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Audit of the Department of Justice's Administration of the September 11th Victim Compensation Fund

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AUDIT OF THE DEPARTMENT OF JUSTICE'S ADMINISTRATION OF THE SEPTEMBER 11TH VICTIM COMPENSATION FUND

EXECUTIVE SUMMARY

Title II of the James Zadroga 9/11 Health and Compensation Act of 2010 (Zadroga Act) reopened the September 11th Victim Compensation Fund (VCF) and extended claimant eligibility to individuals who removed debris from or were present at the sites of the September 11th attacks. The VCF provides claimants a no-fault alternative to torts litigation because individuals seeking VCF compensation must waive their right to sue for damages caused by September 11th-related injuries or deaths. In December 2015, Congress reauthorized the VCF to accept claims through December 2020 and provided it with an additional $4.6 billion, bringing the total amount available for compensation to $7.375 billion.

Under the Zadroga Act, the Attorney General designates a VCF Special Master with the final authority to assess all eligibility claims and compensate victims. From the VCF's reopening in May 2011 to July 2016, Sheila Birnbaum, a New York-based attorney in private practice, served as the Special Master. In July 2016, Birnbaum resigned from her position and since that time Rupa Bhattacharyya, Director of the Civil Division's Constitutional and Specialized Tort Litigation Section, has served as the Special Master. Both Special Masters were assisted by Deputy Special Masters. Soon after her appointment, Special Master Birnbaum appointed Deborah Greenspan, a Washington, D.C.-based attorney in private practice, to serve as a Deputy Special Master. In April 2014, Birnbaum also named Nell McCarthy as a Deputy Special Master. McCarthy left the VCF in December 2015 and Greenspan left in November 2016. Stefanie Langsam and Jordana Feldman, both full-time Civil Division employees, have since served as Deputy Special Masters under Special Master Bhattacharyya.

The Department of Justice (DOJ) Office of the Inspector General (OIG) conducted this audit to evaluate how the Special Master administered the VCF and how the Civil Division and Justice Management Division (JMD) helped support VCF operations from 2011 through February 2016. During this time, the VCF claim process had three stages: the first determined claimant eligibility, the second calculated victim compensation, and the third processed the award for payment. Our review determined that various process inefficiencies increased the claim processing timeframe.

We found that the VCF did not consistently maintain in its Claims Management System (CMS) support of certain eligibility and compensation decisions. Some claim files lacked proof establishing presence at a September 11th attack site or of a September 11th-related physical condition, while other claim files included the status of ongoing claimant litigation, which the Zadroga Act required to be resolved before a claimant could receive an award. Some claim files also lacked proof of Special Master or designee approval of eligibility or compensation amounts. We believe that inconsistent documentation placed the VCF at an increased risk of

making erroneous award decisions or of being unable to substantiate such decisions in later appeals or reviews.

During the course of our audit, the VCF made significant changes to address a number of procedural inefficiencies that we believe should help streamline and expedite the evolving VCF decision-making process. For example, the VCF established teams of specialists dedicated to reviewing particular claimant groups. In addition, Special Master Bhattacharyya reported that she has required that VCF personnel maintain complete files to support eligibility and claim decisions in the CMS and has redesigned the quality review process, which has been in place since 2015, to ensure compliance with this requirement.

Throughout our audit, VCF leadership emphasized to us that it evaluates each claim individually; however, we identified systemic weaknesses affecting this process in making expedited awards to deceased victim claims whose representatives reported extreme financial hardships. When the VCF expedited making an award that was not complete, the VCF required that the victim's representative file an amendment or an appeal to receive additional compensation. While we acknowledge the VCF's intent to expedite awards to representatives of deceased victims reporting financial hardships, it appeared to us unnecessarily burdensome and inefficient to require the victim's representative to file an amendment or appeal to receive the remainder of the award.

The Civil Division and JMD issued nearly $60 million in contracts to support VCF operations. We did not identify any discrepancies with how JMD awarded and monitored VCF contracts. However, we identified that, between August 2011 and June 2016, the Civil Division issued 18 non-competitive neutral service contracts, valued at over $3.6 million, to the private law firms of Deputy Special Master Greenspan without sufficiently documenting the justification and rationale for non-competitively awarding them. We also found that the Civil Division issued three independent non-competitive neutral service contracts. The Civil Division Contracting Officer told us that he largely relied on the direction of Special Master Birnbaum to justify awarding these contracts. We found that the justifications lacked sufficient detail, such as the nature of acquisition need or the specific expertise and qualifications of the contractors, as required by the Federal Acquisition Regulation (FAR) when making non-competitive contracts.

We also found that these non-competitive contracts lacked sufficient administrative oversight. As a result, we determined that there were a total of 156 days where the contractor performed services without a contract, which the Civil Division Contracting Officer acknowledged to us is very unusual. The Contracting Officer modified the contracts to cover the performance gaps after we discussed the matter with him.

We further identified a potential conflict of interest involving these non-competitive contracts due to the fact that Deputy Special Master Greenspan dictated the contract requirements, including developing the Statements of Work and identifying the contract period of performance; and signed the contracts on behalf of her law firm. Both the Civil Division and Deputy Special Master Greenspan

recognized this might have created a potential conflict of interest, and therefore consulted the JMD Ethics Office; yet our review found this potential conflict question was never appropriately addressed or resolved by the Civil Division or JMD. We believe Greenspan should have proactively excluded herself from negotiating these contracts because of the resulting financial benefit to her law firms where she remained a partner, and that the Civil Division should have required someone else to represent the government's interest in establishing the contracts. While Deputy Special Master Greenspan told us that her firms did not make a profit on the contracts, we believe that it is indisputable that the $3.6 million in revenue that the contracts generated for the law firms and its partners was not insubstantial. Nevertheless, because we were unable to obtain sufficient information to determine the profitability of these contracts for the law firms, we could not ascertain whether Greenspan received any financial compensation as a result of the contracts.

Additionally, we had concerns with the VCF's development of its CMS. The VCF contracted with International Business Machines Corporation (IBM) to develop its CMS and, as of July 2016, had spent $19.4 million on it. While the VCF reports that the CMS is functional, it originally did not allow for the high levels of customization needed by the VCF. As a result, the VCF had to develop a number of systemic workarounds and tools to review and process claims. We remain concerned about the CMS given that the VCF and the contractors have not been able to ensure that it met all contracted requirements.

Finally, in the course of this audit, we discovered that VCF employees transmitted by unencrypted email claimants' personally identifiable information (PII) from DOJ servers to private e-mail servers operated by the respective law firms to which Special Master Birnbaum and Deputy Special Master Greenspan served as partners. The transmitted PII included claimants' social security numbers, dates of birth, and medical information. We immediately notified the Department of this concern by a Management Advisory Memorandum, a copy of which we include with this report as Appendix 4. As described in its response to the Memorandum contained in Appendix 5, the DOJ informed us that it has since worked with the private law firms to safeguard and destroy claimant information, and that the VCF also instituted additional procedures to mitigate its employees from sending claimant information from DOJ-controlled servers.

Our report makes three recommendations to the VCF regarding its claims management process and four recommendations to the Civil Division regarding its administration of future VCF contracts.

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AUDIT OF THE DEPARTMENT OF JUSTICE'S ADMINISTRATION OF THE SEPTEMBER 11TH VICTIM COMPENSATION FUND

INTRODUCTION

Title II of the James Zadroga 9/11 Health and Compensation Act of 2010 (Zadroga Act), reopened the September 11th Victim Compensation Fund (VCF) and extended claimant eligibility to individuals who removed debris from or were present at the sites of the September 11th attacks.[1] The Zadroga Act originally authorized the VCF to accept claims through October 2016 and appropriated $2.775 billion in compensation. In December 2015, Congress reauthorized the VCF to accept claims through December 2020 and provided it with an additional $4.6 billion, bringing the total amount available for compensation to $7.375 billion.[2] As established by Congress, the VCF provides claimants a no-fault alternative to torts litigation because any individual seeking VCF compensation must waive the right to sue for damages caused by September 11th-related injuries or deaths.

Two Department of Justice (DOJ) components have assisted the reopened VCF. The Civil Division supports the VCF's operations and administers several contracts for services it requires to review claims. Such contracted services include those for litigation, information technology, and clerical support, some of which require Justice Management Division (JMD) assistance to award the contracts. Additionally, the Civil Division transmits payment information to the U.S. Department of the Treasury (Treasury), which disburses awards to individual claimants or their designated representative.

VCF Leadership

Legislation establishing the VCF provided that the Attorney General designate a Special Master with the final authority to assess all eligibility claims and compensate victims. In May 2011, the Attorney General appointed Sheila Birnbaum, a New York-based attorney specializing in product liability, toxic torts, and insurance coverage litigation, to serve as the Special Master of the reopened VCF. Birnbaum served in this capacity as a part-time, non-compensated Special Government Employee (SGE).

Birnbaum led the VCF until she resigned in July 2016. The Attorney General then appointed Rupa Bhattacharyya, Director of the Civil Division's Constitutional and Specialized Tort Litigation Section, to serve as the VCF's Special Master. Unlike

[1] Pub. L. 111-347 (2011). The original September 11th Victims Compensation Fund (2001 VCF) covered only those injured or killed by the terrorist attacks at the World Trade Center; the Pentagon; and the site of the aircraft crash at Shanksville, Pennsylvania and was operational from 2001 to 2004.

[2] Pub. L. 114-113 (2015).

Special Master Birnbaum, Bhattacharyya is serving as Special Master as a full-time, DOJ employee on detail from the Civil Division.

Both Special Masters have been assisted by up to two Deputy Special Masters at a time. Soon after her appointment, Special Master Birnbaum appointed Deborah Greenspan, a Washington, D.C.-based attorney specializing in class action, mass torts, and bankruptcy litigation, to serve as Deputy Special Master.[3] Greenspan previously served as a Deputy Special Master for the original VCF. In April 2014, Nell McCarthy was also named as a Deputy Special Master. Both Greenspan and McCarthy left the VCF during our audit: Greenspan left in November 2016 and McCarthy left in December 2015. Stefanie Langsam and Jordana Feldman, both full-time Civil Division employees, have served as Deputy Special Masters under Special Master Bhattacharyya.

September 11th Certified Physical Conditions

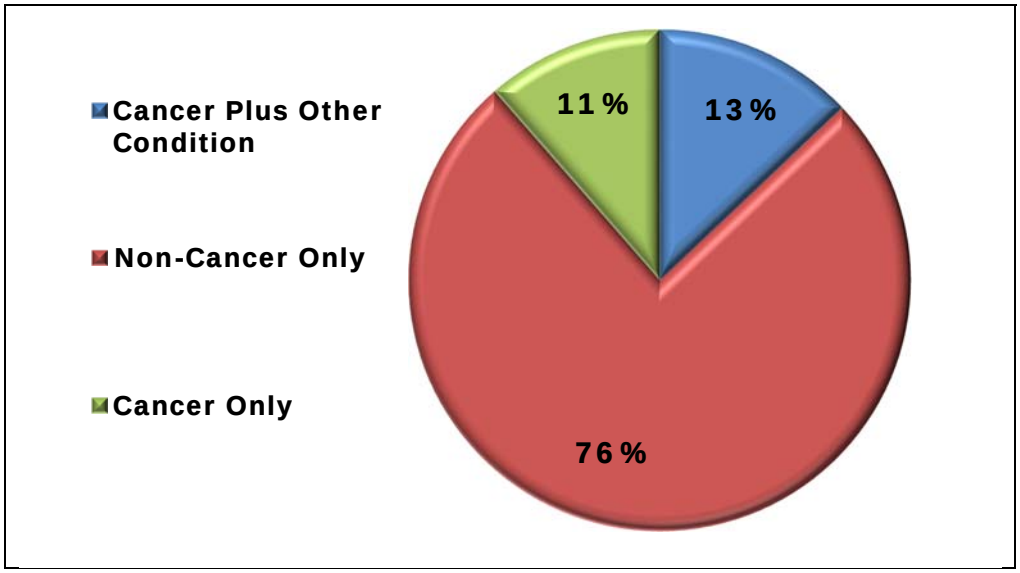
To be eligible for recovery from the VCF, claimants must have a certified physical condition caused by or related to the September 11th terrorist attacks. The physical condition must be certified by the World Trade Center Health Program (WTCHP), a federally funded program administered by the National Institute for Occupational Safety and Health, or verified through the VCF's private physician process.

The range of covered conditions includes treatable illnesses such as asthma and bronchitis to more terminal conditions such as pancreatic and lung cancer. Based on VCF data as of December 2015, about 24 percent of claimants suffer from some form of cancer, as shown in Figure 1.

[3] Deputy Special Master Greenspan served the VCF in a part-time capacity as an uncompensated SGE. Both Birnbaum and Greenspan received permission to continue to practice law privately while administering the VCF.

Figure 1

September 11th Related Physical Conditions



Source: VCF data as of December 2015.

The WTCHP also receives and reviews health information regarding potential conditions that could be attributed to the September 11th attacks. For example, in April 2013, a police association of the City of New York petitioned the WTCHP to consider adding prostate cancer to the list of eligible conditions. The WTCHP conducted its review and published a Final Rule in September 2013, which added prostate cancer to the list of September 11th-related health conditions.[4] The Final Rule included the methods used to review and approve prostate cancer as an eligible condition. In this way, the list of certifiable physical conditions continues to expand to cover additional types of ailments developed among those present at the site. According to the WTCHP, as of August 2016, there are about 50 types of cancer it believes are related to exposures from the September 11th terrorist attacks.

OIG Audit Approach

The objectives of the audit were to evaluate how the Special Master administered the VCF and how the Civil Division and JMD supports VCF operations from the time the VCF reopened in 2011 through February 2016. Considering this timeframe, our review primarily concentrated on how the VCF, under the stewardship of Special Master Birnbaum, processed and adjudicated claims and assessed how the Civil Division and JMD assisted VCF operations.[5]

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[4] 42 C.F.R. § 88.1 (2013).

[5] We completed nearly all of our audit fieldwork and testing prior to Special Master Birnbaum's resignation in July 2016. For more information about our audit scope and methodology, see Appendix 1.

To accomplish these objectives, we interviewed VCF leadership and personnel and observed its activities and controls from December 2015 through February 2016. We collected and evaluated available policies and procedures and met with Procurement and Ethics Officials with the Civil Division and JMD to learn how they awarded contracts to support VCF operations and the development of contract requirements. We also worked closely with a VCF consultant to obtain an understanding of the Claims Management System (CMS) used by the VCF to collect the appropriate claimant data needed for it to assess claimant decisions. We judgmentally selected claims to review for compliance with the Zadroga Act, VCF regulations, and internal VCF policies and procedures to ensure that VCF personnel appropriately documented and supported eligibility determinations and award decisions. We calculated the average time that the VCF required to handle a claim through each of the three main stages of the claims review process and analyzed general statistics for claimants who received payments. For more information on our methodology, see the Objectives, Scope, and Methodology in Appendix 1.

The Audit Findings section of this report summarizes the results of our review. The first part of this section details concerns regarding the VCF's claims management process. The second part details our findings regarding the Civil Division's support and oversight of contracts established for the VCF.

AUDIT RESULTS

Claims Management Process

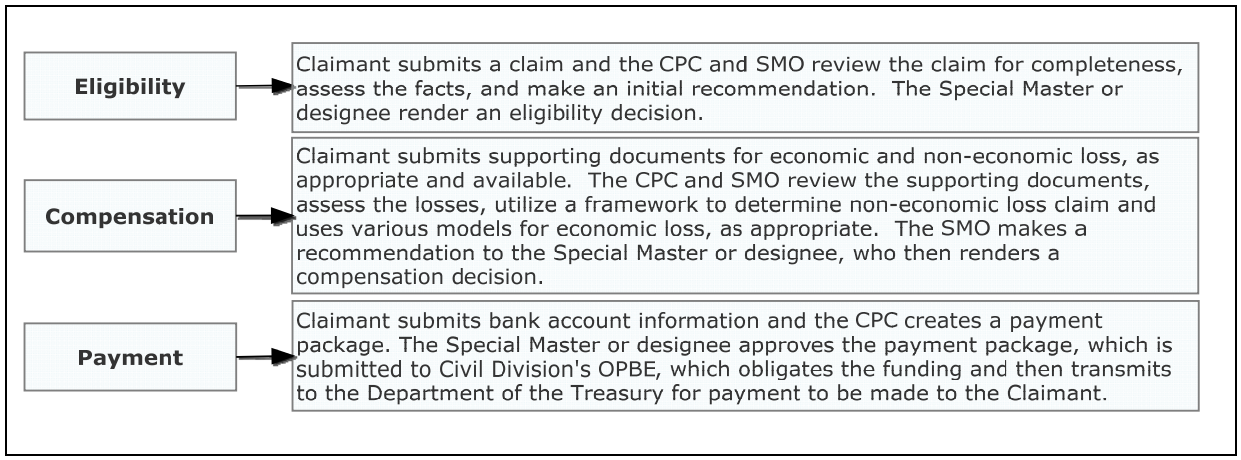
As of December 2015, VCF leadership determined the eligibility of 17,673 claims and awarded over $1.8 billion in compensation to 9,131 eligible claimants or their representatives. We found that the Special Master's Office did not consistently maintain adequate documentation to support these eligibility and compensation decisions. Further, we found that the Special Master's Office did not, as of February 2016, have consistent procedures in place for attorneys to follow when making decisions associated with applying offsets and calculating compensation related to deceased victims claims. While the VCF updated its policies and procedures to address many weaknesses we identified during our audit, to further address these issues the VCF needs to: (1) provide evidence that revised policies ensure relevant documents are retained in the CMS, (2) provide evidence that revised policies ensure appropriate application of award offsets, and (3) implement specific guidance regarding the provision of awards associated with pain and suffering experienced by victims prior to death.

Process Stages

The VCF Special Master has legislative authority to assess all eligibility claims and compensate those injured during the aftermath of the September 11th attacks. The VCF's Special Master's Office (SMO) has developed and continues to refine Standard Operating Procedures (SOPs) to guide how VCF personnel should review claims to confirm eligibility and calculate proposed award compensation amounts. Based on these SOPs, the VCF claims management process comprises three primary stages, as shown in Figure 2.

Figure 2

Overview of Claims Decision Process



Note: Appendix 2 provides a detailed breakdown of the VCF's claims management process.

Source: OIG summary of claims process.

The first stage determines claimant eligibility, the second calculates victim compensation, and the third processes the award for payment to the claimant or his or her representative. If the claimant or his or her representative disagrees with the VCF's determination of eligibility or award amount, they may request that the VCF reconsider its decision by filing an appeal. At the time of our audit, the VCF's Claims Processing Center (CPC) initiated the payment process only after an individual claimant or representative agrees to the proposed compensation amount or after the SMO renders a post-appeal decision.[6]

Concerns Regarding the Pace of Claim Processing and Award Making

Beginning in 2012, various media reports criticized the pace with which the VCF was making claimant eligibility and award decisions. One November 2013 news article reported that according to the VCF, in the two years since it reopened, it had only made 112 eligibility decisions and awarded $27.2 million of the $2.8 billion initially authorized.[7]

We spoke to Special Master Birnbaum and her leadership team regarding the VCF's pace of decision and award making through November 2015. These officials stated that they encountered a number of issues that affected the speed at which they could begin soliciting and processing claims. First, as originally enacted, the Zadroga Act did not provide an appropriation for the VCF to pay administrative or operational costs associated with policymaking. Because of this, the VCF's two uncompensated SGEs – Special Master Birnbaum and Deputy Special Master Greenspan – initially had to rely heavily on Civil Division support to build the foundation of the VCF's infrastructure. Although Congress subsequently addressed this issue with updated legislation, the VCF was only permitted to pay for administrative expenses and hire its own personnel beginning in October 2011, which was 10 months after it was officially reopened.[8]

According to Special Master Birnbaum, identifying the universe of potential claimants proved to be extremely challenging and much more complicated than for those whose claims were considered by the original 2001 VCF. This is because under the Zadroga Act, both those that had been injured removing debris and those injured because they had been present at a September 11th-attack site in the immediate aftermath of the attacks were eligible for compensation. As such, VCF leadership reported that it spent considerable time drafting claimant rules and procedures that needed to take into account this wide potential population of claimants, including designing registration, eligibility, and compensation claim forms and working on requests for proposals to acquire contracts needed to support the claims process. Considering the unknown universe of potential claimants, VCF

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[6] As of this report, the VCF states that it starts processing payment on the 35th day after the appeal period lapses or, if an appeal is filed, following a post-appeal decision. If a claim is approved for expedited processing, the processed starts immediately, regardless of appeal.

[7] CBS New York, *Group Says 9/11 Compensation Fund's Pace Of Distribution 'Unacceptable,'* November 22, 2013.

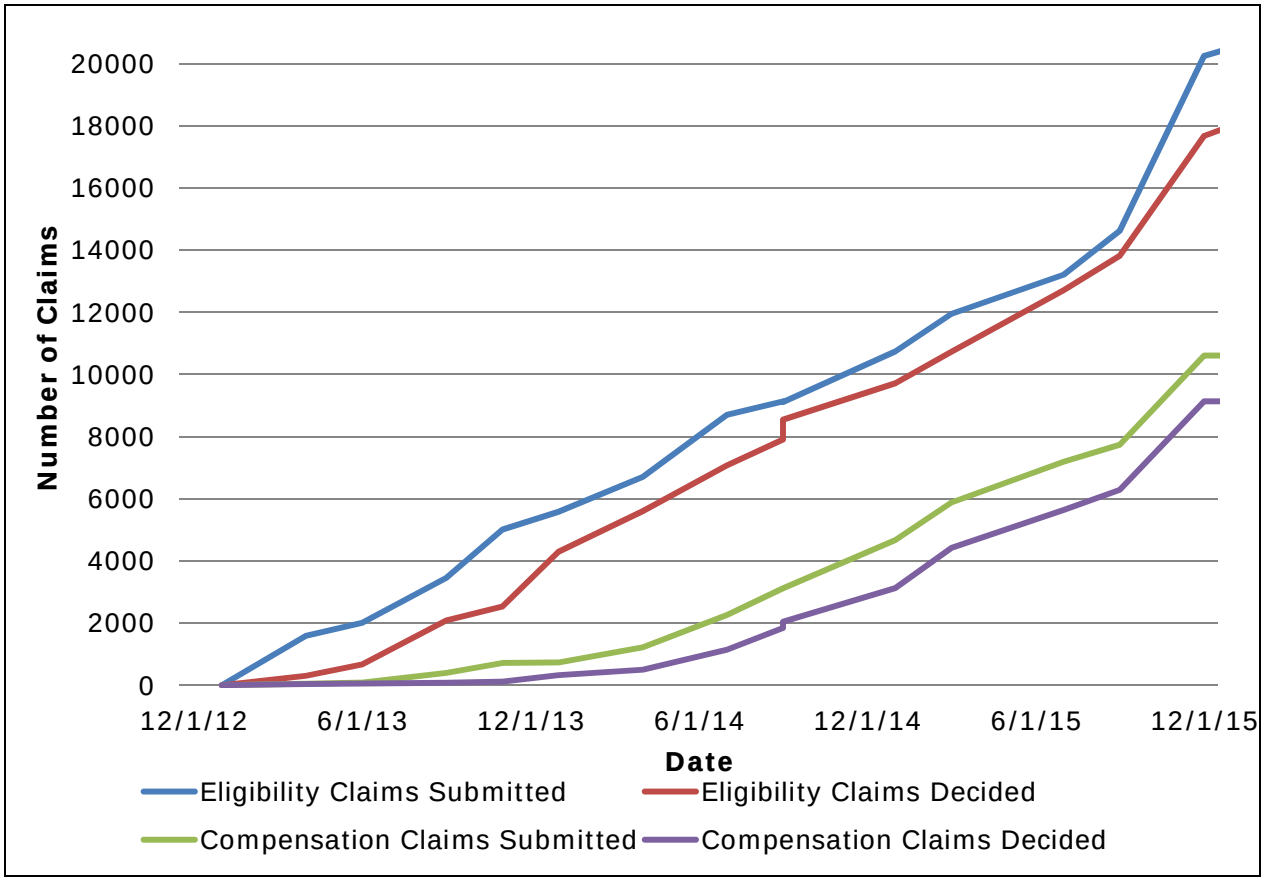
[8] Pub. L. 112–10 (April 2011).

officials also emphasized that they sought to establish working relationships with third parties – labor unions, employers, and state and federal agencies such as the National Institute for Occupational Safety and Health and the U.S. Social Security Administration – to facilitate obtaining and verifying claimant eligibility and compensation information. Deputy Special Master Greenspan also stated that her team worked very closely with attorneys representing claimants in order to explain the requirements and necessary documents to try to facilitate claims and avoid unnecessary mistakes and incomplete claim forms.

As the reopened VCF continued to establish the framework by which it obtained the information it needed to determine claimant eligibility and compensation amounts, our audit found that the pace of claims processing and award decision making steadily increased through 2015, as shown in Figure 3. We discuss the evolution of the claim processing throughout this report.

Figure 3

Eligibility and Compensation Determinations



Note: The VCF did not make any eligibility or compensation decisions prior to March 2013. Claims submitted are claims with required evidence and support needed for eligibility or compensation review.

Source: VCF quarterly and annual reports.

As of December 2015, VCF leadership had determined the eligibility of 17,673 of the total 22,078 (80 percent) claims it had received by that time. VCF annual reports indicate that of the pending claims, 2,575 were in progress and 1,830 were incomplete because they lacked documents required to make a determination. By this time, the VCF awarded over $1.8 billion in compensation to 9,131 eligible claimants or their representatives. The mean amount of these awards was nearly $200,000 and award amounts ranged from $10,000 to $4,133,466.

Analysis of the Claims and Award Process

Across the three primary stages of the claims management process, the CPC generally focused on working with claimants, their representatives, and the CPC private physician team to answer questions and assemble the support needed by the SMO to assess claimant eligibility and compensation amounts. The SMO primarily served to advise Special Master Birnbaum and Deputy Special Master Greenspan on eligibility and compensation amount recommendations. Considering the criticism that the VCF initially received regarding the amount of time it required to make award decisions, we reviewed data associated with 9,166 paid claims that the VCF maintained in its CMS through February 2016 and counted the average days each claim spent in each of the three primary process stages.

VCF leadership reported to us that the time needed to: (1) obtain necessary claimant documents and answers to inquiries, and (2) consider appeals, contributed significantly to the delay in making final eligibility and compensation decisions. As such, and given the difficulty of fairly taking into account the wide variation in and reasons for these factors, we excluded the time; (1) a claim spent between stages and (2) a claim decision was under appeal or amendment when computing day-count averages. However, because of the uniqueness of each claim, our analysis did not exclude the time a specific claim was "on hold" for additional information during any stage. For example, the average day count for the eligibility stage only included the days between when the VCF had a fully supported claim ready for review and when the Special Master or her designee first determined the claimant's eligibility. Table 1 presents the average day counts that a claim spent during each primary process stage from the inception of the VCF through February 2016.

Table 1

Aging of Claims

Primary Process Stage	Average days
Eligibility Decision	253
Compensation Determination	189
Payment	23
Overall Average	465

Source: OIG Analysis of CMS Data

This section presents an overview of how, based on the SOPs in effect as of February 2016 and our interviews with responsible personnel, the CPC and SMO processed claims from registration to payment. While we note that the VCF claims management process has evolved over time, we describe a variety of concerns identified as a result of our analysis that, once addressed by the VCF, should improve the efficiency and effectiveness of its claims management process.

Stage 1: Assessing Claimant Eligibility

Under the regulations establishing the VCF to effectuate Zadroga Act eligibility criteria, a claimant must: (1) have registered with the VCF by the statutory deadlines, (2) have a certified or verified physical condition resulting from the September 11th terrorist attacks, (3) be able to demonstrate proof of presence at a September 11th-crash site during the time of the attacks or immediately after the attacks, and (4) have properly dismissed or settled all September 11th-related lawsuits.[9]

During the time of our audit, the CPC first received and reviewed claims for completeness. Considering claimant eligibility requirements, the CPC worked with each claimant or his or her representative to acquire 13 different documents or sets of documents. Such documents, detailed in Appendix 3, included those that established presence, physical injury, proof of lawsuit dismissal, waiver of rights, and various other exhibits and supporting documents. Once the CPC received the required documents, it scanned and uploaded them, as necessary, to CMS and compiled a summary of the claimant's eligibility information. The CPC then sent the claim material to the SMO so its attorneys could review the documents and determine whether the claim met the four basic legislative requirements outlined above. Once this was completed, the SMO sent a recommendation to Deputy Special Master Greenspan regarding the claimant's eligibility to receive an award. Deputy Special Master Greenspan then reviewed the SMO's recommendation and rendered a decision regarding the claimant's eligibility.[10] The SMO then input the decision into the CMS and the CPC compiled and sent a letter to each claimant to notify him or her of the eligibility decision.

If Deputy Special Master Greenspan determined that a claimant was not eligible to receive an award, the CPC sent the claimant a decision notification letter, which he or she could then appeal. The appeal process served as a formal method by which claimants could meet with an Appeals Hearing Officer, present new evidence, and request that the VCF reconsider their eligibility status. A claimant must have filed a notice to appeal within 30 days of the date of the determination letter, and there was no set time in which the VCF must address appeal requests.

[9] 28 C.F.R (2011) § 104.22.

[10] In response to a draft of this report, Greenspan stated that initially, both she and Birnbaum reviewed each claim prior to rendering a decision regarding the claimant's eligibility. This was primarily because they were developing guidance on the sufficiency needed to support claims, which they wanted to be based on experience with actual VCF claims.

Stage 2: Determining Award Compensation Amounts

The VCF bases a claimant's total compensation award amount on the claimant's: (1) economic loss, (2) non-economic loss, and (3) collateral offsets. Economic losses are an estimated amount of income that a victim would have earned had he or she not been injured or killed by the attacks. Non-economic losses are amounts awarded for physical and emotional pain, suffering, physical impairment, or other losses resulting from a diminished quality of life related to injuries sustained in the aftermath of the attacks. Under the Zadroga Act, the VCF must reduce award amounts by all collateral source compensation a claimant received or is entitled to receive from federal, state, or local governments in relation to injuries or death suffered as a result of the September 11th attacks.[11]

To determine a specific claimant's economic loss, the CPC worked with the claimant or their representative to gather evidence of lost income, medical expenses, and replacement services, to the extent claimed. Once the CPC acquired these documents, attorneys at the SMO used different models to calculate the claimant's present and future loss of funds. These models, developed by a contractor, sought to account for the various financial aspects (such as salary structure, potential future salary, and pension benefits) of the claimant's profession or the organization in which the claimant worked or is working.[12]

To calculate a claimant's non-economic loss, SMO attorneys applied a framework developed for WTCHP-certified physical conditions and reviewed claimant personal statements and medical records regarding various issues, such as his or her pain and suffering experienced as a result of September 11th-related injuries and the severity if the claimant's condition. We found that the framework established ranges of non-economic loss award amounts for different combinations of physical conditions.[13] Moreover, the VCF has continuously updated the kinds of injuries and health issues on its framework based on what physical conditions the WTCHP determined over time to be related to the September 11th attacks.

As noted previously, after calculating a claimant's economic and non-economic loss, the SMO then must reduce the total award amount by any identified collateral offsets, which include any September 11th-related legal settlements, social security benefits, disability pensions, workers compensation, and other government awards.[14] To ensure that the CPC and SMO offset from any award the

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[11] 42 U.S.C 300mm-41 (2016).

[12] Deputy Special Master Greenspan stated that she and a forensic accountant developed the models for the 2001 VCF; the models were subsequently updated by a contractor for the VCF.

The VCF maintained about 45 different economic loss models during our review. For example, for claimants who worked or work at the FDNY, the SMO applied a model that applied specific data points applicable to the FDNY's salary structure and benefits.

[13] The VCF developed groupings of conditions for the purpose of assessing and determining non-economic loss for victims of the September 11th attacks.

[14] For example, if a claimant received an award due to a September 11th-related injury from the Public Safety Officers Benefit (PSOB), a separate DOJ award program administered by the Office of

funds a claimant received through lawsuits, it also queried search engines such as the Public Access to Court Electronic Records (PACER) and Lexis Nexis CourtLink. Once the CPC and SMO applied the offset to a claimant's total economic and non-economic loss, the SMO then compiled a summary for Deputy Special Master Greenspan and Special Master Birnbaum that provided different options for compensation along with a recommended compensation amount. For example, in one case, we found that an SMO attorney provided four different options based on varying levels of disability attributed to September 11th. Special Master Birnbaum and Deputy Special Master Greenspan then reviewed the options and decided the total award amount for each claim. The SMO then uploaded the summary and inputted the decision into the CMS. The CPC then performed a quality review check and, once confirmed, compiled and sent to the claimant or his or her representative a letter that defined the total award amount that the VCF determined the claimant was entitled to receive.[15]

Each claimant has the right to request that the VCF reconsider the amount of his or her award by asking for an appeal within 30 days of the date of the loss calculation letter. If a claimant appeals the VCF's total award amount, the CPC schedules an appeal hearing for the claimant to present additional evidence or testimonies. Usually held in-person, these hearings provide claimants with an additional opportunity to present new information or to further present how their September 11th-related physical condition impacts their life. Following the hearing, the Appeals Hearing Officer recommends to the SMO whether to adjust the award amount. The Special Master then renders a final determination on the total award amount and the CPC notifies the claimant of the decision. We did not identify significant systemic deficiencies with how the VCF scheduled hearings or resolved appeals.

Stage 3: Processing Award Payments

After the VCF determines a claimant's final award amount, the CPC starts the payment process, which requires the assistance of the Civil Division and the U.S. Department of the Treasury (Treasury). During the time of our audit, after either a claimant agreed to the proposed loss calculation amount or after a final

Justice Programs, the claimant's total award amount would be reduced by the award the claimant received from the PSOB. The PSOB provides: (1) death benefits to survivors of fallen law enforcement officers, firefighters, and other first responders; and (2) disability benefits to officers catastrophically injured in the line of duty. U.S. Department of Justice Office of the Inspector General, *Audit of the Office of Justice Programs' Processing of Public Safety Officers' Benefit Programs Claims*, Report 15-21 (July 2015).

[15] Each loss calculation letter includes the amount awarded for economic loss, non-economic loss, and collateral offsets, as applicable.

compensation amount was awarded following an appeal, the CPC payment team prepared a payment package for the Special Master's consideration.[16]

After Special Master Birnbaum or her designee approved the payment package, the CPC payment team conducted what the VCF referred to as a "cold review" of the claimant file to ensure that: (1) it supported all eligibility and compensation decisions and (2) there were no changes to a claimant's status since the Special Master approved the award.[17] Once the CPC payment team completed the cold review, they sent the payment package to the Civil Division Office of Planning, Budget, and Execution (OPBE).

An OPBE official stated that upon receipt of the payment package, the OPBE: (1) checked for any missing payment-specific information, (2) confirmed the claimant's or representatives' name, and (3) ensured that there was a proper VCF approval on file. The OPBE then obligated the funds in their financial system and certified the payment to Treasury to disburse the payment. After Treasury disbursed the funds, the OPBE provided a payment report to the CPC payment team. The VCF then issued a payment confirmation letter to the claimant or his or her representative.

Claim Process Delays and Changes

From the VCF's inception to February 2016, we identified areas within each of the three primary claim process stages that we believe contributed to the VCF's delay in processing claims during this time. Most importantly, we found that until 2015, 4 years after it reopened, the VCF required that the CPC and SMO route all eligibility and compensation decisions to Deputy Special Master Greenspan for review and approval.[18] During this time, Greenspan served the VCF in a part-time, appointed SGE capacity. According to multiple VCF officials, the decision to route all decisions through a single official – the Deputy Special Master – led to significant bottlenecks and delays in the claims process.

Further, while discussing with CPC and SMO personnel their roles and functions in the claims process, we noted that both CPC and SMO personnel completed what we found to be redundant summaries to assist in making eligibility and compensation determinations. CPC personnel compiled summaries that included information on the main elements of eligibility, including presence, condition, registration, and settlement of prior lawsuits or waiver of any future lawsuits. When the file was received by the SMO, its attorneys compiled an

[16] The payment package includes the payment authorization form, the Automated Clearing House (ACH) payment information form, the VCF's payment tracking form, and the Civil Division Office of Planning, Budget, and Execution (OPBE) payment detail form.

[17] The cold review team followed a detailed checklist that provides step-by-step instructions on items to review, check, and verify.

[18] In response to a draft of this report, Deputy Special Master Greenspan stated that the DOJ had advised the VCF that only DOJ employees (including SGEs) could make final eligibility and compensation decisions.

additional summary for the Special Master to review. We found that this occurred because the CPC and the SMO personnel did not regularly communicate or coordinate their work with one another, at least through the end of 2015.

We reviewed the VCF's application materials, which required claimants to submit an array of documents such as personal affidavits establishing presence, medical records and medical receipts, and earnings and pension documents.[19] According to multiple VCF officials, the amount of different documents, forms, and exhibits submitted by the claimants required a significant amount of time to process. We believe that the number of different documents required, as well as the multiple layers of review and analysis performed, contributed to the time required by the VCF to process claims.

VCF leadership was aware of claims process inefficiencies and made significant changes to how it assessed claims during our review. The VCF hired Nell McCarthy to serve as an additional Deputy Special Master to oversee CPC operations in April 2014 and began expanding its staff from 75 to 103 employees. The VCF also implemented a "fast track" process whereby it processed eligibility and only non-economic loss awards simultaneously. Further, the VCF implemented an expedited claims review process for situations of significant financial hardship or imminent death. To assist with the expedited nature of these claims, multiple VCF personnel – instead of just one designated official – could approve fast track and expedited claims. According to VCF officials, these initiatives have improved the pace of claims processing and increased the number of payments issued.

In May 2016, the VCF instituted a team structure to improve efficiency by eliminating multiple levels of review that contributed to delays in processing claims. VCF leadership explained that teams will consist of up to four CPC reviewers and one or two SMO attorneys responsible for reviewing and evaluating certain types of claims. For example, one team may be responsible for the Fire Department of the City of New York (FDNY) claims while another team may solely be responsible for New York City Police Department claims. Based on the new structure, the SMO attorney serves as the Team Leader and provides substantive guidance on claim review, feedback on work products and, where appropriate, training. Further, VCF leadership explained that the team structure also necessitates that the CPC and SMO work together to develop complete and accurate summaries for Special Master consideration. Team Leads reported to us that they believed that the new team structure will improve communication between the CPC and SMO and increase overall efficiency of claims processing.

In August 2016, the VCF implemented a new claim form that it developed to be more user-friendly and easier to understand. The new form reduced the number of required documents to support a claim. Further, the VCF replaced the multiple attestations, certifications and exhibits submitted with the prior claim forms with a

[19] Appendix 3 lists the required documents for eligibility (October 2013) and compensation (May 2013).

required single signature page. Additionally, this new form allows claimants to complete and submit both eligibility and compensation at the same time.

While the VCF implemented these and other changes too recently for the OIG to fully analyze their impact as part of this audit, based on our review of the claims data (which showed an increase in the amount of decisions made and payments issued), along with the significant changes and efforts the VCF has implemented since 2015, we believe that the actions taken should help address the delays in claims processing and award determination.

Claimant Files and Recordkeeping

In August 2011, the CPC and SMO began working with International Business Machines Corporation (IBM) to develop the CMS with the intended capability to store, review, and document the life of each individual claim and also identify and track individual claim characteristics. Based on our discussions with VCF leadership and personnel, because the VCF intended to use the CMS to store the information it needed to support award decisions, the CMS was also supposed to serve as the primary repository of claimant information.

To assess how the VCF was using the CMS as of February 2016, we reviewed the records uploaded and maintained in the system as well as other document repositories. We also interviewed CPC claim reviewers and SMO attorneys to evaluate how they used the CMS to review claims. In addition, we reviewed and analyzed a judgmental sample of 13 CMS claimant files to determine whether information the CPC and SMO maintained in the CMS actually supported the eligibility and compensation process.

Our review found that the VCF was not consistently documenting evidence in support of claimant decisions in the CMS at critical points of the claims process. In the 13 sampled claim files, we could not readily identify documents establishing proof of presence at a September 11th attack site. In other claim files, we could not locate documented proof of a September 11th-related physical condition or documents necessary to show the status of ongoing claimant litigation, which the Zadroga Act requires to be resolved before a claimant can receive an award. CMS files also did not include copies of documents needed by the SMO to recommend compensation amounts to the Special Master, such as the various calculation models considered by the SMO. In addition, 10 of the 13 CMS claimant files did not contain evidence supporting final approval of claimant eligibility or his or her proposed compensation amount.

For example, we highlight two instances identified during our review. First, the VCF mailed one claimant a “Substantially Complete Letter,” to confirm to the claimant that it received all documents needed to evaluate that person’s claim for compensation. However, we found that the claimant did not provide evidence to the VCF to demonstrate that he or she had the presence at a September 11th attack site, which is required to be eligible for an award. The claim moved forward in the claims process for consideration as an eligible claim without the required supporting documents, although VCF personnel later flagged the deficiency and

required the claimant to address it. Second, the VCF paid one claimant $4,883 even though the claimant had outstanding September 11th-related litigation and therefore should not have been eligible to receive an award. VCF officials told us that they sent the claimant a letter requesting the return of the amount it had paid the claimant. The claimant ultimately reimbursed the VCF.

The VCF stated that it subsequently examined the same claims files we reviewed and was ultimately able to locate all required information within CMS. Nevertheless, based on our file review results, we believe that claimant eligibility and compensation decisions were not uniformly or consistently documented in the CMS, which places the VCF at an increased risk of misplacing or not being able to locate information needed to support award decisions efficiently.

During our review, which we performed in February 2016, VCF officials stated that its personnel developed various tools and workarounds separate from the CMS to help them review and track claims. For example, because the CMS could not track whether a claimant accepted a proposed award or sought an appeal, the CPC regularly needed to export from the CMS a list of claimants who had not yet accepted their proposed award and manually update the list based on current information.

We discussed the evolving capabilities of the CMS with VCF leadership, who acknowledged that the CMS has proven to be a very complicated system that relies on data feeds from multiple and different databases. We believe that the VCF's practice of exporting, updating, and reconciling data outside of the CMS increased the time VCF personnel needed to review claims for eligibility and compensation.

Although there are no specific requirements to include all evidence of claim decisions entirely in the CMS, we note that the VCF developed the CMS with express purpose of storing, reviewing, and documenting claims. Special Master Bhattacharyya told us that, immediately upon being appointed Special Master, she prioritized requiring that VCF personnel maintain complete files to support eligibility and claim decisions in the CMS. Moreover, the VCF reports that designated quality review teams now check to make sure that SMO eligibility and compensation documents are in the CMS. While we recognize the efforts that the VCF has reported it has implemented since our testing, we recommend that the VCF provides evidence that the revised policies and procedures ensure that all relevant documents and actions taken at critical points in the claims review process, including eligibility, compensation, appeals, and payment are retained or otherwise consistently referenced in the CMS. Such policies should therefore detail best practices for employees to follow with regard to naming and placing files and other support in the CMS.

Compensation Decisions

To ensure that the VCF consistently and accurately calculated awards, we assessed claims that we believed were most at risk of errors considering the VCF's claims management process. These claims included those with: (1) offsets, (2) high non-economic loss awards, and (3) deceased victims. We obtained,

reviewed, and analyzed the data from the CMS to determine whether information the VCF has maintained in the CMS actually supported eligibility and compensation decisions.

Applying Offsets and Other Types of Deductions

Under regulations established in 2011 to effectuate the Zadroga Act, the VCF was to reduce awards by all collateral source compensation including payments received by a claimant from the federal government for damages related to the September 11th attacks or related debris removal.[20] The SOPs established by the VCF at this time instructed its personnel to identify 2001 VCF awards, September 11th-related lawsuit amounts, and WTCHP medical and pharmacy claim costs received by claimants in order to calculate the collateral offsets to apply. Generally, these procedures stated that injuries previously compensated by the 2001 VCF are ineligible for further compensation, except for additional losses not previously compensated in the 2001 VCF.

We selected a judgmental sample of 37 out of 657 claims made by individuals that had a 2001 VCF record to verify whether the VCF properly offset the 2001 VCF award.[21] Our review found that the VCF applied the entire 2001 VCF award as an offset in 3 cases and only partially applied or did not apply the 2001 VCF award in 27 instances, or 90 percent of the sampled cases. Based on the justifications provided in the CMS, we could not readily determine why the VCF offset some awards but not others. We subsequently followed up with VCF officials in July 2016 to determine why personnel did not always reduce the current award by the entire 2001 VCF award. VCF officials stated that the VCF's policy was to award compensation for: (1) the exacerbation of a condition for which a claimant received a 2001 VCF award, (2) any new eligible condition(s), or (3) any September 11th-related loss not previously compensated. Special Master Bhattacharyya also told us that, at the time, the VCF did not interpret the Zadroga Act to mean that it must automatically reduce current awards by the 2001 VCF award. Instead, consistent with the VCF's procedures for evaluating each claim on an individual basis, the VCF in 2011 decided to offset current awards by the 2001 VCF award on a case-by-case basis depending on the type of loss, new conditions, and unique claimant circumstances.

Although we understand the VCF evaluated each claim individually, based on the results of our testing, it appeared to us that SMO attorneys did not consistently document the rationale for fully including, partially including, or not including the 2001 VCF offset in the award determination. One VCF official stated that VCF leadership discussed the need to develop clear guidance for applying 2001 VCF awards as offsets. In April 2017, VCF officials stated that new policies have been

[20] 28 C.F.R. § 104.47, as updated June 2016.

[21] Of the 37 sampled claims, the 2001 VCF did not issue awards associated with 7 of these claims due to the claim being withdrawn or denied. Therefore, we were only able to test 30 claims to determine whether the VCF properly offset the 2001 VCF award.

adopted to ensure that the VCF consistently applies 2001 VCF awards as offsets from future awards.

As stated previously, the VCF reports that it has substantively updated its policies regarding documenting claims decisions in the CMS since the time of our testing. We therefore recommend that the VCF provides evidence that the revised compensation determination policies and procedures ensure appropriate application and documentation of award offsets.

Calculating Non-Economic Losses for Personal Injury Claimants with Severe Conditions

Under regulations implemented by the VCF to effectuate the Zadroga Act, the presumed non-economic loss for surviving claimants who suffered physical harm should be based on the standard $250,000 non-economic loss for deceased victims and adjusted based upon the extent of the personal injury claimant's physical harm. In August 2016, Special Master Bhattacharyya stated that the VCF calculates awards for non-economic loss on an individual basis because the circumstances of each claim are unique. As such, the SMO calculates non-economic loss in each case based on the severity of the claimant's condition, the effects of treatment, the type of treatment, the number of serious conditions, and their effect on the claimant's quality of life. Under the SMO's internal non-economic loss guidelines, the highest non-economic awards are received by those who suffered from multiple types of unrelated cancers or had cancer and a significant non-cancer condition.

To assess whether the VCF complied with its internal guidance to calculate non-economic losses, we selected a judgmental sample of 13 of the highest-dollar awards for non-economic loss made to claimants with personal injury claims.[22] We found that the VCF calculated award amounts that did not always comport with its non-economic guidance that limited losses to $340,000. Nevertheless, in all 13 cases, we note that each claimant required significant treatments, surgeries and multiple hospitalizations. The majority of these claimants also suffered from multiple types of cancers.

Deputy Special Master Greenspan stated that the VCF developed and utilized its guidelines to make award decisions for non-economic losses that served as a "starting point" to assist the SMO and Special Master. As such, the Special Master can make additional awards if warranted by the severity of the claimant's conditions. In each of the sampled cases, Special Master Birnbaum moreover confirmed that she determined that the severity of the condition warranted a significant increase in the non-economic loss calculation established by the VCF policy. We found that, in each case, the rationale was documented in CMS and it

[22] We originally selected the 15 highest dollar awards for non-economic loss for personal injury claimants. Upon further review, we found that 2 of the 15 claimants in the CMS were not physical injury claims and were, in fact, deceased victim claims. The VCF explained that the initial category is set by CMS with the information provided by the claimant. Therefore, we removed these claims from our sample of personal injury claimants.

was evident that the Special Master based these decisions on information provided in CMS. Considering that the Zadroga Act ultimately provides the Special Master final authority to calculate and set awards for non-economic loss, we make no recommendation.

- **Non-Economic Awards for Deceased Victims Claims**

The regulations established by the VCF to promulgate the Zadroga Act provides $250,000 in non-economic loss to each deceased victim and $100,000 in non-economic loss for the spouse and each dependent of a deceased victim. To determine whether the VCF appropriately evaluated deceased victim claims and complied with its regulations, we selected a judgmental sample of 15 deceased victim files and reviewed how the VCF calculated the total award and award for non-economic loss for each. Of these 15 deceased claims, 6 claims did not receive an additional $100,000 for the spouse and each dependent of the deceased victim by the time of our review in February 2016, as shown in Table 2 below.

Table 2

Awards for Non-Economic Loss for Spouse and Dependents

Sample Item No.	Claimant Marital Status	Number of Dependents	Required Award for Non-Economic Loss for Spouse and Dependents ($)	Amount Awarded for Spouse and Dependents ($)	Difference ($)
6	Married	2	300,000	0	300,000
7	Married	0	100,000	0	100,000
8	Married	1	200,000	0	200,000
9	Married	0	100,000	0	100,000
10	Married	0	100,000	0	100,000
11	Married	0	100,000	0	100,000

Source: OIG summary based on the VCF records.

For the six cases, VCF officials noted in the CMS that due to reported financial hardship, the VCF expedited making the $250,000 award due to the eligible death of the victim. However, it is unclear to us why the VCF expedited making only part of the non-economic loss award due to these claims, even though information in the CMS at the time of our review – such as birth or marriage certificates and tax returns – supported providing additional non-economic loss awards associated with spouses and dependents.[23] VCF attorneys also stated that they were unsure of how to calculate deceased victim awards. As such, attorneys were referencing different iterations of VCF policies to review and evaluate claims.

We further note that the loss calculation letter prepared at the time of these six expedited awards did not detail what portion of each award the VCF had

[23] In response to a draft of this report, Deputy Special Master Greenspan stated that the VCF did not provide non-economic awards associated with dependents for expedited claims because the VCF did not have information available at the time regarding offsets that could potentially apply to the dependents. Nevertheless, we could not identify in these six claim files notes acknowledging that there were outstanding awards pending to be considered for spouses and dependents.

expedited. Instead, the letter stated that the claimant's representative could file an amendment or appeal. Because the VCF did not notify the claimant in the loss calculation letter that the claim may be entitled to additional funding, we believe that the claimant was placed at risk of not applying for or receiving non-economic loss awards for dependents of deceased victims.

In March 2017, Special Master Bhattacharyya issued updated guidance to attorneys and other claims reviewers that clarified calculating non-economic awards for deceased claims. The VCF also hosted a teleconference with law firms representing claimants regarding updates in its policies, including those associated deceased claims. The VCF also reported that it was updating its loss calculation letter to detail exactly how it calculated each portion of the claimant's award, including the $250,000 non-economic loss award for a deceased victim and the $100,000 wrongful death amount awarded for each spouse and dependent. We reviewed examples of updated loss calculation letters and we believe that the updated letter ensures that claimants know the status of their respective claim.

In addition to the standard non-economic loss awards for spouses and dependents of deceased victims, a VCF official stated that they can calculate additional awards for non-economic loss for eligible deceased individuals who experienced prolonged periods of pain and suffering associated with injuries related to September 11th prior to death. However, we found that the VCF did not always award a deceased victim an award for non-economic loss for the time he or she spent suffering prior to death. In 15 of the cases we reviewed, we determined that 13 of the cases had victims who died because of their September 11th-related condition.[24] Of these 13 cases, 6 claimants received both an award for victim pain and suffering prior to death and the established award for death, while 7 claimants only received the established award for death, as shown in Table 3.

[24] The remaining two claimants were not awarded the $250,000 decedent award, because their death was unrelated to their September 11th eligible conditions.

Table 3

Awards for Non-Economic Loss for Death and Pain and Suffering (pre-death)

Sample Item No.	Award for Death ($)	Non-Economic Loss for Pain and Suffering (pre-death) ($)	Total Non-Economic Loss ($)
1	250,000	250,000	500,000
2	250,000	250,000	500,000
3	250,000	250,000	500,000
4	250,000	250,000	500,000
5	250,000	250,000	500,000
6	250,000	0	250,000
7	250,000	0	250,000
8	250,000	0	250,000
9	250,000	0	250,000
10	250,000	0	250,000
11	250,000	0	250,000
12	250,000	0	250,000
13[a]	0	90,000	90,000
14[a]	0	90,000	90,000
15	250,000	250,000	500,000

[a] Because these claimants died due to a non-September 11th condition, the VCF did not award the established award for death.

Source: OIG analysis of VCF records.

In one example, a claimant received $250,000 for the victim's pain and suffering associated with a September 11th-related cancer and $250,000 for the subsequent death attributed to that same condition. In contrast, another sampled victim had a September 11th-related cancer and later died, however they only received $250,000 for the victim's death. They did not receive an award for non-economic loss of $250,000 for the victim's pain and suffering attributed to that same condition prior to death. We followed up with VCF officials to obtain an understanding of the differences in these awards. VCF officials told us that they issued only $250,000 associated with the victim's death on an expedited basis due to the claimant's extreme financial situation. VCF officials stated that the claimant could later file an amendment for the remaining non-economic and economic loss portion of the claim.

While we acknowledge the VCF's intent in expediting awards to claimant's reporting financial hardships, it was unclear to us at the time of our review why the non-economic portion of the expedited award did not include compensation for pre-death pain and suffering. As previously discussed, a victim's condition is certified as part of the eligibility phase of the claims process and therefore, at that point in the claims process, the VCF should have already acquired sufficient evidence needed to support the conditions and determine the proper non-economic award for eligible conditions. Instead, the VCF required that claimant file an amendment or appeal to the claim in order to receive any possible remaining awards. We believe that because the claimant already provided adequate support for the non-economic

portion of the claim, it was unnecessarily burdensome and inefficient to require a claimant to file an amendment or appeal with the VCF to obtain any remaining award for non-economic loss. We therefore recommend that the VCF implement specific guidance to ensure that all representatives of deceased victims – including those that received expedited awards – have received, as appropriate, non-economic compensation for the time the eligible deceased victim spent in pain and suffering prior to death.

Handling of Personally Identifiable Information

To determine award eligibility and compensation amounts, the VCF requires that a claimant or their representative submit to it personally identifiable information (PII), such as his or her name, social security number, date of birth, medical and financial records, and employment information.[25] We reviewed whether the VCF appropriately safeguarded claimant file information while it made eligibility and compensation decisions.

The Civil Division established and administered DOJ e-mail accounts for all VCF personnel, including SGEs Special Master Birnbaum and Deputy Special Master Greenspan. However, prior to December 2015, we found that VCF personnel routinely transmitted claimant information to the private law firm e-mail accounts used by Special Master Birnbaum and Deputy Special Master Greenspan. VCF personnel stated that Deputy Special Master Greenspan requested that employees send information to her private law firm e-mail address because she did not use her Civil Division e-mail address and did not log in to the CMS. Deputy Special Master Greenspan further told us that having the documents sent to her private law firm e-mail address facilitated the reviewing and processing of claims because: (1) DOJ-provided equipment was unreliable and did not work; (2) logging into the CMS required far too much time to review upwards of dozens of claim files at once; and (3) she was able to monitor her law firm e-mail account continuously. As a management control, the Deputy Special Master told us that she requested that SMO attorneys redact PII, such as social security numbers, before sending an e-mail with claimant information to her law firm email address.

VCF personnel told us that the Department authorized the sending of victim eligibility and compensation information from Department e-mail servers to the Deputy Special Master so long as PII was properly redacted.[26] However, we found that the VCF sent claimant PII to non-DOJ servers that was neither redacted nor encrypted.

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[25] DOJ defines PII as "any information about an individual maintained by an agency, including information that: (1) can be used to distinguish or trace an individual's identity, such as name, social security number, date and place of birth, mother's maiden name, or biometric records; and (2) any other information that is linked or linkable to an individual, such as medical, educational, financial, and employment information." DOJ Instruction 0900.00.01.

[26] We have not obtained written evidence of the Department's authorization to send claimant information to external non-Department servers.

Our review of e-mail communications between DOJ e-mail accounts of VCF personnel and private law firm accounts of the Special Master and Deputy Special Master revealed that the VCF did not encrypt e-mails sent to non-DOJ accounts and, in some cases, the VCF did not redact PII, such as claimant social security numbers, dates of birth, and medical and employment records. When we determined that the VCF transmitted PII to non-DOJ servers without redaction or encryption, we immediately met with VCF and Civil Division officials to discuss our concerns regarding the safeguarding of claimant PII. We also issued a management advisory memorandum to the Civil Division expressing our specific concerns.[27] In response to our management advisory memorandum, the Civil Division: (1) directed all VCF officials to cease transmitting unencrypted claimant information to non-DOJ email accounts, including those at the WTCHP and at the law firms of Special Master Birnbaum and Deputy Special Master Greenspan, and (2) advised Special Master Birnbaum and Deputy Special Master Greenspan that they should receive claimant information only via their official DOJ e-mail accounts. The Civil Division then worked with the JMD Office of the Chief Information Officer to develop an action plan to safeguard claimant data and information still residing on non-DOJ servers.

In July 2016, the Civil Division reported that it had worked with all of the relevant law firms to identify the claimant related data and PII residing on each of their e-mail servers and associated network drives. Information technology personnel at each of the law firms also confirmed with the Civil Division that they have up-to-date security systems that detect unauthorized intrusion into their e-mail servers and confirmed that the claimant information was not compromised. Once the information was identified, the Civil Division obtained copies of the information from the law firm servers and network drives and the law firms certified that they deleted the data from their servers and drives.

Based on Civil Division and JMD's work with the law firms, as well as confirmation that all VCF personnel are now conducting all VCF business on DOJ networks, we believe that the Department has taken sufficient actions to remedy this matter and therefore do not provide a recommendation.

[27] The DOJ Inspector General issued a management advisory memorandum to Civil Division leadership in February 2016 detailing our concerns that PII data may reside on multiple non-DOJ devices, computers, and servers. This memorandum is included as Appendix 4 of this report. The Civil Division's March 2016 response to our memorandum is included as Appendix 5.

DOJ Oversight and Support of VCF Operations

As of July 2016, the VCF spent almost $60 million on contracts issued by JMD and the Civil Division for 10 different recipients to support the VCF. We did not identify significant discrepancies with how JMD Contracting Officers awarded and monitored VCF contracts. However, we found that the Civil Division in some cases did not provide sufficient justifications and rationale to support awarding non-competitive neutral services contracts. We also found that a Deputy Special Master requested and signed contracts between the VCF and her private law firms, which we believe created the appearance of a conflict of interest. We believe that the Civil Division needs to improve its oversight and document justifications for neutral service contracts issued to support VCF operations.

Overview of VCF Contract Activity

Considering the objectives of the audit, this section examines how the Civil Division and JMD assisted the VCF by administering nearly $60 million in contracts and task orders required or otherwise requested by the VCF to support its operations. Table 4 details these contracts and task orders.

Table 4

Victims Compensation Fund Support Contracts

Contractor / Neutral Service	Awarding Agency	Contract Purpose	Period of Performance	Amount Paid ($)[a]
IBM	JMD	Development of the CMS	8/2011-9/2017	$19,398,061
PAE/Labat	JMD	Litigation Support Services – SMO and CPC Claim Reviewers	8/2011-5/2019	25,187,354
CACI	JMD	Rent and Nurse Evaluators	8/2011-5/2019	5,142,259
Lockheed Martin	JMD	Statistics and Projection Support	8/2011-5/2019	3,817,411
Deloitte	JMD	Two reviews of the Claims Process[b]	8/2011-5/2019	1,787,505
Dickstein Shapiro	CIV	Development of Policies, Guidelines, Trainings, and Management of SMO	8/2011-2/2016	3,415,442
Blank Rome	CIV	Development of Policies, Guidelines, Trainings, and Management of SMO	3/2016-6/2016	161,367
Individual A	CIV	Claim Reviewer	6/2013-present	435,956
Individual B	CIV	Claim Reviewer	5/2015-present	51,793
Individual C	CIV	NY Office Director and Hearings Coordinator	1/2012-5/2016	579,469
			Total Amount Paid	**$59,976,617**

[a] Award amounts as of July 2016.

[b] The VCF hired Deloitte to conduct a review on the efficiency, quality, and consistency of the VCF program processes. The first review, completed in April 2014, included 17 observations and recommendations, including restructuring of teams, processes improvements, optimizing communications, goals, quality control process, and staff training. The second review was initiated in December 2015 to gain an understanding of the VCF's current processes and procedures, and develop action plans to identify tracking of claims in the system. VCF leadership cancelled the review due to reauthorization.

Source: Civil Division and JMD Contracts, Statements of Work, and invoices.

JMD awarded contracts or task orders that the VCF required to: develop CMS; hire claim reviewers, nurse reviewers, and experts to develop models to calculate economic loss; support administrative functions; and obtain leases for office space. The Civil Division also issued several contracts to develop the claims process, draft guidance, and hire claims reviewers, an office director, and hearing coordination services.

For each of the contracts listed in Table 4, we respectively examined how the VCF worked with JMD and the Civil Division to select contractors and monitor contractor performance. We did not identify any discrepancies with how JMD Contracting Officers awarded and monitored the VCF contracts. However, as discussed in the following sections, we identified some concerns regarding how the Civil Division Contracting Officer supported its contract awards and monitored the VCF contracts.

Awarding VCF Neutral Service Contracts

The Civil Division issued various contracts for the VCF under Federal Acquisition Regulation (FAR) Part 6.302, which does not require competition to acquire neutral services for any current or anticipated litigation or dispute.[28] Between 2011 and June 2016, the Civil Division issued 18 non-competitive neutral service contracts to two private law firms associated with Deputy Special Master Greenspan. In addition, the Civil Division issued three independent non-competitive neutral services contracts: two to assist SMO operations in Washington, D.C., and a third to operate the VCF's New York office and coordinate hearings with claimants and their representatives. In general, we found that the Civil Division based rates paid under the aforementioned contracts on the salary and benefits earned by a full-time federal employee classified as a GS-15, Step 10.[29]

Legal Services

Deputy Special Master Greenspan stated that DOJ was not able to provide the number of attorneys the VCF needed to support the SMO at its inception.[30] The VCF therefore requested that the Civil Division establish non-competitive contracts

[28] FAR Part 6.302-3 states that full and open competition need not be provided for when it is necessary to award the contract to a particular source or sources in order to acquire the services of a neutral person for any current or anticipated litigation or dispute. Additionally the FAR notes that neutral service includes mediators or arbitrators, to facilitate the resolution of issues in an alternative dispute resolution process.

[29] In her response to a draft of this report, Deputy Special Master Greenspan stated that she inquired about her law firm providing services pro-bono, but was informed that pro-bono services could not be provided. However, Greenspan did not provide evidence of this inquiry with her response, and we did not identify such evidence during the audit.

[30] In her response to a draft of this report, Greenspan stated that DOJ asked if VCF leadership could locate the necessary attorneys, after which Greenspan suggested some from her own firm who worked on the 2001 VCF.

with the private law firms of the Deputy Special Master to acquire neutral legal services and access to employees who worked on the original VCF. Between August 2011 and June 2016, the Civil Division issued 18 non-competitive neutral service contracts under FAR 6.302-3 to Greenspan's two law firms – Dickstein Shapiro and Blank Rome.[31] Greenspan signed as the representative on behalf of both law firms on the contracts. Deputy Special Master Greenspan stated that the firms applied a reduced hourly rate for attorneys working on VCF matters. The VCF ultimately paid over $3.6 million to Greenspan's law firms to develop policies and guidelines, perform trainings, and otherwise supported SMO operations.

- **Contract Justifications**

Under FAR 6.302-3, a Contracting Officer must support, by written justifications and approvals that include sufficient facts and rationale, the applicability of the authority required to award contracts without competition. Additionally, FAR 6.303 stated that sufficient justifications should demonstrate that the proposed contractor's unique qualifications or the nature of the acquisition requires the use of a non-competitive award.

We reviewed the documents that the Civil Division's Contracting Officer prepared to justify awarding the 18 contracts non-competitively to the private law firms of Deputy Special Master Greenspan. We found that the documents provided a generic statement that the unique requirements of the procurement precluded competition and thus a market survey was not required. These documents also cited Deputy Special Master Greenspan's expertise and previous experience with the original VCF to justify providing non-competitive awards to her private law firms. While we confirmed that attorneys from the law firms also worked on the original VCF, the documents prepared to justify the non-competitive contracts to Dickstein Shapiro and Blank Rome only cited the qualifications of Deputy Special Master Greenspan, who was already working with the VCF as an SGE, and not particular attorneys working with those law firms at the time of the awards. Based on these tenets, as well as the purpose of the contracts to facilitate claims review and processing, we believe that justifications that lack sufficient facts and rationale needed to demonstrate either the unique qualifications of selected contractors or the specific nature of the acquisition that requires a non-competitive award risk unfairly precluding other potential vendors from competition.

We discussed the justification requirement with the Civil Division Contracting Officer, who stated that he believed that requests from Special Master Birnbaum "held a lot of weight" with regard to providing the justification needed to award non-competitive contracts. Thus, because Special Master Birnbaum expressly requested hiring the Deputy Special Master's law firms, the Contracting Officer stated that he did not deem it necessary to include further information to justify awarding non-competitive contracts. The Contracting Officer also stated that he

[31] Deputy Special Master Greenspan served as a Partner at Dickstein Shapiro when it was first awarded non-competitive neutral services contracts from the Civil Division beginning in 2011. The law firm of Blank Rome purchased Dickstein Shapiro in February 2016 and the Deputy Special Master then became a partner of that firm.

had limited involvement in developing the law firm contracts requirements, including the Statements of Work that dictated the specific type of legal services under contract. The Contracting Officer stated that he relied on the VCF to develop requirements of contracts awarded to the Deputy Special Master law firms.

Although we ultimately do not question the expertise of Deputy Special Master Greenspan or either of her private law firms, the Civil Division did not provide a justification that sufficiently detailed the expertise of the law firms to demonstrate that they were uniquely qualified to receive a series of 18 non-competitive contracts. We further do not believe that the justifications capture with specificity the nature of the contract to show that it should be awarded without competition. When an agency awards non-competitive contracts without sufficient justifications, as the Civil Division did with the contracts awarded to the Deputy Special Master's private law firms, we believe it risks creating the perception that the contractor received inappropriate or otherwise unfair preferential treatment. That is particularly the case here, where the contracts were with the Deputy Special Master's private law firms. We therefore recommend that the Civil Division ensure that it documents sufficient justifications when assisting the VCF with awarding neutral services contracts without competition in the future.

- **Appearance of Conflict of Interest**

Both the Civil Division and Deputy Special Master Greenspan recognized that these contracts might create an appearance of a conflict of interest between Greenspan's role of both drafting the parameters of and approving her law firms' receipt of the contracts. The Civil Division reached out to JMD for guidance on whether Greenspan's role with the VCF and private law firms created a potential conflict of interest. While the JMD Ethics Officer acknowledged receipt of the Civil Division's request, the JMD Ethics Officer told us that she believed it was the Civil Division's responsibility to review the role that Deputy Special Master Greenspan should have in establishing contracts with her private law firms. The JMD Ethics Officer further stated that she did not believe it was her place to opine on the propriety of the matter.

According to the JMD Ethics Officer, an employee may seek a waiver if his or her interest in a particular matter is negligible. Otherwise, an employee must disqualify him or herself from contract negotiations before participating in any matter that potentially affects their financial interests. We discussed the waiver requirement with Deputy Special Master Greenspan, who told us that JMD provided her with a waiver. However, the waiver received by Deputy Special Master Greenspan only permitted her to continue to practice law while serving as an SGE. The waiver did not authorize Deputy Special Master Greenspan to negotiate or otherwise facilitate contracts between the VCF and her law firms. We do not believe that any such waiver could have authorized her to negotiate such contracts given that her interest, as a partner with these law firms, could not be described as negligible. Therefore, we believe that Deputy Special Master Greenspan should have proactively excluded herself from negotiating these contracts, and the Civil Division should not have permitted her to participate in such negotiations in any event. The Civil Division's Contracting Officer also stated to us that he believed

that the JMD Ethics Officer had resolved the concern regarding Deputy Special Master Greenspan's role before requesting the contract.

While Deputy Special Master Greenspan and the Civil Division both raised the matter regarding a potential conflict of interest, neither the VCF nor the Civil Division have been able to provide evidence needed to resolve this matter. When Deputy Special Master Greenspan acted on behalf of both the VCF and her law firms on the same contract, we believe, at a minimum, that this action created the appearance of a conflict of interest that the VCF and Civil Division should have taken proactive steps to avoid. Instead of permitting Deputy Special Master Greenspan to negotiate these private law firm contracts, the VCF and the Civil Division should have required that someone else represent its interests in establishing these contracts. Therefore, we recommend that Civil Division, in coordination with JMD, ensure that it reviews contracts issued in relation to Special Government Employees or their businesses for potential or actual conflicts of interest.

We sought to determine whether the Deputy Special Master received any financial gain as a result of establishing $3.6 million in contracts with her law firms for over a period of 5 years. We discussed with Blank Rome accounting personnel how it or Dickstein Shapiro divided or shared proceeds derived by these contracts among the firm's partners. This official stated that neither Blank Rome nor Dickstein Shapiro allocated to partners any funds received by the contracts because the firms did not record a profit from the contracts.[32] The official explained that this occurred because the firms charged a substantially lower rate for its attorneys working for the VCF.

To assess this information further, we requested that the firm provide a detailed breakdown of the costs associated with the project. The accounting official stated that Dickstein Shapiro did not track projects by cost and therefore she could not provide that information. We then requested that the firm detail the shares received by the Deputy Special Master while it was under contract with the VCF. The accounting official stated that the firm did not break down the shares to the level of detail that would show that derived from the contract. An official from the firm's General Counsel's office explained that even if they had broken down the information, they no longer have access to the information for Dickstein Shapiro because the firm had been liquidated and only Dickstein Shapiro's liquidator had access to its accounting information. Deputy Special Master Greenspan also confirmed that her firm had charged a substantially lower rate for its attorneys working for the VCF and therefore her firm did not sustain a profit from the work performed under the DOJ contract. Despite this, we believe that it is indisputable that the $3.6 million in revenue that the contracts generated for the law firms and its partners was not insubstantial. Nevertheless, because we were unable to obtain

[32] One of the 18 contracts was issued to Blank Rome, the Deputy Special Master's current law firm after it acquired Dickstein Shapiro. However, when we asked about how shares are divided at Blank Rome, the accounting officer stated that the pay structure is different and partners only receive a salary and not shares. It is similarly unclear whether the partner's salaries were determined based on income received and, therefore, might have been impacted by the contract in this instance.

sufficient information to determine the profitability of these contracts for the law firms, we could not ascertain whether Greenspan received any financial compensation as a result of the contracts.

Independent Neutral Service Contracts

The Civil Division's Contracting Officer also awarded three individual non-competitive neutral service contracts at the express direction of either Special Master Birnbaum or Deputy Special Master Greenspan. According to documents prepared by the Civil Division Contracting Officer, Deputy Special Master Greenspan specifically requested that the two independent neutrals be hired to help review and assess eligibility and compensation claims at the VCF's Washington D.C. office. Additionally Special Master Birnbaum requested an individual neutral to help manage the VCF's New York office.

As stated above, FAR 6.3 states that a Contracting Officer must support, by written justifications and approvals that include sufficient facts and rationale, the applicability of the authority required to award contracts without competition. Sufficient justifications should expressly demonstrate either the nature of the contract requiring non-competition or the unique qualifications of those receiving non-competitive awards. While we found that the justifications provided for the two Washington, D.C. neutrals included facts and rationale, such as their specific experience or qualifications, the justifications offered for the New York office neutral, specifically requested by Special Master Birnbaum, did not detail why the specific neutral qualified to receive non-competitive contracts. The justification also did not specify why the nature of the contract required a noncompetitive award. Between January 2012 and May 2016, this neutral received $580,000 in VCF funds. This underscores our previous concern that the Civil Division needs to ensure that it documents sufficient justifications when hiring specific contractors for the VCF without competition.

Monitoring VCF Contracts

FAR 1.602 holds Contracting Officers responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. We found insufficient contractor performance monitoring and gaps in the period of performance for one contract.

Claims Management System

In August 2011, at the request of the Civil Division, JMD awarded a 5-year, competitively bid contract, with the option for a sixth year, to IBM to develop a Claims Management System (CMS) to support the VCF.[33] According to VCF officials,

[33] At the inception of the VCF, Civil Division issued a Request for Proposal to build a claims management system. Three contractors initially competed for the project, however two of the three contractors pulled their proposals prior to the final decision. Civil Division therefore selected IBM to complete the project.

earlier versions of CMS had functionality problems that resulted in the system working very slowly even though the system handled very little claimant data at the time.

A VCF representative stated to us that she did not believe that the initial IBM team had the experience necessary to deal with the complex nature of the CMS. We confirmed that the VCF, having a dire need for a functional system, requested that IBM begin developing the CMS using a commercial settlement system because the VCF believed that this would help facilitate CMS development. However, IBM personnel told us that the settlement system did not allow for the high levels of customization needed by the CMS. In addition, as the VCF was still developing the claim process and procedures, IBM regularly needed to update the CMS to reflect the changes in the VCF's claim processes. IBM officials stated that this made developing CMS particularly difficult. In light of these difficulties, we note that the VCF met with IBM and provided step-by-step workflow information needed to help IBM configure the CMS and regularly contacted JMD's Contracting Officer regarding status of IBM's performance on the contract.

Within the first year of development, the JMD Contracting Officer and Civil Division's Contracting Officer Representatives reviewed the CMS code developed by IBM and found that it could continue to serve as the foundation for the CMS. However, the VCF suggested and IBM agreed to replace certain personnel serving on its CMS team. From January 2015 to October 2015, the VCF addressed contractual shortcomings with IBM by applying penalties, and negotiating discounted and unbilled labor costs. The VCF reported saving approximately $2.8 million dollars by negotiating labor costs and recouped $381,500 in penalties.

While IBM and the VCF ultimately worked together to create a CMS that VCF personnel can use, we believe that the VCF still has had to develop a number of systemic workarounds and tools to review and process claims within the CMS. For example, the CMS still lacked a correspondence module to create letters, which is a critical function needed for the VCF to communicate with claimants and process claims. A correspondence module was a requirement of the initial contract in 2011. However, a VCF official stated that IBM had been asked to prioritize other database functionality over developing a correspondence module in the CMS.

The CMS development contract with IBM is set to end in September 2017. While the VCF reports that the CMS developed to date under the contract is functional, we remain concerned about the performance of the contract given that the CMS used by VCF personnel during the audit still did not meet all contracted requirements. Therefore, we recommend that the Civil Division continue to work with JMD to monitor IBM's performance closely to ensure that it meets necessary requirements by the end of the contract.

Performance Gaps in Legal Services Contracts

Each of the 18 private law firm contracts included a start and end date in which each of the firms was approved to work for the VCF. We compared the start and end date of the law firm contracts and identified several periods of performance

gaps between Dickstein Shapiro contracts, which, as shown by Table 5, totaled 156 days.

Table 5

Identified Contract Gaps

Contract Number	Period of Performance	Contract Gap (days)
3N-CIV02-0037	10/2/2012 - 12/31/2012	1
3N-CIV02-0205	1/02/2013 - 3/31/2013	1
3N-CIV02-0393	4/01/2013 - 6/30/2013	0
3N-CIV02-0622	7/12/2013 - 9/30/2013	11
4N-CIV02-0033	10/04/2013 - 12/31/2013	3
4N-CIV02-0193	2/07/2014 - 3/31/2014	37
4N-CIV02-0449	4/23/2014 - 4/30/2014	22
4N-CIV02-0538	5/29/2014 - 6/30/2014	28
4N-CIV02-0657	7/11/2014 - 8/31/2014	10
4N-CIV02-0940	9/23/2014 - 12/31/2014	22
5N-CIV02-0226	1/22/2015 - 12/31/2015	21
	Total	**156**

Source: Civil Division contracts with Dickstein Shapiro.

We found that during the period not covered by a contract, Dickstein Shapiro personnel still performed services for the VCF and received payments for the work it performed. When asked about the gaps in the period of performance, the Contracting Officer stated it was unusual for a contractor to work outside an award's period of performance. This official provided to us evidence that he notified the VCF that many of the contracts were about to expire and stated that the VCF was not always responsive to these notifications. In August 2016, Civil Division determined that it could not ratify the contract gaps because the VCF already paid for the services.[34] Consequently, the Civil Division's Contracting Officer executed modifications to each of the affected contracts to cover the performance period gaps.

The FAR requires that Contracting Officers oversee contracts to ensure compliance with the terms and conditions of the contract.[35] The gaps in performance periods and payments for unauthorized contract work raised to us significant concerns regarding contract oversight. Although the VCF has no plans to contract SMO work to private law firms in the future, the Civil Division, as the contracting agency, still was responsible for monitoring contracts that supported the VCF. We therefore recommend that the Civil Division develop procedures to effectively monitor future contracts it establishes for the VCF.

[34] FAR 1.602-3 defines ratification as the act of approving an unauthorized commitment by an official who has the authority to do so.

[35] FAR 1.602-2, *Responsibilities*.

CONCLUSION AND RECOMMENDATIONS

At the time of our review, the VCF did not consistently document support for claimant decisions in the CMS. We note that VCF officials stated a need to maintain some claimant data outside of CMS as its functionality was continuing to change to address the needs of an evolving claims process. Following her appointment in July 2016, Special Master Bhattacharyya required that the VCF maintain complete files to support eligibility and compensation decisions in the CMS. We believe this will decrease the risk of both deleting and misplacing information needed to support claim decisions and prevent decision mistakes.

Our review identified inconsistencies pertaining to expedited compensation decisions that the VCF made for deceased victims and their dependents reporting financial hardships. While we credit the VCF's efforts to expedite awards in such cases, at the time of our review, the loss calculation letter prepared by the VCF for those expedited claims did not detail what portion of the overall award was expedited. Moreover, VCF personnel stated that they were unsure how to calculate deceased victim awards and referenced different iterations of VCF policies to review and evaluate these types of claims. Some expedited claims did not include full compensation for the deceased pain and suffering, leaving claimants to file an amendment or an appeal to obtain additional funds. While Special Master Bhattacharyya issued updated guidance to clarify calculating such non-economic awards in March 2017 and the VCF updated its loss calculation letter format, we recommend that the VCF implements specific guidance to ensure that all personal representatives of deceased victims receive compensation, as appropriate, for the time an eligible deceased victim spent suffering prior to death.

To support VCF operations, the Civil Division awarded a series of neutral service contracts. To make such awards without competition, the FAR requires the Contracting Officer document adequate justifications and rationale. However, we found that the justifications put forth for the separate contracts used to hire an office manager and obtain legal support from Deputy Special Master Greenspan's law firm were not sufficient because they did not detail the specific expertise of the office manager or the law firms that ultimately received non-competitive awards.

We also found that the legal services contracts had several periods of gaps in the period of contract performance. Further, we determined that the Deputy Special Master Greenspan drafted the Statement of Work and dictated the contract period of performance for the contracts awarded to her own law firms. We found this to be problematic considering the Deputy Special Master then signed the contract on behalf of her law firms. As a result, we believe this created the appearance of a conflict of interest that the VCF and Civil Division should have taken proactive steps to avoid.

Lastly, our audit also revealed ongoing issues regarding CMS development, the contract for which expires in September 2017. While the VCF reports that the CMS is functional, we remain concerned about the monitoring of the contract given

that the CMS used by the VCF personnel still did not meet all contract requirements.

We recommend that the VCF:

1. Provide evidence that its revised policies and procedures will ensure that all relevant documents and actions taken at critical points in the claims review process, including eligibility, compensation, appeals, and payment are retained or otherwise consistently referenced in the CMS.

2. Provide evidence that its revised compensation determination policies and procedures will ensure appropriate application and documentation of award offsets.

3. Implement specific guidance to ensure that all representatives of deceased victims – including those that received expedited awards – have received, as appropriate, non-economic compensation for the time the eligible deceased victim spent in pain and suffering prior to death.

We recommend that the Civil Division:

4. Ensure that it documents sufficient justifications when assisting the VCF with awarding neutral services contracts without competition in the future.

5. In coordination with JMD, ensure that it reviews contracts issued in relation to Special Government Employees or their businesses for potential or actual conflicts of interest.

6. Continue to work with JMD to monitor IBM's performance closely to ensure that it meets necessary requirements by the end of the contract.

7. Develop procedures to effectively monitor future contracts it establishes for the VCF.

STATEMENT ON INTERNAL CONTROLS

As required by the *Government Auditing Standards*, we tested, as appropriate, internal controls significant within the context of our audit objectives. A deficiency in an internal control exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to timely prevent or detect: (1) impairments to the effectiveness and efficiency of operations, (2) misstatements in financial or performance information, or (3) violations of laws and regulations. Our audit of the Special Master's Office (SMO) administration of the Victim's Compensation Fund (the VCF), and the Civil Division's and JMD's support of VCF operations was not made for the purpose of providing assurance on their internal control structures as a whole. The Civil Division's, SMO's, and JMD's management are responsible for the establishment and maintenance of internal controls.

As noted in the Audit Findings section of this report, we identified deficiencies in the Civil Division's and VCF's internal controls that are significant within the context of the audit objectives. Based upon the audit work performed, we believe that the deficiencies adversely affected the Civil Division's and the VCF's leadership ability to administer and manage VCF funds appropriately. The Audit Findings section of this report discusses these matters in detail.

Because we are not expressing an opinion on the Civil Division's, SMO's, and JMD's internal control structure as a whole, this statement is intended solely for the information and use of the Civil Division, SMO, and JMD. This restriction is not intended to limit the distribution of this report, which is a matter of public record.

STATEMENT ON COMPLIANCE WITH LAWS AND REGULATIONS

As required by the *Government Auditing Standards* we tested, as appropriate given our audit scope and objectives, selected transactions, records, procedures, and practices, to obtain reasonable assurance that Civil Division's, JMD's and SMO's management complied with federal laws and regulations for which noncompliance, in our judgment, could have a material effect on the results of our audit. Civil Division's, JMD's, and SMO's management are responsible for ensuring compliance with applicable federal laws and regulations. In planning our audit, we identified the following laws and regulations that concerned the operations of the auditees and that were significant within the context of the audit objectives:

- Pub. L. 111-347 – James Zadroga Act or James Zadroga 9/11 Health and Compensation Act of 2010
- Pub. L. 112-10 – Department of Defense and Full-Year Continuing Appropriations Act, 2011
- Pub. L. 114-113 – Consolidated Appropriations Act, 2016
- 42 U.S.C. 300mm – World Trade Center Health Program
- 42 C.F.R. Part 88.1 – World Trade Center Health Program
- 28 C.F.R. Part 104 – September 11th Victim Compensation Fund
- FAR 1.6 – Career Development, Contracting Authority, and Responsibilities
- FAR 6.3 – Competition Requirements- Other than full and open competition

Our audit included examining, on a test basis, Civil Division's, JMD's, and SMO's compliance with the aforementioned laws and regulations that could have a material effect on operations. We interviewed Civil Division, JMD, and SMO employees, assessed their internal control procedures, and examined claim decision and contract records.

As noted in the Audit Findings section of this report, we found instances where the Civil Division did not have controls in place to ensure compliance with the FAR. Specifically, we noted that the Civil Division issued multiple non-competitive neutral service contracts without providing adequate justifications and rationale to support making such contracts.

APPENDIX 1

OBJECTIVE, SCOPE, AND METHODOLOGY

Objectives

The audit objective was to evaluate how the Special Master administered the VCF, and how the Civil Division and Justice Management Division (JMD) helped support VCF operations from 2011 through February 2016. To accomplish this objective we evaluated how the Special Master processed and adjudicated claims and assessed how the Civil Division and JMD assisted VCF operations.

Scope and Methodology

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

We held over 60 interviews with VCF leadership and personnel and observed VCF activities and controls at its locations in Washington, D.C. and New York, New York. We evaluated policies and procedures developed by the VCF and obtained walkthroughs of each stage of the claims process. We also held over 20 interviews with JMD and Civil Division officials. We collected and evaluated policies and procedures and met with Contracting Officers, Contracting Officer's Representatives, and Ethics Officials within the Civil Division and JMD to learn how they awarded contracts to support VCF operations and the terms and conditions of such contracts.

Claim Management System

We worked closely with VCF data specialists to obtain an understanding of how the Claims Management System (CMS) constructed data and the data fields necessary to build a universe of claims. During our review of the data and while compiling a universe of claims, we identified several areas of concern. We found claim files that were not marked as test files but appeared to be test entries with fictional or made up names; improper file dates that did not align with the VCF's claims management process; incorrect cumulative award amounts for claimants with multiple claims; physical injury claims that should have been, based on the documents contained in the claimant file, designated as deceased claims; and incorrect law firm names for claimants with legal representation. VCF officials stated that these issues were largely not under their control. For example, if a claimant registered using a fictional name, that name would automatically be added to the claim universe for registration. Additionally, a claimant could have mistakenly applied for a physical injury claim when the claimant actually meant to apply for a deceased claim, in this case the VCF would have to re-categorize the claim as a deceased claim when reviewing the claim.

Despite these concerns with the data in the CMS, we were able to reconcile the claims universe in the CMS with claim information that the VCF reported on its 2015 Annual Report. As such, we utilized the universe we compiled to assess, test, and report on various aspects of the VCF operations. We do not believe that this confirmed application significantly affects the accuracy or integrity of our findings and recommendations.

In general, the scope of this audit was defined by claims included in the CMS database from inception of the VCF as of February 2016, excluding identified test records. Based on the data downloaded from the database as of February 2016, CMS had 69,492 registered claims. At this time, the database included 9,166 claim records that had been processed for eligibility, compensation, and payment. It is to this universe of claims that we applied the aging analysis by milestone detailed in our report

Aging of Claims

We calculated the average time the VCF took to handle a claim through each of the three main stages of the claims review process and analyzed general statistics for claimants that received payments. This aging analysis applies the *Claimants Progress* and *Claimants Progress Archive* data received on 6/28/2016.

- **Eligibility *Aging.*** To calculate the eligibility aging figure, we used a start date of the first time the claim milestone moved to a *Submitted* status, and an end date of the first time the claim moved to final status, in this case *Approved* or *Denied*. For the 57 instances that claims did not have a *Submitted* action, we used the *Under Review* milestone as a start date.
- **Compensation Aging.** To calculate the compensation aging figure, we used a start date of the first time the claim milestone moved to the more recent of either: (1) the earliest *Compensation Submitted* date or (2) the earliest *Eligibility Approved date* and an end date of the first time the claim moved to final status, in this case *Substantially Complete*.
- **Payment Aging.** To calculate the payment aging figure, we used a start date of the first time the claim moved to, *Payment Process* and an end date of, the first time the claim moved to *Package Sent to OPBE*.

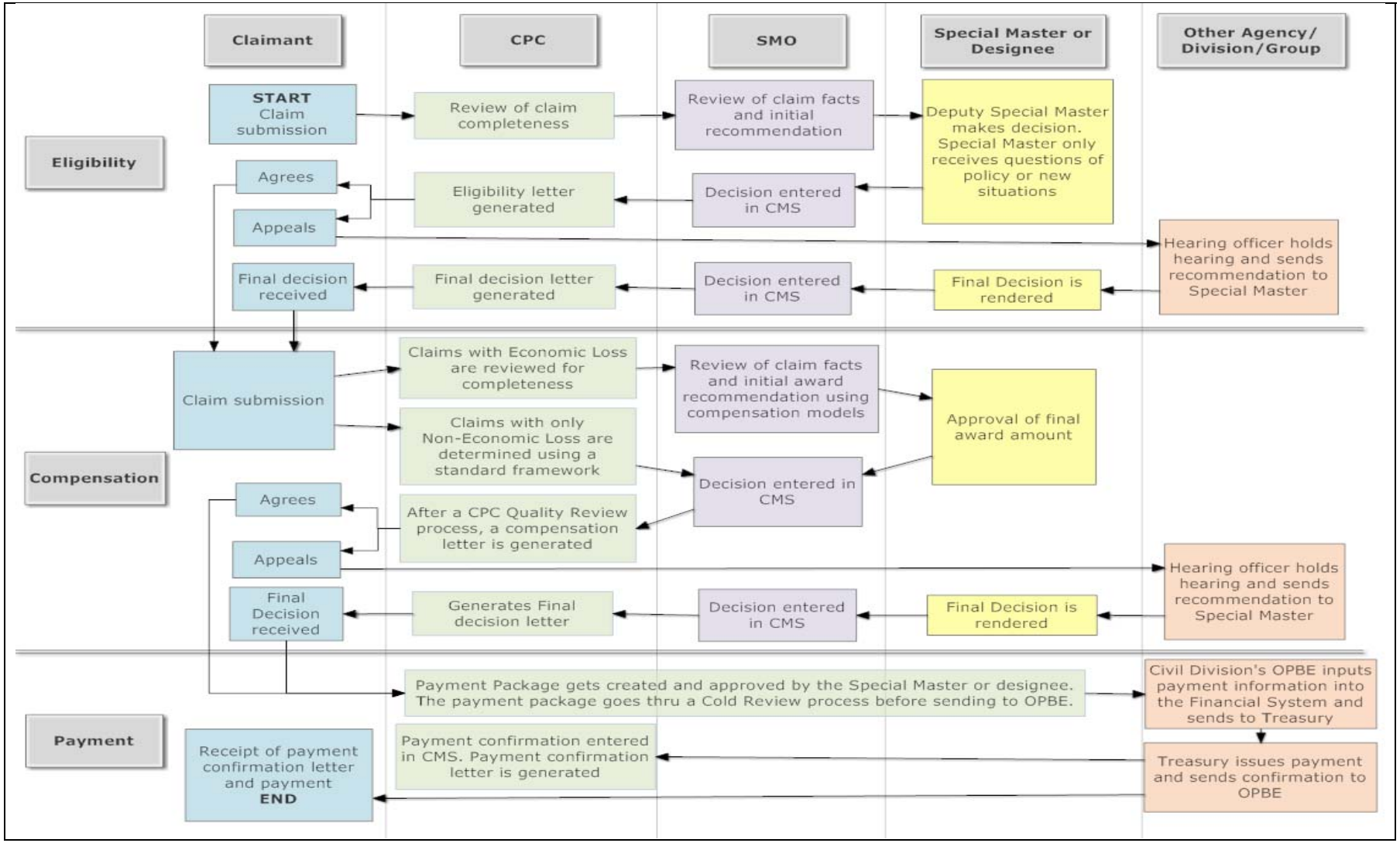
Case Sample Selection

Based on our understanding of the claims process and the data universe that we compiled, we judgmentally selected claims to review for compliance with the regulations established by the VCF to effectuate Zadroga Act eligibility, and compensation criteria, to ensure that the VCF appropriately documented and supported eligibility determinations and award decisions.

Although the sample units were selected judgmentally, the universe of Registration IDs was stratified to cover claimants at various stages of the four milestones (registration, eligibility, compensation, and payment). Our sample selection methodologies were not designed with the intent of projecting our results to the populations from which the samples were selected.

APPENDIX 2

CLAIMS DECISION PROCESS



Source: OIG Summary of the VCF Claims Process.

APPENDIX 3

DOCUMENTS REQUIRED TO ASSESS CLAIMANT ELIGIBILITY AS OF OCTOBER 2013 AND COMPENSATION AS OF MAY 2013

Eligibility	
Document	**Reason**
Presence Documents	Documents establishing a claimant's presence at a September 11th crash site from September 11, 2001, through May 30, 2002. This includes a claimant's location, time, and activities at a September 11th crash site.
Physical Injury Documents	Documents supporting physical injury or condition that the claimant sustained as a result of the September 11th attacks or the related debris removal efforts. A claimant's private physician must provide any relevant records to support the diagnosis.
Privacy Act Notice	Authorizes the DOJ to disclose any records or information for the purpose of determining a claimant's qualification and/or compensation of a September 11th related claim.
Proof of Dismissal of Any Lawsuit	Certifies that a claimant is not a party to a lawsuit relating to the terrorist-related aircraft crashes of September 11th or the related debris removal.
Acknowledgement of Waiver of Rights	Waives a claimant's right to file a lawsuit relating to September 11th or the related debris removal.
Declaration of Authority to Act on Minor Claimant's Behalf	Required document if the claimant is a minor (under 18 years old) at the time the claim is submitted.
Claimant's Acknowledgment of Attorney's Compliance with Limitation on Attorney Fees	Proof that a claimant who is represented by an attorney acknowledges the limitations on attorney fees (not to exceed ten percent of any award), other than those that are routinely incurred.
Authorization For Communication and Correspondence	Authorizes a designated individual with whom the CPC and SMO can discuss a claimant's claim.
Certification of Accuracy of Information	Certifies that the information contained in and submitted with or attached to the Eligibility Form is true and accurate, under penalty of perjury.
Exhibit A – Authorization for Release of Medical Records	Authorizes the release of a claimant's medical information to the VCF, DOJ, and WTCHP for purposes of evaluating the claim.
Exhibit B.1 – Authorization for Release of Pension Records and Health Information by New York Individuals and Entities	Required if a claimant has applied for a pension from a State of New York entity.
Exhibit C- Attorney Certification of Compliance with Provision on Limitation on Attorney Fees	Attorney certification of compliance with provision on limitation on attorney fees.
Exhibit D – Attorney Request for Approval For Charge of Non-Routine Expenses	Required for attorneys who seek additional expenses with the claim other than those routinely incurred in the course of providing legal services.

Compensation	
Document	**Reason**
Medical Expense Loss	Proof of claimed medical costs or other expenses that were not reimbursed. For example, invoices or receipts for prescription drugs or from the health provider showing payments received.
Future Medical or Other Expenses	Documents relevant to future medical or other expenses and statement from a treating physician regarding prognosis and need for ongoing treatment.
Health Insurance Information	Health insurance documents for period of past medical expenses. For future medical expenses, current health insurance coverage documents are required.
Loss of Earnings to Date - Compensation Information (base/salary/wages) (if applicable)	Documents supporting loss of prior earnings and/or other benefits from work already missed as a result of injury.
Loss of Earnings to Date - Replacement Services Loss to Date	Documents showing type and costs of replacement services to date, including invoices or receipts showing services rendered and payments received.
Claim of Lost Future Earnings	Only applicable if seeking compensation for loss of future earnings and/or loss of future replacement services.
A. Medical Condition-Disability	Documents supporting a disability determination from a government agency, insurer, or physician.
B. Compensation / Benefits Information	Proof of compensation, including benefits and any other form of compensation, as well as pension information, for the period beginning three calendar years prior to the decrease in earnings capacity as a result of disability and up to the year the claim is being filed. Tax returns for the period beginning three years prior to the decrease in earnings capacity as a result of disability and up to the year claim is being filed are also required.
C. Future Loss of Replacement Services	Proof of the type and costs of replacement services expected to be incurred in the future.
Collateral Source Compensation	Documents showing all collateral sources of compensation received or entitled to receive.
Other Information in Support of Compensation Form	Additional documents may be relevant to the individualized circumstances of claim.
Certification for Compensation Form	Signed (original signature) Privacy Act Notice and the Certification of Accuracy of Information.
Exhibits	Submit original compensation Exhibit 1 to claim a disability or a loss of prior or future earnings. Submit additional copies (original signature) of Exhibit A, Exhibit B1, and Exhibit B2 for individuals and entities such as medical providers, New York pension funds, or other entities in the Compensation Form that may have medical or pension information on claim but not identified in the Eligibility Form.

Source: Eligibility Form for Personal Injury Claimants V.2.2 and Compensation Form for Personal Injury Claimants V.2.2.

APPENDIX 4

OIG MANAGEMENT ADVISORY MEMORANDUM

U.S. Department of Justice

Office of the Inspector General

February 11, 2016

MANAGEMENT ADVISORY MEMORANDUM FOR:

BENJAMIN C. MIZER
PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL
FOR THE CIVIL DIVISION

FROM: MICHAEL E. HOROWITZ
INSPECTOR GENERAL

SUBJECT: Unauthorized Release of Personally Identifiable Information Pertaining to September 11th Victim Compensation Fund Claimants

The purpose of this memorandum is to advise you that the OIG learned in the course of its ongoing audit that September 11th Victim Compensation Fund (VCF) employees transmitted personally identifiable information (PII) pertaining to claimants, including social security numbers, dates of birth, and medical information, from Department of Justice (Department or DOJ) e-mail servers to a private e-mail server operated by a law firm of one special government employee (SGE), and potentially to two more servers operated by law firms of another SGE. We believe that the Department needs to take immediate action to identify and secure the PII sent from its servers and enact procedures to ensure that VCF personnel no longer transmit PII outside DOJ servers.

Background

In October 2015, we initiated an audit to review the administration of the VCF, which was reopened by Title II of the James Zadroga 9/11 Health and Compensation Act of 2010 (Zadroga Act). The Zadroga Act expanded compensation eligibility to certain individuals who removed debris following the attacks.[1]

[1] Pub. L. 111-347 (2011)

Two individuals lead the VCF and serve as uncompensated SGEs. Sheila Birnbaum, a New York-based attorney who specializes in product liability, toxic torts, and insurance coverage litigation, serves as the VCF's Special Master with the legislatively mandated final authority to assess eligibility claims and compensate victims. Shortly after being appointed Special Master, Ms. Birnbaum named Deborah Greenspan, a Washington, D.C.-based attorney who specializes in class action, mass torts, and bankruptcy litigation, to serve as Deputy Special Master. Ms. Greenspan previously had served as a Deputy Special Master for the original VCF.

Ms. Birnbaum and Ms. Greenspan continue to practice law privately while administering the VCF. Although both have received Department e-mail addresses and equipment, we found during the course of our audit that both have actively used their private law firm e-mail accounts to facilitate handling VCF claims. In addition, Ms. Greenspan has Special Masters Office (SMO) attorneys assisting her in reviewing and processing VCF claims. These SMO attorneys consist of DOJ employees and independent contractors, who work in DOJ facilities or from home, as well as employees from Ms. Greenspan's private law firm who conduct their VCF work at the private firm's office. We found at least one of these employees from Ms. Greenspan's law firm also used a non-DOJ e-mail account to facilitate handling VCF claims.

The VCF Award Process

The VCF claims process comprises two distinct parts: determining eligibility and calculating compensation. Eligible VCF claimants must: (1) have registered with the VCF by statutory deadlines, (2) have a certified physical condition caused by the September 11th terrorist attacks, (3) be able to show proof of presence at a September 11th crash site during the time of the attacks or immediately after the attacks, and (4) have properly resolved September 11th-related lawsuits.

For eligibility claims, VCF Claims Processing Center (CPC) personnel first ensure that claims have the required documents and signatures. Claims are then sent to VCF SMO attorneys, who contact claimants or representatives to verify eligibility information, if necessary. The SMO attorneys subsequently summarize several claim requests (referred to as batches) on electronic worksheets that they then e-mail with supporting documents to the Deputy Special Master. The Deputy Special Master then determines the eligibility of each claim or requests additional information necessary to make a decision.[2]

[2] The Deputy Special Master only sends eligibility decisions to the Special Master for review if there are questions or if it is a new situation that raises a policy issue.

Once the Deputy Special Master deems a claimant eligible, SMO attorneys access the Claims Management System to review assembled claim information – pension plans, workers' compensation forms, and medical records – and calculate various compensation options.[3] In calculating economic losses, the SMO attorneys consider the claimant's future lost income, past expenses, and replacement services. In calculating non-economic losses, SMO attorneys consult claimant personal statements regarding various issues, such as pain and suffering endured from September 11th-related injuries. SMO attorneys then e-mail the Deputy Special Master their compensation options, along with supporting documents, to assist her in determining a final award amount for each claim.

Release of VCF Claimant PII

Through our assessment of the claims process, we found that VCF employees transmitted claimant PII, including social security numbers, dates of birth, and medical information, from Department e-mail servers to private e-mail accounts at the Deputy Special Master's law firm. The Deputy Special Master told us that she used her private law firm e-mail address to facilitate reviewing and processing claims because Department-provided equipment did not work properly. According to both VCF and Civil Division employees, the Department authorized the sending of victim eligibility and compensation information from Department e-mail servers to the Deputy Special Master so long as PII was properly redacted.[4] In addition, we confirmed that the Deputy Special Master instructed employees to redact social security numbers and other PII prior to sending information to her non-Department server.

However, our review of evolving VCF policies and procedures, as well as e-mails and attachments, indicates that VCF employees still released un-redacted claimant PII from Department e-mail servers. VCF standard operating procedures direct personnel to e-mail case summaries to the Special Master's and Deputy Special Master's private law firm e-mail addresses. Moreover, we have identified e-mails sent to the Deputy Special Master's and an SMO attorney's private law firm accounts that included attachments with un-redacted PII, such as social security numbers, dates of birth, and medical information. Additionally, we noticed that the Special Master appeared to use her law firm e-mail address as a primary mode of communication with VCF employees prior to December 2015. We therefore remain concerned that PII

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[3] Under the Zadroga Act, the VCF must also adjust compensation amounts to account for pensions, life insurance payments, and other settlements received by claimants due to harm sustained by the September 11th attacks.

[4] As of the date of this memorandum, we have not obtained written evidence of the Department's authorization to send claimant information to external non-Department servers.

may have also been sent outside the DOJ network to the Special Master's private law firm e-mail account.

Although we do not know how many claimants may have had PII released to private e-mail servers, we note that as of September 2015, the VCF has made 13,818 eligibility determinations and 6,285 compensation decisions.

The Civil Division and VCF instructed VCF employees to cease transmitting claimant information from Department e-mail servers on December 10, 2015. A Civil Division official also confirmed that the Special Master and Deputy Special Master received additional equipment to facilitate making eligibility and compensation determinations. We believe these steps represent significant improvements in VCF handling and securing of claimant PII.

Although we have received no evidence that claimant data sent outside the Department has been misused or accessed inappropriately, we remain concerned that such data may still reside on multiple non-Department devices, computers, and servers. Therefore, we believe the Civil Division should work with responsible information technology personnel at current and, if applicable, former law firms of the Special Master and Deputy Special Master to determine whether claimant PII data resides on servers outside of the Department and, if so, determine whether such data has been compromised.

Within 30 days of the date of this memorandum, please advise the actions taken to address the issues outlined in this memorandum. At a later date, we plan to issue an audit report detailing our audit findings, including the matter discussed in this memorandum. If you would like to discuss this memorandum, please contact me at (202) 514-3435 or Jason R. Malmstrom, Assistant Inspector General for Audit, at (202) 616-4633.

cc: Carlos Uriate
Associate Deputy Attorney General

Catherine V. Emerson
Executive Officer
Civil Division

Richard P. Theis
Assistant Director
Audit Liaison Group
Internal Review and Evaluation Office
Justice Management Division

Sheila Birnbaum
Special Master
September 11th Victim Compensation Fund

Deborah Greenspan
Deputy Special Master
September 11th Victim Compensation Fund

APPENDIX 5

CIVIL DIVISION'S RESPONSE TO THE OIG MANAGEMENT ADVISORY MEMORANDUM

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, DC 20530
March 11, 2016

Michael E. Horowitz
Inspector General
U.S. Department of Justice

Dear Mr. Horowitz,

Thank you for your letter of February 11, 2016. As we have previously conveyed to your staff, we take OIG's concerns about the transmission of personally identifiable information ("PII") related to claimants in the September 11th Victim Compensation Fund ("VCF" or "Fund") extremely seriously.

The VCF is headed by a Special Master who, by statute, is appointed by the Attorney General. The Special Master is charged with "administer[ing] the compensation program," "promulgat[ing] all procedural and substantive rules for the administration" of the Fund, and "employ[ing] and supervis[ing] hearing officers and other administrative personnel to perform the duties of the Special Master" under the statute. *See* Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, § 404(a), *as amended by* James Zadroga 9/11 Health and Compensation Reauthorization Act of 2010, Pub. L. No. 111-347, *and* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, §§ 301-405 (2015). When establishing the Fund, rather than create a new administrative infrastructure within the Office of the Special Master, the Department of Justice decided to designate the Civil Division to provide administrative support to the Special Master. Among those supporting functions are information technology, human resources, procurement, finance, budget, facilities, and various other aspects of administrative support that the Fund requires.

We understand that VCF has taken many steps since questions were raised by your office in December, and we appreciate your acknowledgement that VCF has made significant improvements in handling and securing of claimant PII. Your staff brought its concerns to the Civil Division's attention on December 9, 2015. On December 11, 2015, at our request, VCF managers directed all VCF staff to cease transmission of any claimant information to non-DOJ systems in order to allow Civil Division and VCF personnel the opportunity to work with OIG to determine the nature and scope of any problems with then-current VCF practices and procedures and implement remedial measures as appropriate. We also advised the Special Master and Deputy Special Master to ensure that any electronic communications containing claimant information be sent

and received on their DOJ email accounts, rather than on their law firm email accounts. We informed OIG of these precautionary steps by email dated December 11, 2015.

Thereafter, as we worked with OIG and VCF to determine the nature and scope of concerns about VCF's handling of PII, VCF managers informed us that it was essential to VCF operations that they be permitted to resume electronically communicating claimant information to and from claimants and claimants' authorized representatives. We were informed that such communications were necessary to provide claimants and their representatives with updates on the status of their claims, and also to request necessary factual clarifications and updates for claim processing purposes. We were informed that these communications may include PII, such as claimant names, addresses, dates of birth, and medical record information. In all such cases, VCF personnel informed us that they would confirm that the claimant had signed an authorization form permitting disclosure of claim-related information to their representative. We advised VCF that it could transmit claimant information to claimants and their authorized representatives, provided that VCF put in place several safeguards to protect the transmission of this PII. Among these safeguards are both automatic and manual encryption utilities that the Civil Division implemented in 2015 as part of the Department's Data Loss Prevention ("DLP") initiative. The Civil Division trained key VCF staff on using DOJ-approved manual encryption tools to ensure the secure encrypted transfer of sensitive claimant information sent by email outside of the Department's logical perimeter. We advised OIG of this communication by email dated January 14, 2016.

In addition to manual encryption for outgoing VCF email containing claimant information, VCF communications are subject to automated Social Security Number ("SSN") filtering and encryption tools that the Department began implementing in June 2015. The Department's Fidelis DLP utility was initially used to actively and automatically detect well-formed SSNs and alert Civil Division IT security staff for review and action. Since October 23, 2015, all outgoing emails and attachments sent to non-.gov and non-.mil email addresses that were flagged by Fidelis DLP as containing a well-formed SSN are automatically encrypted using the Department's ProofPoint encryption solution even if they have not been marked for manual encryption. Since February 19, 2016, that automatic encryption process has been applied to email messages sent to .gov and .mil accounts in addition to non-government systems. All email sent from VCF DOJ accounts to other DOJ email accounts is transmitted over the Department's encrypted JUTNet network and does not leave the Department's logical perimeter or traverse the open Internet.

The Civil Division has procedures in place for reporting, tracking and responding to PII breaches. The Division also receives an automated daily report from the Department that identifies the total number of emails sent to non-DOJ email addresses each day that contained a SSN and whether each email was encrypted. Those reports are sent to the Division's Chief Information Officer. Suspected PII breaches are immediately reported to DOJ's Computer Emergency Response Team ("DOJCERT") upon detection by mission or program staff and Civil Division IT security staff work with mission or

program staff and the Justice Security Operations Center ("JSOC") in investigating and responding to inadvertent or erroneous PII disclosures and breaches.

In your letter dated February 11, 2016, you stated that OIG has received no evidence that claimant data sent outside of the Department has been misused or accessed inappropriately. You requested that we make two additional inquiries of the current and former law firms, where applicable, of the Special Master Sheila Birnbaum and Deputy Special Master Deborah Greenspan. These two inquiries were (1) "whether claimant PII data resides on servers outside of the Department" and (2) if so, "whether such data has been compromised."

Since receiving your letter, we have worked with the responsible IT personnel at Deputy Special Master Greenspan's firm, Blank Rome LLP (previously Dickstein Shapiro LLP[1]), and determined through conversations with Deputy Special Master Greenspan that some claimant PII resides on the firm's servers. Our understanding is that the information was only obtained in the course and scope of VCF work and has only been used for VCF program purposes. It is our understanding from discussions with Deputy Special Master Greenspan and the responsible IT personnel that only those who are working on VCF matters have access to the information. Further, the IT personnel were not aware of any firm files or systems having been compromised. Additionally, the IT personnel confirmed that they have in place IT security software for purposes of detection and prevention of malicious activity.

We have worked with the responsible IT personnel at Special Master Birnbaum's current firm, Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn Emanuel"), and her former firm, Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"), where she was a partner until April 2013. We determined that limited claimant PII resides on Quinn Emanuel's servers and that only Special Master Birnbaum, her assistant, and firm IT administrators have access to emails or files that may contain VCF PII. With respect to Skadden, we determined that limited claimant PII may reside on Skadden servers and that at the time that she worked there, only Special Master Birnbaum, her assistant, and firm IT administrators had access to emails or files that may contain VCF PII. Since her departure, only firm IT administrators have such access. With respect to both firms, our understanding is that the information was only obtained in the course and scope of VCF work and has only been used for VCF program purposes. With respect to both firms, IT personnel were not aware of any firm files or systems having been compromised. Additionally, the IT personnel at both firms confirmed that they have in place IT security software for purposes of detection and prevention of malicious activity.

[1] In February 2016, Dickstein Shapiro LLP merged with Blank Rome LLP. According to information from the responsible IT personnel, Dickstein Shapiro LLP data remains separate and on its own servers. The data in question has not been transferred to Blank Rome LLP servers.

We appreciate your inquiry and take your questions very seriously. We have worked quickly and diligently to address concerns with VCF personnel as they have arisen. Please do not hesitate to reach out with any additional questions or requests.

Respectfully,

Benjamin C. Mizer
Principal Deputy Assistant Attorney General

cc: Carlos Uriarte
Associate Deputy Attorney General

Richard P. Theis
Assistant Director
Audit Liaison Group
Internal Review and Evaluation Office
Justice Management Division

Sheila Birnbaum
Special Master
September 11th Victim Compensation Fund

Deborah Greenspan
Deputy Special Master
September 11th Victim Compensation Fund

APPENDIX 6

VICTIM COMPENSATION FUND'S RESPONSE TO THE DRAFT AUDIT REPORT

U.S. Department of Justice

September 11th Victim Compensation Fund

July 26, 2017

MEMORANDUM

TO: JASON R. MALMSTROM
Assistant Inspector General for Audit
Office of the Inspector General

FROM: RUPA BHATTACHARYYA
Special Master
September 11th Victim Compensation Fund

SUBJECT: VCF Response to the Draft Report of the OIG's Audit of the Department of Justice's Administration of the September 11th Victim Compensation Fund

The September 11th Victim Compensation Fund (VCF or the Fund) appreciates the opportunity to provide comments to the Draft Audit Report of the Office of the Inspector General (OIG) entitled "Audit of the Department of Justice's Administration of the September 11th Victim Compensation Fund," provided to the VCF on July 28, 2017. Below, we provide general comments on the Report, followed by a response to the three recommendations directed to the VCF. The VCF also has reviewed the response provided separately by the Civil Division and concurs with the statements made therein.

General Comments

By any measure, the VCF is an extraordinarily successful program. As OIG reports, as of December 2015, the VCF had determined the eligibility of 17,673 claims and awarded over $1.8 billion in compensation to 9,131 eligible claimants or their representatives. Report at 5. In the eighteen months since December 2015,[1] as reported in the Quarterly Report published July 21, 2017, the VCF has rendered 3,775 more eligibility determinations, and awarded over $1 billion more in additional compensation on more than 4,282 additional claims. In total, as of June 30, 2017, the VCF had made 21,448 eligibility decisions, finding 16,942 claimants eligible for compensation. The VCF had made award determinations on 13,413 of those claims at a total value of $2,818,804,225.81. That means that the VCF's compensation awards have exceeded the $2.775 billion originally appropriated when the Zadroga Act was passed in 2011, and that it is beginning to make awards out of the

[1] This 18-month period effectively represents one year of claims processing activity. The VCF did not render compensation determinations for six months as it worked to implement changes required by the December 2015 Reauthorization statute, and could not pay any new awards until funding became available on October 1, 2016. The VCF began rendering compensation determinations post-Reauthorization on June 30, 2016.

appropriated funds added when Congress and the President reauthorized the VCF in December 2015.

The reauthorization of the VCF for an additional five years, extending its application period until December 18, 2020, and appropriating $4.6 billion in additional funding, is a demonstration of Congress's faith in the program and a recognition both of its success and of the enormity of the work that remains to be done. The toll taken by the attacks was high, its consequences are continuing, and it is indisputable that no amount of money can alleviate the losses suffered as a result of the events of September 11, 2001. But the VCF plays a critical role in providing some small measure of relief to those who continue to suffer. In all, the VCF has compensated claims from more than 11,000 responders to the attacks in New York City, at the Pentagon, and at the Shanksville site, as well as more than 2,000 others who lived, worked, or traveled through areas of lower Manhattan that were exposed to debris and toxins generated by the attacks and their aftermath. More than 4,000 of these claimants suffer from one or more cancers related to their 9/11 exposure, while the remainder suffer from other, often times disabling, physical injuries. More than 7,000 claims are pending, and nearly 6,000 requests have been filed by those who have already received awards, seeking additional compensation due to new injuries or losses.

When OIG's audit of the VCF was initiated in October 2015, the Fund, created by Congress in 2011, had been operating for nearly four years and was slated to close to new applications just about a year later. The reauthorization of the VCF occasioned major changes at the VCF during the course of the OIG review, including a significant leadership change with the resignations of Special Master Sheila Birnbaum and Deputy Special Masters Deborah Greenspan and Nell McCarthy, and the appointment of new Special Master Rupa Bhattacharyya, and Deputy Special Masters Stefanie G. Langsam and Jordana H. Feldman. Updated regulations implementing changes to the VCF made by the Reauthorization statute were issued in September 2016, as was a new Policies and Procedures document for use by the public; internal policy guidance and standard operating procedures spanning all aspects of the Fund were reevaluated and revised; and resources were assessed, expanded, and shifted to meet the needs of the Fund as it moved into the post-Reauthorization period.

Thus, while OIG undertook to review a program that was winding down and nearing its end, the VCF, as it exists today, is reauthorized and reinvigorated in its efforts to serve the 9/11 community, and has taken substantial steps to realign the program to promptly, accurately, consistently, and fairly decide the claims already pending and the claims still anticipated to be filed. The VCF's primary focus since Reauthorization has been on two goals: rendering determinations on the oldest pending claims and increasing the speed at which claims are processed, both without compromising standards for careful and thorough claim review and resolution. At the same time, the VCF has redoubled its commitment to the guiding principles of rendering decisions that are fair to claimants, faithful to the law, and accountable to taxpayers. Enhancements made to the VCF's claimant portal streamlined the application process; procedural changes shortened the time frame for deciding claims; and steps taken to implement a claim review prioritization plan ensured that the oldest claims were decided first as the Fund systematically works through the backlog of pending claims. Accordingly, while the VCF greatly appreciates the

time and effort that OIG expended in reviewing the Fund's operations through February of 2016 when it completed its substantive review, Report at 37, the VCF that was the subject of that review little resembles the operation that exists now.

It is in this more complete context that the VCF responds to certain observations in the OIG Report that are not tied to recommendations directed at the VCF. First, while OIG correctly remarks on the slowness of claims processing in the early years of the program, Report at 6-7, it acknowledges the substantial obstacles faced by the VCF and the Civil Division as they strove to develop a program with significant differences from the original VCF which operated from 2001 to 2004 under the direction of Special Master Kenneth Feinberg in the immediate aftermath of the attacks. *See id.* Of particular note, the substantial work that was done by VCF leadership to "establish working relationships with third parties – labor unions, employers, and state and federal agencies such as the National Institute for Occupational Safety and Health and the U.S. Social Security Administration – to facilitate obtaining and verifying claimant eligibility and compensation information," Report at 7, cannot be minimized. The VCF's information sharing relationships, put in place through the hard work and extraordinary foresight of the early VCF leadership team, are the bedrock on which our claim review work rests, and continue to pay dividends today: the information received through these relationships significantly lowers the burdens on claimants, provides the VCF with accurate and reliable information, and allows for the timely resolution of pending claims. The VCF's success would not be possible without the time invested in this early foundational work. As OIG recognizes, Report at 7, the pace of claims processing has steadily increased, and it remains one of the VCF's top priorities to continue to make improvements in this rea.

Second, while the VCF appreciates OIG's effort to map the aging of claims, Report at 8, Table 1, we believe that OIG's methodology, *see* Report at 37, is substantially flawed. In particular, the VCF believes that the counts of days that a claim is in the Eligibility Decision stage and in the Compensation Determination stage are erroneous because the claim statuses that OIG used as beginning and end points were not appropriately chosen to capture the relevant time frames. For example, for the Compensation Determination stage count, OIG counted the time between the date on which compensation was submitted or the date on which eligibility was approved, whichever was *earliest*, and the date on which a compensation determination was made. Report at 37. But compensation can be submitted at the same time as eligibility or before eligibility is approved, even though it is not reviewed until *after* eligibility approval. Thus, the more accurate count would use the compensation submitted date or the eligibility approved date, whichever is *later*. In any assessment of claims processing times, moreover, it is important to recognize, as OIG does, that the VCF reviews each claim individually, and certain claims are more complicated and take additional time to review, resulting in time frames higher than the average, whereas simpler claims that seek only noneconomic loss may be processed under a fast track procedure, where eligibility and compensation determinations are made at the same time, resulting in time frames lower than the average. In response to numerous requests, the VCF is attempting to develop a timeline for claims processing so as to provide claimants with a better understanding of when decisions might be expected, and we hope to publish this information soon.

Finally, OIG raises various concerns regarding the VCF's Claims Management System (CMS), which is developed and maintained under a contract with International Business Machines Corporation (IBM). As OIG recognizes, CMS is a complex system that requires high levels of customization in order for it to properly serve as the VCF's management tool. Report at iii. CMS is designed to serve two critical functions: (1) as a claimant portal where claimants and/or their lawyers submit and amend their claims, upload documents they wish the VCF to review, access VCF correspondence made available through the portal, and check the status of their claims; and (2) as an administrative portal used by VCF staff in every aspect of its claim review, from tracking claim progress, to storing evidence necessary to decide claims, to serving as a repository for claim and contact notes, to providing the mechanism for the entry of claim determinations and the database from which significant reporting is generated both for public consumption and for internal workflow management. While, over the history of the program, the relationship with IBM has not always been smooth and questions have been raised in the past about its delivery on contractual requirements, this relationship is also one that has changed significantly since the December 2015 reauthorization of the VCF and the change in leadership both on the VCF team and the IBM team. Since Reauthorization, IBM has been a critical, collaborative, and indispensable partner in the VCF's efforts to realign the program for the future. An example of the early success of the new IBM team is the redesigned claimant portal, debuted in August 2016, which continues to be the subject of positive feedback from claimants and their representatives. While we recognize OIG's concerns with CMS and with the various workarounds adopted, we are confident that, with continued VCF-IBM collaboration and appropriate contract oversight, CMS can continue to serve as a functional and adequate platform for VCF claims processing.

Response to Specific Recommendations

Recommendation 1: *Provide evidence that [the VCF's] revised policies and procedures will ensure that all relevant documents and actions taken at critical points in the claims review, process, including eligibility, compensation, appeals, and payment are retained or otherwise consistently referenced in CMS.*

Response: Concur. The maintenance of an adequate administrative record that properly documents decisions and the inputs to the decision making process is a critical component of any administrative program. Since July 21, 2016, the VCF has taken numerous steps to ensure that an appropriate administrative record is maintained with respect to each claim for which a determination is made.[2] The various claim review templates used to propose recommendations for eligibility or compensation approval have all been updated to ensure that the appropriate information is documented in each claim when a determination is made. The templates are specific to each general category of claims (for example, FDNY/NYPD responders, claims subject to fast track review or seeking non-economic loss

[2] In addition, as part of the post-Reauthorization process that required the VCF to make full payment on more than 9,000 "Group A" claims, i.e., those claims that had already received an award determination prior to December 17, 2015, the VCF conducted quality review checks on each Group A claim to ensure that complete documentation, including of eligible conditions, presence, and timely settlement of related litigation, was in the file before authorizing final payment.

only, claims for lost earnings, etc.) and they support consistency in documenting the review of each factor used to assess eligibility and of the various inputs to the compensation calculation. As each recommendation is completed, the template is uploaded to the claim in CMS "Supporting Documents" and the claim is then produced for final review and approval by the Special Master or her designee. These draft recommendations are identified in CMS as Document Type "SMO Summary or Supporting Document," "Eligibility Worksheet," or "Compensation Worksheet." The models used to calculate economic loss are also uploaded to "Supporting Documents" and are identified as drafts prior to a determination being made. All templates provide a specific place for an authorized approver to sign and date the recommendation to document approval of the determination. Approved determinations are uploaded to CMS and are identified as Document Type "Approved SMO Determination." Similarly, the final model is uploaded to CMS and ingested as part of the entry of the compensation determination so that appropriate information can be extracted for incorporation into the letters sent to claimants explaining their award.

Pursuant to updated internal Appeals Guidance, the receipt of appeal forms are logged in CMS through Claim Notes and the addition of a claim category (the forms themselves are uploaded to "Supporting Document") and appeals determinations are documented in each claim as an "Approved SMO Determination," with a signed eligibility or compensation summary documenting the decision and citing any document or evidence relied upon. Each appeal record also contains the transcript of the appeal hearing and (except in hearings conducted by the Special Master) a summary report filed by the hearing officer describing the evidence presented at the hearing and the hearing officer's recommendations or conclusions.[3]

As to the payment stage, from the start of VCF2, the payment process and the required associated documents necessary to pay a claim were structured in accordance with directions provided by the Civil Division Office of Planning, Budget, and Execution (OPBE), which has responsibility for the processing of Civil Division financial transactions. The payment process was established with the specific requirement that certain payment information not be contained in CMS as that would necessitate classifying the system as a Financial Management System, which it is not intended or designed to be. Because of this requirement, the forms used to authorize VCF payments are generated with data contained in CMS (such as claimant details, award amounts, etc.), but are stored in a separate, secure location on the DOJ network that is accessible only to the VCF Payment team. VCF ACH Payment Information Forms, which provide the claimant's banking information needed to complete electronic wire transfers, are maintained only in hard copy files. Although OPBE is responsible for the eventual payment transaction and accounting, the VCF team does use CMS to track the steps in the payment process. This includes recording key activities and dates they occur, such as the date the claim is "ready for payment," the date the payment package is prepared, the date the package is authorized by the Special Master, and the date the package is delivered to OPBE. Once OPBE confirms that Treasury has completed the payment, additional data is ingested into CMS to show the date the payment was completed

[3] In hearings conducted by the Special Master, the Special Master's conclusions are reflected in the appeal determination.

by Treasury and the associated voucher number and confirmed payment amount. This ensures that all activity related to the payment is tracked by the VCF from start to finish.

The VCF strongly disagrees with OIG's conclusion, based on its limited judgmental sample of just 13 of the over 17,000 eligibility determinations and over 9,000 compensation determinations made by the time it concluded its review, that VCF claim files contained in CMS failed to include proof of presence at a September 11th attack site, proof of a September 11th-related physical condition, documents necessary to show the status of ongoing claimant litigation, or evidence supporting final approval of claimant eligibility or his or her proposed compensation amount. *See* Report at i, 14-15, 38.[4] As OIG notes, VCF review of the same 13 files produced evidence of all of the above in CMS, *id.* at 14, and in the two specific instances OIG discusses, VCF had identified the error and taken steps to correct it before the OIG review began. In addition, CMS itself contains "Determination" screens which reflect the disposition of the claim once the determination is entered following approval. On the eligibility side, this will indicate "Approved" or "Not Approved." For compensation, the determination will include the high level components of the award, i.e., economic loss, non-economic loss, collateral offsets, and total award. The VCF, therefore, also disagrees with the OIG's concern that VCF is at "increased risk of misplacing or not being able to locate information needed to support award decisions efficiently." *Id.* Notwithstanding these disagreements, as discussed above, the VCF fully concurs in the recommendation that complete administrative records be maintained for every claim and, as detailed above, has put in place mechanisms to ensure that relevant documents and actions taken at critical points in the review process are retained or otherwise consistently referenced in CMS. The VCF, therefore, requests that OIG consider this recommendation closed.

Recommendation 2: *Provide evidence that [the VCF's] revised compensation determination policies and procedures will ensure appropriate application and documentation of award offsets.*

Response: Concur. Since July 21, 2016, the VCF has substantively reviewed its policies and procedures surrounding offsets, and has issued specific guidance in two areas relating to the appropriateness of offsets.

First, the VCF has clarified its policies regarding the proper calculation of VCF2 non-economic loss claims when there is also a VCF1 award. That policy was publicly described in a call with law firms held on March 2, 2017, with published notes available on the VCF's web site. *See also* Policies and Procedures at § 1.7. As a general rule, for non-economic losses, VCF1 awards are not treated as an offset; instead, a VCF2 award will only be made if the claimant has amended the VCF1 claim to assert new conditions not compensated in VCF1 or if the condition compensated in VCF1 has exacerbated such that the claimant has suffered an additional loss. In both cases, the VCF2 award provides *additional* compensation for *new* injuries or losses as appropriate under non-economic loss guidelines

[4] The VCF appreciates OIG's recognition that its "sample selection methodologies were not designed with the intent of projecting [its] results to the populations from which the samples were selected." Report at 38.

given the combination of all 9/11-related conditions from which the claimant suffers, and an offset of the VCF1 award is not appropriate. VCF1 *economic* loss awards may be offset in circumstances where the calculation of the VCF2 award duplicates some category of loss already awarded. These types of claims have been discussed extensively, including at SMO policy committee meetings and at a training for claim reviewers held on April 13, 2017. Internal written guidance relating to VCF1-VCF2 economic loss awards is in use by the claim review team and that guidance is currently under review to determine if additional clarification would be helpful.

Second, the VCF has significantly revised its guidance relating to the appropriate offsets to be taken in deceased claims (i.e., those claims where the victim died of an eligible 9/11-related condition) where there is both a request for a personal injury award (loss suffered prior to death) and a wrongful death award (loss suffered on account of the death). As a general rule, these two awards are calculated separately, and offsets applicable to the personal injury claim will only be applied to the personal injury award, while offsets applicable to the wrongful death claim will only be applied to the wrongful death award. The two awards will not offset each other. Certain offsets, such as a lawsuit settlement or a Public Safety Officer Benefit payment, are taken from the combined total of the personal injury and wrongful death awards. The revised "Loss Calculation Detail" included with the award letter (a template will be published as part of the notes from an upcoming law firm meeting to be held on August 9, 2017) reflects how each of the two awards was calculated, as well as the total sum awarded. In addition to providing extensive guidance and training on this subject, the VCF has automated the production of the "Loss Calculation Detail" addendum so that it is generated automatically by the models, which will help to ensure that all reviewers are properly applying the deceased claim offsets policy.

In light of these efforts, VCF requests that OIG consider this recommendation closed.

Recommendation 3: *Implement specific guidance to ensure that all representatives of deceased victims – including those that receive expedited awards – have received, as appropriate, non-economic compensation for the time the eligible deceased victim spent in pain and suffering prior to death.*

Response: Concur. Since July 21, 2016, the VCF has devoted significant time to reviewing its policies and procedures surrounding deceased claims, i.e., those claims where the victim died of an eligible 9/11-related condition and thus compensation is sought both for personal injury (losses suffered before death) and wrongful death (losses suffered on account of the death). As discussed above, the VCF has issued revised internal guidance intended to clarify a number of questions raised about deceased claims and has clarified both the type of awards and the types of offsets that are applicable to each component of such a claim. In addition, claim reviewers have been instructed that bifurcating awards is strongly disfavored, and that on expedited claims (i.e., those claims where the claimant or counsel has provided information demonstrating a terminal illness or significant financial hardship and specifically requested that the claim be given expedited review), where all information required to calculate both the personal injury and wrongful death claims has been provided, a complete award determination should be issued. Where sufficient information is not provided to award economic or wrongful death losses, but the claim is

being expedited at the claimant's request, the standing instruction is to award only the personal injury non-economic losses given the claimant's terminal condition or exigent financial need and request the information needed to complete processing of any economic loss portion of the personal injury claim and the wrongful death claim.

VCF procedures require any such information to be provided in the form of an amendment. Once any payment is issued on the claim, any further request for an award is, by definition, an amendment. The VCF ensures that Claimants who specifically request expedited review and payment of an incomplete claim, are aware that, to the extent they wish to further pursue the claim, they will be required to amend their claim once they have compiled all of the information needed to complete their claim. The VCF disagrees with OIG that this procedure imposes any burden or creates any confusion amongst claimants. To the contrary, the VCF has an exceptionally generous and well-understood amendments policy, which allows any claimant to amend his or her claim at any time prior to the program's December 18, 2020, closure date, if he or she wishes to seek an additional loss or compensation for a new injury. Amendments are routinely filed in the program, and every claimant who receives a partial award due to their own request for expedition is aware of the procedure (which is outlined in every award letter the VCF issues) for amending their claim should they wish to seek additional compensation. In light of the clarifications made to VCF policy with respect to the composition and timing of deceased claim awards, the VCF requests that OIG close this recommendation.

* * * * *

In conclusion, once again, the VCF appreciates the opportunity to provide comments on the draft report and is grateful for the time that OIG spent in examining the VCF's procedures and for its willingness to work with the VCF in a collaborative and productive manner. If you have any additional questions, please do not hesitate to contact us.

cc: Catherine Emerson
Executive Officer, Civil Division

APPENDIX 7

CIVIL DIVISION'S RESPONSE TO THE DRAFT AUDIT REPORT

U.S. Department of Justice

Civil Division

Washington, DC 20530

July 26, 2017

MEMORANDUM

TO: Jason R. Malmstrom
Assistant Inspector General for Audit
Office of the Inspector General

FROM: Catherine V. Emerson
Executive Officer
Civil Division
U.S. Department of Justice

SUBJECT: Civil Division's Response to the OIG Draft Audit Report – The Department of Justice's Administration of the September 11th Victim Compensation Fund

Thank you for providing us with the opportunity to respond to the Office of the Inspector General's (OIG) formal draft report entitled, "The Department of Justice's Administration of the September 11th Victim Compensation Fund." Please find below our responses to the four recommendations provided in the draft report.

Recommendation 1: *Ensure it documents sufficient justification when assisting the VCF with awarding neutral services contracts without competition in the future.*

Response: Concur. The Civil Division will review its existing procedures to ensure that contracts issued to assist VCF with neutral services are justified in accordance with the requirements of the Federal Acquisition Regulation (FAR). We are concerned, however, about the report's focus on the phrase "unique qualifications" from FAR 6.303-2(a)(5) with respect to the content to be included in written justifications. In its entirety, the provision requires "[a] demonstration that the proposed contractor's unique qualifications *or* the nature of the acquisition requires use of the cited authority." FAR 6.303-2(a)(5) (emphasis supplied). Because FAR Subpart 6.3 only references and requires a demonstration of uniqueness in the context of an acquisition under FAR 6.302-1, which deals with situations where "only one responsible source and no other supplies or services will satisfy agency requirements"—that is, the supply or service in fact is unique—we do not believe the FAR requires a demonstration of "unique qualifications" to justify non-competitive awards for neutral services contracts, which are covered by 6.302-3. Instead, the agency is required to demonstrate that the nature of the acquisition

requires use of the cited authority. Nevertheless, the Division agrees that such justifications should be drafted in a way that specify why the nature of the contracts do not require competition under the FAR and why the contractors are qualified to perform the work specified under the contract.

Recommendation 2: *In coordination with JMD, ensure that it reviews contracts issued in relation to Special Government Employees or their businesses for potential or actual conflicts of interest.*

Response. Concur. The Civil Division agrees with OIG on the importance of ensuring that conflicts of interest do not exist when contracts are issued in relation to Special Government Employees (SGE) or their businesses. We will ensure that any SGE utilized by the Division in the future has secured written approval before permitting them to be involved with the issuance of contracts related to their work as an SGE for the Division or their personal businesses.

Recommendation 3: *Continue to work with JMD to monitor IBM's performance closely to ensure that it meets necessary requirements by the end of the contract.*

Response: Concur. We will continue to work with JMD to monitor IBM's performance closely to ensure that it meets necessary contractual requirements. For well over a year, IBM has been utilizing the agile methodology for identifying opportunities to assess the direction of a project throughout the development lifecycle. In an agile paradigm, every aspect of development—requirements, design, etc.—is continually revisited throughout the lifecycle. By stopping and re-evaluating the direction of a project every two weeks, the team has time to steer it in another direction, if need be. These bi-weekly meetings are attended by the Deputy Special Master, the Contracting Officer's Representative, and the JMD Contracting Officer. The results of this "inspect-and-adapt" approach to development have greatly reduced both development costs and time to market.

Recommendation 4: *Develop procedures to effectively monitor future contracts it establishes for the VCF.*

Response: Concur. Civil Division will establish procedures to prevent any gaps in performance periods and payment for unauthorized contract work for VCF.

Thank you for the opportunity to respond to the draft report provided by your office. Should you need additional information, please do not hesitate to contact me.

APPENDIX 8

OFFICE OF THE INSPECTOR GENERAL ANALYSIS AND SUMMARY OF ACTIONS NECESSARY TO CLOSE THE REPORT

The OIG provided a draft of this audit report to the September 11th Victim Compensation Fund (VCF) and the Civil Division. We incorporated the VCF's response in Appendix 6 and Civil Division's response in Appendix 7 of this final report. We provided relevant sections of this report to IBM as well as a complete draft of this report to Sheila Birnbaum, former Special Master of the VCF, and Deborah Greenspan, the former Deputy Special Master of the VCF. IBM, Birnbaum, and Greenspan provided written comments that we considered while finalizing this report.

In response to our draft audit report, the VCF and Civil Division concurred with our recommendations, and as a result, the status of the audit report is resolved. The following provides our analysis of the comments we received and summary of actions necessary to close the report.

Analysis of VCF's General Comments

As part of its response, the VCF provided comments pertaining to the claims processing times it experienced in the early years of the program. The VCF underscored the substantial efforts of its leadership to acquire and validate claimant information with third parties to facilitate eligibility and compensation decision-making. The VCF indicated that such efforts resulted in significantly reducing the burden on claimants and provided the VCF with accurate and reliable information that allowed for timely resolution of pending claims.

We agree with the VCF's comment that establishing relationships with the third parties proved beneficial to the claims process and take no issue with these efforts. As discussed in the *Concerns Regarding the Pace of Claim Processing and Award Making* section of the report, we detailed the numerous challenges that the VCF encountered, which may have resulted in slowing the pace of claim processing. The difficulties encountered included determining how to assess complicated claims, estimating the size of the claimant population, and, as emphasized by the VCF, establishing relationships with third parties.

Additionally, the VCF also made comments pertaining the OIG's aging of claims analysis. The VCF's response indicated that the beginning and end points used by the OIG to analyze claim aging by each stage were not appropriate in capturing the relevant time frames.

To perform this analysis, we worked closely with VCF data specialists in order to obtain a thorough understanding of the data. As we discuss in the *Analysis of the Claims and Award Process section* of the report, we considered several factors

when calculating the average number of days a claim spent in each stage and the unique qualities of each claim. In its comments, the VCF stated that the OIG should have selected the later date of compensation submitted or eligibility approved, instead of the earliest. We subsequently reviewed the parameters of our aging analysis, and confirmed that we relied on the more recent date – and not the earliest – to perform our aging analysis. We modified our methodology statement regarding the aging calculation on the *Objective, Scope, and Methodology* section of the report to more clearly reflect the correct parameters.

We further note that due to the uniqueness of each claim, we only focused our calculation on the time a claim spent from submission to the first determination. Thus, the reported averages did not include the time after a decision was rendered. For example, the results of our aging analysis do not include the time a claim spent under appeal or the time required to determine additional physical conditions or additional economic information that could have resulted in increasing the number of average days in a particular stage. The purpose of our aging analysis was to assess, by a comparable measure, how long claims on average spent in each major milestone.

Lastly, the VCF commented on its continued collaboration with IBM and its contract oversight changes since December 2015. In their response, the VCF provided examples of work that has been developed by IBM as part of the improved collaboration. While this audit does not seek to assess the quality of IBM's current work performance, we considered the additional material provided by the VCF as part of its response to assess the status of the pertinent recommendation.

Recommendations for the VCF:

1. **Provide evidence that its revised policies and procedures will ensure that all relevant documents and actions taken at critical points in the claims review process, including eligibility, compensation, appeals, and payment are retained or otherwise consistently referenced in the CMS.**

   Closed. The VCF concurred with our recommendation. The VCF stated that adequately documenting decisions and inputs to the decision making process is a critical component of any administrative program. The VCF also stated that since July 21, 2016, it has taken numerous steps to ensure that it maintains an appropriate administrative record with respect to each claim, including employing eligibility worksheets, compensation worksheets, and models used to calculate economic loss. The VCF also stated that updated internal guidance in the appeals process now includes logging appeal forms in the claim notes and documenting appeals determinations in each claim with a summary documenting the decision, the hearing transcript, and a summary report filed by the hearing officer. The VCF also provided details regarding how it established payment process requirements.

Attached to its response, the VCF provided updated internal documents and guidance that demonstrate that it has implemented policies and procedures since our audit fieldwork. These policies and procedures were put in place to ensure that all relevant documents and actions taken at critical points in the claims review process, including eligibility, compensation, appeals, and payment, are retained or otherwise consistently referenced in the CMS.

The VCF noted that while it concurred with this recommendation, it strongly disagreed with our resulting concern regarding incomplete or inconsistent claims files contained in CMS. As stated in this report, we reviewed a judgmental sample of 13 files in CMS to ensure that each file contained the evidence required to justify eligibility and claimant decisions sufficiently. Our testing could not locate a number of important documents in several of the 13 files. While we commend the VCF for ensuring that required documents were subsequently in each file (whether the material may have been mislabeled, placed in a different part of the file, or otherwise not readily identifiable to us at the time of our review), we believe our report appropriately noted a balanced concern regarding our inability to locate critical claimant information in CMS readily. As stated in our report, this is what we believe placed the VCF at increased risk of misplacing or not being able to locate information needed to support award decisions efficiently. Nevertheless, the VCF has provided to us evidence demonstrating that it has established specific procedures regarding its CMS file structure that, in our opinion, sufficiently address the concern stemming from the results of our testing. As a result, this recommendation is closed.

2. **Provide evidence that its revised compensation determination policies and procedures will ensure appropriate application and documentation of award offsets.**

   Closed. The VCF concurred with our recommendation. The VCF stated in its response that, as of July 21, 2016, it has substantively reviewed its policies and procedures surrounding offsets, and has issued specific guidance in two areas relating to the appropriateness of offsets. The VCF stated and provided evidence demonstrating that it has: (1) clarified its policies regarding the proper calculation of non-economic loss claims when there was a prior VCF award and (2) significantly revised its guidance relating to the appropriate offsets to be taken in deceased claims where there was both a request for a personal injury award and a wrongful death award. We reviewed these revised policies and determined they were designed in a way that was reasonably adequate to address the concerns identified in our testing. As a result, this recommendation is closed.

3. **Implement specific guidance to ensure that all representatives of deceased victims – including those that received expedited awards – have received, as appropriate, non-economic compensation for the time the eligible deceased victim spent in pain and suffering prior to death.**

Closed. The VCF concurred with our recommendation. The VCF stated in its response that it has issued revised internal guidance intended to answer a number of questions regarding deceased claims and has clarified the type of awards and the types of offsets applicable to each component of such claims. The VCF has also instructed its claim reviewers to calculate both the personal injury and wrongful death claims if all required information is available. In instances when sufficient information is not available, the VCF has instructed its personnel to award only the personal injury non-economic loss. The VCF provided to us internal documents and guidance that demonstrates it has fully implemented these revised policies.

Although the VCF concurred with the recommendation, the VCF took issue with our assertion that it was unnecessarily burdensome and inefficient to require a claimant requesting an expedited award to file an amendment or appeal to obtain remaining non-economic loss awards. The VCF stated that the expedited process was initiated by the claimant, and thus, every claimant requesting an expedited award was aware that if they wished to further adjust their award, they would have been required to amend their claim.

However, as stated in our report, our concern regarding an unnecessary burden or inefficiency in such cases applied only to claimants with certified conditions and not the VCF's amendment process as a whole. This is because a claimant with a certified condition should have already provided the VCF with sufficient evidence needed to support his or her respective condition and non-economic loss. In those particular instances, we believe it indeed was unnecessarily burdensome and inefficient to rely on the amendments process to ensure that an eligible deceased victim received non-economic compensation for the time he or she spent in pain and suffering prior to death.

Nevertheless, we reviewed the VCF's revised policy and agree that it appears adequately designed to address the issues we identified in our testing. We further support VCF's continued efforts to ensure that this policy is understood by its claimant population. As a result, this recommendation is closed.

Recommendations to the Civil Division:

4. **Ensure that it documents sufficient justifications when assisting the VCF with awarding neutral services contracts without competition in the future.**

   Resolved. The Civil Division concurred with our recommendation. The Civil Division stated in its response that it will review its existing procedures to ensure that contracts issued to assist the VCF with neutral services are justified in accordance with the requirements of the Federal Acquisition Regulation (FAR).

The Civil Division stated that it was concerned about the report's focus on the phrase "unique qualifications" from FAR 6.303-2(a)(5) with respect to the content that should be included in written justifications. The Civil Division does not believe that the FAR requires a demonstration of a "unique qualification" to justify non-competitive awards for neutral service contracts. The Civil Division nevertheless agrees that such justifications should be drafted in a way that specifies why the nature of the contracts do not require competition under the FAR and why the contractors are qualified to perform the work specified under the contract.

As we discuss in the *Legal Services* section of the report, we explain that FAR requirements include that there be sufficient justification to demonstrate that the proposed contractor's unique qualifications or the nature of the acquisition requires the use of a non-competitive award (emphasis added). We focused our attention on the unique qualifications aspect because the Contracting Officer specifically stated in the justifications for three of the four neutral service contracts that the personnel were uniquely qualified to provide assistance. Nevertheless, we determined that the prepared justifications did not consistently provide support for the cited unique qualifications. We also sought to determine if the justifications included the nature of the acquisition that required a non-competitive award and found that the justifications did not capture with specificity the nature of the contracts sufficiently to demonstrate that they should be awarded without competition.

This recommendation can be closed when we receive and review evidence demonstrating that the Civil Division has ensured that it will document sufficient justifications when it assists the VCF with awarding neutral services contracts without competition in the future.

5. In coordination with JMD, ensure that it reviews contracts issued in relation to Special Government Employees or their businesses for potential or actual conflicts of interest.

Resolved. The Civil Division concurred with our recommendation. The Civil Division stated in its response that it agrees with the report on the importance of ensuring that conflicts of interest do not exist when contracts issued in relation to a Special Government Employee (SGE) or their businesses. The Civil Division states that it will ensure that future SGEs have obtained written approval before permitting them to be involved with issuing contracts related to their official work or their personal businesses.

This recommendation can be closed when we receive documentation that the that Civil Division has, in coordination with JMD, issued policies to ensure that it reviews contracts issued in relation to Special Government Employees or their businesses for potential or actual conflicts of interest.

6. **Continue to work with JMD to monitor IBM's performance closely to ensure that it meets necessary requirements by the end of the contract.**

   Resolved. Civil Division concurred with our recommendation. Civil Division stated in its response that it would continue to work with JMD to monitor IBM's performance closely to ensure that it meets necessary contractual requirements. In addition, the Civil Division's response included that IBM has been utilizing the agile methodology for identifying opportunities to assess the direction of a project throughout the development lifecycle. In an agile paradigm, every aspect of development is continually revisited throughout the lifecycle. By stopping and re-evaluating the direction of a project every two weeks, the Civil Division reports that the team has time to steer it in another direction, if need be. The Civil Division reports that these bi-weekly meetings are attended by the VCF's Deputy Special Master, the Contracting Officer's Representative, and the JMD Contracting Officer.

   The Civil Division's stated actions are encouraging and demonstrate its commitment to working with JMD and to more closely monitor IBM's performance. This recommendation can be closed when we receive evidence that the Civil Division ensured that IBM met the necessary requirements by the end of the CMS contract.

7. **Develop procedures to effectively monitor future contracts it establishes for the VCF.**

   Resolved. The Civil Division concurred with our recommendation. The Civil Division stated that it will establish procedures to prevent any gaps in performance periods and payment for unauthorized contract work for the VCF.

   This recommendation can be closed when we receive implemented procedures that effectively monitor contracts established for the VCF.

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