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August 4, 2011

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

Re: Docket No. CIV 151, Notice of Proposed Rulemaking, James Zadroga 9/11 Health and Compensation Act of 2010.

Dear Mr. Zwick:

I am writing on behalf of the AFL-CIO to submit comments on the Department of Justice's notice of proposed rulemaking for regulations to implement Title II of the James Zadroga 9/11 Health and Compensation Act of 2010 (76 Fed. Reg. 119 (21 June 2011), pp-36027- 39).

The AFL-CIO is a national labor federation representing 55 national and international unions and 12.2 million members. We have a deep and immediate interest in the regulations that are being developed to implement the 9/11 Health and Compensation Act (HCA).

Many of those killed on September 11th were union members who died doing their jobs. Similarly many of those who responded to the attacks and cleaned up the World Trade Center (WTC) site were members of AFL-CIO unions. Since the attacks, the AFL-CIO, the New York State AFL-CIO and our unions have been deeply and immediately involved first to protect the safety and health of these workers and then to ensure proper medical monitoring, treatment and compensation for those who were sick and injured. Since 2003, we were deeply involved in the crafting and passage of federal legislation to establish ongoing monitoring, treatment and compensation programs for 9/11 responders, clean-up workers and community members –

legislation finally passed by the Congress in December 2010, and signed into law on January 2, 2011.

The regulations being developed by the Department of Justice to implement Title II of the HCA, and the companion regulations being developed by the Department of Health and Human Services to implement Title I of the law, are vitally important to the responders, clean-up workers and community members who were exposed to toxic substances and other hazards in the aftermath of the September 11 attacks. Thousands of these individuals have developed serious health problems as a result of their exposures, many are disabled and some have died. According to the most recent information available from the National Institute for Occupational Safety and Health (NIOSH), in 2010, a total of 18,462 individuals received medical treatment in the federally funded World Trade Center Health Programs for a condition related to their exposure at the WTC.[1] According to unofficial estimates provided by NIOSH in September 2010, since 2006, when the federally funded treatment program first began, approximately 36,000 individuals had received treatment for a WTC-related condition in the programs.

Unfortunately, many of those who are sick have faced severe economic hardship as a result of their conditions. Unable to work, they have lost income and run up huge medical bills, particularly prior to federally funded treatment being made available in 2006. Their employers have contested their workers' compensation claims, delaying or denying their ability to receive replacement for wage loss or payment of medical costs. Many of these individuals became ill after the original VCF closed in 2003, leaving them limited options to seek any compensation for their injuries and losses.

The enactment of the James Zadroga 9/11 Health and Compensation Act of 2010 offers hope to those who are sick that they will get the medical care and compensation they need. But that will only happen if the regulations and procedures that DOJ and HHS adopt implement the law as intended and provide timely and ready access to services and programs, appropriate and quality medical care and fair compensation.

The regulations that have been proposed by DOJ in the AFL-CIO's view represent a good faith effort to implement Title II of the HCA in an effective and fair manner. However, there are some deficiencies in the regulations, particularly the limitation in the geographical boundaries, as compared to the boundaries for the health program that should be addressed in the final rule. In addition, there are ways the regulations and program could be improved to ensure that those who are sick are fairly compensated and to make the program more consistent, efficient, transparent, and effective. Our specific comments on the proposed rule and recommendations for how it can be improved are as follows:

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[1] National Institute for Occupational Safety and Health, World Trade Center Health Program, Number of Participants in the WTC Health Programs (as of March 31, 2011),. http://www.cdc.gov/niosh/topics/wtc/census.html.

Eligibility – The Definition of the 9/11 Crash Site

The proposed rule defines the 9/11 crash site to include: 1) the World Trade Center site, Pentagon site, and Shanksville, PA site; 2) the building destroyed in the 9/11 terrorists attacks; 3) the area in Manhattan south of Reade Street, and south of Centre Street to the Brooklyn Bridge, or any area contiguous to the crash sites that that the Special Master determines was close enough to the site that there was a demonstrable risk of physical harm resulting from the impact of the aircraft or the aftermath; or 4) any area related to, or along routes of debris removal, such as barges and Fresh Kills.

While this definition includes a geographical area that is larger than that defined under the original September 11 Victim Compensation Fund, it covers a smaller geographical area than is established for the World Trade Center Health Program under Title I of the James Zadroga Health and Compensation Act. Under the HCA the WTC Health Program is available to eligible responders and community members who worked, resided or were otherwise present in the New York City disaster area, which is defined as the area of Manhattan that is south of Houston Street and any block in Brooklyn that is wholly or partially contained within a 1.5 mile radius of the former World Trade Center site. This means that there may well be individuals diagnosed with a World Trade Center related health condition, who have suffered significant loss of health and income, but are ineligible for compensation from the VCF.

The intent of Congress in enacting the HCA was clearly to provide both health care and compensation to those with World Trade Center related health conditions. Indeed, in costing out the legislation, the Congressional Budget Office assumed "that the geographic areas of exposure defined in Title I would also be used as the criteria for compensation payments under Title II."[2] While the titles of the bill were developed separately, with Title II - the compensation title - building off of the earlier legislation that established the VCF, every effort should be made to coordinate and align the operation of the health program and the compensation program. Title II of the HCA gives the Special Master the authority to include in the geographical area for eligibility any area contiguous to a crash site that the Special Master determines that there was a demonstrable risk of physical harm from the impact of the aircraft or its aftermath. The boundaries established in Title I for the health program were based upon evidence that individuals in this area were at risk of serious health problems as a result of exposures related to the attack on the World Trade Center, its collapse and the aftermath. It certainly makes sense for the Special Master to conclude that those who are within those boundaries, who are diagnosed with a World Trade Center related condition, are at a demonstrable risk of physical harm. The geographical boundaries of the VCF should be expanded to be the same as the geographical boundaries for eligibility established under Title I for the World Trade Center Health Program.

Eligibility – Physical Harm

The original VCF and the HCA provide for compensation for physical harm related to exposures at the 9/11 crash sites. The proposed regulations do not provide for compensation for mental health only conditions, even if those conditions are covered by the WTC health program.

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[2] Congressional Budget Office Cost Estimate, June 25, 2010, H.R. 847 James Zadroga 9/11 Health and Compensation Act of 2010.

This means that individuals with PTSD and other serious WTC related mental health conditions are not eligible to receive compensation for these conditions. The preamble of the DOJ proposed rule states that statutory language does not permit the VCF to cover individuals with only mental and emotional injuries, even if these injuries are covered by the WTC Health programs. There is abundant evidence that there are serious mental and physical health conditions that are a direct result of the 9/11 attacks and related exposures. The serious mental health problems that have resulted have real physical effects, and the physical health problems that many have suffered have likewise resulted in significant related mental health problems. It is difficult, if not impossible to separate these effects. The AFL-CIO recommends that the Special Master reconsider this determination and cover all World Trade Center related conditions covered by the World Trade Center Health Program.

Under the proposed rules, the Special Master may require that the eligibility form for seeking compensation include various forms of proof for establishing eligibility. These include proof of presence at the site and proof of physical harm. To the extent possible, the AFL-CIO recommends that these proof requirements be aligned with the proof requirements in the health program so that the documentation/proof requirements are similar and determinations made in the health program can serve as presumptions in the compensation program. This will streamline the program and reduce administrative costs in the VCF and allow more of the available funds to be spent on compensation.

The preamble of the proposed rule indicates that the Special Master will publish a list of presumptively covered conditions based upon the list of conditions found under the WTC Health Program to be WTC-related. This list can be amended based upon the science. The preamble also states that the VCF will consider claims for conditions not on the presumptive list, but it is DOJ's expectation that the number of such cases compensated will be rare. The AFL-CIO would like to point out that Title I of the HCA also includes provisions for a health condition not on the list of presumed WTC-related conditions to be designated as WTC-related on a case-by-case basis as a result of review by an expert panel of independent physicians appointed by the WTC Program Administrator (section 3312(b)(2)). This provision was included in recognition of the fact that there may be individual cases where such a determination is made based upon the exposure and medical evidence in an individual case, prior to the condition being included on a presumptive list for the entire eligible population. The AFL-CIO believes that the DOJ rules should provide for such individual cases to be presumptively eligible for compensation based upon the findings and determinations made in the WTC Health Program.

In addition to individuals who receive a medical diagnosis of a WTC-related condition and treatment through a WTC Health Program provider, there are individuals who may have WTC-related conditions who have been treated by physicians that are not associated with the WTC Health Program. This is particularly true for individuals who became ill and received treatment prior to the establishment of a federally funded WTC treatment program. The VCF rule regarding proof of physical harm should be clarified to state that proof can either be from a certification from the WTC health program or from a determination of a health care provider who has examined the patient. The VCF should set forth the kind of information (e.g. medical records, test results) that must accompany such a determination whether it comes from a WTC Health program or other physician. While if there were unlimited funding, it might be preferable

for all those seeking compensation to be certified by the WTC Health Program, such a requirement is in our view not feasible, particularly for individuals who were treated earlier, but are no longer in the program, and would divert money from treatment of sick individuals.

Amendment of Claims

As proposed, the rules permit individuals who previously filed claims with the VCF to amend those earlier claims if additional relevant information has become available. The AFL-CIO strongly supports this provision. Since the original VCF was closed, significant additional medical and scientific information has become available identifying new WTC- related conditions not previously recognized, and documenting that earlier recognized WTC conditions may progress to result in more serious health effects and disability. Individuals who suffer such harm should be compensated.

Awards

Under the proposed rules the amount of awards will be based on similar criteria utilized in the original VCF, with similar collateral source offsets applied. The costs of medical treatment provided by the WTC health program will not be included in any award. One major issue not addressed in the proposed rule is how future medical costs will be calculated in determining the amount of awards. There are a number of uncertainties and complicating factors in determining these future medical costs to claimants.

First, the present legislation only authorizes the WTC health program for 5 years. While there is every intention on the part of supporters and sponsors of the legislation to seek extension of the medical treatment program, at this point there is no guarantee that such an extension will occur, particularly in the current budgetary climate. In addition, the future of the Patient Protection and Affordable Care Act which is scheduled to go fully into effect in 2014, and may affect out of pocket medical costs for some individuals with WTC-related conditions, is uncertain.

The payment of awards to individuals is complicated by the funding that is available for the compensation program. Due to PAYGO considerations, the amount that may be paid out in the first five years of the VCF is limited to $875 million of the total $2.775 billion available in funds for the VCF. To adjust to this funding stream issue, the legislation provides that awards may be paid in two installments – one in the first five years and a second in year six of the program. (In addition awards may be pro-rated if sufficient overall funds are determined to be insufficient to pay the full amount awards).

To address the uncertainties about the coverage for future medical costs for World Trade Center related conditions, and to account for the possible cash flow issue for award payments, the AFL-CIO suggests that future medical costs be computed as a conditional award, based on the assumption that the WTC Health Program will terminate in five years. However, this part of the award should not be paid until year six. This will allow the special master to make final determinations on future medicals prior to final payment in year six based upon whether the legislation has been extended and the realities of medical coverage for future medical costs under

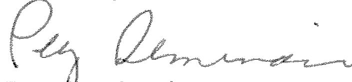
other sources of coverage at that point in time. It will also allow funds to be available to more people in the first five years of the program for losses they have already incurred.

Prorating of Awards

The HCA and the proposed regulations provide for awards to be prorated if sufficient funds are not available. Awards may be made in two installments – one in the first five years, and another in year 6, and awards may be reduced on a prorated basis if based upon claims experience the Special Master determines that sufficient funds will not be available to pay eligible claims. In the event that pro-rating of awards is necessary, the AFL-CIO recommends that the Special Master provide information to claimants on the full evaluation of the proposed award if funds had been available and the prorated value of the award due to the limitation in funding. This will allow the Special Master to determine and report on the shortfall in funds available for compensation to 9/11 claimants.

Thank you in advance for consideration of these comments. We hope they assist the Department of Justice in its efforts to fairly and effectively implement the James Zadroga 9/11 Health and Compensation Act.

Sincerely,



Peg Seminario
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