FULL TEXT VERSION(S) OF BILL: ♦ 107 H.R. 2926

#### An Act

To preserve the continued viability of the United States air transportation system.

Be it enacted by the Senate and House of Representatives of the United States of America  
in Congress assembled ,

#### **[\*1]** SECTION 1. SHORT TITLE.

This Act may be cited as the "Air Transportation Safety and System Stabilization Act".

#### TITLE I--AIRLINE STABILIZATION

#### **[\*101]** SEC. 101.--AVIATION DISASTER RELIEF.

(a) In General.--Notwithstanding any other provision of law, the President shall take the following actions to compensate air carriers for losses incurred by the air carriers as a result of the terrorist attacks on the United States that occurred on September 11, 2001:

(1) Subject to such terms and conditions as the President deems necessary, issue Federal credit instruments to air carriers that do not, in the aggregate, exceed \$ 10,000,000,000 and provide the subsidy amounts necessary for such instruments in accordance with the provisions of the Federal Credit Reform Act of 1990 (2 U.S.C. 661 et seq.).

(2) Compensate air carriers in an aggregate amount equal to \$ 5,000,000,000 for--

(A) direct losses incurred beginning on September 11, 2001, by air carriers as a result of any Federal ground stop order issued by the Secretary of Transportation or any subsequent order which continues or renews such a stoppage; and

(B) the incremental losses incurred beginning September 11, 2001, and ending December 31, 2001, by air carriers as a direct result of such attacks.

(b) Emergency Designation.--Congress designates the amount of new budget authority and outlays in all fiscal years resulting from this title as an emergency requirement pursuant to section 252(e) of the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. 901(e)). Such amount shall be available only to the extent that a request, that includes

designation of such amount as an emergency requirement as defined in such Act, is transmitted by the President to Congress.

**[\*102] SEC. 102. AIR TRANSPORTATION STABILIZATION BOARD.**

(a) Definitions.--In this section, the following definitions apply:

(1) Board.-- The term "Board" means the Air Transportation Stabilization Board established under subsection (b).

(2) Financial obligation.-- The term "financial obligation" means any note, bond, debenture, or other debt obligation issued by an obligor in connection with financing under this section and section 101(a)(1).

(3) Lender.-- The term "lender" means any non-Federal qualified institutional buyer (as defined by section 230.144A(a) of title 17, Code of Federal Regulations (or any successor regulation) known as Rule 144A(a) of the Securities and Exchange Commission and issued under the Security Act of 1933, including--

(A) a qualified retirement plan (as defined in section 4974(c) of the Internal Revenue Code of 1986 (26 U.S.C. 4974(c)) that is a qualified institutional buyer; and

(B) a governmental plan (as defined in section 414(d) of the Internal Revenue Code of 1986 (26 U.S.C. 414(d)) that is a qualified institutional buyer.

(4) Obligor.-- The term "obligor" means a party primarily liable for payment of the principal of or interest on a Federal credit instrument, which party may be a corporation, partnership, joint venture, trust, or governmental entity, agency, or instrumentality.

(b) Air Transportation Stabilization Board.--

(1) Establishment.-- There is established a board (to be known as the "Air Transportation Stabilization Board") to review and decide on applications for Federal credit instruments under section 101(a)(1).

(2) Composition.-- The Board shall consist of--

(A) the Secretary of Transportation or the designee of the Secretary;

(B) the Chairman of the Board of Governors of the Federal Reserve System, or the designee of the Chairman, who shall be the Chair of the Board;

(C) the Secretary of the Treasury or the designee of the Secretary; and

(D) the Comptroller General of the United States, or the designee of the Comptroller General, as a nonvoting member of the Board.

(c) Federal Credit Instruments.--

(1) In general.-- The Board may enter into agreements with 1 or more obligors to issue Federal credit instruments under section 101(a)(1) if the Board determines, in its discretion, that--

(A) the obligor is an air carrier for which credit is not reasonably available at the time of the transaction;

(B) the intended obligation by the obligor is prudently incurred; and



(C) such agreement is a necessary part of maintaining a safe, efficient, and viable commercial aviation system in the United States.

(2) Terms and limitations.----

(A) Forms; terms and conditions.--A Federal credit instrument shall be issued under section 101(a)(1) in such form and on such terms and conditions and contain such covenants, representatives, warranties, and requirements (including requirements for audits) as the Board determines appropriate.

(B) Procedures.--Not later than 14 days after the date of enactment of this Act, the Director of the Office of Management and Budget shall issue regulations setting forth procedures for application and minimum requirements, which may be supplemented by the Board in its discretion, for the issuance of Federal credit instruments under section 101(a)(1).

(d) Financial Protection of Government.--

(1) In general.-- To the extent feasible and practicable, the Board shall ensure that the Government is compensated for the risk assumed in making guarantees under this title.

(2) Government participation in gains.-- To the extent to which any participating corporation accepts financial assistance, in the form of accepting the proceeds of any loans guaranteed by the Government under this title, the Board is authorized to enter into contracts under which the Government, contingent on the financial success of the participating corporation, would participate in the gains of the participating corporation or its security holders through the use of such instruments as warrants, stock options, common or preferred stock, or other appropriate equity instruments.

(3) Deposit in treasury.-- All amounts collected by the Secretary of the Treasury under this subsection shall be deposited in the Treasury as miscellaneous receipts.

**[\*103] SEC. 103. SPECIAL RULES FOR COMPENSATION.**

(a) Documentation.--Subject to subsection (b), the amount of compensation payable to an air carrier under section 101(a)(2) may not exceed the amount of losses described in section 101(a)(2) that the air carrier demonstrates to the satisfaction of the President, using sworn financial statements or other appropriate data, that the air carrier incurred. The Secretary of Transportation and the Comptroller General of the United States may audit such statements and may request any information that the Secretary and the Comptroller General deems necessary to conduct such audit.

(b) Maximum Amount of Compensation Payable Per Air Carrier.--The maximum total amount of compensation payable to an air carrier under section 101(a)(2) may not exceed the lesser of--

(1) the amount of such air carrier's direct and incremental losses described in section 101(a)(2); or

(2) in the case of--

(A) flights involving passenger-only or combined passenger and cargo transportation, the product of--

(i) \$ 4,500,000,000; and

(ii) the ratio of--

(I) the available seat miles of the air carrier for the month of August 2001 as reported to the Secretary; to

(II) the total available seat miles of all such air carriers for such month as reported to the Secretary; and

(B) flights involving cargo-only transportation, the product of--

(i) \$ 500,000,000; and

(ii) the ratio of--

(I) the revenue ton miles or other auditable measure of the air carrier for cargo for the latest quarter for which data is available as reported to the Secretary; to

(II) the total revenue ton miles or other auditable measure of all such air carriers for cargo for such quarter as reported to the Secretary.

(c) Payments.--The President may provide compensation to air carriers under section 101(a) (2) in 1 or more payments up to the amount authorized by this title.

**[\*104] SEC. 104. LIMITATION ON CERTAIN EMPLOYEE COMPENSATION.**

(a) In General.--The President may only issue a Federal credit instrument under section 101 (a)(1) to an air carrier after the air carrier enters into a legally binding agreement with the President that, during the 2-year period beginning September 11, 2001, and ending September 11, 2003, no officer or employee of the air carrier whose total compensation exceeded \$ 300,000 in calendar year 2000 (other than an employee whose compensation is determined through an existing collective bargaining agreement entered into prior to September 11, 2001)--

(1) will receive from the air carrier total compensation which exceeds, during any 12 consecutive months of such 2-year period, the total compensation received by the officer or employee from the air carrier in calendar year 2000; and

(2) will receive from the air carrier severance pay or other benefits upon termination of employment with the air carrier which exceeds twice the maximum total compensation received by the officer or employee from the air carrier in calendar year 2000.

(b) Total Compensation Defined.--In this section, the term "total compensation" includes salary, bonuses, awards of stock, and other financial benefits provided by an air carrier to an officer or employee of the air carrier.

**[\*105] SEC. 105. CONTINUATION OF CERTAIN AIR SERVICE.**

(a) Action of Secretary.--The Secretary of Transportation should take appropriate action to ensure that all communities that had scheduled air service before September 11, 2001, continue to receive adequate air transportation service and that essential air service to small communities continues without interruption.

(b) Essential Air Service.--There is authorized to be appropriated to the Secretary to carry out the essential air service program under subchapter II of chapter 417 of title 49, United States Code, \$ 120,000,000 for fiscal year 2002.

(c) Secretarial Oversight.--



(1) In general.-- Notwithstanding any other provision of law, the Secretary is authorized to require an air carrier receiving direct financial assistance under this Act to maintain scheduled air service to any point served by that carrier before September 11, 2001.

(2) Agreements.-- In applying paragraph (1), the Secretary may require air carriers receiving direct financial assistance under this Act to enter into agreements which will ensure, to the maximum extent practicable, that all communities that had scheduled air service before September 11, 2001, continue to receive adequate air transportation service.

**[\*106] SEC. 106. REPORTS.**

(a) Report.--Not later than February 1, 2001, the President shall transmit to the Committee on Transportation and Infrastructure, the Committee on Appropriations, and the Committee on the Budget of the House of Representatives and the Committee on Commerce, Science, and Transportation, the Committee on Appropriations, and the Committee on the Budget of the Senate a report on the financial status of the air carrier industry and the amounts of assistance provided under this title to each air carrier.

(b) Update.--Not later than the last day of the 7-month period following the date of enactment of this Act, the President shall update and transmit the report to the Committees.

**[\*107] SEC. 107. DEFINITIONS.**

In this title, the following definitions apply:

(1) Air carrier.-- The term "air carrier" has the meaning such term has under section 40102 of title 49, United States Code.

(2) Federal credit instrument.-- The term "Federal credit instrument" means any guarantee or other pledge by the Board issued under section 101(a)(1) to pledge the full faith and credit of the United States to pay all or part of any of the principal of and interest on a loan or other debt obligation issued by an obligor and funded by a lender.

(3) Incremental loss.-- The term "incremental loss" does not include any loss that the President determines would have been incurred if the terrorist attacks on the United States that occurred on September 11, 2001, had not occurred.

**TITLE II--AVIATION INSURANCE**

**[\*201] SEC. 201.--DOMESTIC INSURANCE AND REIMBURSEMENT OF INSURANCE COSTS.**

(a) In General.--Section 44302 of title 49, United States Code, is amended--

(1) in subsection (a)(1)--

(A) by striking "subsection (b)" and inserting "subsection (c)"; and

(B) by striking "foreign-flag aircraft--" and all that follows through the period at the end of subparagraph (B) and inserting "foreign-flag aircraft.";

(2) by redesignating subsections (b), (c), and (d) as subsections (c), (d), and (e), respectively;

(3) by inserting after subsection (a) the following:

"(b) Reimbursement of Insurance Cost Increases.--



"(1) In general.-- The Secretary may reimburse an air carrier for the increase in the cost of insurance, with respect to a premium for coverage ending before October 1, 2002, against loss or damage arising out of any risk from the operation of an American aircraft over the insurance premium that was in effect for a comparable operation during the period beginning September 4, 2001, and ending September 10, 2001, as the Secretary may determine. Such reimbursement is subject to subsections (a)(2), (c), and (d) of this section and to section 44303.

"(2) Payment from revolving fund.-- A reimbursement under this subsection shall be paid from the revolving fund established by section 44307.

"(3) Further conditions.-- The Secretary may impose such further conditions on insurance for which the increase in premium is subject to reimbursement under this subsection as the Secretary may deem appropriate in the interest of air commerce.

"(4) Termination of authority.-- The authority to reimburse air carriers under this subsection shall expire 180 days after the date of enactment of this paragraph.";

(4) in subsection (c) (as so redesignated)--

(A) in the first sentence by inserting ", or reimburse an air carrier under subsection (b) of this section," before "only with the approval"; and

(B) in the second sentence--

(i) by inserting "or the reimbursement" before "only after deciding"; and

(ii) by inserting "in the interest of air commerce or national security or" before "to carry out the foreign policy"; and

(5) in subsection (d) (as so redesignated) by inserting "or reimbursing an air carrier" before "under this chapter".

(b) Coverage.--

(1) In general.-- Section 44303 of such title is amended--

(A) in the matter preceding paragraph (1) by inserting ", or reimburse insurance costs, as" after "insurance and reinsurance"; and

(B) in paragraph (1) by inserting "in the interest of air commerce or national security or" before "to carry out the foreign policy".

(2) Discretion of the secretary.-- For acts of terrorism committed on or to an air carrier during the 180-day period following the date of enactment of this Act, the Secretary of Transportation may certify that the air carrier was a victim of an act of terrorism and in the Secretary's judgment, based on the Secretary's analysis and conclusions regarding the facts and circumstances of each case, shall not be responsible for losses suffered by third parties (as referred to in section 205.5(b)(1) of title 14, Code of Federal Regulations) that exceed \$ 100,000,000, in the aggregate, for all claims by such parties arising out of such act. If the Secretary so certifies, the air carrier shall not be liable for an amount that exceeds \$ 100,000,000, in the aggregate, for all claims by such parties arising out of such act, and the Government shall be responsible for any liability above such amount. No punitive damages may be awarded against an air carrier (or the Government taking responsibility for an air carrier under this paragraph) under a cause of action arising out of such act.



(c) Reinsurance.--Section 44304 of such title is amended--

(1) by striking "(a) General Authority.--"; and

(2) by striking subsection (b).

(d) Premiums.--Section 44306 of such title is amended--

(1) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(2) by inserting after subsection (a) the following:

"(b) Allowances in Setting Premium Rates for Reinsurance.--In setting premium rates for reinsurance, the Secretary may make allowances to the insurance carrier for expenses incurred in providing services and facilities that the Secretary considers good business practices, except for payments by the air carrier for the stimulation or solicitation of insurance business."

(e) Conforming Amendment.--Section 44305(b) of such title is amended by striking "44302 (b)" and inserting "44302(c)".

**[\*202] SEC. 202. EXTENSION OF PROVISIONS TO VENDORS, AGENTS, AND SUBCONTRACTORS OF AIR CARRIERS.**

Notwithstanding any other provision of this title, the Secretary may extend any provision of chapter 443 of title 49, United States Code, as amended by this title, and the provisions of this title, to vendors, agents, and subcontractors of air carriers. For the 180-day period beginning on the date of enactment of this Act, the Secretary may extend or amend any such provisions so as to ensure that the entities referred to in the preceding sentence are not responsible in cases of acts of terrorism for losses suffered by third parties that exceed the amount of such entities' liability coverage, as determined by the Secretary.

**TITLE III--TAX PROVISIONS**

**[\*301] SEC. 301.--EXTENSION OF DUE DATE FOR EXCISE TAX DEPOSITS; TREATMENT OF LOSS COMPENSATION.**

(a) Extension of Due Date for Excise Tax Deposits.--

(1) In general.-- In the case of an eligible air carrier, any airline-related deposit required under section 6302 of the Internal Revenue Code of 1986 to be made after September 10, 2001, and before November 15, 2001, shall be treated for purposes of such Code as timely made if such deposit is made on or before November 15, 2001. If the Secretary of the Treasury so prescribes, the preceding sentence shall be applied by substituting for "November 15, 2001" each place it appears--

(A) "January 15, 2002"; or

(B) such earlier date after November 15, 2001, as such Secretary may prescribe.

(2) Eligible air carrier.-- For purposes of this subsection, the term "eligible air carrier" means any domestic corporation engaged in the trade or business of transporting (for hire) persons by air if such transportation is available to the general public.

(3) Airline-related deposit.-- For purposes of this subsection, the term "airline-related deposit" means any deposit of--

(A) taxes imposed by subchapter C of chapter 33 of such Code (relating to transportation by air); and

(B) taxes imposed by chapters 21, 22, and 24 with respect to employees engaged in a trade or business referred to in paragraph (2).

(b) Treatment of Loss Compensation.--Nothing in any provision of law shall be construed to exclude from gross income under the Internal Revenue Code of 1986 any compensation received under section 101(a)(2) of this Act.

#### TITLE IV--VICTIM COMPENSATION

##### **[\*401]** SEC. 401.--SHORT TITLE.

This title may be cited as the "September 11th Victim Compensation Fund of 2001".

##### **[\*402]** SEC. 402. DEFINITIONS.

In this title, the following definitions apply:

(1) Air carrier.-- The term "air carrier" means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation and includes employees and agents of such citizen.

(2) Air transportation.-- The term "air transportation" means foreign air transportation, interstate air transportation, or the transportation of mail by aircraft.

(3) Claimant.-- The term "claimant" means an individual filing a claim for compensation under section 405(a)(1).

(4) Collateral source.-- The term "collateral source" means all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001.

(5) Economic loss.-- The term "economic loss" means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.

(6) Eligible individual.-- The term "eligible individual" means an individual determined to be eligible for compensation under section 405(c).

(7) Noneconomic losses.-- The term "noneconomic losses" means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.

(8) Special master.-- The term "Special Master" means the Special Master appointed under section 404(a).

##### **[\*403]** SEC. 403. PURPOSE.

It is the purpose of this title to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.



**[\*404] SEC. 404. ADMINISTRATION.**

(a) In General.--The Attorney General, acting through a Special Master appointed by the Attorney General, shall--

- (1) administer the compensation program established under this title;
- (2) promulgate all procedural and substantive rules for the administration of this title; and
- (3) employ and supervise hearing officers and other administrative personnel to perform the duties of the Special Master under this title.

(b) Authorization of Appropriations.--There are authorized to be appropriated such sums as may be necessary to pay the administrative and support costs for the Special Master in carrying out this title.

**[\*405] SEC. 405. DETERMINATION OF ELIGIBILITY FOR COMPENSATION.**

(a) Filing of Claim.--

(1) In general.-- A claimant may file a claim for compensation under this title with the Special Master. The claim shall be on the form developed under paragraph (2) and shall state the factual basis for eligibility for compensation and the amount of compensation sought.

(2) Claim form.----

(A) In general.--The Special Master shall develop a claim form that claimants shall use when submitting claims under paragraph (1). The Special Master shall ensure that such form can be filed electronically, if determined to be practicable.

(B) Contents.--The form developed under subparagraph (A) shall request--

(i) information from the claimant concerning the physical harm that the claimant suffered, or in the case of a claim filed on behalf of a decedent information confirming the decedent's death, as a result of the terrorist-related aircraft crashes of September 11, 2001;

(ii) information from the claimant concerning any possible economic and noneconomic losses that the claimant suffered as a result of such crashes; and

(iii) information regarding collateral sources of compensation the claimant has received or is entitled to receive as a result of such crashes.

(3) Limitation.-- No claim may be filed under paragraph (1) after the date that is 2 years after the date on which regulations are promulgated under section 407.

(b) Review and Determination.--

(1) Review.-- The Special Master shall review a claim submitted under subsection (a) and determine--

(A) whether the claimant is an eligible individual under subsection (c);

(B) with respect to a claimant determined to be an eligible individual--

(i) the extent of the harm to the claimant, including any economic and noneconomic losses; and

(ii) the amount of compensation to which the claimant is entitled based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant.

(2) Negligence.-- With respect to a claimant, the Special Master shall not consider negligence or any other theory of liability.

(3) Determination.-- Not later than 120 days after that date on which a claim is filed under subsection (a), the Special Master shall complete a review, make a determination, and provide written notice to the claimant, with respect to the matters that were the subject of the claim under review. Such a determination shall be final and not subject to judicial review.

(4) Rights of claimant.-- A claimant in a review under paragraph (1) shall have--

(A) the right to be represented by an attorney;

(B) the right to present evidence, including the presentation of witnesses and documents; and

(C) any other due process rights determined appropriate by the Special Master.

(5) No punitive damages.-- The Special Master may not include amounts for punitive damages in any compensation paid under a claim under this title.

(6) Collateral compensation.-- The Special Master shall reduce the amount of compensation determined under paragraph (1)(B)(ii) by the amount of the collateral source compensation the claimant has received or is entitled to receive as a result of the terrorist-related aircraft crashes of September 11, 2001.

(c) Eligibility.--

(1) In general.-- A claimant shall be determined to be an eligible individual for purposes of this subsection if the Special Master determines that such claimant--

(A) is an individual described in paragraph (2); and

(B) meets the requirements of paragraph (3).

(2) Individuals.-- A claimant is an individual described in this paragraph if the claimant is--

(A) an individual who--

(i) was present at the World Trade Center, (New York, New York), the Pentagon (Arlington, Virginia), or the site of the aircraft crash at Shanksville, Pennsylvania at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes of September 11, 2001; and

(ii) suffered physical harm or death as a result of such an air crash;

(B) an individual who was a member of the flight crew or a passenger on American Airlines flight 11 or 77 or United Airlines flight 93 or 175, except that an individual identified by the Attorney General to have been a participant or conspirator in the terrorist-related aircraft crashes of September 11, 2001, or a representative of such individual shall not be eligible to receive compensation under this title; or



(C) in the case of a decedent who is an individual described in subparagraph (A) or (B), the personal representative of the decedent who files a claim on behalf of the decedent.

(3) Requirements.----

(A) Single claim.--Not more than one claim may be submitted under this title by an individual or on behalf of a deceased individual.

(B) Limitation on civil action.--

(i) In general.--Upon the submission of a claim under this title, the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001. The preceding sentence does not apply to a civil action to recover collateral source obligations.

(ii) Pending actions.--In the case of an individual who is a party to a civil action described in clause (i), such individual may not submit a claim under this title unless such individual withdraws from such action by the date that is 90 days after the date on which regulations are promulgated under section 407.

**[\*406]** SEC. 406. PAYMENTS TO ELIGIBLE INDIVIDUALS.

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

(b) Payment Authority.--This title constitutes budget authority in advance of appropriations Acts and represents the obligation of the Federal Government to provide for the payment of amounts for compensation under this title.

(c) Additional Funding.--

(1) In general.-- The Attorney General is authorized to accept such amounts as may be contributed by individuals, business concerns, or other entities to carry out this title, under such terms and conditions as the Attorney General may impose.

(2) Use of separate account.-- In making payments under this section, amounts contained in any account containing funds provided under paragraph (1) shall be used prior to using appropriated amounts.

**[\*407]** SEC. 407. REGULATIONS.

Not later than 90 days after the date of enactment of this Act, the Attorney General, in consultation with the Special Master, shall promulgate regulations to carry out this title, including regulations with respect to--

- (1) forms to be used in submitting claims under this title;
- (2) the information to be included in such forms;
- (3) procedures for hearing and the presentation of evidence;
- (4) procedures to assist an individual in filing and pursuing claims under this title; and
- (5) other matters determined appropriate by the Attorney General.

**[\*408] SEC. 408. LIMITATION ON AIR CARRIER LIABILITY.**

(a) In General.--Notwithstanding any other provision of law, liability for all claims, whether for compensatory or punitive damages, arising from the terrorist-related aircraft crashes of September 11, 2001, against any air carrier shall not be in an amount greater than the limits of the liability coverage maintained by the air carrier.

(b) Federal Cause of Action.--

(1) Availability of action.-- There shall exist a Federal cause of action for damages arising out of the hijacking and subsequent crashes of American Airlines flights 11 and 77, and United Airlines flights 93 and 175, on September 11, 2001. Notwithstanding section 40120(c) of title 49, United States Code, this cause of action shall be the exclusive remedy for damages arising out of the hijacking and subsequent crashes of such flights.

(2) Substantive law.-- The substantive law for decision in any such suit shall be derived from the law, including choice of law principles, of the State in which the crash occurred unless such law is inconsistent with or preempted by Federal law.

(3) Jurisdiction.-- The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001.

(c) Exclusion.--Nothing in this section shall in any way limit any liability of any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act.

**[\*409] SEC. 409. RIGHT OF SUBROGATION.**

The United States shall have the right of subrogation with respect to any claim paid by the United States under this title.

**TITLE V--AIR TRANSPORTATION SAFETY****[\*501] SEC. 501.--INCREASED AIR TRANSPORTATION SAFETY.**

Congress affirms the President's decision to spend \$ 3,000,000,000 on airline safety and security in conjunction with this Act in order to restore public confidence in the airline industry.

**[\*502] SEC. 502. CONGRESSIONAL COMMITMENT.**

Congress is committed to act expeditiously, in consultation with the Secretary of Transportation, to strengthen airport security and take further measures to enhance the security of air travel.

**TITLE VI--SEPARABILITY****[\*601] SEC. 601.--SEPARABILITY.**

If any provision of this Act (including any amendment made by this Act) or the application thereof to any person or circumstance is held invalid, the remainder of this Act (including any amendment made by this Act) and the application thereof to other persons or circumstances shall not be affected thereby.

Speaker of the House of Representatives.



November 20, 2001

Mr. Kenneth L. Zwick, Director  
Office of Management Programs  
U.S. Department of Justice  
Civil Division  
Main Building, Room 3140  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear Mr. Zwick:

The Justice Department has requested comments with respect to the implementation of regulations regarding the "September 11<sup>th</sup> Victim Compensation Fund of 2001." ("The Fund"). Unless otherwise noted, the comments that follow have not been adopted as the policy of the American Bar Association or any of its entities and should be considered solely as observations which the Attorney General of the United States, the Department of Justice and the Special Master may wish to consider in the drafting and implementing of regulations. However, the remarks do reflect input from the ABA's Sections of Dispute Resolution, Litigation, and Tort and Insurance Practice, each of which contributed significantly to the development of the concepts contained in this document.

It should be the goal of the regulations required pursuant to the September 11<sup>th</sup> Compensation Act of 2001, to establish a compensation program that is simple, fair, predictable, cooperative with other compensation efforts and expeditious. Public confidence in the fairness and equity of the Fund program is essential to its success. While the Special Master must be empowered to make judgments about many variables impacting individual claims, the process must be viewed as one providing the citizens a certainty of recovery and reasonable awards consistent with the evidence that will be unique to each claimant.

With the above guiding principles in mind, we submit the following remarks regarding the matters on which comment was solicited.



## **I. GENERAL ISSUES OF ADMINISTRATION.**

### **A. "Interim Final" Rules by December 21, 2001**

In order to ensure effective administration of the Fund, promote fairness and assure that victims are provided reliable information about their rights, the effective date of final and binding regulations should be December 21, 2001. Without the regulations being final on December 21, 2001, a claimant will not be in a position to definitively assess the efficacy of filing a claim on the date the Fund program is scheduled to begin. This would fall afoul of one of the goals of the Act, the resolution of claims in a reliable, expeditious manner. Additionally, not having a set of final regulations in place by December 21, 2001, will lead to confusion and may undermine public confidence in the Fund program. However, it is not necessary that all regulations be finalized by that time. Rather, regulations critical to commencement of operations should be fixed by December 21, 2001, and should be followed by such supplemental regulations as are found necessary.

### **B. Good Cause Under 5 U.S.C. § 533(d)**

Based on the delay that will take place if regulations are not in place by December 21, 2001, there is good cause under 5 U.S.C. 533(d) to waive the requirement that rules not go into effect for at least 30 days after promulgation absent good cause. Not having regulations in place in a timely fashion will lead to serious delay in claimant decision making regarding whether to seek compensation under the Fund and will ultimately delay payouts.

### **C. Scope of "Interim Final" Regulations**

The Department should complete a final version of the core regulations contemplated by § 407(1)-(4) by the statutorily stipulated date. It should, however, view such supplemental materials as are needed to improve the working of the process as fitting subjects for later promulgated regulations.

### **D. Effect of Dismissal of a Lawsuit and Ineligible Claimants**

Comments were also solicited on whether a claimant who has a currently pending civil case and withdraws from such action by 90 days after the date the initial rules are promulgated is precluded from re-filing the action if: (a) the claimant ultimately elects not to file a compensation claim under the federal program; or (b) the claimant is determined by the Special Master not to be eligible. Electing not to file a claim should not preclude any person from re-filing a lawsuit. Under the Act, the right to file a lawsuit is only waived if a claim is actually submitted. If a person is determined not to be eligible, his/her filing of a claim should not waive the right



to file a lawsuit, as the Act applies only to individuals eligible to recover.

## II. THE FORMS TO BE USED IN SUBMITTING CLAIMS AND THE INFORMATION TO BE INCLUDED ON THE CLAIM FORMS.

### A. Breadth of Claim Form

The claim filing process should be simple and easy. The goal of the filing process should be to secure sufficient incident information (precise location of the victim, documentation of injuries, proof of earnings history, proof of medical expenses, income tax returns, collateral source payments or contracts, etc.) to allow for a determination of the total net award under the Program.

1. The Standard Claim Form should: (a) be printed in English but contain a statement that the Claim Form is available in all necessary other languages upon request; (b) prominently state that any individual filing a claim under the Act waives all rights to file a civil action; (c) state that the claimant need not be a U.S. citizen or resident; (d) state the eligibility requirements for being a claimant; (e) advise the claimant of his/her section 405(b)(4) rights and recommend that the claimant seek counsel because the claimant will be waiving certain rights by participation in the Program such as the right to file a civil action and the right to judicial review; (f) list the items of damages recoverable and explain generally what the various items of economic and non-economic loss are; (g) indicate that the decision of the Special Master is final and not subject to judicial review; (h) state the penalties for filing a fraudulent claim; (i) state: "A submitted claim containing complete information as requested in this Claim Form (including all available supporting documentation) shall be considered properly filed. Only properly filed Claim Forms may be eligible for relief from the Fund"; (j) state: "A claim may be amended at any time prior to the close of a claimant's hearing. A claimant may amend his or her claim by changing the amount of compensation sought, elements of damages, or by supplementing his or her claim with the submission of additional supporting evidence; (k) specify the time limits involved in the claims process; (l) explain the review process.

2. The Standard Claim Form should request copies of the following documents: (a) birth certificates (claimant, decedent, and dependents); (b) marriage certificate (claimant, decedent); (c) death certificate (decedent); (d) passport, visa or green card or other appropriate identification (claimant, decedent); (e) federal income tax return or W-2 for years 1999, 2000 and 2001 (claimant or decedent); (f) claimant's or decedent's proof of physical harm or death; (g) verified written statement of how claimant or decedent sustained injury or death as a result of the events of September 11 (the statement shall include where claimant or decedent was physically located at time of injury or death, and a description of the injuries



sustained, if known) and proof of physical presence; (h) financial records (claimant or decedent); (i) informational details of life insurance policies (decedent), disability documents, workers' compensation benefits, social security payments, pension documents, death benefit programs and medical insurance policies; and (j) any other documents or statements that the claimant believes support his or her claim.

For good cause shown, Fund officials can waive production of any of these materials.

The claimant shall have the right to subpoena documentation to comply with these requirements.

The Form should be signed under oath by the claimant or the claimant's personal representative.

**B. When a Claim is "Filed"**

Due to the stringent time requirements in the Act, the Claim Form should not be deemed "filed" until a determination has been made that the necessary documentation has been received. An Intake Office could be created to conduct an initial review and determine that: (1) the Standard Claim Form and supporting documents have been received and are in order; (2) the person submitting the claim is an eligible claimant or personal representative of a claimant and meets all other eligibility criteria; (3) the claimant suffered physical harm or death as a direct and proximate cause of the terrorist-related aircraft crashes of September 11, 2001; and (4) the claimant was physically present within the designated area during the designated period of time. The Intake Office should timely certify the claimant's eligibility or provide the claimant with notice of deficiency and an opportunity to correct deficiencies.

**1. Missing Documentation – Effect on Date of Filing Claim**

To the extent claims substantially fail to comply with the filing requirements, they should be returned unprocessed within a specified period of time with a statement of the reasons why the claim is deficient. The claimant or claimant's personal representative should be allowed until the expiration of the applicable statute of limitations contained within the Act to correct any deficiencies. A claim would be deemed "filed," for purposes of the running of the 120-day time period, after any and all deficiencies are corrected. However, for purposes of the applicable statute of limitations contained within the Act, the claim will be deemed filed on the date of the initial submission to the Office of the Special Master.



### **C.     Adequacy of Documentation**

It is recommended that documentation requirements for date of birth, proof of physical presence, proof of physical harm or death, proof of collateral sources, and proof of other economic or noneconomic losses be patterned after those found in 28 C.F.R. § 79.51 (regulations implementing the Radiation Exposure Compensation Act of 1990).

With respect to the authenticity and reliability of documents, the requirement for originals, and execution of release of records, it is recommended that the regulations track those found in 28 C.F.R. § 79.5 (regulations implementing the Radiation Exposure Compensation Act of 1990).

The claimant or personal representative should bear the burden of providing all written medical documentation, contemporaneous records and other records or documents necessary to establish any and all criteria for compensation. Written records that exist independent of any claim filed should be afforded greater weight than affidavits and declarations created for the purpose of verifying a claim. (See 28 C.F.R. § 79.4 (regulations implementing the Radiation Exposure Compensation Act of 1990)).

A determination should be made as to the accuracy of the supporting documents and information submitted with each claim. Since the overall process is intended to be non-adversarial, it is recommended that a verification procedure be adopted. This goal can be facilitated by a verification procedure similar to that which was utilized in the administration of the National Vaccine Injury Compensation Program (42 U.S.C. §§ 300aa-1 *et seq.*). This procedure should be used to review questionable evidence referred by the Intake Officer to certify its accuracy and sufficiency. This procedure should expedite the claims resolution process and allow the Hearing Officer to process a greater number of claims with minimal procedural delays.

## **III.    PROCEDURES FOR HEARING AND THE PRESENTATION OF EVIDENCE.**

### **A.     Procedures to be Used in Taking and Evaluating Evidence**

The Department has requested comments on the procedures to be used in taking and evaluating evidence. Keeping in mind the 120-day time limit under the statute, the following preliminary matters are suggested: (1) the claimant may extend said time or may waive the right to a hearing by making a written request to the Hearing Officer -- any such request must be signed by the claimant and; (2) the 120-



day period for review and determination of a claim shall commence upon the date that the claim is deemed filed.

The procedures for hearing should (1) provide for a fast-track, non-adversarial, expeditious proceeding for the resolution of claims; (2) include flexible standards of admissibility of evidence; (3) include the opportunity for claimants to submit arguments and evidence on the record without requiring routine use of lengthy oral examinations or hearings; (4) provide appropriate, limited discovery mechanisms for use by claimants; (5) provide options for mediation and/or more extensive evidentiary hearings as a second track process upon waiver of the 120-day time limit; (6) provide a decision on the record after an opportunity for fast-track hearing, or a decision following a mediation or more extensive evidentiary hearing, or a decision on final determination of the Special Master, as requested by the claimant; and (7) provide for a process outlining the timing and availability of oral argument with regard to appeals before the Special Master.

**B. Improperly Filed Claim or Lack of Adequate Supporting Information**

The Department has invited comments on whether the Special Master should be permitted to dismiss a claim as not properly filed for lack of adequate supporting information, and, if so, whether an individual should thereafter be permitted to refile the claim. A claim which is not properly filed for lack of adequate supporting information should not be dismissed. Instead, claims that fail to comply with the requirements of the Act should be returned unprocessed to the claimant or the claimant's personal representative with a statement of reasons why the claim does not comply with the regulations. The claimant or claimant's personal representative should then be given the opportunity to correct the deficiencies and return the claim for filing. A claim should be deemed filed after any and all deficiencies are corrected. However, for purposes of the applicable statute of limitations, the claim will be deemed filed on the date of the initial submission to the Office of the Special Master. Support for such a procedure can be found in a similar provision under 28 C.F.R. § 79.51. In conjunction with this recommendation, an Intake Office should be established to receive all claims submitted, provide forms for claimants' questions, and review the completeness of the forms and the sufficiency of the documents submitted. After a claim is received, the Intake Office should certify each claimant's eligibility and entitlement to compensation or, in the case of deficient claims, provide the claimant with notice and an opportunity to correct the deficiencies.

Additionally, to assure that claims are legitimate, a verification procedure should be established to make a determination as to the accuracy of the supporting documents and the information submitted with each claim. The verification procedure must



establish and follow a review process that includes written, precise, and uniform instructions for determining the accuracy of claims.

### C. Hearings

The Department has also requested comments on whether every claimant should be granted an oral hearing or whether paper hearings may be sufficient and has further requested comments on what types of oral hearings may be practicable, consistent with the statutory deadlines. On this topic, we propose a two-tiered approach which utilizes both an initial, expedited hearing and a more extensive evidentiary/fact-finding hearing (with an option for mediation) and determination review by the Special Master. This two-tiered approach is based upon the review process contained in 28 C.F.R. § 79.52-79.54. This two-tiered approach is discussed below:

#### 1. Initial Decision after expedited hearing.

Following the date when a claim has been accepted for filing, a Hearing Officer shall review the claim, allow the claimant an opportunity for an expedited hearing and issue a written Initial Decision on the record. If deficiencies have not been corrected within the period allotted, the Office of the Special Master shall issue a decision denying the claim, and (a) any decision denying a claim shall set forth the reasons for denial; (b) any decision granting a claim shall set forth the reasons for granting relief and the amount of compensation due, after subtracting amounts received from collateral sources; and (c) all decisions of a Hearing Officer, whether granting or denying relief, shall indicate that the claimant or personal representative may elect to seek mediation and/or a more extensive *de novo* second-track full evidentiary hearing before a different Hearing Officer, or a direct appeal for determination to the Special Master. If a claimant or personal representative fails to file an election for further review with the Office of the Special Master, such person will be deemed to have filed an election to accept the judgment of the Hearing Officer as then sent to the Special Master for a final determination. The Special Master shall then consider the claim and if he/she deems appropriate, enter a final determination which is not subject to judicial review.

#### 2. Evidentiary Hearing.

Upon waiver of the 120 day requirement, any claimant may elect a *de novo* second-track, more extensive evidentiary hearing conducted in the presence of a Hearing Officer. Claimants or personal representatives shall have the opportunity to present the evidence submitted for the Initial Decision as well as any other relevant evidence, and shall have the opportunity to present and examine witnesses. The



Hearing Officer shall not be bound by formal rules of evidence or procedure. The hearing shall be conducted in a non-adversarial manner.

The Hearing Officer who presides over the more extensive evidentiary hearing shall issue a written decision granting or denying the claim. The decision shall set forth the reasons for granting or denying relief. Where relief is granted, the Hearing Officer shall set forth his/her recommendation for the amount of compensation due, after subtracting amounts received from specifically identified collateral sources. Any decision denying or granting a claim must indicate that the decision will be reviewed by the Special Master. The Hearing Officer will forward his or her recommendation to the Special Master. The Special Master shall then review the recommendation of the Hearing Officer and enter a final determination which is not subject to judicial review.

### 3. Mediation

The ABA has a long-standing policy in support of the use of Alternative Dispute Resolution techniques. Accordingly, as a possible alternative to the second-track more extensive hearing process, the Special Master may wish to permit, but shall not be required to do so, the use of mediation. If permitted, the Special Master should have discretion to select the form of mediation most suitable to the class of claims determined fit for mediation. In that event, a mediation process of the following sort should be offered. Upon waiver of the 120 day requirement, any claimant who chooses to mediate a claim shall be entitled to a mediation session attended by the claimant and a designee of the Special Master and facilitated by a qualified mediator who is a neutral. If a mutually agreeable settlement recommendation is reached, the mediator shall then draft a statement indicating that a tentative settlement has been reached and setting forth the terms of the tentative settlement. Both the claimant and the designee of the Special Master must sign the settlement recommendation statement. A statement duly signed will be forwarded to the Special Master. The Special Master shall then review the recommendation of the mediation and enter a final determination which is not subject to judicial review.

If the mediator is unable to settle the claim, the mediator may return the claim to a Hearing Officer for a *de novo*, more extensive evidentiary second-track hearing.

### 4. Appeal

An appeal from the Initial Decision and expedited hearing, or the decision of a Hearing Officer after a second-track, more extensive evidentiary hearing, must be in writing, and must be filed with the Appellate Section in the Office of the Special Master.



The claimant or personal representative may set forth in the appeal the reasons for believing that the decision below is incorrect, but may not submit new written documentation or other records that were not provided to the Hearing Officer or to the mediator before the Hearing Officer issued a recommendation or the mediation occurred.

The Special Master shall review the appeal on the record and issue a determination which shall either affirm or reverse the initial decision below or, when appropriate, remand the claim for further action. The memorandum of determination shall include a statement of the reasons for such reversal, affirmance, or remand. The Special Master's Office shall promptly inform the claimant or personal representative of the action of the Special Master. A determination affirming or reversing the decision below shall be final and not subject to judicial review.

#### **D. Hearing Officers**

The Department has also requested comments on whether the Special Master should use hearing officers to hear witnesses and review written evidence. If so, the Department has requested comments on what qualifications and training those who perform such tasks should have. Additionally, the Department has requested comments on what other specific duties and powers should be delegated to hearing officers.

##### **1. Should Hearing Officers be used?**

Hearing Officers should be used in order to facilitate the expeditious review of claims. Section 405(b)(4)(B) expressly grants claimants the right to present evidence, including the presentation of witnesses and documents. When this section is read in conjunction with section 404(3), granting the Special Master the power to employ and supervise "Hearing Officers," it is clear that the Victim Compensation Act creates a right to a hearing with a Hearing Officer.

##### **2. What qualifications and training should Hearing Officers have?**

A Hearing Officer can be any individual who has experience and skill in presiding over or participating in adjudicatory proceedings such as trials, administrative actions, appeals, mediation or alternative dispute resolution. Hearing Officers can be retired or resigned federal court judges, retired or resigned federal magistrate judges, or retired or resigned state court judges of courts of general jurisdiction or appellate courts. The Special Master may determine that experienced lawyers who have not been judges are adequate to perform the tasks of some Hearing Officers. Employees of the United States government, the airline industry or



insurance industry shall not be selected as Hearing Officers. Hearing Officers should be subject to removal by the Special Master for incompetence, misconduct, neglect of duty, physical or mental disability, or for other good cause shown. Additionally, no Hearing Officer shall conduct any proceedings with regard to a claim in which he or she is prejudiced or partial, or where he or she has any interest in the matter pending for decision.<sup>1</sup> Hearing officers shall not be permitted to act in any claim involving a party that employed such Hearing Officer within one year before the adjudication of such claim.

3. Duties and powers of Hearing Officers.

Hearing Officers should be authorized to: (a) conduct expedited and more extensive hearings and adjudicate claims in accordance with these regulations and the Act; (b) administer oaths and examine witnesses; (c) compel the production of documents and appearance of witnesses by issuance of a subpoena; (d) prepare documents for signature of the parties; (e) issue decisions and orders with respect to claims under the Act; (f) grant continuances in appropriate circumstances; and (g) perform all other necessary actions to discharge the duties of a Hearing Officer.

**IV. PROCEDURES TO ASSIST AN INDIVIDUAL IN FILING AND PURSUING CLAIMS.**

**A. Assistance By the Office of the Special Master**

Key to the success of the Program is the dissemination of explanatory information. To this end the Special Master should create: (a) a website containing a statement of claimant's rights, a description of the claim submission and review processes, and information pertaining to assistance with filing claims; (b) a toll-free number through which potential claimants and representatives may seek assistance

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<sup>1</sup> In conjunction with this, there must be a procedure in which a claimant may challenge the Hearing Officer, setting forth in writing the basis of said challenge. A decision to withdraw from the consideration of a claim shall be within the discretion of the Hearing Officer and reviewable by the Special Master. If the Hearing Officer withdraws, another Hearing Officer shall be designated by the Special Master to complete the claim adjudication in a timely manner.



in filing claims; and (c) a list of public libraries throughout the United States where claimants may obtain access to the Internet to aid them in submitting a claim.

Claimants should be instructed to seek legal counsel if they so desire and should be referred to *pro bono* services that may be available.

### Intake Office

In addition to conducting the initial screening of the Claim Form, the Intake Office should answer claimants' questions and provide various forms to claimants. Intake Officers should explain the claims resolution process to potential claimants and educate claimants about those aspects of the process with which they are unfamiliar.

Intake Officers must possess excellent communication skills. Knowledge of languages other than English would be particularly valuable. Otherwise, translators should be made available upon request. Counseling skills could prove helpful during the early stages of the claims process.

### **B. Expedited Processing**

A triage system should be established that would allow for expedited claims processing with respect to claimants in dire financial circumstances. They should be given the opportunity to be heard first (like recipients of Section 8 Housing who receive a point ranking based on need). The burden should be on the claimant to request expedited processing on a separate form and to provide reasons based on need that would justify earlier review. Also, the Special Master may, upon further request and for good cause shown, order an advance against the final compensation determination of up to \$25,000.

### **C. Attorney's Fees**

It is the ABA's policy that there be no arbitrary or unreasonable limitations placed on attorney fees in agency proceedings. The ABA believes that attorney fees charged in agency proceedings should be reasonable. The ABA also believes fee arrangements should be written in plain language that clearly identifies the basis on which a fee is to be calculated. Claimants should be instructed to seek legal counsel if they so desire and should be referred to *pro bono* services that may be available.

## **V. CLAIMANT ELIGIBILITY**



The eligibility criteria for claims must be clarified so that resolution of claims can occur in a reliable, efficient, and non-adversarial manner, with minimal administrative cost to the claimant and to the United States. To further those goals and to better explain the requirements that a potential claimant must meet, definitions of eligible individuals in Section 405(c)(2) should be made more precise. While the legislation adequately describes a number of matters, the terms "present at," "physical harm," and "immediate aftermath" need to be defined. We suggest the following definitions:

*"Present at"* should mean being at a location described in Section 405(c)(2)(A)(i) or contiguous thereto when physical harm occurs.

*"Physical harm"* should mean a direct injury to a person and any proximately resulting physical condition or loss.<sup>2</sup>

*"Immediate aftermath"* should mean the time beginning with the hijackings of September 11, 2001, and terminating at a time to be determined by the Special Master to encompass all provable injuries arising out of the events of September 11, 2001.

#### **A. Basic Criteria**

To establish eligibility for compensation under Section 405(c)(2), the individual filing a claim under the Act should be required to demonstrate by a preponderance of the evidence that each of the following criteria are satisfied: (1) the claimant was physically present at the affected area at the time, or in the immediate aftermath of the terrorist-related aircraft crashes of September 11, 2001; (2) the claimant suffered physical harm or death as a direct and proximate result of the terrorist-related aircraft crashes of September 11, 2001, while physically present within the affected area during the crash or the immediate aftermath; and (3) in the case of a deceased claimant, the individual filing a claim under the Act is the qualified personal representative of the decedent. A personal representative shall act on behalf of the decedent's beneficiaries as defined by the laws of the decedent's domicile.

#### **B. Evidence in Support of Claims**

All claims and supporting written affidavits and declarations should be under oath and subject to penalty [i.e., under the federal statute covering misrepresentations or perjury in applications to the federal government]. The claimant shall be granted

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<sup>2</sup> The Special Master will be obliged as a matter of policy to determine whether exposure to airborne contaminants is included.



the right to issue subpoenas to facilitate acquisition of evidence in support of a claim. The claims should contain:

1. Proof of the claimant's date of birth. The claimant's date of birth must be established by submitting a birth certificate. If the claimant has no birth certificate, proof of the claimant's date of birth should be established by one of the following records: (a) a baptismal certificate; (b) tribal records; or (c) hospital records of birth.

2. Proof of physical presence. For purposes of establishing eligibility, the claimant must have been physically present within the statutorily defined area during the designated time period. Proof of physical presence may be made by the submission of any trustworthy contemporaneous information or records that, on their face or in conjunction with other such records, establish that the claimant was present in the statutorily defined area during the designated time period. Contemporaneous records from the following sources are presumed to be trustworthy: (a) records of the federal government, any tribal government, or any state, county, city or local governmental office, agency, department, board or other entity, or other public office or agency; (b) records of any private utility licensed or otherwise approved by any governmental entity, including any such utility providing telephone services, including wireless telephone services; (c) records of any religious organization that has tax-exempt status under section 501(c)(3) of the United States Internal Revenue Code; (d) records of any regularly conducted business activity or entity; (e) records of any recognized civic association or organization; or (f) medical records created during the designated time period.

If the claimant or personal representative does not have contemporaneous records demonstrating proof of physical presence, the claimant or personal representative may submit written affidavits or declarations by the claimant's employer, if the claimant is or was employed by an entity in the statutorily defined area. If the claimant or personal representative does not have the affidavit or declaration of such employer, the claimant may submit written affidavits or declarations of any other individual or entity who is able to verify the claimant's physical presence.

3. Proof of physical harm or proof of death.

(a) Proof of physical harm. Written medical documentation is required in all cases to prove that the claimant suffered or suffers from the physical harm that is a direct and proximate result of the terrorist-related aircraft crashes of September 11, 2001. Acceptable written medical documentation may come from the following sources: (i) hospitals, clinics, or treatment centers; (ii) reports of licensed physicians or other medical personnel; (iii) records of authorized rescue personnel;



or (iv) official registries of injured persons maintained by Federal, State, or local governments. The written medical documentation submitted must contain sufficient information to allow the Office of the Special Master to determine the nature and extent of harm to the claimant.

(b) Proof of death. Proof of the claimant's death is conclusively established by: (i) A showing that the claimant was either a member of the flight crew or a passenger on American Airlines flight 11 or 77 or United Airlines flight 93 or 175, on September 11, 2001; or (ii) A death certificate issued by appropriate authorities as defined under Federal, State or local law.

#### 4. Waiver

If the claimant or personal representative of a claimant does not have conclusive proof of any of the above-described evidence, the claimant or personal representative of a claimant may submit written affidavits or declarations by the claimant's employer, members of the claimant's family, or witnesses to the claimant's death or other reliable sources of proof.

### C. Limitations

1. Participants and representatives of participants. No individual identified by the Attorney General to have been a participant or conspirator in the terrorist-related aircraft crashes of September 11, 2001 and no representative of such individual shall be eligible to receive compensation under the Act.

(2) Single claim. No more than one claim may be submitted under this title by an individual or on behalf of a deceased individual.

(3) Waiver of civil actions. Upon the submission of a claim under the Act, the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related crashes of September 11, 2001. The preceding sentence does not apply to a civil action to recover collateral source obligations. An individual who is a party to such a civil action may not submit a claim under this title unless such individual withdraws from such action by the date that is 90 days after the date on which these regulations are promulgated.

(4) Time Limitation. No claim may be filed after the date that is two years after the date on which these regulations are promulgated.

## VI. NATURE AND AMOUNT OF COMPENSATION.



#### **A. Schedules or Statistical Methodologies**

The Department has invited comments on whether and how schedules and statistical methodologies should be developed and used in reaching a determination for each claimant within the mandated time period. Schedules and statistical methodologies should not be developed and used. The Act establishes a process that entitles each claimant to a hearing at which he/she can present evidence and witnesses if he/she desires to do so. This requires each claim to be analyzed on an individual case-by-case basis. A pre-determined grid or matrix-type system will defeat the purpose and function of the Act; moreover, such a system will likely erode public confidence in the program's ability to offer full and fair compensation and due process protection. As the ABA Task Force on Terrorism and the Law has previously stated, the concepts of predictability and horizontal equity are of paramount importance to the perceived fairness of the Fund program. Hence, as awards are finalized a publicly-available data base ought to be created consistent with privacy concerns that will allow later claimants to assess prospects.

#### **B. Use of Experts**

There should not be a prohibition on the use of experts by claimants. Under the Act, each claimant is given the right to a hearing where he/she can present evidence and witnesses. Since each case is to be decided individually, there may be instances where expert testimony is required to prove and develop essential elements of a claim. However, with respect to economic experts material in report form rather than live testimony should be encouraged.

#### **C. Choice of Law**

The Department also seeks comments on which state's law should apply to both economic and non-economic damages. A uniform set of rules should be applied to all cases. This will provide a means of providing fair, equitable compensation for all individuals making a claim, although the amount awarded to various claimants will differ based on factors such as income earned. Having a different set of rules in place for different victims will lead to some victims recovering for items that may not be available under the laws applicable to other victims and vice versa. Such a result is not contemplated by the Act. Non-economic losses are not to be determined in accordance with any particular state law. Section 402(7) does not refer to "applicable state law." Moreover, § 402(7) presents a comprehensive list of non-economic losses which may be recovered. Various states do not allow for certain of the non-economic damages which are specifically allowed by the Act. Therefore, using state law to determine non-economic damages will almost certainly conflict with the express language of the Act. We suggest that a uniform body of law be fashioned that effectuates each of the elements outlined in the Act.



However, "Economic Loss" is defined under the Act as "any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law" (*emphasis added*). This seems to suggest that a choice of law must be made for economic losses. If so, it is proposed that the law of the domicile of the claimant, or the situs, at the election of the claimant, be chosen but only insofar as it is not in conflict with the requirements of the Act. If there is a conflict, the language of the Act must control.

#### **D. Collateral Sources**

The Department has requested comments on what constitutes a "collateral source" and on whether charitable contributions should be considered a "collateral source." Based on public policy considerations and the plain language of the Act, charitable contributions should not be considered collateral sources for the purposes of the Act. Additionally, public policy considerations and equity mandate that payments made to victims that carry with them a right of subrogation should not be considered collateral sources under the Act.

##### **1. Charitable contributions shall not be considered Collateral Sources for the purposes of the Act.**

Including charitable contributions as collateral sources would be contrary to the Act because they are not in the same class of payments as the examples of collateral sources listed in the Act. (See § 402(4)). The examples of collateral sources in the Act are all payments or assets that belong to the decedent by statute or contract. Charitable donations are not of the same character. It would be contrary to the spirit of charitable giving to include charitable contributions within the definition of collateral sources to defeat or reduce a person's claim. More importantly case law establishes that proper respect for Congressional powers implies that statutory construction must begin with the language employed by Congress and the assumption that the overriding meaning of that language accurately expresses legislative purpose. If the Congress wanted to reduce the amount of the award by the amount of the charitable contributions/gifts received they would have, or should have, explicitly noted it in the Act.

Under 404(a)(2)(B)(iii), a Claim Form must include "information regarding collateral sources of compensation the claimant has received or is entitled to receive as a result of crashes." While a claimant might have already received some charitable assistance, much of this assistance may come after the claimant completes the Fund process or during the Fund process. Furthermore, a claimant is not "entitled" to



receive that money. For these reasons, the regulations should make clear that charitable assistance contributions are not considered a collateral source.

2. Contributions subject to subrogation rights shall not be considered collateral sources for the purposes of the Act.

A collateral source rule usually operates to allow recovery of losses compensated by insurance and is traditionally justified on two grounds: (1) it preserves the insurer's right to subrogation and (2) it preserves the injured party the benefit of insurance for which he has paid. Dan B. Dobbs, *The Law of Torts* § 380 at 158-59. Allowing the reduction of a collateral source which has a subrogation right attached to it from the damages the claimant is entitled to under the Act will result in reducing the compensation from the claimant twice. It will allow for the reduction in damages from the claimant under the Act for a collateral source the claimant has paid for; at the same time, the claimant will be required to pay back the amount paid under the subrogation clause to the original payee of the benefits. For this reason, the following procedure should be applied: collateral source does not include benefits paid or payable by a person, partnership, association, corporation, or other legal entity entitled by contract or statute to a lien against the proceeds of a recovery by a claimant for damages under the Act. Support for this is found in Michigan Compiled Laws Annotated, Section 600.6303(4). Finally, any collateral source deduction should only be made from the determined economic losses.

3. Final collateral source consideration.

If the Special Master decides, however, to deem charitable contributions and contributions subject to subrogation rights as collateral sources and subtracts these amounts from the award, at a minimum, the regulation should require that the original payee will have no right to enforce any subrogation clause in its contract against the claimant for any amount deducted from an award. In addition, the award document, itself, should show precisely the amount and source of any collateral source being deducted from the award and should clearly tell the claimant that he/she has no responsibility for reimbursing those payees for any funds that they received at an earlier date.

If there is not a vested right under contract or some other means to enforce payment by the claimant, those funds should not be considered a collateral source and should not be deducted from the award.

## **VII. OFFICE OF THE SPECIAL MASTER**

The duties and responsibilities of the Special Master should also be established. These should be modeled after the Special Master provisions of the



National Vaccine Injury Compensation Program, 42 U.S.C. §§ 300aa-12(c) - 300aa(12)(d).

The Special Master should be charged with: (1) administering the Office of the Special Master and its staff, providing for the efficient, expeditious, and effective handling of claims, and performing such other duties related to the Act as may be assigned by the Attorney General; (2) administering the September 11<sup>th</sup> Victim Compensation Fund of 2001 Program; (3) appointing and fixing the salary and duties of Hearing Officers; (4) appointing and fixing the salary and duties of Mediators; (5) establishing and fixing the salary and duties of personnel in the Intake Office; (6) establishing and fixing the salary and duties of personnel in the Verification Office; (7) appointing and supervising such administrative personnel as are necessary; (8) hearing appeals from decisions of Hearing Officers; (9) rendering final determinations of claims; (10) reporting every six months to the Attorney General on the number of claims filed under the Act and their disposition, the types and amounts of awards, the length of time for the disposition of claims, the cost of administering the Program, and recommendations for changes in the Program; (11) developing Claim Forms in accordance with section 405(a)(2) of the Act; (12) establishing all necessary orders rules, guidelines and procedures; and (13) reporting to Congress on a yearly basis on the operation of the Program.

#### **VIII. ASSESSMENT PROGRAM**

Not later than December 31, 2004, the Attorney General, in consultation with the Special Master, shall submit a report on the performance of the Fund established by the September 11<sup>th</sup> Victim Compensation Act of 2001. This report shall include an assessment of the extent to which the Fund has equitably and efficiently provided compensation to individuals (or relatives of deceased individuals) who were physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001. The report shall identify the extent to which specific provisions of the Act and of the regulations subsequently promulgated to carry out the Act have affected the equity and efficiency of the compensation provided by the Fund. The report shall also compare the net compensation obtained by claimants against the Fund to the net compensation obtained by claimants who pursue a civil action in any Federal or state court for damages sustained as a result of the terrorist-related crashes of September 11, 2001, taking account of the claimants' injuries and losses. This report shall be based on a study conducted by an independent research organization with expertise in the area of compensation for personal injuries and experience in empirically analyzing the performance of diverse systems used to compensate injury victims. The Special Master and the Fund shall collect the information needed to support the evaluation as specified by the independent research organization.

#### **IX. OTHER CONSIDERATIONS**

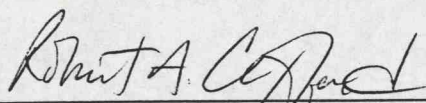


1. The ABA Sections that have significantly contributed to these comments are positioned to submit comprehensive additional comments and a Claim Form for use in administering the Fund Program. The ABA stands ready to provide this additional information upon request.

2. Experience in prior claim programs has demonstrated the need, where appropriate, for waiver or minor extensions of otherwise applicable filing and determination deadlines. This principle is reflected in the above comments. However, in crafting such provisions, the Special Master needs to fix an expedient end date for all determinations to fulfill the Congressional mandate and intent of the Act.

3. The Special Master is encouraged to develop regulations to address questions of fraudulent claiming.

Respectfully submitted,



Robert A. Clifford, Chair of the American Bar Association's Task Force on Terrorism and the Law

Task Force Members

*Harold S. Barron*  
*Section of Business Law*

*Richard P. Campbell*  
*Section of Tort and Insurance Practice*

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October 26, 2001

The Honorable Robert D. McCallum, Jr.  
Assistant Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Room 3141  
Washington, DC 20530-0001

Dear Mr. Assistant Attorney General:

Thank you for the opportunity to meet with you and the other Department of Justice attorneys concerning the regulations for the September 11th Victim Compensation Fund. I thought we had an extremely good exchange of ideas, which is of great help to us as we go forward.

Our goal is to clarify through the regulations how the Fund will be administered in such a way as to build public support and confidence in the Fund. We want to do everything possible to ensure the success of the Fund, not only for the victims we will represent but also because its success will stand as a powerful statement to the world (and the terrorists) how a great nation generously and compassionately treats its citizens who are injured through no fault of their own.

Because we believe that TLC attorneys will represent the vast majority of claimants in the Fund, we share your concerns about having a process that is both expeditious and just. This is, however, a concern that we believe can be solved.

It was very helpful to learn that the Department does not view the Fund as adversarial. That will simplify the process and allow a cooperative effort to achieve the goals of the Fund. By the use of the procedures we recommend or similar ones, we believe the process can also be greatly expedited in ways that relieve the statutory burden placed on the Special Master and his or her staff.

I believe this can be achieved in an equitable manner for similarly situated plaintiffs without having to resort to matrices, as we discuss below. In addition, I very much appreciate your concern about the practical limits of the 120 day claims process under the Act, and the need to expedite the process whenever possible.

For example we do not believe that every claim will require a hearing. We would hope, once the Fund is open for business, that, at least for TLC represented claimants, we could negotiate

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Trial Lawyers Care, Inc. is the non-profit corporation set up by volunteer trial lawyers across the nation to provide access to free legal services to the September 11th terrorist attack victims who are eligible and choose to make claims under the federal September 11th Victim Compensation Fund.



Mr. Robert D. McCallum, Jr.

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October 26, 2001

settlements for large numbers of cases. That, of course, would be dependent upon victims trusting the process sufficiently to accept TLC representation (only available for claims in the Fund) which may be largely dependent upon the perception of the fairness of the regulations.

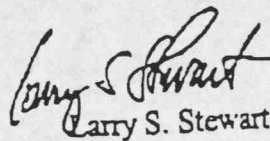
In that regard, we strongly urge that the regulations not contain any matrix for damages. A matrix by its very nature is arbitrary and at odds with the letter and spirit of the Act. The due process rights granted to claimants under section 405 of the Act, including the right to present witnesses, would have diminished value if a claimant's entire case were merely to be checked against a preexisting schedule. Indeed, the very concept of a matrix is so synonymous with arbitrariness that at a conceptual level it could engender serious public criticism.

While it is important that all victims be treated equally by having the same standards applied to their individual claims as would be the case in the Civil Justice System, like the Civil Justice system, the Act does not guarantee equal results. As a practical matter that would be impossible because of the innumerable variables that are involved in individual situations.

I enclose written suggestions and stand ready to assist in any way.

Lastly, I meant to mention at our meeting that I hope the Department uses its subrogation rights to collect monies from any at-fault party, especially the terrorist groups. I can think of nothing more powerful or meaningful than for the United States government to sue the terrorist groups and recover the frozen funds for the Victim Compensation Fund.

Very truly yours,

  
Larry S. Stewart

LSS:jc

Enclosure

LAMcCallum.doc



October 29, 2001

**Trial Lawyers Care**

**RECOMMENDATIONS FOR REGULATIONS FOR  
THE SEPTEMBER 11th VICTIM COMPENSATION  
FUND**

Trial Lawyers Care submits the following recommendations for the September 11th Victim Compensation Fund:

**I. UNIFORM SUBSTANTIVE RULES.** To fulfill the intent and purpose of the Act and to expedite the claim decision process, under Section 404(a)(2) of the Act, uniform substantive rules should be adopted to administer who can recover and set standards for what can be recovered.

**A. Who can recover.** The regulations should clearly state the family members and dependents who can recover as derivative claimants (in personal injury claims) or beneficial claimants (in death claims). When a family member is injured or killed, the resulting losses extend to the members of the family, such as spouses and children and those dependent on the injured person. The Act refers to relatives and consortium claims and the regulations should clarify these claimants for both personal injury and death claims.

This is not to suggest that there should be multiple claims. The Act makes it clear that there will be only a single claim brought by either an injured survivor or the personal representative of a deceased person. Rather, within such claims, the regulations should clarify the derivative claimants for personal injury claims and the beneficial claimants for death claims.

The regulations should also clarify who is a spouse, child (with provisions for adopted children and children born out of wedlock) and who is a dependent. There should further be provisions to protect the immigration status of claimants.

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**B. What can be recovered.** The regulations should also clearly state the standards for determining damages. The Act provides for full non-economic damages "of any kind or nature" but does not differentiate between personal injury and death claims. The regulations should clarify the non-economic damages recoverable in each type of claim. For example, for personal injury claims, non-economic damages should include all past and future pain and suffering, inconvenience, physical impairment, loss of the capacity to enjoy life, injury to reputation and any aggravation of any preexisting disease or condition. In death cases, non-economic damages should include any conscious pain and suffering of the decedent as a result of the terrorist acts prior to death, as well as the past and future mental pain and suffering of a spouse, children, grandchildren and decedent's parents resulting from the decedent's death.

There should also be a uniform standard for economic damages. The terrorist acts were an attack on all of America — our institutions, our values and our very way of life. Thousands of innocent and unwitting people were killed and injured simply because they happened to be on a plane, in a building or trying to save their fellow Americans. They should not be subjected to different standards simply because they happened to live in different states. A uniform standard for all damages is consistent with the purpose of the Act, its federal nature and the normative rules used by federal courts for resolving conflicts of laws issues and would avoid disparate results and provide for a speedy process.

For personal injury claims, economic damages should include past and future loss of earnings, loss of earnings capacity and any medical expenses. It should also include past and future loss of support and services, consortium and affection to the claimant's spouse and children and, in the case of children, loss of parental guidance. For injuries to minor children, economic damages should include past and future loss of support and services, companionship and affection to the claimant's parents.

For death claims, economic damages should include past and future loss to the decedent's estate of the net accumulations of earnings that would have been realized over a normal life expectancy and any medical, funeral or other last expenses of the decedent. In addition, economic damages in a death claim should include the loss of support and services, society, and comfort of a decedent's spouse, children and any dependents and, in the case of children, loss of parental guidance.

The regulations should also provide for the reimbursement of the reasonable costs of making a claim.

**II. DEFINITIONS.** There should be definitions covering the usual terms. In addition, the following terms should be defined to clearly set forth who is an eligible claimant:



- a. "Physical Harm". Physical harm should be an objectively verifiable injury and any resulting condition, disability or loss that directly and in natural sequence is caused by the injury.
- b. "Present at". Present at should be defined as being in a location described in the Act or in such proximity so that a physical harm was caused by the destruction of such location.
- c. "Immediate aftermath". Immediate aftermath should include all events resulting from the attacks, so as to include all individuals who were injured responding to and/or attempting to rescue individuals. It should also include the period following the attacks during which rescue efforts continued to find victims and during which injuries occurred in that process.

II. **COLLATERAL SOURCES.** The Act provides for deduction of collateral sources so that damages under the Fund do not duplicate benefits received from those sources. The regulations should clarify how that process will work so that the purposes of the Act will be fulfilled and the claimants will not be penalized. For that purpose, we recommend the following:

- a. By law or contract, some collateral source payors have a right of subrogation or a lien on damages. These provisions are common, for example, in state worker compensation laws such as those in New York and in health insurance policies. If those collateral sources were deducted from the Fund award and then the claimant had to also pay back the same amount because of the subrogation or lien, the claimant would suffer a double deduction. The regulations should provide that unless the Hearing Officer can clearly ascertain that there is no right of subrogation or lien, such collateral sources should not be deducted.
- b. With the exception of life insurance, which under the Act must be deducted, only collateral sources, which duplicate damages recoverable under the Fund, should be deducted. Collateral sources benefits for other items not recoverable under the Fund should not be deducted.
- c. Many collateral sources, such as life insurance, were purchased by the claimants out of their earnings. Part of what they "receive" is the payments that they made to secure the benefit. In those cases, only the net benefit should be deducted.
- d. As to future collateral sources, only those to which a claimant has a vested or contractual right to receive should be deducted. Mere possibilities and sources dependent on future fundraising should not be considered. Further, as to future benefits, only the present value of those benefits should be deducted.



- e. Collateral benefits should not include charitable gifts. Charitable gifts are not enumerated in the Act and many of the gifts to date have been for items that would not be compensable in the Fund; i.e., temporary housing, food allowances, etc. To attempt to sort through other charitable gifts or potential benefits would be extremely complex, time consuming and could result in unequal treatment between victims.

### III. SIMPLIFIED AND EXPEDITIOUS RULES OF PROCEDURE AND EVIDENCE. To help expedite the process, we recommend the following:

#### a. Procedure.

- i. There should be a simple claim form, which will not discourage claims from being filed.
- ii. There should be a clear statement as to when claims will be deemed to be filed and the 120-day period for decision begins. There should be some allowance for review of a form for completeness when it is submitted and provisions for handling a form that is not complete; i.e., return to the claimant for completion.
- iii. There should be qualifications for attorney representation: i.e., admission in good standing with a state bar. Attorneys should also be required to advise clients of the availability of any pro bono programs.
- iv. There should be a provision for claimants to, at their election, extend the 120-day period. Any requests for extension should be in writing signed by the claimant.
- v. Hearings should be held to the extent possible at or near the claimant's residence.
- vi. Claimants should be given the chance to supplement any evidence found to be insufficient.
- vii. Hearings should be recorded.

#### b. Evidence.

- i. The rules of evidence should be relaxed. Witnesses should, however, testify under oath



ii. Affidavits should be accepted as proof of standard items such as employment history, earnings, loss of services, relationships, etc.

iii. There should be rebuttal presumptions for items such as:

1. Life expectancy. By designating a presumptively applicable table, such as that published by the National Center of Health Statistics, dispute can be avoided in the vast majority of claims.
2. Work life expectancy. It should be presumptively designated as 65.
3. The value of future earnings. By designating the "total offset" method of calculation as the presumptively proper method of calculation, the necessity for expert economic evidence can be avoided in most claims.

IV. **HEARING OFFICERS.** The perception of the fairness of the hearing process will depend in large part on who are the Hearing Officers. In many ways they are the lynch pins of the success of the Fund. For the Hearing Officers we recommend:

- a. That they be retired judges, thereby demonstrating knowledge of and experience in the Civil Justice system.
- b. That to the extent possible they be drawn from the areas where the victims are located.
- c. That they be challengeable for prejudice or bias.
- d. That they be removable for cause.

V. **DECISIONS.**

- a. Decisions should be in writing, setting forth the specific award for each beneficiary, any collateral sources being deducted and the reasons therefore.
- b. Decisions should be due within 10 days of a hearing.
- c. There should be a due process review procedure to appeal from a Hearing Officer decision to the Special Master. The claimant would have to agree to extend the 20-day period for authorization of payment as a prerequisite to the appeal. The regulations should specify the standard for the review; i.e., errors of law or



procedure or a decision contrary to the substantial weight of the evidence. In the event of a reversal, the 120-day period for decision should start anew.

**VI. AUTHORITY TO COMPROMISE AND SETTLE.** Settlements of claims can greatly expedite the claims decision process. It can also result in negotiated values that may serve as guides for the resolution of other claims. The regulations should therefore make clear that the Special Master has the authority to compromise and settle claims.

**VII. PAYMENT OF CLAIMS.**

- a. The regulations should specify to whom payments will be made; i.e., to individuals, trusts, guardians of minors or incompetents, personal representatives, etc.
- b. The Hearing Officer should have the right to require that a guardian be appointed for any minor or incompetent.
- c. Claimants should have the right to elect to receive periodic payments.

**VIII. NOTICE OF THE PROGRAM**

- a. The availability of the Victim Compensation Fund should be widely publicized in the news media.
- b. All victims of the September 11<sup>th</sup> attacks should receive direct mail information about the availability of the Victim Compensation Fund.
- c. Notices of the Victim Compensation Fund should include information on the availability of all pro bono programs such as Trial Lawyers Care.

**IX. PRIVACY PROTECTION.** To the extent authorized by law, there should be provisions protecting the privacy of the claimants and the information that they submit in the claims process.



**A000007**

Tuesday, November 27, 2001 8:32 AM  
New York Workers' Compensation offset

To: Kenneth L. Zwick:

I am the president of the Injured Workers' Bar Association, an organization of New York lawyers that represent claimants in proceedings before the NY Workers' Compensation Board. We are concerned about the question of whether payments from the Victim Compensation Fund will be considered third-party settlements under the provisions of Section 29 of the New York Workers' Compensation Law. As the attached analysis shows under current law we believe such payments would be considered third-party settlements subject to advance approval by the WC insurance carrier. I strongly believe that when regulations are drafted for the Victim Compensation Fund this issue be considered, and appropriate action taken to protect the victims rights to payments from NYS Workers' Compensation carriers. Thank you.

Individual Comment

Attachment 1:

Third Party Consent and the Workers' Compensation Claims Arising out of the September 11 Terrorist Attacks

Shortly after the attacks on the World Trade Center and the Pentagon the Congress passed federal legislation to address concerns about the economic impact of possible personal injury litigation arising out of the attack. Signed into law on September 22, 2001 the September 11 Victims Compensation Fund [Title IV of the Air Transportation System Stabilization Act, H.R. 29826] allows the persons who were injured in the attacks or the survivors of those killed to waive their right to file a personal injury lawsuit and in return receive a lump sum payment from the federal government. Review of the Act and such analysis as has been published so far reveals that no one has clearly addressed the possible legal effect of such a waiver on a New York State (or other state) workers' compensation claim.

The American Trial Lawyers Association and the New York State Trial Lawyers Association have announced a laudable pro bono effort to assist anyone filing a claim under the federal law. A new association called Trial Lawyers Care, Inc. has been formed for this express purpose. In our view it is critical, however, that any attorney who represents or assists a person filing such a claim first investigate fully whether a workers' compensation claim has been filed or may be filed, and if so whether the workers' compensation insurance carrier will consent to the waiver of the right to sue. Regardless of whether the federal waiver program accounts for the existence of an actual or potential workers' compensation benefit by an offset or other non-duplication of benefits language, in our opinion in New York the insurance carrier's statutory rights to approve a third party settlement and recover their possible lien will be unaffected.

Under §29 of the New York State Workers' Compensation Law, the workers' compensation carrier has an absolute lien on any benefits obtained in a third party action up to the limit of their liability for both indemnity and medical benefits paid. If a claimant with an actual or potential third party action seeks to settle that action by compromising their claim, they must obtain the consent of the workers' compensation carrier to do so. Should the claimant fail to obtain the carrier's consent to settle, they will be absolutely barred from receipt of any and all further workers' compensation benefits.

In our view by executing the waiver of a possible third party claim, a claimant may be found to have



prejudiced the lien rights of the workers' compensation carrier and may in consequence lose many thousands of dollars of workers' compensation payments over the rest of their lives. The acceptance of the waiver in this situation is basically the same as settling a regular personal injury case arising out of a compensable accident. The mere fact that the injury or death occurred from the attack at the World Trade Center or Pentagon should not change any of the obligations of the attorney representing a claimant or the rights of the workers' compensation carrier.

Please note further that under Section 29 of the Workers' Compensation Law when a claimant chooses not to sue a tortfeasor, the workers' compensation carrier has a right of subrogation. This factor makes the argument all the more compelling that a claimant must obtain the consent of the compensation carrier before waiving the right to bring a lawsuit because such waiver compromises the carrier's right of subrogation.

If the requirements of §29 are not complied with the consequences to the injured worker can be devastating. A surviving spouse and children could receive as much as \$400 per week. In the case of a 32-year-old widow who lives another 50 years, the failure of that widow's counsel to obtain the consent of the workers' compensation carrier to the waiver can result in loss of more than \$1,000,000.00 over the rest of her lifetime.

We realize that some practitioners might take the position that waiving one's right to sue to receive the federal payment is not the equivalent of settling a third party action as contemplated in §29 of the Workers' Compensation Law. Of course it is possible that in the future a court may rule that accepting the waiver was not the same as settling a personal injury lawsuit, but we advise our members not to take this risk without first thoroughly protecting their client's interest.

If any attorney wants to pursue the position that money paid out under a federal victims program is not the equivalent of settling a third party action, the attorney could do so by first getting the consent of the carrier to the waiver and paying or putting in trust any money that the workers' compensation carrier claims as a lien. As part of that consent agreement the attorney should include language in the consent letter that it is the attorney's position that consent does not have to be obtained and that he will litigate the matter before the Workers' Compensation Board and/or in the courts. The attorney should also obtain in the consent letter a guarantee that the carrier will pay back any lien taken as part of the consent and that the carrier will reinstate any benefits not paid because they were taking "credit against a third party recovery". This method will protect both the claimant and the attorney should a court eventually rule that the monies paid out under the federal program were not the equivalent of a third party action.

It should go without saying that if someone proceeds with a regular lawsuit as a result of the September 11 attack then the provisions of §29 of the Workers' Compensation Law must be complied with prior to any settlement. Clients should be advised that the workers' compensation carrier may assert a lien against the proceeds of the Federal recovery and reserve the right to take an offset for the claimant's net recovery against any future claim for compensation benefits. If this is the case, then it may not be worthwhile for the claimant to give up his/her right to sue, because no benefit would actually accrue to the claimant since the Federal recovery would simply become an advance payment of compensation--deferring the carrier's obligation to make payments to the claimant for a period of several years.

Unfortunately, the federal legislation establishing the September 11 Victims Compensation Fund did not explicitly deal with the issue of workers' compensation carrier liens. The legislation does contain offset language that appears to discount any federal award by actual or potential workers' compensation indemnity benefits. This is not enough, in our view, to overcome the lien rights under §29 since they attach to medical as well as indemnity benefits. Perhaps Congress will deal with this issue at some future time but for now, as attorneys advise victims or survivors, a foremost concern should be determining and



properly protecting the workers' compensation benefits of the victims.

For more information or to locate a qualified workers' compensation attorney from any part of New York State visit our web site at [www.injuredworkersbar.org](http://www.injuredworkersbar.org).

Article researched and written by members and .

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**W000484**

November 1, 2001

Dear Acting Associate Attorney General Perry:

We submit this letter to set forth the comments of the State of New York and the City of New York on the recently enacted Air Transportation Safety and System Stabilization Act ("ATSSSA") and, specifically, the provisions establishing procedures and standards for compensating victims who suffered injury or death as a result of the September 11th terrorist attacks.

As you undoubtedly appreciate, New Yorkers and other injured in New York as a result of the terrorist attacks at the World Trade Center constitute the vast majority of those harmed on September 11th. To be an effective and meaningful vehicle for victim compensation, the ATSSSA must be interpreted and administered in a manner that gives full force to Congress' clear statement of the purpose of ATSSSA, which is "to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001." §403.

The attached memorandum sets forth our comments and recommendations in detail. As you will see, based upon the language of the statute and the intent of Congress, we recommend that the regulations:

- \* provide that all individuals in New York City physically harmed by the airline crashes, the collapse of the World Trade Center, or the smoke and debris resulting from those events are eligible to submit claims for compensation;
- \* ensure that the individuals working to extinguish the ongoing fires, clear debris, and recover remains, including the police officers, firefighters, construction workers and other emergency personnel who have been injured during this difficult effort, are not excluded from the claims process;
- \* make clear that individuals who suffered any physical harm are able to file claims;
- \* define the "personal representative" of the decedent who may file a claim according to state estate law;
- \* provide that a victim's compensation include any pecuniary losses specifically enumerated in the statute, as well as any other compensable under state law; and
- \* make clear that a claimant's compensation may be reduced only by the amount of the collateral source compensation the claimant is legally entitled to receive as a result of the terrorist-related aircraft crashes of September 11, 2001.

The issue of collateral source compensation is of particular importance. ATSSSA defines the term "collateral source" as "all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001." §403(4). As the attached memorandum makes clear, statutory language, the intent of Congress, analogous provisions of New York State law, and public policy all point to a definition of "collateral source" that includes only legally-required monetary payments, and not assistance from family and friends, charitable contributions in-kind benefits, or payments contingent upon future events.



Finally, we offer various suggestions for the claims form and the rules for submission of evidence. For example, while documentation should be required for establishing medical expenses, it should not be required to demonstrate physical harm, because many individuals who were physically harmed either did not seek medical attention or received medical care at a triage location where no documentation was kept. Liberal procedures should permit claimants to present newly discovered evidence of harm or other losses (e.g., latent injuries or future medical expenses).

Thank you for considering our views on this important matter. If you have questions regarding any of the issues discussed in this letter or the attached memorandum, please feel free to contact Counsel to the Governor James McGuire, Deputy Attorney General Debra Cohn or Deputy Counsel to the Mayor Larry Levy.

We look forward to working with you to serve all the victims of the September 11th terrorist attacks.

Sincerely,

Comments by:  
State of New York

## **COMMENTS OF THE STATE OF NEW YORK AND THE CITY OF NEW YORK ON THE AIR TRANSPORTATION SAFETY AND SYSTEM STABILIZATION ACT**

This memorandum sets forth the comments of the State of New York and the City of New York on the recently enacted Air Transportation Safety and System Stabilization Act ("ATSSSA"). In particular, the memorandum comments on ATSSSA's procedures and standards for compensating victims who suffered injury or death as a result of the September 11th terrorist attacks.

Title IV of ATSSSA, which is the "September 11th Victim Compensation Fund of 2001," establishes two vehicles for victims to obtain compensation: 1) a claims process administered by the Attorney General, acting through a Special Master; and 2) a federal cause of action with exclusive jurisdiction in the Southern District of New York. This memorandum concerns the former, the administrative claims process.

ATSSSA states that "the purpose of this title [is] to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001." §403 (emphasis added). New Yorkers and others injured in New York as a result of the terrorist attacks at the World Trade Center constitute the vast majority of those harmed and the regulations issued by the Department of Justice must fulfill the intent of Congress by ensuring that full compensation is provided to all such victims.

### **I. POTENTIAL CLAIMANTS.**

#### **A. INDIVIDUAL VICTIMS.**

The ATSSSA defines individuals who are eligible to file a claim with the Special Master as:

(A) an individual who-



(i) was present at the World Trade Center, (New York, New York), the Pentagon (Arlington, Virginia), or the site of the aircraft crash at Shanksville, Pennsylvania at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes of September 11, 2001; and

(ii) suffered physical harm or death as a result of such an air crash;

(B) an individual who was a member of the flight crew or a passenger on [the aircrafts subject to terrorist-related crashes on September 11, 2001;] or

(C) in the case of a decedent who is an individual described in subparagraph (A) or (B), the personal representative of the decedent who files a claim on behalf of the decedent.

#### Sec. 405(c)(2)

Thus, certain terms are critical to determining the eligible claimants: 1) "was present at the World Trade Center, New York, New York," §405(c)(2)(A); 2) "the immediate aftermath" *id.*; 3) "suffered physical harm" §§ 405(a)(2)(B)(i), 405(c)(2)(A); and 4) "personal representative of the decedent," §405(c)(2)(C). This memorandum discusses each in turn. The proposed definitions and standards set forth below aim to fulfill the congressional purpose of compensating all the victims. Where appropriate, references to New York law are provided. The proposals also draw on definitions, standards, and procedures used by federal, state, and local government agencies to identify and provide services to the victims of the World Trade Center tragedy. Finally, several other goals helped shape the proposed definitions: equity among victims; administrative ease; and discouraging fraud and abuse.

#### 1. "Present at the World Trade Center, New York, New York"

The phrase "present at the World Trade Center, New York New York" should be defined to cover all individuals in New York City harmed by the airline crashes, the collapse of the World Trade Center, or the smoke and debris resulting from those events. The vast majority of those victims were located in Manhattan south of 14th Street, but the regulations should ensure that individuals outside that area, who also were physically harmed, are allowed to file claims.

The federal, state, and local governments already recognize that the effects of the World Trade Center attacks extended beyond the narrow confines of the twin tower complex. On September 13, 2001, President Bush signed a disaster declaration, making individuals in all five counties in New York City eligible for assistance. On September 11, New York City Police Department closed all streets in Manhattan south of 14th Street. Debris was found in parts of Brooklyn and Queens. For several days following the attack, the "red zone" restricted area included all of Manhattan south of 14th Street. Even now, more than a month after the crashes, the restricted area exceeds a 16 acre zone.

FEMA's Mapping and Analysis Center (MAC) received remote sensing data on the days after the attacks, indicating that areas affected by the disaster were far-reaching. The available information documents that the ash and debris traveled across all of downtown Manhattan. A photograph of lower Manhattan taken on September 12, 2001, shows that, even 24 hours later, the ash and debris continued to travel north of Chambers Street and across the East River into Brooklyn.

Defining "present at the World Trade Center, New York, New York," as covering all individuals who were in New York City who were harmed by the airline crashes, the collapse of the World Trade Center, or the smoke and debris resulting from those events, would ensure that all individuals who were physically harmed as a result of the crashes of September 11, can file claims, while offering



administrative ease to the Department of Justice. An alternative definition would frustrate congressional purpose and consign victims physically harmed by the terrorist attacks to an uncertain future by being forced to litigate in the Southern District of New York.

## **2. "At the Time, or the Immediate Aftermath"**

The World Trade Center disaster response is still continuing. Although most of the areas in Manhattan outside the "red zone" have been cleared of debris, the "red zone" itself remains an active disaster site, with fires still burning, and the search for bodies continuing. Just as a forest fire does not end the moment it is lit, but continues until the fire is extinguished, so too does the World Trade Center disaster. Undoubtedly, Congress intended that the firefighters, police officers and other emergency and construction workers who continue to work at the site should be covered by the victim compensation scheme.

In light of the congressional intent, and the Presidential disaster declaration, the phrase "at the time or the immediate aftermath" should be defined to continue until the fires have been extinguished, the debris cleared, and a determination has been made that no other bodies remain at the site.

## **3. "Suffered Physical Harm"**

ATSSSA provides that a person is eligible under the statute if he or she meets the "present at" requirement and suffered "physical harm" or death as a result of one of the crashes. §405 (c)(2)(a)(ii). The regulations, therefore, should make clear that an otherwise eligible person may apply for an award as long as he or she can show any physical harm. This is consistent with the purpose of the statute, which is to compensate "any individual" who was physically injured or killed as a result of the aircraft crashes of September 11, 2001. §403. Neither the statement of purpose nor the eligibility language requires that the injury or harm be "serious" or otherwise meet an arbitrary threshold. Cf. 29 U.S.C. §654(a)(1) (OSHA imposes duty on employer to provide working environment free from hazards likely to cause death or "serious physical harm"; 30 U.S.C. §1291(8) (Surface Mining Control and Reclamation Act of 1977 addresses condition which could reasonably be expected to cause "substantial physical harm" to persons outside permit area); 42 U.S.C. §14952 (b)(1) (Secretary of State may waive laws governing intercountry adoptions to prevent "grave physical harm" to child); N.Y. Ins. Law §§5102, 5104 (person injured in automobile accident can bring pain and suffering claim only if he suffered "serious injury"); Oberly v. Bangs Ambulance, Inc., 96 N.Y. 2d 295 (2001) (No-Fault Law requires "serious injury" before injured party may bring tort action for noneconomic loss, pain and suffering). Although victims who suffered any physical harm should be allowed to file a claim, the amount of the award, of course, will depend upon the extent of the harm to the claimant. §§405(b)(1)(B)(i) and (ii).

## **B. "PERSONAL REPRESENTATIVE" OF INDIVIDUAL VICTIMS.**

"Personal representative" should be defined according to applicable state law. The New York Estates, Powers, and Trusts Law ("EPTL") defines a "personal representative" as "a person who received letters to administrate the estate of a decedent". EPTL §1-2.13. A person who receives letters to administrate a decedent's estate must be either a "distributee" (a decedent's adopted or biological relative) if the person died without a will, a person named as executor or executrix if decedent had executed a will, the public administrator (if decedent dies without known relatives or a will), or a person appointed by the court as temporary administrator. EPTL §§4-1.1; 5-4.1; 5-4.5; N.Y. Surr. Ct. Proc. Act. §1001.

Letters of administration must be granted to persons who are distributees of a person who died without a will in the following order: surviving spouse; children; grandchildren; parents; siblings; and then any



other persons who are distributees.. N.Y. Surr. Ct. Proc. Act §1001. The distributees also may consent, if unanimous, to appointment of a non-distributee. Id. §§ 1001. 1002. A personal representative of a deceased may bring a wrongful death action on behalf of the distributee of the deceased to recover the pecuniary damages suffered by the distributee as a result of the decedent's death, EPTL §5-4.1; see EPTL §§4-1.1,5-4.5, or an action to recover for injuries, including conscious pain and suffering, suffered by the decedent prior to his death EPTL §11-3.1.

The damages recovered in a wrongful death action are to be distributed by the personal representatives to the relatives of the deceased as specified in EPTL §§4-1.1, 5-4.4(a) and 5-4.5, without going through the estate, and in proportion to the pecuniary injuries suffered by each of them. EPTL §5-4.4(a)(l).

## II. AMOUNT OF COMPENSATION.

The ATSSSA provides that "the amount of compensation is based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claim." §405(b)(ii). The Special Master will determine the extent of the harm to the claimant, including any economic and noneconomic losses. §405(b)(1)(B)(i)

### A. ECONOMIC LOSSES.

ATSSSA defines the term "economic loss" to mean:

any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.

§402(5). The state law applicable to the victims harmed in New York will in most instances be New York law. See generally Babcock v. Jackson, 12 N.Y. 2d473 (1963). New York law allows all the types of economic loss enumerated in ATSSSA. Consistent with ATSSSA's purpose - - "to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001" - ATSSSA and New York law in a wrongful death action allow for recovery of all pecuniary losses resulting from the decedent's death. See EPTL § 5-4.3 (damages in wrongful death action consist of fair and just compensation for "pecuniary injuries" suffered by distributees of decedent including but not limited to medical, nursing and attention expenses, funeral expenses); Loetsch v. New York City Omnibus Corp., 291 N.Y. 308 (1943) (pecuniary losses include loss of financial support); EPTL §5-4.3, Practice Commentaries (pecuniary losses

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## Comments, VictimComp

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**From:** Wasp, Daniel [DWASP@WILENTZ.COM]  
**Sent:** Tuesday, November 06, 2001 10:07 AM  
**To:** Comments, VictimComp  
**Subject:** Re: Question of Whether or not awards from the September 11th Victims compensation fund should be reduced by amount of char...

Dear Sir/Madam (whomever is reading this for AG Ashcroft) :

The answer to the question of whether awards from the Victims Fund should be reduced by charitable donations is clearly NO.

First of all the legislation that created the fund was after all a bailout of the airlines that, inter alia, capped airline liability for the four hijackings at their insurance policy limits. By compensating the victims of the WTC, the Pentagon and the PA crash the fund not only insures prompt payment to the families affected but also, and primarily, saves the corporate assets of the airline industries. Now without even discussing the economic effects of not saving the airlines, the fact remains by reducing awards by the amount of charity a victim's family received the USDOJ would effectively be using the donations of millions of Americans, and others, to underwrite its bail-out of the Airlines. Certainly this is not what the Charities or the people who donated to them intended.

Secondly, by reducing the award amounts by the amounts of other collateral sources such as life insurance, Worker's compensation and pension survivor benefits, the fund is in step with collateral source rules in the various jurisdictions that would be applicable in any litigation stemming from events of September 11th. However, I cannot recall ever reading about, nor do I believe I could find if I looked, any case where an award for personal injury and/or wrongful death was ever reduced by any charitable donations the plaintiff/victim had received. A fair reading of the statute, and I have read it, would be that the fund was intended to take the place of litigation. Variation from litigation norms were expressly provided, such as waiving the claimants burden of proving liability, however, the claimant must still prove their measure of damages. The language regarding reductions of awards for monies received by collateral sources would appear to be just the application of a collateral source rule. Since, as I stated above, I believe that, no jurisdiction that applies a collateral source rule to PI and wrongful death litigation, reduced the amount of damages by any charitable amounts received, an argument could be made that reduction of the



award by such amount is not authorized by the statute. Although a legitimate argument it is admittedly not the strongest of legal arguments, but in the court of public opinion (combined with the above) it is somewhat more compelling of an argument.

Lastly, and this is the more rhetorical and political of arguments, if the Government is going to reduce the awards by the amount of charity a victim receives, will they also be looking to reduce the awards by 1/3 since the victims who opt into the fund will be eligible for free legal service from ATLA, NYSLTA and ATLA-NJ through Trial Lawyers Care. Will the reduction for charitable awards include donation of services from others looking to help. It sounds ridiculous to me as well, but think of the potential sound bytes.

Thank you for your attention.

Sincerely,

Daniel R. Wasp



**W000645**

Monday, November 26, 2001 4:04 PM  
Public Comments of Cantor Fitzgerald L.P.

Per my discussion with \_\_\_\_\_, enclosed are the public comments of Cantor Fitzgerald L.P. in both WordPerfect and PDF formats. Please confirm receipt of same.

Thank you for your assistance.

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To:  
Kenneth L. Zwick  
Director, Office of Management Programs  
Civil Division  
U.S. Department of Justice  
Main Building, Room 3140  
950 Pennsylvania Avenue NW  
Washington, DC 20530

Re: Notice of Inquiry and Advance Notice of Rulemaking, September 11th Victim Compensation Fund of 2001, 28 CFR Part 104, CIV 104P, AG Order No. RIN: 1105-AA79

**PUBLIC COMMENT OF CANTOR FITZGERALD L.P. ON THE U.S. DEPARTMENT OF JUSTICE'S NOTICE OF INQUIRY AND ADVANCE NOTICE OF RULEMAKING REGARDING THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001**

Cantor Fitzgerald L.P., together with its affiliates, eSpeed, Inc. and TradeSpark L.P. (herein collectively referred to as "Cantor Fitzgerald") submit these comments in response to the Department's Notice of Inquiry. Cantor Fitzgerald is a financial services firm whose operating units are involved in a variety of market-based and software business initiatives. Cantor Fitzgerald is eager to be involved in assisting the Department in whatever way it can, and it appreciates the Department's prior efforts to let Cantor Fitzgerald participate in the process.

**I. CANTOR FITZGERALD'S INTEREST IN COMMENTING**

Cantor Fitzgerald occupied four floors at the top of One World Trade Center and, among the high-floor firms, was one of the trade center's oldest tenants. Not a single person who was in Cantor Fitzgerald's offices at the time of the attack survived. Several others who were not in the firm's offices, but were in the World Trade Center at the time of the attack, survived and have suffered debilitating physical injuries, including severe burns.

Out of the roughly 1,000 Cantor Fitzgerald employees who worked in One World Trade Center, 657 perished in the tragedy. Over a third of them had dependent children, most of whom are younger than 12 years of age. Over 40 Cantor Fitzgerald widows were expecting children at the time of the attack. In all, approximately 1,500 Cantor Fitzgerald children lost at least one parent.

For those of us at Cantor Fitzgerald who remain, the loss of so many friends and colleagues has been devastating. And there is no way that the families of those who were lost can ever be made truly whole.



For them, each "big day" each life event will be a reminder of all that they have lost which can never be recaptured. We at Cantor Fitzgerald, however, have committed ourselves and our company to ensuring that the families our lost colleagues left behind whose grief we share and who are members of our extended family will have fewer worries, and more opportunities for happiness in the future. With this goal foremost in our minds, we are committed to rebuilding Cantor Fitzgerald and its affiliates.

To achieve this end, Cantor Fitzgerald has voluntarily developed and is implementing the following plan, which it had no legal obligation to create:

- Discretionary Bonus Payments and Distributions - On October 22, Cantor Fitzgerald began distributing more than \$45 million in bonus payments and distributions to the estates of those lost on September 11. These payments were entirely discretionary and were voluntarily made by the firm in the absence of any legal obligation. The minimum payment will be \$5,000, and even the estates of employees who started with the firm as recently as September 10 will receive a payment.
- Voluntary Support - Cantor Fitzgerald L.P. is undertaking to distribute for the benefit of the affected families an amount equal to 25% of the partnership's profits that otherwise would have been distributed to the remaining partners for the next 5 years. These funds will be used to pay for 10 years of healthcare benefits to the families of our lost colleagues, which will cost an estimated \$70 million. The remainder of the funds will be distributed for the benefit of the families of the lost employees, and Cantor Fitzgerald will continue such distributions beyond 5 years, if necessary, until each family has received at least \$100,000 in cash.
- The Cantor Fitzgerald Relief Fund - Cantor Fitzgerald has established a separate charitable relief fund to which others may donate. The Relief Fund already has distributed approximately \$8 million, including at least \$5,000 to each Cantor family. The fund is a Delaware corporation and has been recognized exempt by the IRS. 100% of the money donated to the fund will go to charitable disbursements; Cantor Fitzgerald will bear the operating costs.
- Registry - Cantor Fitzgerald has established a registry for affected families to receive non-monetary gifts and services from people and companies who have contacted the company seeking to help affected families. This registry is administered by the staff of the Cantor Fitzgerald Relief Fund.
- Employee Assistance Program - Cantor Fitzgerald extended its Employee Assistance Program, which provides short-term counseling, to the families and friends of those lost on September 11.
- Other Voluntary Assistance - Cantor Fitzgerald will extend the period during which all outstanding eSpeed stock options held by affected employees may be exercised to up until the fifth anniversary of the date they were granted. The firm also will fully vest and deliver all shares of eSpeed restricted stock, subject to applicable withholding taxes. In addition, Cantor Fitzgerald has fully vested the matching employer contributions under the 401(k) account balances of all affected employees as of September 15, 2001.

This plan represents a substantial sacrifice for Cantor Fitzgerald at a time of economic hardship. Nevertheless, it would be a serious mistake to view the amounts Cantor Fitzgerald has committed to its families as compensation for their losses or as having a significant impact on their continuing financial hardships. Indeed, for Cantor Fitzgerald to give its families even \$100,000 each would cost over \$65 million, and that would not even begin to provide for these families' needs.

In issuing its Notice of Inquiry, the Department of Justice has asked numerous questions, including



whether voluntary payments, such as those outlined above, are "collateral sources" that should reduce the amount that victims' families may recover from the September 11th Victims' Compensation Fund of 2001.<sup>1</sup> Cantor Fitzgerald plainly has a tremendous interest in not having its families penalized for voluntary payments that the company has made to them even though such payments were not required by law or contract. It also has a strong interest in ensuring that the regulations ultimately promulgated by the Department fully achieve Congress's purpose of providing those families the option of full and fast compensation for the losses they have suffered.

## **II. THE DEPARTMENT SHOULD ISSUE RULES DECLARING THAT VOLUNTARY PAYMENTS, SUCH AS THOSE MADE BY CANTOR FITZGERALD, ARE NOT "COLLATERAL SOURCE PAYMENTS" THAT MAY BE DEDUCTED FROM FUND AWARDS**

Cantor Fitzgerald believes that the Department can and must promulgate regulations to clarify that private voluntary payments to victims whether made by employers, individuals or charitable entities are not "collateral source payments" within the meaning of the statute and should not be deducted from the amount of compensation the Special Master determines a claimant is entitled to receive. Such regulations would be in keeping with both the letter and spirit of the Fund, as well as the firmly established public policy of encouraging victim assistance and private charitable gifts and trusts.

In analyzing this issue, one must first recognize that the basic common law rule has long been that evidence demonstrating a plaintiff received money from collateral sources (such as insurance) could not be introduced by a defendant at trial.<sup>2</sup> One of the principal reasons for this rule was that society's interests were furthered by adopting a rule that encouraged individuals to plan for calamities and to assist victims.<sup>3</sup>

The "collateral source rule" has been limited by statute in many states, including New York,<sup>4</sup> so that defendants can offset their liability with certain kinds of payments the plaintiff has received. However, consistent with basic rules of statutory construction, those statutes generally have been narrowly construed, and their interpretation has been informed by the policies underlying the common law collateral source rule.<sup>5</sup>

### **A. Private Voluntary Assistance Is Not a "Collateral Source Payment" under the Language of the Statute**

Under the statute, the Special Master must reduce the amount of a claimant's compensation "by the amount of collateral source compensation the claimant has received or is entitled to receive as a result of the terrorist-related crashes of September 11, 2001."<sup>6</sup> In defining the term "collateral source," Congress gave examples that plainly evince its intent to encompass entitlements or obligations of a governmental or a contractual nature, such as "life insurance, pension funds, death benefits programs, and payments by Federal, State, or local governments."<sup>7</sup> Each of these examples implicates a legal obligation either as a result of a private contract or a governmental entitlement for an entity to pay the claimant a specific and ascertainable monetary benefit. This is consistent with the approach of other rules and statutes that modify the common law collateral source rule. For example, under New York's rule, payment cannot be set off against a plaintiff's damages unless the court finds that "the plaintiff is legally entitled to the continued receipt of such collateral source [payment], pursuant to contract or otherwise enforceable agreement, subject only to the continued payment of a premium and such other financial obligations as may be required by such agreement." (NY CPLR § 4545(c).) A voluntary payment, of course, is no such entitlement or obligation, regardless of whether it is made before or after a claimant files a claim.<sup>8</sup> Moreover, both of these statutory sections require a specific nexus between the entitlement (or



obligation) and the terrorist attack. (See Section 405(b)(6) (the payment or entitlement must be "as a result of the terrorist-related crashes"); Section 402(4) (citing as examples entitlements "related to the terrorist-related aircraft crashes of September 11, 2001").) Put differently, to be a "collateral source payment" under the statute, the obligation whether statutory or contractual must directly arise from the terrorist attack. Gratuitous payments to the families of September 11th victims have their genesis not in terrorist activity or even the fact of death, but rather arise from the familial, civic, religious, or humanitarian concerns of individuals and entities seeking to advance their own goals and objectives.

Courts that have addressed similar statutory schemes consistently have held that private voluntary contributions are not collateral source payments for the purpose of reducing a claimant's damage award. See, e.g., *Dewitz v. Nuestel*, 508 N.W.2d 334, 340-41 (N.D. 1993) (cash gift from church group to accident victim was not subject to statute requiring reduction for payments from "collateral sources"); *Longman v. Jasiek*, 414 N.E.2d 520, 524-25 (Ill. App. 1980) (payments to cover medical expenses were not subject to statute requiring reduction for collateral source payments).

In *Longman*, for example, the court addressed the propriety of offsetting a personal injury award by the amount of cash payments given to the plaintiff. The Illinois statute under review broadly defined collateral source payments to include all injury-related expenses "which have been paid, or which have become payable to the injured person by any other person, corporation, insurance company, or fund in relation to a particular injury." *Id.* (quoting Ill. Rev. Stat. 1979, ch. 110, ¶ 68.4). In holding that the cash assistance was not a collateral source payment under the statute, the court explained that the "by reason of" requirement implied a legal obligation that sprang from the specific injury:

It is clear from the statute's language that the legislative intent was to reduce judgments only as a result of moneys "paid" or "payable" by reason of a legal obligation "in relation to a particular injury."

*Longman*, 414 N.E.2d at 525 (emphasis added). The *Longman* court concluded that because there is no legal obligation to render voluntary cash assistance, such payments are not "collateral sources" under the statute and should not be deducted from the damage award. *Id.*

Similarly, in *Dewitz*, the North Dakota Supreme Court was called upon to determine whether a statute mandating the reduction of economic damage awards by all collateral source payments applied to voluntary contributions received by the victim. *Dewitz*, 508 N.W.2d at 340. There, the statute expansively defined the term "collateral source" to include "any sum from any other source paid or to be paid to cover an economic loss which need not be repaid by the party recovering economic damages." *Id.* (quoting N.D. Cent. Code § 32-03.2-06) (emphasis added). Notwithstanding the term's broad statutory definition, the *Dewitz* court concluded that voluntary financial assistance is not a "collateral source" payment because it is not paid on account of a legal obligation triggered by the injury, but rather out of "a sense of community." *Id.*

With respect to the Fund, the language employed by Congress regarding collateral source payments is the functional equivalent of the statutory language at issue in *Longman* and *Dewitz*. The plain language of the statute and traditional principles of statutory construction compel the conclusion that an employer's voluntary payments to victims' families are not "collateral source payments" under the statute as Congress wrote it. The Department's rules implementing the Fund should make this fact explicit.

Any other approach would mire the Special Master in determining what payments claimants had received and whether they were "collateral source payments." This would be an absurd and fruitless inquiry. For example, is an emergency loan from a family member a "collateral source payment"? How about a "gift" of the same amount? And what if it comes from a private charity or an employer? Are



toys, meals or other non-monetary gifts from concerned individuals "collateral source payments"? Pro bono assistance from various professionals? And are we really going to impose on claimants an obligation to keep track of such things?

As Congress wrote it, the statute gives the Department the only workable, bright line rule: a collateral source payment includes only payments to a claimant who had a legal entitlement to the payment by reason of a preexisting legal obligation that was triggered as a direct result of the terrorist attack of September 11th.

### **B. The Statute's Structure Reinforces the Conclusion that Congress Did Not Intend to Have the Special Master Deduct Voluntary Payments from the Amount of Compensation He or She Awards Victims**

Congress included the Fund as part of a larger statutory scheme to aid the nation's airlines. As part of the overall statutory scheme, the airlines' liability is capped, claimants are precluded from suing the airlines, and the government agrees to pay (through the Fund) for the damages suffered by those who were personally injured in the September 11th tragedy without any determination of liability.

If the Department were to issue a regulation requiring claimants' recoveries to be reduced by the amount of all voluntary assistance they received, the net effect would be to have civic-, humanitarian-, and charitably-minded citizens and entities rather than the government funding the bailout of the nations' airlines. Cantor Fitzgerald's decision to distribute 25% of the profits that would have been distributed to its partners over the next five years for the benefit of the families of its deceased employees would, in effect, be converted into a commitment to give one-fourth of those profits to the airlines, flowing through the government. That cannot have been the intention of Congress.

Indeed, this conclusion is bolstered by the fact that the only mention of private voluntary assistance in the statute is Section 406(c), which creates a mechanism whereby individuals, businesses and other entities may contribute money directly to the Fund. If the Department were to require the Special Master to reduce a claimant's compensation award by deducting private contributions the claimant received, it would render all private contributions to claimants de facto payments into the Fund. If, in writing the definition of "collateral source payments," Congress had intended to appropriate all private assistance into the government's treasury, then it would have been wholly unnecessary to create a means for civic-, humanitarian-, and charitably-minded citizens and entities to give money to the Fund at all.

One of the most basic principles of statutory construction is that statutes should be read so that "no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless, or nugatory." 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:03 (6th ed. 2000). If the Department were to issue regulations allowing or requiring the Special Master to offset a claimant's compensation award by the amount of private voluntary payments the claimant has received, it would be violating this basic rule.

### **C. The Legislative History Makes Clear that Congress Had No Intention of Depriving Claimants of the Comfort of Private Assistance**

The legislative history behind the Fund's creation further makes clear that Congress never intended to include private voluntary contributions within the definition of collateral sources. Specifically, in explaining how the Special Master would fix compensation under the statute, Senator Leahy made no mention of deducting private contributions from a victim's compensation. Rather, he explained: "When making a determination, the Special Master will take into account any life insurance, death benefits, or other government payment received by the victims and their families."<sup>9</sup> Senator Leahy's omission of



private voluntary assistance from his explanation of the Fund's offset provision is particularly telling in light of the fact that the Senate had just addressed the importance of private contributions in the wake of the September 11th tragedies.<sup>10</sup>

As the Department recognized in its Notice of Inquiry, there are "strong policy reasons for excluding charitable contributions from the definition of 'collateral sources.'" <sup>11</sup> Indeed, it is the fixed policy of the law to encourage such charitable gifts, trusts and other voluntary assistance whenever possible.<sup>12</sup> Thus, between the two possible outcomes, the one that encourages such voluntary payments should be adopted.<sup>13</sup>

Congress expressly recognized the vital and independent role that private contributions have played in the aftermath of the September 11th tragedies. As Senator Hatch explained at the Senate hearings addressing the Fund: Unfortunately, the Government cannot do everything. What pleases me most in the aftermath of this tragedy is the extent to which the communities across the country have reached out to help their neighbors .... There are many wonderful charitable organizations such as the Red Cross and the Salvation Army who responded immediately to assist victims of the terrorist attack. Donations have been pouring in from across the country to assist the victims. It warms my heart and reminds me of the Thousand Points of Light that President Bush's father often referenced regarding the generous nature of our communities. Because of all this, I am confident our country will come out of this tragedy stronger. 147 Cong. Rec. S9589, 9595 (daily ed. Sept. 21, 2001) (statement of Sen. Hatch).

Senator Hatch's comments highlight the important fact that the September 11th relief efforts require the continuing support of private individuals, employers, and charitable organizations. Unfortunately, any regulatory scheme that requires (or allows) the Special Master to deduct private voluntary contributions from a claimant's recovery would create numerous powerful disincentives for employers and charitably-minded people and entities to continue contributing to aid victims of the September 11th tragedies. Most importantly, all who made such contributions would effectively be giving their money to the federal government. Private charities, such as The Cantor Fitzgerald Relief Fund, would be severely hampered in their efforts to raise additional funds for the victims because would-be donors would no longer see their individual contributions as necessary and could not target their donations to address specific needs, such as college tuition. See *Arambula*, 72 Cal.App.4th at 588 (recognizing that "[c]haritable contributions are primarily motivated by the intended use to which donations are put"). And if regulations required claimants' awards to be reduced by the charitable assistance they had received up to the date they filed their claim, private charities and donors would have the incentive to delay distribution of their contributions until after the claimants had been paid by the Fund. Similarly, some employers would find it difficult to justify continued voluntary payments when the only effect on the employees' families would be a reduction in the amount of compensation they would receive from the Fund. That is not what Congress intended in creating the Fund.

Even after creating the Fund, Congress has continued to stress the importance of private assistance to the victims of September 11th, at the same time emphasizing the necessity of honoring the intent of the donors. During the recent controversy surrounding the Red Cross Liberty Disaster Fund, members of Congress sharply criticized a decision later reversed to reserve part of that fund to aid victims of future terrorist incidents. The Subcommittee members repeatedly stated their concern that this would frustrate the intent of those who made the voluntary payments. See *Charitable Contributions for September 11: Protecting Against Fraud, Waste, and Abuse: Hearing Before the Subcommittee on Oversight and Investigation of the House Committee on Energy and Commerce*, 107th Cong. (Nov. 6, 2001). In light of Congress's continuing concern about the availability of private assistance and the intentions of the donors, it would be ironic, to say the least, if the Department issued rules that thwarted donor intent by effectively rerouting all private contributions into the federal government's treasury.



In sum, Congress recognized the importance of continued private financial assistance to the victims of the September 11th attacks. In setting up the Fund, it even created a way in which individuals could give directly to the Fund. Nowhere did Congress indicate either in the statute or the legislative history that it intended to nationalize all private voluntary payments made to the victims by reducing the amount of compensation victims could receive from the Fund. The plain language of the statute, legislative history, fundamental principles of statutory construction, case law interpreting similar statutes, and basic public policy all compel the conclusion that the Department should not issue regulations allowing or requiring the Special Master to reduce a claimant's compensation by the amount of any private voluntary payments he or she has received. Instead, the Department's regulations must make clear that such payments, especially those made by employers, must not be deducted from amounts victims may receive from the Fund.

### **III. THE RULES MUST ADVANCE THE STATUTE'S PRIMARY GOALS OF PROVIDING FULL COMPENSATION TO ALL CLAIMANTS QUICKLY AND GIVING VICTIMS ADEQUATE INFORMATION TO DECIDE WHETHER TO FILE A CLAIM**

The Department has asked for guidance as to how the claim process may be implemented. Plainly, there are lessons to be learned from the experience gained from claims programs in mass tort settlements. There are, however, important differences between the Fund and the typical mass tort settlement, and these differences counsel for some restraint in importing the procedures of mass tort settlements into the regulations implementing the Fund. For example, in most mass tort settlements, the amount of money to be distributed among the claimants is limited. The limited nature of the settlement fund often has certain practical and structural effects on the claim process. For instance, matrices are sometimes created that cap an individual claimant's recovery based on certain qualifying characteristics. Also, evidentiary submissions in settlements may be challenged in procedures more reminiscent of an adversarial process.

The Fund created by Congress has no such artificial limitation on amount. Rather, it is designed to fully and quickly compensate claimants for each of the elements of damages that they otherwise would be able to claim in a court of law, with the exception of punitive damages. Indeed, the whole purpose of the Fund is to persuade victims of the September 11th tragedy to choose to be compensated by the Fund's expedited process rather than in interminable lawsuits against the airlines and others. Of course, if those who have suffered large financial losses cannot recoup them from the Fund because their recovery is capped, they will be more likely to pursue litigation.

Certain maxims follow naturally from the Fund's purpose of providing full compensation to victims quickly, and thereby persuading them to forego lawsuits:

- If victims are to be persuaded to file claims with the Fund rather than bring lawsuits, they must be assured that the amount they will receive will approximate the amount of damages they would be entitled to under the law at a jury trial.
- Because they give up the right to sue the moment they file a claim, victims will not be able to decide whether to file claims under the statute until the rules are really final and there is some tangible demonstration that claimants actually will receive full compensation from the Special Master.
- Because the overarching purpose of the statute is compensation, the rules should not be drafted in a way that persons who are not awarded compensation from the Fund should be deemed to be "claimants" who have waived their right to sue.



### **A. Certainty and Thus Quick Issuance of Truly Final Rules Is Key To Successfully Implementing Congress's Intent**

For victims of the September 11th tragedy, the clock is ticking, and has been for some time. The families have bills that must be paid and lives that have been put on hold in the uncertainty that has followed September 11th. Moreover, the statute of limitations on the filing of wrongful death and survival actions which in New York is two years<sup>14</sup> continues to run. Congress understood these tremendous pressures when it gave the Department the task of having the Fund's claims process up and running by December 21.

The Notice of Inquiry states that the Department is considering issuing on December 21 "interim final" rules that would be subject to another round of review and comment. (Notice of Inquiry at 5.) The Department also seeks comment on whether "good cause" exists to waive the typical 30-day period between the promulgation of rules and their effective date. (Id. at 7.)

Cantor Fitzgerald respectfully submits that such "good cause" is evidenced by the fact that Congress, in requiring the Attorney General to promulgate regulations to implement the Fund's claims process "[n]ot later than 90 days after the date of enactment of this Act," clearly understood that time is of the essence in getting the claims process up and running. Another round of public comment after publishing "interim final rules" on December 21 would only further delay the date when families could have full information in order to decide whether to file a claim against the Fund.

Assuming that (i) the Department issues "interim rules" that are amended, subject to public comments, and become final sometime in late January, (ii) some families file claims immediately thereafter, and (iii) the Special Master takes the 120 days he or she is allowed by statute to carefully evaluate and determine the claims, it would be sometime in June before victims' families would begin to learn the kind of information that many will want to know before deciding whether to file a claim (e.g., exactly how the process will work and how much families will actually be paid). As the Department has explicitly recognized, without certainty as to how the compensation program will work, "some claimants may be reluctant to commit themselves to the Fund as an alternative to tort awards." (Notice of Inquiry at 9.) Moreover, the media have noted that many lawyers who are advising families will want to see the range of awards the Special Master actually makes before counseling their clients whether to submit a claim or file a lawsuit.<sup>15</sup>

Cantor Fitzgerald recognizes the difficulty of fashioning a final claims process out of whole cloth in the time called for by Congress. We have received numerous inquiries from families regarding how the Fund's claim process will proceed and how quickly they could receive money from the Fund. If the purposes of the statute are to be served, the Department must do everything within its power to create certainty with respect to the claim process as soon as possible. Any delay in the issuance of truly final regulations delays the claim process for everyone and shortens the amount of time that families have to deliberate about whether to submit a claim or file a lawsuit.

Congress intended families to have two years in which to decide whether to file a claim against the Fund. Section 405(a)(3). However, the two year statute of limitations on filing a lawsuit began running on September 11th. Thus, victims' families must decide whether to file a lawsuit by September 2003. The longer families are deprived of information about how the Fund actually will make awards and the adequacy of those awards, the shorter the time period in which they can make a reasoned decision whether to participate in the Fund or file a lawsuit.

### **B. All Claimants Must Be Fully Compensated for Damages Allowed By Law, Just as They Would**



## Be at a Trial

The Department has asked whether the Special Master should use "schedules" to enable him or her to award compensation within 120 days of a claim being filed, as Congress required in the statute. (Notice of Inquiry at 15.) Cantor Fitzgerald's suggestions about how schedules may be used beneficially are detailed in subsection C below. In this subsection, however, we address the suggestion made by some that such "schedules" should be used as a mechanism to artificially limit the size of damage awards or in some way cap recovery for some categories of September 11th victims. Such suggestions are contrary to the Fund's very purpose. The Fund was not created to measure the value of the victims' lives. Indeed, no one person's life has any more inherent value than another person's.

Rather, the Fund was established to fully compensate decedents' survivors for the elements of damages they could claim in wrongful death and survival actions under state law.<sup>16</sup> State tort law has long held that those damages, both economic and noneconomic, are based on the individual circumstances of the decedent and the survivors. The decedents each earned different incomes and funded different activities for their families. State wrongful death and survival statutes reflect those differences, and under those statutes, the survivors' economic losses are determined, in part, by measuring the lost financial support the decedent would have provided the survivors based, *inter alia*, on his or her projected income. The Fund, in adopting these basic definitions of economic and noneconomic losses that reflect well-settled tort law, ensures that the victims of the September 11th tragedy are treated no differently than other tort victims.

For most of the Cantor Fitzgerald families, the deceased was the primary source of the family's income. These families made financial, life and social commitments based on the assumption that the deceased would continue to contribute to the family's income. They purchased homes, automobiles, and other things that now without that source of income they are in danger of losing. Many of the families have children who will hope to attend college someday, and undergraduate degrees alone may cost much more than \$100,000 per student. Moreover, many of those who died were supporting not only their immediate family, but parents as well.

Mandatory schedules are not the only mechanism that some have suggested to artificially limit the recovery of September 11th victims. Some have suggested that a decedent's presumed work life should be reduced where the decedent was involved in certain financial professions. Any presumption that people who worked at Cantor Fitzgerald would have retired before the standard retirement age would not only be arbitrary, it would be without factual support in many, if not most, cases. Moreover, many of the markets in which the firm's employees worked were simply too new to make any reasoned assumptions about retirement age in those businesses. The statute, in requiring the Special Master to look at claimants' individual circumstances, preserves each claimant's right to present evidence about the decedent's actual intentions regarding retirement. Employing any mechanism to artificially limit the amount any victim of the September 11th tragedy may recover from the Fund including schedules and special presumptions about retirement age is antithetical to both the purpose and the language of the statute.

Congress included the Fund and the cap on airline liability in the "Air Transportation Safety and Stabilization Act" to provide an alternative to litigation against the airlines that was designed to avert the possible bankrupting of airlines by litigation and the subsequent need for a government bailout. The goal was to encourage victims to obtain their compensation from the Fund, rather than filing lawsuits. That goal would be thwarted by any regulation that artificially limited the amount claimants could recover from the Fund or undercompensated them for their damages. Indeed, such a regulation undoubtedly would encourage those with the largest economic losses to file suit.



The language of the statute reflects Congress's intention. The statute expressly states that the Fund's purpose is victim compensation.<sup>17</sup> Nowhere does it mention or in any way authorize payment of anything less than a claimant's full damages. Rather, under the statute, compensation broadly includes "any possible economic and noneconomic losses that the claimant suffered as a result of [the terrorist attacks]."<sup>18</sup> The statute's definition of "economic loss" leaves no doubt that the fund is designed to fully and completely compensate a claimant for at least the same pecuniary losses that he or she could recover under state law. (See Section 402 (5) (economic loss is "any pecuniary loss . . . to the extent recovery for such loss is allowed under applicable State law").)<sup>19</sup>

State law provides three primary types of pecuniary damages in a wrongful death action: lost "support" or earnings, lost services, and lost inheritance. See, e.g., EPTL § 5-4.3.<sup>20</sup> Many courts, in calculating lost support under the wrongful death statute, look to, *inter alia*, the decedent's gross income at the time of death, including yearly bonuses and profit sharing plans.<sup>21</sup> In calculating the decedent's gross income, therefore, the Special Master must not artificially constrain that figure to just "salary," but must take into account the value of the stock options, participation in partnership investment, and deferred compensation awards the decedent earned. Although stock options are not taxable income when received, they clearly have a value. The Special Master could use recognized formulae, such as a Black-Scholes analysis, to value such options at the time they were granted. Similarly, Cantor Fitzgerald awarded certain individuals the opportunity to participate in partnership investments including providing them loan guarantees which also were awarded as a result of the decedents' work for the company. The value of these opportunities also plainly comprise lost income for purposes of measuring lost support. Moreover, Cantor Fitzgerald granted certain individuals other partnership interests that should be factored into the lost support calculation.

Congress, in mandating that claimants could recover the economic damages that are allowed under state law, did not authorize the Special Master to discriminate against groups of victims by issuing awards for less than their actual damages. Rather, it bound the Special Master to take into account, *inter alia*, the economic damages the claimant is entitled to under state law when determining the amount of compensation from the Fund. The Department should adopt no rule or schedule that would impede the Special Master from awarding full damages to any victim of the September 11th tragedy.

### **C. Schedules or Matrices May Be Useful in Establishing Minimum Compensation Amounts and Giving Victims Information to Determine Whether to Make a Claim**

The Department has requested comment on whether the publication of schedules would assist victims in determining whether to file a claim. (Notice of Inquiry at 15.) Matrices or grids are often used in mass tort settlements, and certainly the publication of such tools would assist victims in evaluating whether to file a claim. Such matrices use certain characteristics of the victim (e.g., age, medical condition) to establish individual recoveries. It is important to reiterate, however, that although matrices in mass tort cases sometimes are used to fix the outer limits of a range of recovery because of the overall limitations on the settlement fund no schedule published by the Department should fix a "cap" on the amount a claimant may recover.

That is not to say that a schedule would be of no use. Indeed, Cantor Fitzgerald is aware of many families who likely would find it extremely burdensome and emotionally exhausting to undertake the effort to marshal extensive proof regarding each of the elements of their damages. Particularly where the decedent's income was not highly variable and he or she was fully established in a profession, it may be possible to develop a formula that would reasonably approximate the claimant's pecuniary damages without the need for extensive evidentiary proofs. If the Department were to develop such a formula or



matrix that a claimant could elect to recover under using minimal evidentiary proof without compromising the right of other claimants to elect a more fulsome evidentiary proceeding where they could submit more extensive proof of their pecuniary damages the Department could achieve many of the benefits Congress had in mind when it created the Fund. The key to the utility of any such matrix is that its use is not mandatory and does not forcibly cap a claimant's recovery.

To the extent the Department is considering developing a schedule for elements of claimants' and decedents' noneconomic losses, such as pain and suffering, that schedule also should be an elective schedule, not a mandatory one. The statute clearly preserves the right of claimants to ask the Special Master to look at their individual circumstances in determining their losses, both economic and noneconomic. Furthermore, if the Department uses matrices or schedules as an option that claimants can elect, they should use separate forms for economic loss and noneconomic loss. It is clearly conceivable that a claimant might want to elect a simplified process for compensation of one form of damages while preserving his or her right to pursue a full hearing on the other form of damages.

Indeed, if the Department developed an elective formula or schedule, the Department should consider paying claimants who elect such a process on an accelerated basis. If the process required the claimant who elected to be compensated from the schedule to submit a simplified "EZ" form including certain basic details about the survivors along with certain readily-available proofs of the decedent's death and full gross income (possibly through tax records or employment records), there would be no need for the Department to take 120 days to decide the claim, nor 20 days to pay the award listed in the matrix or schedule. An added benefit of this approach would be that claimants would not be required to use an economist to prove pecuniary damages.

Elective schedules and accelerated compensation processes may also be used for those who survived the September 11th tragedy, but suffered physical injuries. Numerous resource materials exist to determine average compensation for various physical injuries, such as severe burns, that could be used to create a minimum compensable amount for physical injuries. As mentioned above, however, such schedules must not be used to artificially limit a claimant from recovering his or her actual damages or deprive him or her of a more comprehensive evidentiary hearing.

#### **D. The Regulations Can Make It Easier For Claimants To Prove Their Claims and Receive Information**

Numerous mass tort settlements have employed procedures designed to make it easier for claimants to file claims without the necessity of consulting a lawyer. For example, in the Dalkon Shield Claimants Trust, the Trust created user-friendly claim forms that were tested on unrepresented claimants from a variety of socioeconomic levels before they were finalized.<sup>22</sup> Additionally, the Trust had reviewers who would assist claimants in ensuring that their forms were complete and in obtaining medical records.<sup>23</sup> Similarly, in the diet drug settlement, claimants could present their records directly or authorize settlement administrators to obtain them.<sup>24</sup>

The Department has asked whether there are actions that could be taken before a claim is deemed complete or filed. (Notice of Inquiry at 10.) Cantor Fitzgerald respectfully suggests that the Department should consider employing "reviewers" or "administrators" who would be empowered to review a claim and obtain basic evidence on behalf of the claimant. In making a claim against the Fund, the claimant could sign an authorization that the "reviewer" or "administrator" could use to gather necessary records. For example, a "reviewer" who had a signed authorization could direct employers to forward directly to the Department basic employment records, which would go a long way in helping to establish lost earnings.



Certain mass tort settlements also employed communications strategies that the Department may wish to consider. In the Diet Drug litigation, class members received a "plain English" brochure describing the claim process, a more formal "official notice" with rules governing the process, and various color-coded forms, including a form for an accelerated payment option.<sup>25</sup> Moreover, the Dalkon Shield Claimants Trust which had a goal of allowing claimants to participate in the claim process without the necessity of hiring a lawyer conducted informational meetings for unrepresented claimants in seven cities.<sup>26</sup>

Once the claim process has begun and the Special Master begins to make awards, it is important for potential claimants to receive periodic information about the amount of the awards and the progress of the claim process, particularly where as here the act of filing a claim precludes the victim from filing a lawsuit. During the conduct of the claim process, the Dalkon Shield Claimants Trust published a "plain English" newsletter for claimants, as well as a newsletter for lawyers entitled "Attorney Update."<sup>27</sup> The Department should consider issuing similar periodic updates for victims and attorneys.

Employers are also an important resource for all communications with potential claimants. Many have established communications networks for use by the families of their employees, which also could be used to disseminate details about the Fund's claim process and progress. For example, Cantor Fitzgerald has an official website for its family at <http://www.cantorusa.com>, and it periodically conducts meetings with the families.

## **CONCLUSION**

Cantor Fitzgerald appreciates the opportunity to provide comment to the Department on the various questions presented in the Notice of Inquiry, and it comprehends the difficulty the Department faces in promulgating rules and implementing the claim process by the deadline imposed by Congress. Cantor Fitzgerald stands ready to assist the Department in ensuring that the families of its lost employees, as well as its injured surviving employees, are able to look to the Fund for full and fast compensation for the economic and noneconomic damages they have suffered as a result of the September 11th terrorist attacks.

Respectfully submitted,

Comment By:  
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New York, NY

1. The Fund was established by Congress in the Air Transportation Safety & System Stabilization Act, PL 107-42 § 403 (to be codified at 49 U.S.C. § 40101 et seq. (2001)). This statute is referred to herein as "the Statute" or "the Act."

2. See, e.g., *Oden v. Chemung Co. Indus. Dev. Agency*, 87 N.Y.2d 81, 85 (1995).

3. See, e.g., *Arambula v. Wells*, 72 Cal. App. 4th 1006, 1012 (1999).

4. See NY CPLR § 4545.

5. See, e.g., *Oden*, 87 N.Y.2d at 86 ("We note . . . that CPLR 4545(c) is a statute enacted in derogation of the common law and, as such, is to be strictly construed. . . . Further, it is to be construed in the narrowest sense that its words and underlying purposes permit, since the 'rules of the common law must be held no further abrogated than the clear import of the language used in the statute absolutely requires.'").

6. Section 405(b)(6) (emphasis added).



7. Section 402(4).

8. The requirement that a "collateral source payment" be a payment that the claimant is entitled to receive as a result of the payor's legal obligation is further supported by the statute's neutrality as to when collateral source payments are received. By requiring a reduction for such payments that claimants are "entitled to receive" in the future, Congress highlighted the fact that collateral source payments necessarily arise out of preexisting entitlements. It would make no sense to interpret the statute so that all monies received by a claimant in the past were deductible (even if they were gifts), but the only future payments deductible would be those to which the claimant had an entitlement. The statute's definition demonstrates that the very nature of what makes a payment a "collateral source payment" is the fact that it results from a legal entitlement. This is true for past payments, as well as future ones. Thus, even if a claimant already has received a gift or other voluntary payment by the time he or she files a claim, those funds are not "collateral source payments" that have been "received" under the plain meaning of the statute.

9. 147 Cong. Rec. S9589, 9599 (daily ed. Sept. 21, 2001) (statement of Sen. Patrick Leahy).

10. *Id.* at 9595 (statement of Sen. Orrin Hatch) ("[Charitable] donations have been pouring in from across the country to assist the victims.").

11. Notice of Inquiry at 16.

12. See *Arambula v. Wells*, 72 Cal. App. 4th 1006, 1012-13 (Cal. Ct. App. 1999) ("When called upon to construe private humanitarianism, 'courts do not now adopt an antagonistic spirit toward [a donor's] charitable intent ... .'"); *In re Price's Will*, 264 A.D. 2d 29, 32 (N.Y. App. Div.), *aff'd*, 46 N.E. 354 (N.Y. 1942) ("Charitable gifts and trusts are of ancient origin [and] are favorites of courts of equity ... .").

13. *Id.*

14. EPTL 5-4.1.

15. See, e.g., Bob Van Voris, *Details of Federal Airline Bailout Package Still Uncertain*, N.Y.L.J. at 5 (Oct. 4, 2001) ("Once a claimant chooses either to file an administrative claim or sue in court, there is no turning back. . . . As a result, many lawyers plan to wait and see how the process works and learn whether the special master is generous or stingy with the government's money before making the call.").

16. State wrongful death and survival statutes share the same purpose of compensating for damages:

Clearly, New York's wrongful death statute was not intended to compensate distributees for the value of the decedent's life. Instead, the statute authorizes an award of "fair and just compensation" to the decedent's beneficiaries for their own pecuniary injuries, their personal loss of support or voluntary assistance, probable inheritance, services and the parental guidance that the decedent otherwise would have provided.

Lee S. Kreindler, et al., *New York Law of Torts* § 15.19 at 364 (West 1997).

17. Section 403.

18. Section 405(a)(2)(B)(ii).

19. Moreover, the statute defines "noneconomic losses" broadly and does not limit them to those recoverable under state law. (See Section 402 (7) (defining the term to mean "losses for physical and emotional pain, suffering, inconvenience . . . loss of society and companionship, loss of consortium . . . and all other nonpecuniary losses of any kind or nature"). This represents a Congressional determination that even where a particular state's law would not allow for recovery of a particular element of nonpecuniary damage, such as loss of consortium, the victims of the September 11th tragedy will be compensated for such loss.

20. See also Lee S. Kreindler, et al., *New York Law of Torts* § 15.13 at 352 (West 1997) ("The pecuniary injuries suffered are personal to the statutory distributees and limited to the loss of future voluntary assistance, possible inheritance, loss of services and, if applicable, parental guidance.").

21. See, e.g., *Johnson v. Manhattan & Bronx Surface Transit Operating Auth.*, 71 N.Y.2d 198, 203-04 (1988).

22. See Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 Ford. I. Rev. 617, 639



(1992).

23. Id. See also Georgene M. Vairo, Georgine, the Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution, 31 Loy. L.A. L. Rev. 79, 131-32 (1997).

24. See In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation, 2000 WL 1222042 at \*24 (Aug. 28, 2000).

25. Id. at \*37.

26. See Vairo, Paradigm Lost (or Found)?, 61 Ford. L. Rev. at 640.

27. Id.

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**W000413**

Monday, November 19, 2001 8:04 PM

Comments on Notice of Inquiry and Advance Notice of Rulemaking

I am attaching comments as **General Counsel of Keefe, Bruyette & Woods.****Attachment 1:**

Kenneth L. Zwick  
Director  
Office of Management Programs  
Civil Division  
U.S. Department of Justice  
950 Pennsylvania Avenue  
Washington, D.C. 20530

Via e-mail

Dear Mr. Zwick:

I am the General Counsel of Keefe, Bruyette & Woods, Inc., also known as KBW. Our main offices were located on the 88th and 89th floors of Two World Trade Center in New York. KBW is a full service broker dealer that, prior to September 11, 2001, had approximately 175 employees in New York and an additional 50 employees in six smaller satellite offices throughout the country.

KBW lost 67 employees in the terrorist attack. Before the airplane crashed into Two World Trade Center, approximately 40 employees who had been in the office had left the building. No KBW employees on the 88th and 89th floors at the time of this second crash survived. At this time, only eight of the KBW victims have been found and positively identified.

Of these victims, 33 were married and 28 had children. In some cases, victims also provide some or all of the support to their parents or other family members. There were also some employees who were engaged to be married. Ages of victims ranged from 23 years old to 77 years old. Seventeen were in their 20's; thirty-one were in their 30's; thirteen were in their 40's; four were in their 50's; one was in their 60's; and one was in their 70's. The victim's annual compensation ranged from the low five figures into seven figures. The job descriptions of our victims covered the full range of employees, from Chairman to receptionist. Except for those lost, only one KBW employee was physically injured in the immediate aftermath of the attack.

Since the September 11 attacks, KBW has been communicating with every single victim family through a "Shepard's Program." Each victim's family has been assigned to a surviving KBW employee. The KBW employee serves as a communication link to the family. Through this program, KBW has become aware of the broad spectrum of concerns and difficulties being faced by those close to the victims. A significant concern for most families is how to deal with the economic impact of losing a key earner in the family.

The clear intent of the Congress in adopting the September 11th Victim Compensation Fund of 2001 (the "Fund" or the "Victims Compensation Fund") is to address, in a full, fair and prompt manner, the consequences that will be faced by persons injured and killed in the attacks and their families. As part of



the "Air Transportation Safety and System Stabilization Act" (the "Act") this Fund is intended to provide a meaningful alternative for all such victims to litigation of tort claims against the airlines and others.

The limitations on liability contained in Section 408 of the Act were clearly designed to limit the attractiveness of conventional litigation against the airlines. The recent extension in the bills passed by the House and Senate of the limitations on liability to other potential defendants makes conventional recovery for losses through litigation an even more unattractive alternative for victims and their families. It would be compounding a tragedy for these persons if, in light of these unprecedented limitations on liability, the Victims Compensation Fund is not administered in a manner designed to afford a fair award of benefits to compensate for losses suffered by these persons.

We strongly believe that in order to accomplish this goal, any regulations implemented under the Act and the administration of the Fund by the Special Master must fairly compensate for the losses faced at all age, job description or compensation levels. There should be no arbitrary limitations or assumptions that would limit the ability of claimants to present all appropriate evidence to establish economic and non-economic loss. If this is not done, the Fund will then only be fair to the limited number of persons whose claims will be small enough that they may feel fairly treated. It will also, under such a scenario, become an inadequate refuge for those so desperate for a "quick" payout, regardless of the fairness, that they will end up being short-changed for their true losses. Others will face the choice of inadequate awards under the Fund or pursue protracted litigation where damages are limited to insurance coverage the defendant had in place, even if inadequate.

We believe many victims and their families would embrace a fair and simple claims process that would provide economic security, allowing them to move on with their lives. For many of these persons, submission of claims solely on paper, without hearings, may be appropriate. Some families, either because they believe they will receive a higher amount by submitting substantial expert and other testimony at a hearing before the Special Master or in conventional litigation, will not take advantage of such a streamlined process.

Because of these potentially different approaches, we believe that the regulations should envision a bifurcated claims process. In one, a simplified claim process, although a pure "formula" may not be possible, the end result of filing a claim should be fairly obvious. Even such an approach would have to allow for presentation by the claimant, and take account of, individual special circumstances. For example, at KBW, equity ownership represented a significant economic benefit for employee shareholders. It would be unfair if a simplified process did not allow for some "proof" of economic loss associated with current and potential future equity ownership. This simplified claims process is more fully discussed below under Topic #4.

In a second, more complex claims process, the regulations would provide for an evidentiary and hearing process which is much like the damages phase of a conventional tort case. Obviously, if neither of these alternatives is acceptable, a victim's representative may pursue conventional litigation, cognizant of the limitations on liability and venue contained in Section 408 of the Air Transportation Safety and System Stabilization Act.

The remainder of this comment letter will address certain specific questions raised in Notice of Inquiry and Advance Notice of Rule Making (the "Notice of Rulemaking") of the Department of Justice published on November 5, 2001. The underlined captions below refer to captions where specific issues have been raised in the Notice of Rule Making.

#### **General approach to regulations that must be promulgated by December 21, 2001.**



**f) Issues relating to the rules to be promulgated by December 21, 2001.**

**Scope of Regulations.** In light of the extensive waiver of rights for those who make claims under the Victims Compensation Fund, we believe the rules adopted should be extremely comprehensive. If rules are vague or incomplete, many potential claimants may delay filing claims. This may also encourage claimants to pursue conventional litigation, which is clearly not the intent of the Act. In addition, such an incomplete set of rules may leave open important threshold questions for potential claimants. For example, potential claimants will need clear guidance on the scope and application of the definition of collateral source in assessing whether to seek benefits under the Act. Charities, employers, and other potential sources of support to victims will also benefit from clarity on this point in making gifts and structuring survivors benefits. This is discussed in greater detail under Topic #6, below.

The Act appears to provide for claims to be made solely by the victim or the victims representative. However, the Act appears to call for reduction of awards to reflect collateral sources properly paid to persons other than a victim or their estate. This opens the question of whether the personal representative or victim should also allege ancillary claims, such as family claims, against the Fund. If only victim and estate claims are permitted, the litigation waiver should only apply to the victim or victim's estate. If family claims, such as, loss of consortium, loss of parental guidance and comfort or intentional infliction of emotional distress, are allowed, the waiver of rights to pursue civil litigation may also cover these persons. There should be no doubt as to the scope of potential claims and the extent of the waiver.

**Topics #1 & 2: The forms to be used in submitting claims under this program and the information to be included on the claims form.**

Consistent with the bifurcated approach discussed above, a simplified application form should be made available for the simple claims process. This form should be available for any size of benefit claim and should not be limited to claims below a maximum dollar amount. Even large claims may be efficiently handled through a fair simplified application process.

Even such a simple claims form will require fairly detailed information (some of which may best be provided in the form of attachments). Some of the most important information would include the following:

- \* Personal information about the victim
- \* A description of injuries, if the victim has been injured (which may be in the form of medical records and receipts) or a statement that the victim has died (along with a copy of the Death Certificate)
- \* Information establishing the legal right of a claimant to act as the personal representative of the victim (which could be a state guardianship order or appointment as an administrator or executor for a decedent)
- \* Information that establishes the presence of the victim at the sight of the attack (which may be similar to the information required for issuance of a death certificate-such as a certificate from the next of kin and from an employer) including their likely specific location in the area of the attack.
- \* An employment and compensation history and job description of the victim (either through copies of W-2's, tax returns or letters from employers)
- \* Information documenting other specific actual or potential economic or other non-economic loss suffered by the victim
- \* Information about persons who may have an interest in the benefits paid to the victim, including family members, other dependents, and known creditors or others with legal claims against the victim (this information should be used as the basis for some mailing of a notice to such interested parties, similar to the process used in administering a probate proceeding)



It may be that even for such a simplified claims process, the information may be supplied in a series of steps. After the initial filing of this form, there should be a procedure to allow the claimant to provide additional written information and to provide information to further explain or clarify certain statements or claims. Because this is an entirely new process and because of the complete destruction in the terrorist attacks, which may have resulted in destruction of critical information, and the related emotional toll on potential claimants, we believe there should be a liberal opportunity to complete the filing and to correct mistakes in a filing. In light of the requirement that claimants waive rights to civil litigation, such waivers should not be effective until the form is fully filed and all appropriate information has been submitted and the form is accepted as complete for filing by the Special Master.

It would be unnecessary to have claimants who wish to offer substantial testimony or evidence and obtain a hearing to have to provide substantial details of their claim in an initial filing. For this more complex process, the Department should provide a different form that will effectively commence the claims process, recognizing that greater detail will be submitted in further submissions and hearing testimony. There should be uniform rules of evidence adopted, including rights to subpoena witnesses and rules of conduct for document subpoenas and depositions. Since this will be a complex procedure, the Special Master and the claimant should have the right to waive specific deadlines to allow for the proper productions and the preparation of expert reports and testimony.

Recognizing that this is a new program, and that such claimants may subsequently elect to pursue the simplified claims process, or pursue litigation, the waiver of the right to pursue civil litigation under the more complex process should not be deemed effective until some designated time after the initial filing.

#### **Topic #4: Procedures to assist an individual in filing and pursuing claims under this title.**

There are a variety of issues common to nearly all claims. Many of these are similar to the type of statistical or actuarial data and assumptions often used in mass tort cases. Until there is widespread dissemination of the amount of a number of awards from the Fund, there could be great uncertainty among claimants as to what they may expect. This may convince claimants to either wait until others have been "guinea pigs" or that, in making any claim, they must provide extensive proof of all potentially relevant data and assumptions.

The Department should consider engaging experts who can prepare a variety of models and assumptions on which the Department will rely in handling of the claims process. Such data should be published along with some explanation of how it will be applied by the Special Master in the claims process.

The models and assumptions should cover issues such as life expectancy, number of productive working years in comparable jobs in relevant industries, anticipated inflation and discount rates, reasonable expectations as to compensation growth and industry and economic cycle statistics. Assumptions used in establishing awards related to the pain and suffering of a deceased victim should also be published. Victims and personal representatives may rely on such assumptions or may, in written submissions or by oral testimony, present additional information in the nature of expert data. Unless it is appropriate for the Special Master to take into account additional or contrary proof on such issues presented by a claimant, such published assumptions should be binding upon the Special Master.

Limitations on Fees of Attorneys and Others. Given the importance to victims and their families of the end result of making a claim, it is highly likely that even those willing to file under a simplified procedure for written submissions will use the services of an attorney or other outside claims assistance. It is nearly certain that those using a complex claims process will use an attorney and other advisors.



While certain organizations have pledged to provide pro bono services to assist in making claims, many individuals will want to engage advisors who may charge a fee. Limiting fees may prevent claimants from obtaining the advice they may feel is best.

To the extent not already covered by existing laws, improper solicitations of potential claimants should be prohibited. "Cold call" solicitations of victims or their families should be discouraged.

### **Topic #5: Claimant Eligibility**

Definition of Physical Harm and Immediate Aftermath. In defining both "physical harm" and "immediate aftermath" we believe certain types of claims, such as those made by persons who were not present at the time of attack or during any subsequent structural failure, should be excluded from the Victims Fund process. Under such a limitation, it should be made clear if rescue and recovery workers who arrived at the scene after the actual attacks or structural collapse would be allowed as claimants under the Fund.

There is a need to limit the scope of potential claimants under the Fund. If this is not done, the process may be overrun by claims with a far less clear connection to the terrorist attack. For example, residents of apartments in lower Manhattan making claims based on environmental damage related to ongoing fire condition or asbestos contamination have the option to pursue conventional tort claims and should not be claimants against the Victims Compensation Fund. Unfortunately, with the continuing goal of Congress to limit potential defendant liability, it may be that these victims will not ultimately receive fair treatment in the courts.

The New York City Coroner's office has already established the type of proof necessary to issue a death certificate for victims. Such a level of proof should be sufficient for the Special Master to prove that the victim was in such a circle of imminent physical danger. This would require an affidavit from the next of kin and the employer. Other information, such as letters from persons who saw a victim in the building, or who spoke with or received an email from the victim at the time, may help verify these affidavits and may provide more specific information on the location of the victim in the area of attack. In lieu of such affidavits, the death certificate itself may establish presence at the site during the attack or immediate aftermath.

Definition of Personal Representative. Generally, if ancillary family claims are not allowed, an injured victim who is competent to make a claim should be the only party permitted to make such a claim under the Act. If, however, ancillary claims are allowed to be included, such persons should be notified that they have a right to join in such a claims process. For a surviving victim not competent to make an individual claim, a properly appointed guardian under state law should be the personal representative. For deceased victims, their personal representative should be the same as the administrator or executor under the intestacy or probate process, since these persons legally represent the victim's estate. Since New York and other states have adopted streamlined death certificate and probate processes, the appointment of such a representative should not be an undue burden. In order to limit fraudulent claims, any claims made by persons other than the victim, the victim's next of kin or the state appointed guardian, executor or administrator of the victim should be reviewed extremely carefully.

### **Topic #6: Nature and Amount of Compensation.**

In addition to publishing certain assumptions and models that may be relied upon by the Special Master, it would be advisable to publish statistics of actual awards in a manner that can assist in preparation of future claims. Obviously the privacy and security of recipients of awards under the Fund must be protected.



Collateral Sources. We believe that an overly broad definition of collateral sources is likely to force potential claimants to pursue conventional tort claims and avoid the Victims Compensation Fund. The definition of Collateral Source should be consistent with the application of similar concepts as applied in conventional tort cases.

The Act has a substantial inconsistency between the definition of "Collateral Source" in Section 402 (4) and the impact of collateral sources on the decision process of the Special Master, as set forth in Section 405 (b)(6).

Section 402 (4) provides:

The term " collateral source" means all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State or local governments related to the terrorist-related aircraft crashes of September 11, 2001 (emphasis supplied).

Section 405 (b)(6) provides:

The Special Master shall reduce the amount of compensation determined under paragraph (1)(B)(ii) by the amount of the collateral source compensation the claimant has received or is entitled to receive as a result of the terrorist related aircraft crashes of September 11, 2001(emphasis supplied).

If the allowable claims of a personal representative or injured victim do not include family claims of other relatives, a narrow reading of the operation of Section 405 (b)(6) to reduce an award solely by amounts payable to the victim or their estate by reason of such person's death or injury would be appropriate. Such a reading would exclude from collateral sources used to reduce benefit awards amounts paid to beneficiaries of insurance policies, pension funds, IRA accounts and other similar items, other than those paid directly to the victim or the victim's estate. Such a treatment would be generally consistent with state tort laws. On the other hand, if ancillary family claims are allowed, it may be proper to include in collateral source payments certain payments made or to be made to family members.

The definition in Section 402 is very inclusive. However, we believe that the inclusion of items which were already assets owned by the victim prior to the attack in collateral sources is not appropriate. For example, vested interests in pension funds and IRA or 401(K) accounts; the cash surrender value of whole or universal life policies (as opposed to term policies); and interests in deferred compensation plans are really assets owned by the victim before the terrorist related attack. To include these in collateral source items would be to penalize the victims who saved and built their assets while benefiting victims who made fewer efforts to save and build their assets. Such "owned" assets can easily be distinguished from term life insurance payments; disability insurance payments, survivor's benefit payments; and payments made under various government programs such as Social Security, Workman's Compensation, and Crime Victims Board payments.

While an argument could be made that payments from various charities are collateral sources, there is no "entitlement" to such amounts and, accordingly, the language of Section 405(b)(6) would appear to support exclusion of such amounts. Similarly, outright gifts from family, friends or employers, do not represent an "entitlement" and should be excluded from collateral sources. Including such items in the definition of collateral sources will either reduce the interest of various persons in helping victims and their families or will cause such persons to wait until claims have been awarded under the Victims Compensation Fund before making such gifts. If the Department is not prepared to completely exclude such gifts from collateral source treatment, at a minimum, gifts for certain purposes, such as payment of



health insurance premiums, tuition or other education assistance and housing and other "emergency" expenses should be excluded.

I appreciate the opportunity to provide these comments to the Department of Justice. While I recognize the difficulties in drafting regulations to implement the September 11 Victims Compensation Fund of 2001, a fair simplified process will benefit many victims and families consistent with the purposes of the Act.

Very truly yours,

Keefe, Bruyette & Woods, Inc.  
New York, New York

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**W000166**

Wednesday, November 07, 2001 4:45 AM  
Avoid double dipping

Gentlemen,

The tragedy of 9-11 has affected us all. As a nation, I'm sure all Americans wish to help our fellow citizens in need.

However, the US govt should be expected only to supplement insurance companies and charities assisting the families of victims, not to replace them.

Please avoid entrapping US taxpayers with another entitlement, regardless of cause.

Furthermore, differentiating between compensating civilians and not our military personnel, for acts of terror or war, may appear duplicitous.

Sincerely,

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**W000038**

Tuesday, November 06, 2001 9:33 AM

Brother NYPD WTC victim

1. The American people donated to charities to assist my sister in law and parents not to help balance the government's books.
2. The bailout fund is not charity for the families, but for the airlines. The families have already been robbed by this legislation of the ability to sue the airlines for every penny they have regardless of whether or not the airlines are in any way culpable. The legislation prevents damages awarded from exceeding the airline's insurance. Why do the families have to be the continual victims of this tragedy - first of the terrorists, then of the airlines and now of congress.
3. The idea of this fund is to prevent a mountain of lawsuits against the airlines. If the families sued neither charitable nor insurance monies received would be deducted from any settlement or court decision.
4. The set up of the fund is already outrageous:
  - Being asked to sign away rights before being offered a settlement
  - NO appeal to settlement - which seems unconstitutional and is certainly unconscionable
  - No guidelines for how the amount will be arrived at available to families
  - A Master of the Fund position with unprecedented powers who has yet to be announced.

THIS FUND IS NOT CHARITY, IT ASKS THE FAMILIES TO SURRENDER THEIR RIGHTS IN EXCHANGE FOR A SETTLEMENT. IF THE GOVERNMENT DECIDED TO PLACATE THE AIRLINE LOBBY THE FAMILIES OF VICTIMS SHOULD NOT HAVE TO PAY FOR IT.

Best Regards,

**Individual Comment**

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November 25, 2001

Kenneth L. Zwick, Director  
Office of Management Programs  
U.S. Department of Justice  
Main Building, Room 3140  
Washington, DC 20530

Dear Mr. Zwick:

I lost my only son in the horrific terrorist attacks on the WTC 9/11/01. My son was also tragically taken from his wife, two sisters and six young nephews.

I have great concerns over the determination and administration of the proposed legislation: September 11<sup>th</sup> Victim Compensation Fund.

My son as well as the majority of the other victims that day were killed in the absolute prime of their lives - doing what we as families and our nation had taught them early on in their lives to do - work hard - be responsible - be good citizens. They were at work before 9:AM in the morning, pursuing their dreams and planning for the economic futures of their families.

It is painfully clear that among others sharing responsibility for those tragic events, American Airlines and United Airlines failed to provide us with even minimum security - allowing four hijackings in a matter of hours.

It seems to me to be unquestionably in the best interests of the airlines, the U.S. Government, the victims, the victims families as well as all Americans to have an equitable out-of-court settlement rather than endure lengthy, painful litigation which will drag out for many years. The settlement offer, therefore, must be one that is acceptable to the victims and their families and compensates them for their losses.

Following are my comments with respect to the proposed legislation:

1. The definitions, terms and provisions need to be clearly and simply stated.
2. There should be two separate procedures for filing claims. One form should be used for the surviving victims and another form should be used for families of deceased victims.
3. With respect to compensation to families of deceased victims, the formula should be simple and straightforward. (A) Economic Loss - something on the order of the average of the victim's income over the last 3 years multiplied by the number of years remaining to their retirement age. (B) Non-Economic Loss should be the same dollar amount for all victims and/or families. Pain and suffering is not measurable or distinguishable. How can it be determined that one's pain and suffering is greater than another's. (C) Collateral Sources such as life insurance,

E001323



- pension funds, IRA's, 401k's and legislated tax relief should not be deducted from an individual's payments. These have been paid for by the victim, were part of their compensation package – or have been offered as a relief to families.
5. A simple to understand settlement package needs to be offered to each claimant of deceased victims. The dollar amount of the settlement needs to be provided to the claimants prior to expecting claimants to waive their rights to file civil actions.
  6. Claimants of deceased families should not be expected to prove their case to a Special Master. They have already endured more than is imaginable. If the victim has been provided a "Victim Identification Number, has been issued a death certificate and can supply 3 years' tax returns, this should be sufficient for the administrators of the fund to formulate a proposed settlement package for these families.
  7. Claimants want to accept a settlement package. They simply want to bring some closure to this terrible tragedy, go on with the lengthy grieving process, have some economic hope for a future without their loved ones and maintain trust and confidence in their Government. If the package is fair, claimants will accept it. If it is not, they will have no choice but to pursue other legal options available to them as Americans.

Thank you for the opportunity to submit comments. I only hope that in the weeks ahead as you finalize this legislation you will keep the horror and magnitude of our pain and loss in your hearts and do what may be difficult – but is just and right.

Respectfully,

Grieving Mother  
8. New York, NY

E001324



W000300

## STATE OF OKLAHOMA

DISTRICT ATTORNEY COUNCIL  
OKLAHOMA CITY, OKLAHOMA

November 8, 2001

Kenneth L. Zwick, Director  
Office of Management Programs  
Civil Division  
U.S. Department of Justice  
Main Building, Room 3140  
950 Pennsylvania Avenue NW  
Washington, DC 20530

RE: September 11th Victim Compensation Fund of 2001  
Dear Mr. Zwick,

In the attached document, I have attempted to answer each topic with relevant comments that may assist the Department in setting up the September 11th Victim Compensation Fund of 2001.

My comments are based on 17 years of experience with a state compensation program and more specifically, my experience in assisting victims with compensation after the Oklahoma City bombing in 1995.

I hope you find these comments and recommendations useful. If I can offer further information, please feel free to call me at .

Sincerely,

Oklahoma Crime Victims Compensation Board

Billing Code: Department of Justice, Office of the Attorney General  
28 CFR Part 104  
CIV 104P; AG Order No. RIN: 1105-AA79  
September 11th Victim Compensation Fund of 2001

To: Kenneth L. Zwick, Director  
Office of Management Programs  
Civil Division  
U.S. Dept. of Justice  
Main Building, Room 3140  
950 Pennsylvania Avenue NW  
Washington, DC 20530

From: Administrator  
Oklahoma Crime Victims Compensation Board



Oklahoma City, OK  
Date: November 8, 2001

Re: Public comments regarding September 11th Victim Compensation Fund of 2001

Topic 1 & 2: The forms to be used in submitting claims under this program and the information to be included on the claims form:

I recommend the Special Master obtain copies of claim forms from state victims compensation programs and decide which one meets their needs without having to "reinvent the wheel" so to speak. The National Association of Crime Victim Compensation Boards has links to state compensation programs at their website: [nacvcb.org](http://nacvcb.org). Most programs can be contacted via the Internet. The Office for Victims of Crime may have copies of applications as well. The DOJ could modify a state application to meet their needs. Instructions for the claimant need to be as detailed as possible to avoid confusion and future criticism of the process. The instructions also need to detail what will be considered a collateral source (i.e. insurance, retirement benefits, donations, workers compensation, etc.). Terms should be defined and if there are caps, those should be listed.

The Department may have a difficult time getting information that will be needed in order to verify expenses because the law does not give specific authority to do so. At the very least, a release of information, signed by the victim or claimant, will be essential for the Department to be able to obtain information from third parties.

Supporting documents that may be needed include: a doctor's statement of disability, proof of victim's net income, information from insurance companies, pension plans, Social Security, charitable organizations, explanation of benefits from medical insurance companies, and verification from a physician that medical treatment is related to the crime. Itemized statements for medical, dental, and funeral expenses may also be necessary in order to verify economic loss.

With regard to when a claim should be deemed "filed", the Special Master may wish to consider all claims "filed" as soon as they hit the door. Claims can be found "ineligible" if sufficient information is not provided. It is not unusual for victims to get confused by the process and forget to turn in all of the documents that will be requested. If there is something missing, the Special Master may wish to contact the claimant and give them an opportunity to get the missing information. If the Special Master simply denies the claim because of insufficient information and there is no appeal process, claims may be denied for legitimate victims who may be incapacitated and unable to assist with the process. It may be feasible to award federal grant funds to state compensation programs in the affected areas to hire people to assist these claimants at the local level, before the claim ever reaches the Special Master for decision. Before a decision such as this is made, it would be advisable to speak with the state compensation programs that have been directly impacted.

Topic #3: Procedures for hearing and the presentation of evidence.

Witness statements could be considered if the victim's presence at the sight is in question. Witness statements may also be used to verify the victim was not disabled prior to September 11th.

The law states the Special Master shall complete a review, make a determination, and provide written notice to the claimant, with respect to the matters that were the subject of the claim under review. The Special Master may very well review the case and determine additional information is needed. This decision to postpone awarding the claim would be perfectly valid under the law because it does not say



an AWARD must be made within 120 days. Notice of the Special Master's decision to continue the claim could be sent to the claimant and the case could stay in pending status until the requested information is received. The decisions made by the Special Master should not be rushed. The 120- day clock could begin when ALL documentation is received, which may or may not be at the time the claim is filed.

If attempts have been made to gather supporting documentation and the claimant fails to provide this information after a deadline has been clearly given, the Special Master is justified in declining an award and the claimant should not be permitted to re-file the claim.

The claimant could be given the choice of a paper hearing or an oral hearing, only if the Special Master denies the claim and no funds are awarded. It would be to the claimant's benefit to have a hearing officer or panel of officers (similar to a Board). Hearing officers should be allowed to ask questions, request submission of additional information, and prepare recommendations for consideration of the Special Master. The proceeding should be recorded and held in a location convenient to the claimant. Scheduling conflicts are going to arise. The claimant should only be allowed to cancel a hearing once, and only in the event of an emergency. If the victim or claimant fails to appear without notice, they should be denied any future opportunity for a hearing.

Topic #4: Procedures to assist an individual in filing and pursuing claims under this title.

The process should not be so difficult that financial experts and attorneys will be needed to get through it. If a cap is placed on non-economic losses, and economic losses such as income loss are based on a formula that is universal for all claimants, there will be no need for economic experts. The burden should be on the Special Master, not the claimant, through personal economic experts, to decide what the economic loss is.

A toll-free number (answered by live human beings) would be helpful to the claimants. Newsletters would be helpful in order to notify families of changes that are made in the procedures. Office location should be easily accessible to the public. If attorney fees, accountant fees, etc. are to be paid out of the compensation awards, the Special Master could set a fee schedule and notify the claimant of this schedule at the time the claim form is sent to them. The instructions could make it clear that any expense for attorney fees or economic experts, over the fee schedule, will be the claimant's responsibility.

There should be no rules as to who can assist the victim or claimant in filing claims and in proceedings. The only rule pertaining to this should specify professions to be compensated under a fee schedule.

The Department should take no action to ensure that individuals who have the option of filing a compensation claim with this program are not improperly solicited or influenced by those with an interest in having them make such an election.

Topic #5: Claimant Eligibility

It will be difficult to verify who was "present at" the WTC. Persons present at the Pentagon and those in Shanksville will likely be easier to identify. Since the program will only be considering claims for those killed or physically injured, information from the physician or medical records may be sufficient. Deaths should be documented by death certificate. "Present at" should include any area impacted by the debris, smoke, etc. "Immediate aftermath" was most likely included to cover first responders. "Physical harm" should be a tight interpretation and should only refer to physical injury (not psychological) that resulted in the need for medical treatment. Obviously, someone who simply cut a finger while escaping the WTC



should not be entitled to the same type of award as the person who lost his hearing or sight as a result of the incident. It would be to the program's benefit to make awards only when there is serious injury or death. This will eliminate the potential for massive fraud. Awards for latent, but not yet evident, harm should be considered if the claim is filed within two years and the serious injury is deemed a direct result of the incident on September 11th, with confirmation from two reputable physicians.

It will be difficult to positively confirm if someone was injured at the WTC and other affected areas. The only way the compensation program was able to do this in OKC was through verification of a visit to the ER. ER reports typically show where the victim sustained the injury and can be obtained through hospital medical records. If the Department chooses to consider non-serious injury, the possibility of fraud will be much higher. If a case is suspicious, keep asking for more documentation until there is substantial proof that the victim was where they say they were. There should be stiff penalties for anyone filing a false claim and those penalties should be in the claim instructions. The penalties need to include repayment of the award if fraud is discovered.

Before "immediate aftermath" is interpreted, the Department may want to consult with the drafters of the language to find out the intent. If the language was strictly to provide for the first responders, perhaps this can be clarified by rule.

The "personal representative" should be a spouse, parent, or legal guardian of a dependent child of the victim. Once the "personal representative" files the initial claim, the Special Master could allow co-claimants to file claims. In death claims, it will be important to have procedures that allow for multiple claimants. We have found at the state level that it is impossible to have only one claimant or "personal representative" in all cases. Consider a person who has had multiple marriages with ex-wives and children from each. Often times these families do not speak to each other. Limiting compensation to one claimant would be unfair and impractical. It could also lead to unnecessary litigation. I would recommend having one case file per victim with consideration for multiple claimants under that claim. Claim forms will likely be needed from each claimant and all could be tied together with a unique claim number for the victim. Failure to identify all potential claimants could lead to disaster for the program. Waivers for civil action could be signed by anyone who is signing the claim form as the claimant or legal guardian of a minor child.

#### Topic #6: Nature and Amount of Compensation

In order to make the job of the Department less burdensome, and create fairness for the victims and family members, I recommend a cap be placed on the non-economic loss portion of the award. A higher cap could be considered for death claims and those involving permanent disability. If the Department plans to consider eligibility for victims of non-serious injury in the scheme, I recommend a much lower cap for non-economic losses. Victims want information up front. By having caps and limits, everyone knows the rules and there are no surprises. When they know these things before they ever make the claim, the victim will not feel "cheated" and will be less likely to view the Special Master's decision as arbitrary and inequitable. Before ever making a claim, these families have an important decision to make about their future. By giving them all of the information possible about what they may be eligible to receive, families will be able to make an informed decision about whether or not to file a claim.

Income loss - Long term loss of support can be computed as follows:

For victim's spouse: Net monthly income at time of death divided by number of people supported by the income; times the number of months it would have taken for the deceased victim or claimant (whichever is the lesser amount of time) to reach life expectancy.



For victim's dependent child: Net monthly income at time of death divided by number of people supported by the income; times the number of months it would take from the incident date to the dependent child's 23rd birthday or the victim's life expectancy (whichever is the lesser amount of time). Life expectancy cards can be obtained from most insurance companies.

Once this figure is computed for each eligible dependent, the Department can calculate the amount of Social Security, life insurance, retirement, workers compensation and other identified collateral sources the spouse and dependent children will receive over the same period of time stated above. If collateral sources exceed the amount of support the victim was providing prior to death, there is no economic loss. If the amount is less, there is economic loss and an award can be made. Charitable contributions could also be deducted in this manner, if the Department finds them to be a collateral source.

For economic losses of individuals whose lost future income streams would have been highly contingent, variable, or unpredictable, the Department may want to consider requesting the past three years tax returns and base the net income on an average of those three years. This practice can also be used for self-employed individuals and those with no pay stubs or other proof of income.

In order to make the process equitable, there needs to be distinctions made between individuals who died. Those distinctions should be based solely on the net income at the time of their death, or an average income over a three-year period when considering loss of support for the family. For survivors with serious physical injuries, it may be prudent to draw meaningful distinctions between types of injuries, not individuals, if lump sum awards are being considered.

I have no recommendation for standards to be employed for determining non-economic losses. We do not pay for non-economic losses in Oklahoma. I would recommend, as stated earlier, that caps be considered for non-economic losses.

**Collateral Sources:** There are pros and cons for considering charitable contributions as a collateral source. In Oklahoma City, the state compensation program did consider some charitable contributions collateral sources, to the extent the contribution could be tied to a specific expense. In other words, we knew the American Red Cross was paying for the majority of the funerals, therefore, we determined it was not practical for our program to duplicate the payment of this expense. We did not consider assistance given for housing, clothing and food a collateral source because these are expenses the compensation program cannot pay. Other potential collateral sources could include: medical insurance, worker's compensation, Social Security, pension/retirement funds, disability insurance, auto insurance, life insurance, etc. In-kind contributions should not be considered a collateral source.

It will be impossible for the Department to know what a victim or family is "entitled" to receive from charitable organizations unless the organizations share that information. Statements from insurance companies and other collateral sources (with the exception of charitable organizations) are fairly easy to get, but sometimes take time. The claimant, without difficulty, can usually provide this information. It will be impossible to verify all collateral sources without the claimant providing the information. In other words, if the claimant chooses not to tell the Department about a \$250,000.00 life insurance policy (a collateral source by law), it may be difficult for the Department to find out this information, unless the policy was through the victim's employer.

**Fraud Prevention Measures** The Department could state the punishment for fraud on the signature page and make the claimant sign that they understand they will be prosecuted if fraud is discovered. Detecting fraud may be difficult if victims of non-serious injuries are considered eligible for benefits. It may be



equally difficult to relate all of the medical treatment, work loss, and other expenses the victim is claiming to the September 11th attacks.

In order to prevent fraud, I recommend the Department watch the following areas of potential fraud very closely: 1) invalid and non-certified death certificates; 2) expenses dated prior to the attack, and those that appear to have no relationship whatsoever to the attack; 3) physician verification of disability that comes directly from the claimant rather than the physician's office; 4) employer verification when the employer is a family member of the injured or deceased victim (ask for tax returns to verify income).

As much as we all hate to think about it, fraud does occur and we should be on the lookout for it.

Thank you for the opportunity to offer these comments.

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**A000020**

Tuesday, November 27, 2001 1:00 PM

**Attachment 1:**

Comments on September 11 Victims Compensation Program

The Comments of the Association of the Bar of the City of New York are attached.

**Attachment 2:**

November 26, 2001

VIA FACSIMILE (301-519-5956)

Kenneth L. Zwick, Director  
Office of Management Programs  
U.S. Department of Justice  
Civil Division  
Main Building, Room 3140  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Re: September 11 Victim Compensation Program

Dear Mr. Zwick:

The Association of the Bar of the City of New York, the City most affected by the September 11 terrorist attacks, welcomes the opportunity to respond to the Request for Public Comment, published on November 5, 2001, relating to the above program established to "provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001." We recognize the enormity of your challenge in fashioning rules to implement this complex but vitally necessary procedure. The Request for Public Comment raises a number of important issues. However, given the abbreviated response time, our comments will be limited to (1) claimant eligibility; (2) procedures for determining the amount of compensation to be awarded; and (3) procedures for hearing and presentation of evidence. We will also comment on issues that may arise by virtue of the possible applicability of New York law under the regulations.

The comments presented below are informed by the general approach and policy set forth in the Request for Public Comment, which emphasizes that: "[w]ithout having information about how the compensation program works, . . . individuals might not be able to assess whether the compensation program is a viable alternative to continuing their litigation," and consequently, "potential claimants have an interest in knowing as soon as possible how the program is likely to operate in their circumstances." (Comment, p. 8). The regulations promulgated to administer the compensation program should adopt procedures that enable any individual considering participation in the program to determine his/her eligibility and to understand at least the approximate range of his/her potential award before waiving any litigation rights.\*1



## 1. Claimant Eligibility

The Act's stated purpose is "to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001." Act, §403. Claimants include individuals (excluding participants in the attacks) who were present "at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes" and who "suffered physical harm or death as a result. . . ." Id. at §405(c)(2)(A). In the case of a decedent, "the personal representative of the decedent" is the person who is eligible to file the claim. Id. at §405(c)(2)(C). The Act further provides that "[n]ot more than one claim may be submitted. . . by an individual or on behalf of a deceased individual." Id. at §405(c)(3)(A).

The Act does not contain a definition of the term "personal representative". Consistent with the Act, the executor or administrator of a deceased individual, duly appointed under state or other applicable law, should be the only individual authorized to file claims on behalf of the decedent, absent a showing that obtaining such a court appointment in a timely manner is not feasible. This approach enables potential claimants to determine their eligibility to file claims with certainty before opting into the program (which is of paramount importance due to the statutory waiver of civil litigation rights), and avoids embroiling the Special Master in disputes among competing, self-appointed representatives of the decedent. For the same reasons, and again subject to exception for good cause shown, all awards should be made to this court-appointed representative and thereby subject to the supervision of the appointing court with respect to distributions of the award to the decedent's relatives. Escrow payments can be used, as suggested in the Request for Public Comment, if an executor or administrator is not appointed by a court of competent jurisdiction within the time provided by the Act for the filing of claims.

The regulations should provide a method for proceeding under the Act in those situations where it would not otherwise be necessary for a personal representative to be appointed, such as, for example, where all property was held in joint names. In such situations where only adults are involved, they could provide for the decedent's distributees and the personal representative named in the will (if any) to designate one or more persons to act for them, and that person or those persons could be the personal representative for purposes of the Act.

In situations where the personal representative and the distributees cannot agree as to whether to execute the waiver required to proceed under the Act (see p. 5, below), the regulations probably have to prevent either side from so proceeding, absent a ruling to the contrary by a state court.

## 2. Nature and Amount of Compensation

The Act requires claimants to state "the amount of compensation sought" on the claim form, and it requires that all claimants must waive their rights to file or participate in civil litigation for damages sustained as a result of the terrorist attacks. Act, §§ 405(a)(1), 405(c)(3)(B). Consequently, individuals considering whether to participate in the statutory compensation program must be able to calculate the amount of potential awards, at least within an approximate range, in order to make reasoned, informed decisions about whether to opt into the program or to pursue litigation.

To achieve this objective, the regulations should establish a grid that calculates awards, to the extent feasible, through the use of formulas that give similar amounts to claimants similarly situated. This approach will enable potential claimants properly to evaluate their options before filing a claim. It will also expedite the process, assuring that awards are determined within the designated 120-day statutory period, obviating in most cases any need for extensive hearings and evidentiary submissions. It will also promote both the fact as well as the perception of fairness, minimizing the risk of arbitrary award



distinctions between similarly situated claimants.

There are practical and statutory limits to the completeness and rigidity of such a grid, however. It is not possible to represent fairly, in advance of any filings or hearings, all possible variations in the "harm to the claimant, the facts of the claim, and" -- especially -- "the individual circumstances of the claimant," which the Act requires be the bases of the "amount of compensation to which the claimant is entitled." Act, § 405(b)(1)(B)(ii). Nor would a rigid prohibition on variations in awards, based on the claimants' respective circumstances, be consistent with the value America places on the unique dignity and worth of each individual. We should not treat the thousands of victims of the terrorists as faceless and fungible, unworthy of particularized decision-making. Thus the grid should provide presumptive parameters for awards, but should not preclude the Special Master from varying awards within those parameters (or even outside the parameters, in extraordinary cases) to reflect "the individual circumstances of the claimant."

Similarly, while a well developed grid should minimize the number and length of evidentiary hearings, thus helping achieve the Act's purpose of affording prompt compensation, it cannot preclude the right of a claimant under the Act "to present evidence, including the presentation of witnesses and documents. . . ." Act, § 405(b)(4)(B).

The Act provides for awards to individuals who suffered "physical injury" as a result of the September 11 terrorist-related aircraft crashes. Act, § 405(c)(2)(A)(ii). No bright-line test (e.g., "serious injury") should be applied once the threshold of "physical injury" is established, though the degree and permanency of the injury necessarily should be a significant factor in determining the award amount.

With respect to latent injuries, should such an injury manifest itself between the time a claim is filed and the award issued, we believe that the claimant should be permitted to amend the claim to assert such injury.

The Act provides no express guidance as to the size of awards, and plainly the regulations must address this subject in order to establish an award grid. By pointing to "applicable State law" in defining the types of recoverable "economic loss," Act, § 405(5), Congress has pointed to one logical source for the Special Master's decision-making. Compare Act, § 408(b)(2), providing, in the context of the federal cause of action against air carriers, that the substantive law for decision "shall be derived from the law, including choice of law principles, of the State in which the crash occurred. . . ."

However, there is not a direct correlation between the purposes and provisions of the Act and the operation of New York law as it would apply to lawsuits for injuries or deaths in analogous circumstances. Accordingly, while the Special Master may be able to make some use of state case law in formulating awards, the regulations cannot adopt state law whole cloth. In fact, the regulations need to address some issues that otherwise will arise by reason of the application of the New York law governing the estates of decedents and their survivors. We now summarize some of those issues.

Section 403 of the Act states that the purpose of the Act is to provide compensation to persons injured and to relatives of those who were killed as a result of the September 11, 2001 terrorist related aircraft crashes. Compensation may be awarded for both economic loss and noneconomic loss. Section 402(5) of the Act defines economic loss as "any pecuniary loss resulting from harm ... to the extent recovery for such loss is allowed under applicable State law". It is not restricted to loss suffered by a "claimant". However Section 405(b)(1) of the Act requires the Special Master to determine the amount of compensation to which a claimant is entitled based upon the harm "to the claimant." Reading Sections 402(3), 405(a)(1) and 405 (c)(2)(A) of the Act leads to the conclusion that, in the case of decedent



victim, the claimant is the decedent. The regulations must therefore determine whether only damages recoverable by the decedent (or the decedent's estate) under New York law are recoverable under the Act or whether it is also possible to recover damages that New York law would allow to the family of the decedent. We urge the latter approach.

Under New York law a decedent (or, more properly a decedent's estate) can only recover in a personal injury action under section 11-3.3 of the Estates, Powers and Trusts Law (the "EPTL") for damage, such as pain and suffering, medical expenses, etc, suffered by the decedent prior to death. No recovery may be had under that section for post-death damages, other than funeral expenses. Any recovery under that section accrues to the decedent's estate and passes with his other property under his will or, if he has no will, to his intestate distributees.

The right to recover for post-death damages, such as loss of future earnings, must be asserted in a wrongful death action under EPTL 5-4.1 - 5-4.6. This is an action brought on behalf of the decedent's distributees by the decedent's personal representative. Any recovery belongs to those of the distributees who suffered damage by reason of the decedent's death, and not to the decedent's estate. The measure of damages is the loss suffered by the distributees, and not the loss suffered by the decedent. If a personal representative fails to bring a wrongful death action, the distributees can have an administrator appointed by the court to bring the action on their behalf. The action belongs to the distributees and the personal representative who brings it on their behalf acts, in effect, as an agent or trustee for them.

The regulations should clearly provide that damages recoverable in a wrongful death action in New York will be awarded (even though, technically, they are not compensation for harm to the claimant, *i.e.* the decedent). This result is faithful to the express purpose of the Act "to provide compensation to . . . relatives of a deceased individual" killed in the attack. Act, § 403.

The regulations also should provide for the Special Master to identify the basis for the grant of the various portions of the award so that the local probate court can determine the portions properly allocable to the distributees and to the decedent's estate. (Parenthetically, the portion allocable to the distributees as recoverable in a wrongful death action would not be subject to estate tax.)

The regulations also should deal with the problem of the dual rights created by New York law, in the content of the waiver requirement of Section 405(c)(3)(B) of the Act. Since the right to the wrongful death action is vested in the decedent's distributees, while the right to the pain and suffering action is vested in the decedent's estate, it would seem that a waiver by the distributees who would be entitled to bring the wrongful death action as well as by the personal representative should generally be required. Where one or more of the distributees is a minor who does not have a court appointed guardian, the regulations could adopt virtual representation concepts, such as those of section 315 of the Surrogate's Court Procedure Act of the State of New York, or permit waiver on the minor's behalf by a natural guardian, such a parent. Every effort should be made to avoid the need to have a guardian appointed by a court for this purpose. Since any award would be payable to a personal representative (and where minors are involved, a court appointed personal representative should be required), the minor's rights would be safeguarded by the local court which appointed the representative.

In a wrongful death action, recovery by the distributees of a firefighter or police officer can be barred by the so-called "fireman's rule", which prohibits recovery when otherwise actionable negligence resulted in a hazard that the firefighter or officer was employed to confront and the death resulted from that hazard. (The same rule prevents a living fire or police officer from recovering for injuries in such a situation.) Application of the fireman's rule is not appropriate under the Act, since the rule is a defense to a negligence action, and under Section 405(b)(2) of the Act negligence is not to be considered. The



regulations should provide that the fireman's rule will not bar a recovery under that Act. Contributory negligence also should not be considered.

The Act appears to require, by its definition of economic loss, that distinctions in the awards to claimants be drawn in part based on the differing levels of, inter alia, their "earnings and other benefits related to employment. . . ." Some distinctions between claimants may also be appropriate with respect to "non-economic losses," such as for pain and suffering. But we suggest that there should be no distinctions in the pain and suffering component of awards to decedents. The amount of compensation for pain and suffering should not turn on such factors, for example, as whether a decedent was or was not able to reach his family by phone after a crash or hijacking, and was thought on this or some other basis to have suffered or not suffered an instant death or a prolonged anticipation of death. Such distinctions among the deceased victims would neither appeal to our sense of fairness nor respect the dignity of the victims. Here is one situation, then, in which we recommend as a matter of policy that the grid establish a fixed or generous amount, not subject to variation.

The Act requires the Special Master to reduce the amount of any award "by the amount of the collateral source compensation the claimant has received or is entitled to receive" as a result of the terrorist attacks. Act, § 405(b)(6). This section does not specify whether charitable contributions received by claimants should be treated as collateral source compensation. We urge that charitable contributions not be treated as collateral source compensation, consistent with New York law. We understand that this point has been fully briefed for you in the joint comments submitted by the Governor and Attorney General of New York State and the Mayor of the City of New York.

The regulations also should clarify that collateral source compensation received by persons other than the claimant (i.e., the decedent's estate) will not reduce awards. For example, reductions for life insurance and death benefits should be restricted to insurance and benefits that are payable to the decedent's estate, rather than to a spouse or other survivors. A different reading would treat unfairly between survivors of a decedent who invested in a life insurance policy, the proceeds of which would go to reduce an award, and a decedent who invested in stock, the value of which would not go to reduce an award.

If, contrary to our recommendation, the regulations are written to require a reduction of awards for collateral compensation to persons other than the decedent's estate, then the regulations should distinguish between benefits that are payable to those entitled to receive an award and benefits that are payable to others. For example, an award to a surviving spouse under the Act should not be reduced by the proceeds of a life insurance policy that are payable to a sibling who is not one of the decedent's distributees.

The regulations should further provide that the claim of a domestic partner of a deceased should have the same weight as that of a spouse, to the extent permitted by applicable law. In addition, a domestic partner should be entitled to serve as a personal representative under the Act.

### 3. Procedures for Hearing and Presentation of Evidence

As stated above, adoption of the aforementioned approach would permit resolution of many claims on written submissions, reducing the need for evidentiary hearings before the Special Master, though preserving the statutory right of a claimant to a hearing and the right to present witnesses, if the claimant so requests. Hearing officers may utilize different means of speeding the hearing process, such as by requiring, in appropriate cases, direct testimony to be submitted in writing and cross-examination to be limited to instances in which credibility has to be determined.



Claimants who cannot afford counsel should be referred to attorneys who have registered with local bar associations or trial lawyers associations to represent such claimants on a pro bono basis. The Special Master should provide for claimants to be able to consult with accountants or other experts as necessary to prepare a claim.

While pro bono counsel should be available to claimants, claimants should be free to retain counsel of their own choice. Any attorney appearing on behalf of claimants before the Special Master should obtain from their clients, as part of their retention, an acknowledgement that the claimant has been advised that it is not necessary to retain counsel in order to make a claim or appear before the Special Master and that there are bar associations providing free legal counsel, a list of which can be obtained from the Special Master's office. The attorney must also fully disclose, in writing, the amount or means of calculating attorney's fees and disbursements and who is to provide capital outlays anticipated in advance of an award. Finally, the regulations should provide that fees be reasonable as recognized by professional rules of ethics.

The information and evidence required to state a claim should be plainly stated in the form to be developed for the program. The form should be available in English, Spanish and other languages needed by more than a nominal number of claimants. The evidence required to support a claim should not exclude potential claimants by reason of citizenship or residency status in the United States.

Hearing officers should review each claim form to determine whether it is complete before submitting it to the Special Master. Until the form is determined to be complete and is so submitted, the claim should not be deemed "filed" for the purpose of triggering the Special Master's 120 day decision period (Act, § 403(b)(3)), or waiving the claimant's right to sue in court (Act, § 405(e)(2)(B)(i)). No claim should be denied with prejudice on the basis of an incomplete form. In addition, should the Special Master determine at any phase of the proceeding that a claimant is not eligible for purposes of § 405(c) of the Act, the claimant should have the right to opt out of the procedure, thereby permitting the claimant to pursue litigation.

Claimants should be permitted to designate venue, and there should be hearing tribunals established in, New York City, Washington, D.C., Boston and Los Angeles.

\* \* \*

The Request for Public Comment notes that the regulations to be issued by December 21 could be promulgated as "internal final" rules, making possible an additional round of public comment concerning whether such regulations should be amended. The Association strongly supports this procedure, and looks forward to submitting further comments in response to these regulations once issued. In addition, committees of this bar association would be happy to provide further assistance as you develop and implement these rules.

Very truly yours,

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\*1 In response to an inquiry in the Request, we are advised that to date four claims have been filed in the Southern District of New York seeking damages arising out of the September 11 terrorist attack.

Comments of:  
Association of the Bar of the City of New York



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**W000664**

Monday, November 26, 2001 4:52 PM

Comments by the Council on Foundations

Attached are comments submitted by:

Council on Foundations  
Washington D.C.

These comments address the issue of whether charitable gifts should be considered payments from a collateral source.

-----  
November 26, 2001

Kenneth L. Zwick  
Director  
Office of Management Programs  
U.S. Department of Justice, Civil Division  
Main Building, Room 3140  
950 Pennsylvania Avenue NW  
Washington, DC 20530

Re: Adoption of Rules to Govern the September 11 Victim Compensation Program - Topic #6: Should Charitable Gifts Be Considered Payments from a Collateral Source

Dear Mr. Zwick:

The Council on Foundations is a membership organization that serves the public good by promoting and enhancing responsible and effective philanthropy. The Council's 2,100 members include independent foundations, family foundations, community foundations and corporate grantmakers.

Council members responded quickly and generously to the terrorist attacks on September 11. Many gave to The September 11 Fund, established by the New York Community Trust, a Council member, and the United Way of New York City, and to the Survivor's Fund of the Community Foundation of the National Capital Region, another Council member. But Council members also made emergency grants to many of the other charities providing services and financial assistance to those who incurred losses as a result of September 11. In some cases, they established programs of their own to make grants directly to individuals and families. Council members made most of these gifts with the expectation that their contributions, along with the millions of dollars contributed by others, would provide immediate assistance during the time it takes to mobilize a governmental response and would then supplement and enhance the government's effort.

The Justice Department's request for comments on the content of rules governing the government's September 11 Victim Compensation Program asks whether the definition of "collateral source" in section 402 of the Act establishing the program can be read to exclude gifts by charitable organizations to those injured in the September 11 tragedies and to the families of those who lost their lives. The Council believes that gifts by charities should not be deemed to be payments by a collateral source and



that Congress never intended such a result.

There are many reasons why gifts by a charity to September 11 victims do not fall within the statute's definition of "collateral source." This submission will focus on three.

First, as a straightforward case of statutory interpretation, the definition provides four examples of payments that are from a "collateral source" - life insurance, pension funds, death benefit programs and payments by Federal, State or local governments. Each of these examples is a payment to which survivors are entitled either as a contractual obligation or by meeting the qualifications for assistance from a government program. Charitable gifts are plainly different from these payments simply because they are gifts-survivors have no individual, enforceable right to receive a payment from a charity, any more than they would have a right to compel a friend or family member to make a gift. The wording of section 405(b)(6) of the Act underscores this interpretation. That section reduces the compensation available from the government's fund by "the collateral source compensation the claimant has received or is entitled to receive" (emphasis supplied), implying that Congress was thinking about amounts that are predictable because the claimant has a legal right to collect them. Because charity assistance is a gift, not a right, claimants would not be "entitled" to any future assistance, much less a determinable amount. Consequently, applying the collateral source rule to charity aid would treat claimants differently depending on the timing of their receipt of charitable assistance-reductions for those who receive aid prior to their case being determined, but no reductions for those who receive aid subsequently. The Department can avoid this problem by excluding charity aid from the definition of collateral source.

The second reason why charitable gifts should not be considered a collateral source is that doing so would help defeat the purpose of the Act-to encourage survivors to accept an administrative settlement rather than sue airlines and other potential defendants. Since charitable gifts would not reduce damage awards in litigation, using them to reduce the amount claimants would receive from the fund creates a disincentive to use the fund.

A third reason to exclude charitable gifts from the definition of collateral source is that decisions about who should receive charitable gifts, and the amount they should receive, are made on a different basis than the decisions about how much compensation survivors should receive from the government's fund. The purpose of the government fund is to compensate victims and survivors for their economic and noneconomic losses; charity aid is directed primarily to alleviating need. As we will explain, the result of that difference is that reducing government compensation by charitable aid would disproportionately penalize those most in need.

The federal September 11 compensation fund will provide essentially the same level of compensation to survivors on an administrative basis as they would receive if they prevailed in litigation against the airlines and other parties who might be found liable in tort. Thus the fund will award two types of compensation-one that covers economic losses resulting from physical injury or death in the September 11 tragedy and the other covering noneconomic losses, such as pain and suffering, loss of society and companionship and similar nonpecuniary losses. As is appropriate, the victim's current and expected future earnings will be a substantial component of the economic loss portion of the award. As a result, and again appropriately given the nature of the fund, the economic compensation awarded to the family of a stockbroker or an insurance executive will be substantially greater than that received by the family of a receptionist or a dishwasher. Even assuming that the noneconomic loss portion of the compensation award is based on factors that disregard income, it is reasonable to expect that the largest awards from the fund generally will go to the families with the highest pre-September 11 earnings. Charity assistance, however, is based on need. As the IRS wrote in guidance it issued shortly after September 11.



Charitable funds cannot be distributed to persons merely because they are victims of a disaster. Therefore, an organization's decision about how its funds will be distributed must be based on an objective evaluation of the victim's needs at the time of the grant.

Advanced Text of a Special IRS Publication, "Disaster Relief: Providing Assistance Through Charitable Organizations," <http://www.irs.gov/relief/aid-charity-pub.pdf>.

As the Special Publication explains in greater detail, charities provide disaster victims with food, shelter, clothing, medical care, grief counseling and similar emergency services in the immediate aftermath of a disaster. Because the IRS recognizes the need for charities to dispense such aid as quickly and efficiently as possible, it is not normally necessary to conduct an extensive inquiry into the recipient's financial circumstances. However, as the response shifts to meeting longer-term needs, the IRS requires that charities shift their focus to meeting basic needs of those who cannot provide for themselves from other resources.

Recognizing the unique circumstances of the September 11 terrorist attacks, the IRS announced on November 16, 2001 that it will not question payments by charities to September 11 victims and survivors as long as "the payments are made in good faith using objective standards." IRS Notice 2001-78 on Disaster Relief Distributions by Charities to Sept. 11 Terrorist Attack Victims (scheduled to appear in Internal Revenue Bulletin 2001-50, dated December 10, 2001). The IRS notice covers payments made through the earlier of December 31, 2001 or the date on which Congress enacts legislation addressing the issue. Section 103 of The Victims of Terrorism Relief Act of 2001 (H.R. 2884 EAS), which passed the Senate on November 16 and is pending in the House of Representatives, includes language similar to that used in IRS Notice 2001-78 permitting charities to distribute funds to September 11 victims based on objective criteria. Legislative history captures the intent of Congress to permit charities to make payments to appropriate classes, such as firefighters killed in the line of duty on September 11, without directly considering the specific financial needs of each family. Similarly, charities that make payments based on an appropriate surrogate standard, such as the number of dependents in a family, need not examine the specific needs of each family. S. Prt. 107-49 at 30 (2001) <http://finance.senate.gov/76060.pdf>.

IRS Notice 2001-78 and the legislation, if Congress enacts it, free charities to provide assistance to September 11 survivors more quickly than would be possible with strict adherence to the economic need test that normally governs disaster relief distributions once the immediate crisis is past. While the result may be that some families receive charitable assistance that might not have qualified under a strict application of the economic need standard, we believe that many charities will continue to weigh a family's economic circumstances in deciding the type and amount of aid to provide. Knowing that the most substantial settlements from the government's fund likely will accrue to those with the highest pre-attack incomes, it is reasonable to expect that charitable assistance will flow most heavily to the survivors who were economically needy prior to the disaster and whose compensation from the fund is thus likely to be among the lowest.

Despite the fund compensation they will receive, many of these families will need continued charitable support and would suffer disproportionately if the aid they received from charities was used to lower the government's cost of paying compensation claims rather than to provide them with the extra help they need to rebuild their lives.

Believing, as we do, that the Department should not consider payments by charities to be payments by a collateral source if they are based on need, we note that both the IRS announcement and the legislation, if Congress enacts it, in effect deem payments by charities in response to September 11 to bear a



relationship to need and charitable class. We believe that the Justice Department should respect that presumption. To do otherwise would require the Department to gather information on the process employed by dozens of charities with respect to thousands of families and to second-guess the good-faith decisions those charities made. At the very least, this would be terribly time-consuming, likely to produce inconsistent results, and contrary to the intent expressed by the Senate and the IRS regarding this particular disaster.

The role of philanthropy in times of disaster is to meet needs that are not met from other sources. Philanthropy supplements a survivor's personal and family resources and fills the gaps in government programs. Reducing government compensation by the amount of charitable aid a survivor receives would disproportionately penalize those who most need the assistance and could deter giving in future disasters.

Sincerely,

Comments By:  
Council on Foundations  
Washington, DC

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**W000542**

Sunday, November 25, 2001 8:40 PM

September 11th Victim Compensation Fund of 2001 Notice Of Inquiry And Advance Notice Of Rulemaking

Dear Attorney General John Ashcroft,

I am one of two surviving daughters of , a passenger on American Airlines flight 11. I am also president of Families of September 11, Inc.

My mother and thousands more were injured and murdered on September 11, 2001, leaving behind the grieving families that I now represent. Our emotional reservoirs have been sapped low by grief, the foundations of our lives shaken and our coping skills challenged. The diverse futures upon which our eyes were cast before September 11th are now lost from our view. We will replace them, but with what and how we are not certain.

The Congress and the President have put in your hands the means that will help us begin to shape our futures. We urge you to shape the regulations you now consider so that we may see with hope what our lives might come to be.

I have attached to this e-mail the Comment of Families of September 11, Inc. in response to Notice Of Inquiry And Advance Notice Of Rulemaking Of The Civil Division Of The Justice Department [CIV 104P; AG Order No. 2531-2001] RIN 1105-AA79.

We would like very much to participate further in the detailed articulation of the rules under your consideration.

Very truly yours,

Comments by  
Families of September 11, Inc.

**Attachment 1:**

September 11th Victim Compensation Fund of 2001  
Comment Of Families of September 11, Inc.  
In Response to  
Notice Of Inquiry And Advance Notice Of Rulemaking  
Of  
The Civil Division Of The Justice Department  
[CIV 104P; AG Order No. 2531-2001]  
RIN 1105-AA79

**INTRODUCTION**

This response is submitted by Families of September 11, Inc., a not for profit corporation whose members are surviving victims and survivors of victims of the terrorist-related aircraft crashes of September 11, 2001. Included among our members are "legal" relatives (e.g., spouses, parents, children



and siblings) and "de facto" relatives (e.g., step children and parents, survivors of engaged couples and long term co-habitors, etc.) of those victims. Although our members' relationships with the victims and the nature, manifestation and magnitude of their losses are different, all of our members have suffered, are suffering and are likely to continue to suffer from grief and the trauma of September 11th. Many, indeed most, of our members are incapacitated, in varying degrees, from effectively pursuing their previous careers and employment activities.

Our members recognize that they have only three effective means by which to obtain redress for the harm they have suffered and will continue to suffer: (a) commence litigation in the United States District Court for the Southern District of New York, (b) file a claim for compensation under section 405(a)(1) of the September 11th Victim Compensation Fund of 2001 ("the Act"), and/or (c) apply for charitable relief and that only the first (commencement of litigation) will afford them an opportunity to actively participate in the discovery of the truth about the causes of their injuries and the injury and death to their loved ones. Until the Attorney General, in consultation with the Special Master, has promulgated the regulations mandated by the Act, our members will have no basis upon which to choose from these alternatives.

Because the Act has effectively capped the pool of funds available from the air carriers to the limits of the liability coverage maintained by them and because the magnitude of the potential claims (not only for bodily injury and death, but for property damage and other economic loss) is enormous, the regulations under consideration by the Attorney General must afford full compensation to the entire population of victims and survivors of victims of the September 11th attacks or the only remedy available to them will be charitable donations. For a wide variety of reasons (e.g., the Internal Revenue Code limitations on charitable giving, limited available resources, the inconsistent functioning of charitable organizations, etc.), our members have little expectation of obtaining substantial charitable relief. In effect, therefore, the regulations promulgated by the Attorney General are of critical importance to our members. It cannot be forgotten that the Families of September 11 are all innocents. They have been and feel victimized. The rest of the country has or will separate itself from the events of September 11th. The members of our organization have not and likely never will. They need not only the means with which to attempt to rebuild their lives but a process that validates their suffering.

The recommendations made by Families of September 11 focus on four basic issues:

1. The population of eligible applicants;
2. Rules of evidence and substantive law designed to determine the full and fair value of claims before any collateral sources are deducted;
3. Interpretation of the term "collateral sources"; and
4. Making the process simple, convenient, fair and fast.

We address these issues in each of the topics contained in the Notice of Rulemaking in the order presented there.

### **Topics 1 and 2: The Forms To Be Used in Submitting Claims Under This Program and the Information To Be Included on the Claim Form**

The American Trial Lawyers Association has promised to provide pro-bono service to all persons who wish to make claims under the Act. This promise should be confirmed. The form should be drafted with



the expectation that an experienced trial lawyer will fill it out.

In the case of an applicant who claims to represent a deceased victim (i.e., "the Claimant"), the form should require disclosure of the names, addresses and phone numbers of all presumptive relatives of the decedent (see Topic 5) and whether or not such person has been appointed to represent the decedent by a court of competent jurisdiction. Similarly, in the case of an injured victim, the form should require that the Claimant disclose the names, addresses and phone numbers of his/her relatives. See Topics 3 and 5.

In the case of an applicant who claims to be an eligible survivor of a deceased victim, the form should require an affidavit of that individual setting forth the relationship with the decedent and a statement setting forth the basis upon which he/she claims eligibility.

Although the form should contain a statement that the American Trial Lawyers Association will provide an attorney at no charge to assist in the preparation of the form and the representation of a claimant throughout the process, it should also contain a statement that the reasonable fees of a private non- pro bono attorney will be paid to that attorney in addition to the award in an amount not in excess of 10% of the award. See Topic 5.

The form should inform the applicant that the form will not be deemed to have been filed until the Hearing Officer has determined that an appropriate representative of the decedent has been determined and the last survivor seeking status as an eligible applicant has intervened or opted in under the rules (see Topic 3).

The form should be designed in such a way that proof of the applicant's relationship to the injured or decedent victim, the status as a victim and all proof of damages can be accomplished by filing of certified copies of public documents (e.g., birth certificates), affidavits (e.g., proof of presence in or near the World Trade Center or Pentagon at the time of or in the immediate aftermath of the crashes, etc.) and written statements (e.g., air carrier passenger manifests, medical records, etc.).

The form should make clear that the statements made on the application and in affidavits are made under the pains and penalties of perjury, that the Special Master and Hearing Officers have authority and have been directed to report suspected fraud to the Attorney General, and that any knowingly false statement made on the application or any affidavit will result in prosecution. See Topic 6.

The form should provide the applicant an option to present oral evidence at a hearing and should inform the applicant that, if that option is chosen, a hearing will be provided within that state, territory or the District of Columbia in which at least one applicant resides and which the Hearing Officer determines most convenient for the applicants (see Topic 3).

### **Topic 3: Procedures for Hearing and the Presentation of Evidence**

In the case of a decedent, the claim should be deemed to have been filed only when the Hearing Officer has determined that an appropriate representative of the decedent has been determined and the last of the survivor applicants has intervened or opted in, under the rules. A claimant should be considered an appropriate legal representative of a decedent if appointed as such by a court of competent jurisdiction. In the absence of such a judicial appointment, the Hearing Officer should have authority to designate the representative of the decedent and, where the Hearing Officer deems it appropriate, to require the filing of a bond. See Topic 4.

A hearing, if requested, should be provided within that state, territory or the District of Columbia in



which at least one applicant resides and which the Hearing Officer determines to be most convenient for the applicants. Formal rules of evidence should not apply. There should be a record of the proceedings. Any person who seeks status as an eligible individual should be entitled to a review of his/her status as an eligible individual and the amount of the award by a Review Panel chosen by the Special Master on the record of the proceedings before the Hearing Officer. Among the issues to be considered by the Review Panel should be adherence by the Hearing Officers to the expansive and uniform application of state law (see Topics 5 and 6) and the resolution of issues unique to individual claims. There should be no further right of review.

#### **Topic 4: Procedures to Assist an Individual in Filing and Pursuing Claims Under This Title**

There should be at least one Hearing Officer in every state, territory and the District of Columbia in which an applicant under the Act resides, and each Hearing Officer should have an Applicants' Assistant whose responsibility it is to assist applicants and liaison with the American Trial Lawyers Association.

The regulations should provide for payment by the Justice Department of the reasonable fees of those attorneys who do not agree to perform their services pro bono, who assist applicants in the processing of their claims. The amount of those fees should not exceed 10% of the award to the claimant. Provision for payment of reasonable attorney fees is required to assure that all claimants get competent representation by counsel of their choosing, notwithstanding the offer of pro bono services by the American Trial Lawyers Association.

Public notices should be disseminated making it clear that applicants for compensation under the Act have a right to intervene in or opt into a claim filed by a representative of a decedent and written notice, by certified mail return receipt requested, should be given to all persons who are presumptive relatives of a survivor or decedent. See Topic 5.

#### **Topic 5: Claimant Eligibility**

The stated purpose of The September 11th Victim Compensation Fund of 2001 ("the Act") is to "provide compensation to any individual (or relatives of a surviving or deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001. The population of "relatives of deceased individuals" is not clearly defined in the Act and a tension is created between the express purpose of the Act to compensate those "relatives" and other provisions of the Act. Although there is no express provision in the Act for relatives of physically injured, but not killed, individuals, those relatives should be compensated under the Act and the regulations should so provide.

The Act provides, "Not more than one claim may be submitted ... on behalf of a deceased individual," and "in the case a decedent ... [the claimant is] the personal representative of the decedent who files a claim on behalf of the decedent." The Act further provides, "Upon the submission of a claim ..., the claimant waives the right to file a civil action (or be a party to an action) in any ... court for damages...." The term "personal representative of the decedent" is not defined in the Act. As a matter of substantive law, the personal representative of a decedent need not be a relative of the decedent.

It is the position of Families of September 11 that the regulations promulgated to carry out the Act should make clear that all "relatives" who were spouses and parents, children, or siblings of a decedent or injured victim (whether or not survived by a spouse) are presumptively eligible individuals and that other "relatives" may be such eligible individuals. The amount of the compensation awarded to such "relatives" may be highly variable based upon the relationship in fact between the decedent/injured victim and the relative, but the right of the presumptive relatives to participate in the claims process



should be assured. In addition, the regulations should make clear that there is no compensation limit per decedent/injured victim: i.e., the aggregate amount of an award to multiple relatives of such a decedent/injured victim will not be capped in any way.

This can be accomplished by requiring that the legal representative of the decedent or the injured victim identify, in affidavit form, all presumptive relatives and that effective notice be given to all such relatives giving them the opportunity (within a reasonable time - 60 days) to opt into the claim process. If they do not opt in, they will be excluded from compensation under the Act and, if they do opt in, they will effectively waive the right to sue in court. But they should have the choice. Other relatives (e.g., grandparents) who might be eligible will have to be vigilant and take affirmative steps to attempt to qualify. The regulations should provide a temporal limit (e.g., 60 days after notice is sent to presumptive relatives) on intervention in the claim by such more remote relatives. The regulations should make clear, however, that in no event shall a claim on behalf of a decedent be deemed to have been filed earlier than the first to occur of (a) the filing of a claim by an applicant who is the representative of the decedent appointed as such by a court of competent jurisdiction or (b) March 1, 2003. This will prevent a "remote" relative from pre-empting the rights of the duly appointed representative of the estate of the decedent to choose whether and, if so, when to file a claim under the Act, while at the same time preserving the right of such "remote" relative(s) to seek compensation under the Act.

We are concerned with the exclusive effect of this proposal. It appears, however, to have been the intention of the Act to limit compensation to "relatives." If this is construed to mean relatives at law, many deserving individuals with close relationships in fact (i.e., co-habiting partners, survivors of engaged couples, step-children, etc.) who are injured survivors will be excluded. The regulations should more broadly define "relative" to include de facto relatives.

Should the regulations not reflect the "presumptive relatives" approach and its corollaries set forth above, they should at a minimum capture in the population of eligible claimants the most expansive population permitted by an assessment of the law on such issues as it has been developed in all the state and federal courts applying state law, without deference to the law of any such jurisdiction. See Topic 6.

## **Topic 6: Nature and Amount of Compensation**

We believe that experienced Hearing Officers who receive careful guidance from the Special Master can and should decide each case on its own merits. We recognize that using this approach will require the employment of as many as a hundred experienced Hearing Officers and require that they all receive careful training from the Special Master.

Any attempt to provide formulaic outcomes will inevitably be arbitrary. It cannot be forgotten that the families of the victims are all now suffering from the most horrific act of arbitrary violence this country has ever experienced. They need not only compensation that reflects the realities of their lives and their losses, but also the well justified belief that the compensation they receive has been fairly determined. Furthermore, if the act is to fulfill its purpose of providing an effective alternative to litigation, it must promise and give results that fit the circumstances of each case.

Each applicant should be permitted to submit expert testimony on any and all issues (economic and non-economic) upon which the courts have allowed such testimony, including past and projected future economic loss (income streams and expenses), hedonic damages, etc. The probative value of this type and all other evidence should be determined by an assessment of the law on such issues as it has been developed in all the state and federal courts applying state law, without deference to the law of any such jurisdiction. The substantive rules employed to determine that sum of money that will fully and fairly



compensate each eligible applicant should be determined by an assessment of that law on such issues, as it has been developed in all the state and federal courts applying state law, without deference to the law of any such jurisdiction, which provides the most expansive remedies. For instance, although some jurisdictions do not permit recovery for grief and its consequences, such recovery should be permitted here. The specific rules to be applied should not be set forth in detail in these regulations (with the possible exception noted in the second next paragraph), but should be adopted by the Special Master pursuant to the above mandate and communicated to the Hearing Officers during their training. The Hearing Officers will then be in a position to listen to arguments for accepting evidence and applying damages rules on unusual issues and, if necessary referring them on a case-by-case basis to the Special Master or his designee for resolution (similar to an interlocutory appeal). Using this approach will provide potential applicants with a common body of well developed law with which to make decisions whether to pursue a claim under the Act or pursue their claims in court, will provide uniformity of decision making across jurisdictions, and will assure full compensation after applying the collateral source rule mandated by the Act.

This approach is entirely consistent (indeed any more restrictive rule would be inconsistent) with Sections 402 (5) (ECONOMIC LOSS) and (7) (NONECONOMIC LOSSES) of the act, which provide that:

The term "economic loss" means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable state law.

The term "noneconomic losses" means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.

It is essential that "noneconomic loss" awards be consistent for all, particularly among survivors of deceased victims. There should be no linkage between the amount of an "economic loss" award and the amount of the "noneconomic loss" award for such applicants for compensation under the Act. There simply is no rational basis for assuming such a correlation and every reason to think that the economically disadvantaged suffer the same emotional pain, etc. as the economically more fortunate. Indeed, the hearing process would be very much streamlined and the risk of anomalous outcomes substantially reduced, if the regulations provide for a minimum award to each presumptive relative of each deceased victim for the emotional consequences of the emptiness left in and trauma to his/her life in a fixed amount (e.g., \$2,000,000) to be supplemented based upon unique circumstances presented in the claim or at the hearing. Such an approach would have as its premise the reality that even the emotionally most resilient among them (no matter what their ages or other circumstances) have suffered and will continue to suffer from the loss of their loved ones and the haunting images of the terror faced by those loved ones just before and as their lives were extinguished by explosion and fire, crush of steel and mortar, impacts with earth from leaps to death, etc. For even these most resilient ones (some would say, most emotionally repressed) whose tears flow inward unseen, suffer with the others.

Finally, the regulations should require the Special Master and the Hearing Officers to make no distinction among awards customarily given in different locations where a hearing might be held, the injury or death occurred, or a victim or survivors may have lived or are living: rather, they should require that awards be consistent with those made in those locations, nationwide, where the most generous awards are the custom. This is consistent with the broad scope of damages contemplated by the Act and



the unprecedented enormity of and national scope of the September 11th attacks, and is essential to meet the criterion of fairness across geographic regions implicit in the Act.

Since so much of the language of the Act that reads, "The term 'collateral source' means all collateral sources" begs the question of what is a collateral source, the regulations should include as collateral sources only those which are and are of the same kind as those enumerated as examples: i.e., life insurance, pension funds, death benefit programs, and payments by federal, state, or local governments. It is clear to us that charitable contributions are not of like kind to these, nor are "in kind" and/or material contributions of this type.

Furthermore, the regulations should state expressly that the term "collateral source" will be narrowly construed to mean only those sums received by the eligible applicant net of all taxes that exceed the premiums, payments or other contributions made by that applicant and the interest, dividends and capital and other gains attributed to said premiums, payments or contributions, and the scope of the terms "pension funds" and "death benefit programs" should be more clearly defined consistent with this narrow construction. Application of any other rule will place form over substance: The survivor of a victim who invested wisely in the stock market would avoid a collateral source deduction, while the survivor of a victim who invested in whole life insurance, a 401(k) plan or the like would have an award reduced by the investment. If the rule suggested here is adopted, the apparent intent of Congress that applicants for relief under the Act not receive a windfall will be accomplished. For example, the young executive who had paid premiums of \$10,000 for a term life insurance policy with a \$250,000 death benefit would have his award reduced by \$240,000, but the victim who had paid into a retirement plan all contributions to it (no employer participation) would have no set off against recovery. The burden of proving the limited application of the collateral source rule should be on the applicant.

We hope that the Special Master will be an active jurist with many years and broad experience handling civil claims, particularly wrongful death claims. Hearing Officers should be jurists (active or retired) and mediators or arbitrators with many (at least 10) years experience handling civil claims, including wrongful death claims. Although the commitment of the Justice Department to providing and training qualified Hearing Officers will be substantial, it will not exceed the burden that will otherwise be placed on the courts, if the regulations do not afford victims and their families an effective forum for relief and an adequate remedy.

Requiring that all applications and affidavits be signed under the pains and penalties of perjury with the threat of criminal prosecution and the experience and judgment of well qualified Hearing Officers should suffice to determine whether potential future collateral source payments are ones that an individual is "entitled to receive."

Similarly, fraud can best be avoided by requiring affidavits wherever feasible and empowering and requiring the Special Master and Hearing Officers to report suspicion of fraud to the Attorney General for prosecution.

## CONCLUSION

The population of eligible applicants should be sufficiently large to capture all those who have suffered the consequences of the terrorist-related aircraft crashes of September 11th. All spouses, as well as all parents, children and siblings of victims (whether survived by a spouse), have been affected by the trauma of the September 11th crashes and must be presumed to be eligible for compensation under the Act. Other "legal" relatives of the victims may well also have suffered. Finally, narrow legal definitions of relationships cannot accomplish the salutary goals of the Act, and experienced Hearing Officers can



make well reasoned decisions whether to include (or exclude) "de facto" relatives or those with remote degrees of kinship and, if included, the nature and extent of their losses.

The rules of evidence and substantive law must be designed to provide uniformity of application and to fairly determine the full and fair value of claims before any collateral sources are deducted. This can be accomplished by relying upon the enormous body of decisional authority of the state and federal appellate courts. Since the Act itself makes clear that an extremely broad array of both economic and non-economic damages are to be awarded, the most expansive rules of evidence and substantive law recognized by the existing decisional authority should be used for determining both eligibility and damages. Since grief is a part of the suffering of and is impairing the vitality of the vast majority of those who will apply for benefits under the Act, compensation for it should be permitted.

Consistency of outcomes in like circumstances is essential to fairness and its perception. Application of the most expansive and generous interpretations by the state and federal courts, applying state law, and requiring that awards reflect the most generous outcomes for all, notwithstanding the location of the hearing, the applicant or the injury or death of the victim, is also required to assure fairness: This country has never experienced a disaster of this magnitude and it deserves treatment commensurate with the scope of its devastation.

The term "collateral sources" should be narrowly construed to avoid formalist and anomalous results and to effect the purpose of the Act: i.e., to fairly compensate the victims of the September 11th terrorist-related crashes and avoid windfalls to those whose contributions to the "collateral source" are disproportionate to the benefit they received. Since charitable and "in kind" distributions to applicants are simply not of like kind to the "collateral sources" enumerated in the act, they should not result in a reduction in awards.

Finally, it is the intent of these recommendations that the regulations make the process simple, convenient, fair and fast. It is clear that Congress sought this result. The "opt in" and "intervention" recommendations made here should assure that the entire population of intended participants in the Act's recovery process are included promptly after a claim is first filed. The use of experienced decision makers and existing appellate decisional law will provide predictability and uniformity of results. The availability of a hearing convenient to the applicants will provide the opportunity that they need to present their cases and, perhaps just as important, give them the belief that they are being treated as individuals and the merits of their cases are being assessed fairly.

This response to inquiry and advance notice of rulemaking is submitted by e-mail to victimcomp.comments@usdoj.gov on behalf of Families of September 11, Inc., by its president, , with a hard copy to be filed by hand delivery.

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