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July 13, 2016

The Honorable Lamar Alexander
Chairman
The Honorable Patty Murray
Ranking Member
Committee on the Health, Education, Labor, and Pensions
United States Senate

The Honorable Bob Goodlatte
Chairman
The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
House of Representatives

Subject: *Department of Justice: James Zadroga 9/11 Victim Compensation Fund
Reauthorization Act*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Justice (DOJ) entitled “James Zadroga 9/11 Victim Compensation Fund Reauthorization Act” (RIN: 1105-AB49). We received the rule on June 28, 2016. It was published in the *Federal Register* as an interim final rule on June 15, 2016. 81 Fed. Reg. 38,936.

The interim final rule addresses changes required by the James Zadroga 9/11 Victim Compensation Fund Reauthorization Act (the Reauthorized Zadroga Act or the Act). Pub. L. No. 114–113, Division O, 129 Stat. 2242 (Dec. 18, 2015). The Act extends the September 11th Victim Compensation Fund of 2001, which provides compensation to any individual (or a personal representative of a deceased individual) who suffered physical harm or was killed as a result of the terrorist-related aircraft crashes of September 11, 2001, or the rescue and recovery efforts during the immediate aftermath of such crashes or the debris removal efforts that took place in the immediate aftermath of those crashes. According to DOJ, the statute specifically extends the time period during which eligible claimants may submit claims for compensation until December 18, 2020, increases the Victim Compensation Fund’s total funding available to pay claims, creates different categories of claims, directs the Victim Compensation Fund to issue full compensation to eligible claimants, and imposes limitations on certain components of future loss calculations.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of major rules from the date of publication in the *Federal Register* or receipt of the rule and accompanying material—including a statement as to whether the rule is major—by Congress, whichever is later. 5 U.S.C. sect. 801(a)(3)(A). The interim final rule published in the *Federal*

Register on June 15, 2016, stated that the rule had an effective date of June 15, 2016. 81 Fed. Reg. 38,936. The interim final rule also stated it was not a major rule under CRA. 81 Fed. Reg. 38,941. However, we received a corrected submission form from DOJ indicating that it is a major rule on June 28, 2016. A correction in the *Federal Register* has not been published. Since the interim final rule has an effective date of June 15, 2016, the rule does not have the 60-day delay in effective date.

However, any rule that an agency for good cause finds that notice and public comment procedures are impractical, unnecessary, or contrary to the public interest is to take effect when the promulgating agency so determines. 5 U.S.C. sect. 808(2). The interim final rule also stated that DOJ found good cause to waive the statutory delay and make the rule effective June 15, 2016. DOJ reached this conclusion because it determined that, in view of the need to determine, evaluate, and pay compensation claims, to comply with statutory requirements and deadlines, and because the interim final rule will be subject to public comment for 30 days before its final implementation, it was impractical to comply with a statutory delay. We note that the interim final rule that was originally labeled non-major found good cause to waive a 30-day delay under the Administrative Procedure Act for non-major rules, pursuant to 5 U.S.C. sect. 553(d). But, we note further that the CRA, which requires a 60-day delay for major rules, similarly allows the good cause exception.

Enclosed is our assessment of DOJ's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that DOJ complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Stefanie G. Langsam
Deputy Special Master
September 11th Victim Compensation Fund
Department of Justice

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF JUSTICE
ENTITLED
“JAMES ZADROGA 9/11 VICTIM COMPENSATION FUND
REAUTHORIZATION ACT”
(RIN: 1105-AB49)

(i) Cost-benefit analysis

The Department of Justice (DOJ) assessed the benefits and costs anticipated from this rulemaking and considered whether there are reasonably feasible alternatives to the interim final rule, including considering whether there are reasonably viable non-regulatory actions that could be taken in lieu of this rulemaking. DOJ stated that the purpose of this rulemaking is to provide the legal and administrative framework necessary to provide compensation to any individual (or a personal representative of a deceased individual) who suffered physical harm or was killed as a result of the terrorist-related aircraft crashes of September 11, 2001, or the debris removal efforts that took place in the immediate aftermath of those crashes, as provided by title II of the James Zadroga 9/11 Health and Compensation Act of 2010 (the Zadroga Act) and the James Zadroga 9/11 Victim Compensation Fund Reauthorization Act (the Reauthorized Zadroga Act). According to DOJ, the primary benefits and costs of this rulemaking are both set by statute as Congress has appropriated a capped amount for this program—an initial \$2.775 billion payable under the Zadroga Act and an additional \$4.6 billion under the Reauthorized Zadroga Act. As stated in the interim final rule, because the \$7.375 billion appropriated by Congress for the September 11th Victim Compensation Fund (the Fund) must pay for claimant awards as well as the Fund's administrative expenses, it is important for the Fund to establish procedures to screen out ineligible or inappropriate claims while keeping administrative expenses as low as possible consistent with the goal of ensuring that funds are not diverted to processing ineligible claims in order to maximize the amount of funds available for claimants. Finally, based on past practice with the operation of the original Fund and the reopened Fund and the necessity to establish the legal and administrative framework for the reauthorized Fund, DOJ concluded that there are no viable non-regulatory actions that it could take to implement the Reauthorized Zadroga Act in a fair and efficient manner.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

DOJ states that these regulations set forth procedures by which the federal government will award compensation benefits to eligible victims of the September 11, 2001, terrorist attacks. Under RFA, the term small entity does not include the federal government, the party charged with incurring the costs attendant to the implementation and administration of the Fund. According to DOJ, because this rule is being adopted as an interim final rule, an RFA analysis is not required. Lastly, DOJ states that the rule provides compensation to individuals, not to entities.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

DOJ states that the interim final rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one

year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Act.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

DOJ states that its implementation of this rule as an interim final rule, with provision for post-promulgation public comment, is based on sections 553(b)(A), 553(b)(B), and 553(d) of the Administrative Procedure Act (APA). 5 U.S.C. § 553. Under section 553(b), an agency may issue a rule without notice of proposed rulemaking and the pre-promulgation opportunity for public comment where “good cause” exists or for “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.”

DOJ states that all of the revisions identified in Part B of the final rule, the provision entitled: “Revisions to the Rule Conforming to Statutory Changes,” are interpretive rules issued by DOJ to advise the public of the Department’s construction of the new statute. DOJ states that these revisions to the rule merely explain or clarify the application of the substantive law set forth in the Reauthorized Zadroga Act; they do not create new rights or impose obligations independent of the statute.

According to DOJ, the four additional changes, described in Part C, “Additional Regulatory Changes to Reduce Burdens for Claimants,” similarly are not subject to formal notice-and-comment requirements. The first change to section 104.3(c)(3) is interpretive and clarifies the meaning of the term “spouse” consistent with law and pre-existing DOJ policy. The second and fourth changes, which eliminate certain documentation requirements, see sections 104.22(c)(1) and 104.52, are procedural in nature; they eliminate a required component of the documentation submitted with a claim and instead advise that the Special Master retains the discretion to ask for these documents if needed. Finally, the addition of section 104.45(e) and the revisions of section 104.46 reflect general statements of policy; they serve only to advise the public that the Special Master, who administers the Fund, may exercise her discretionary power in certain ways. For these reasons, as stated in the rule, the interim final rule is not subject to the formal notice and comment requirements under section 553 of APA.

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

Congress to implement the regulations is exceedingly strict and therefore it has a limited period of time within which to update the regulations.

APA also permits an agency to make a rule effective upon date of publication in the *Federal Register* where “good cause” exists or for “interpretive rules and statements of policy.” 5 U.S.C. § 553(d). As stated, DOJ has determined that it would be unnecessary and contrary to the public interest to engage in full notice and comment rulemaking before putting these interim final regulations into effect and that it is in the public interest to promulgate interim final regulations. For the same reasons, DOJ has determined that there is good cause to make these interim final regulations effective immediately upon publication in the *Federal Register*, in accordance with section 553(d) of APA (5 U.S.C. § 553(d)). Therefore, according to DOJ, a waiver of the 30-day period prior to the rule’s effective date is appropriate here.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

According to DOJ, the interim final rule implements Pub. L. No. 114-113, which reauthorizes the Fund and contains the Reauthorized Zadroga Act. In order to be able to evaluate claims and provide compensation, the Fund will need to collect information from an individual (or a personal representative of a deceased individual) who suffered physical harm or was killed as a result of the terrorist-related aircraft crashes of September 11, 2001, or the debris removal efforts that took place in the immediate aftermath of those crashes. Accordingly, DOJ’s Civil Division will submit an information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the emergency review procedures of PRA. This request will seek reinstatement of the prior information collection authorized under Pub. L. No. 111-347. DOJ has also published a Notice in the *Federal Register* soliciting public comment on the information collection associated with this rulemaking. 81 Fed. Reg. 20,674 (April 8, 2016).

Statutory authorization for the rule

DOJ promulgated this final rule under the authority of title IV of Pub. L. No. 107-42, title II of Pub. L. No. 111-347, and title IV of Pub. L. No. 114-113. 115 Stat. 230, 237-241 (Sept. 22, 2011); 124 Stat. 3623, 3659-3665 (Jan. 2, 2011); and 129 Stat. 2242, 3000-3018 (Dec. 18, 2015).

Executive Order No. 12,866 (Regulatory Planning and Review)

The Department of Justice has determined that this rule is an economically significant regulatory action under the Order, and accordingly this rule has been reviewed by OMB.

Executive Order No. 13,132 (Federalism)

DOJ determined that this regulation will not have substantial direct effects on the states, on the relationship between the national government and the states, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13,132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment.