

QUESTIONS TO CONSIDER DURING JPP DELIBERATIONS ON ESTABLISHING A UNIFORM DOD COMPENSATION PROGRAM

Prepared by JPP Staff for Use at September 18, 2015 Public Meeting

I. Funding

<p>Feinberg questions for mass-violence/disaster program NACVCB responses/explanations regarding state CVC programs</p>	<p>Initial Panel determinations from August public meeting Additional questions for implementing a DoD CVC program¹</p>
<p>a. How much will the program cost?²</p> <p>NACVCB:³ The cost of a DoD CVC program will depend upon which types of crime victims are eligible. Even if restricted to sexual assault, the cost would be very difficult to estimate since it is impossible to know the proportion of victims who would file claims.</p> <p>JPP Staff: In Fiscal Year 2014, the Services reported 6,660 total reports of sexual assault, which includes 776 reports by civilians.⁴ In 2012, the most recent year available, state CVC programs paid an average of \$1,220 per claim to victims in sexual assault cases.⁵ Currently, the most common maximum amount of compensation available at state CVC programs is \$25,000; see (c), below.</p>	<ul style="list-style-type: none"> • How much will it cost to run the program? • How will the program be staffed? Civilian, active-duty, or a combination?
<p>b. What will be the sources of funding for the program?</p> <p>NACVCB: About ¾ of the state programs are primarily funded from state criminal court fees and fines, and about ¼ are primarily funded by legislative appropriations from general revenue. In all states, the rest of the funding—about \$150 million per year—comes from federal sources such as the Crime Victims</p>	<p><i>At the JPP’s August public meeting, three Members agreed to defer to the office of primary responsibility (OPR), which would implement the JPP’s recommendations. Transcript at 155-56, 192-95.</i></p> <ul style="list-style-type: none"> • Will this be part of the DoD’s overall budget or part of the Services’ budgets? Should any funding come from the VOCA

¹ Additional questions for the Panel to consider were posed in *Written Statement of Mr. Gene McCleskey, Director, Texas Crime Victims’ Compensation Program, to JPP* (Aug. 19, 2015).

² For Mr. Feinberg’s discussion of the questions he posed, see *Transcript of JPP Public Meeting* 140-48 (June 18, 2015) (testimony of Mr. Kenneth R. Feinberg, Founder and Managing Partner, Feinberg Rozen, LLP).

³ See *Written Statement of Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards (NACVCB), to JPP* (Aug. 19, 2015); *Written Statement of Mr. Dan Eddy, Executive Director, NACVCB, to JPP* (June 18, 2015); NACVCB, “Basic Program Information,” available at <http://www.nacvcb.org/index.asp?sid=7>.

⁴ U.S. DEP’T OF DEF., SAPRO, REPORT TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE, encl. 5 (2014); U.S. DEP’T OF DEF., SAPRO, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2013, encls. 1-3 (Apr. 15, 2014).

⁵ U.S. Dep’t of Justice, Office for Victims of Crime, “2012 Victims of Crime Act Performance Report” (June 4, 2013), available at http://ojp.gov/ovc/grants/vocanpr_vc12.html.

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<p>Fund established by the Victims of Crime Act of 1984 (VOCA).</p>	<p>Crime Victims Fund?</p> <ul style="list-style-type: none"> • Should any funding come from court-martial fines and forfeitures? If so, how would the Armed Forces Retirement Homes be funded? • What will happen if there are insufficient funds appropriated to meet the demands of the program? Will the claimants be forced to wait until funding is available? (This is a constant concern of the state CVC programs.)
<p>c. Is there a cap on the aggregate amount of funds appropriated?</p> <p>NACVCB: The maximum reimbursable amount for State SVC programs ranges from \$6,000 in Puerto Rico to no (medical) maximum in New York State. About half of state CVC programs have subcaps, particularly for mental health counseling, often between \$5,000 and \$10,000 or 1-2 years, but can be as low as \$1,000.</p>	<ul style="list-style-type: none"> • What caps, if any, should be established for each category of expenses?

II. Eligibility

<p>a. Who is eligible to receive compensation?</p> <p>NACVCB: Victims of violent or personal crimes, as opposed to financial or property crimes. State definitions vary somewhat but all get to the same place; see (b), below. Among sexual assault crimes, states generally cover sexual contact offenses that are severe enough to cause emotional or physical injury.</p> <ul style="list-style-type: none"> • State reporting requirements range from 24 hours to 180 	<p><i>In August, all Members agreed that both civilians and military members (including restricted report cases) would be eligible, assuming a nexus to the military, as yet undefined. Transcript at 161-64, 198, 205-09.</i></p> <ul style="list-style-type: none"> • Would a military victim of a civilian offender be eligible? If so, how would a state CVC program come into play? Would the victim be eligible for compensation from both programs? • Would Reservists and National Guard Members be eligible?⁶
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⁶ TRICARE covers National Guard and Reserve members (and their dependents) while called or ordered to active service for more than 30 consecutive days. TRICARE does not distinguish between state and federal activated status, but does exclude inactive duty for training, annual training, and otherwise on active service for 30 days

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<p>days, and are most commonly 72 hours. Many states, however, provide for exceptions or routinely waive the requirement in sexual assault cases.</p>	<ul style="list-style-type: none"> • Should there be a reporting requirement? If so, what should it be? Should any distinction be made for pre-2005 cases when restricted reporting was not yet an option?
<p>b. How direct need a claimant’s injuries be to be compensable?</p> <p>NACVCB: Most state CVC programs require a personal injury – whether emotional or physical, or both – that directly resulted from the offense. In sexual assault cases, where mental health therapy or counseling is the primary treatment, programs do have a major challenge, but they show variations in how they approach it: Is the counseling directly treating the harm done by the sexual offense? Or is the counseling getting into broader areas, “life issues,” such as relationships, and past family and developmental problems, etc.?</p> <ul style="list-style-type: none"> • Many state programs are not interested in looking at session notes from the counselor to determine crime-relatedness of treatment, understanding that the whole person has to be treated. But there certainly are parameters, which may be addressed in a counselor-required treatment plan. • About half the states set limits on counseling, generally of 1-2 years, or up to \$5,000 or \$10,000. These subcaps help avoid disputes about the scope of therapy. • Some programs do want to see session notes to ensure: (a) that the victim showed up for counseling; and (b) that what was discussed did not go too far afield. 	<ul style="list-style-type: none"> • Should emotional injuries be compensated in the absence of physical injury? • Should there be any subcap for counseling expenses?

or less. Non-activated members of the Selected Reserve may purchase premium-based plans for themselves and their dependents. See U.S. Dep’t of Def., “TRICARE Choices for National Guard and Reserve” (Mar. 2015), at http://www.tricare.mil/~media/Files/TRICARE/Publications/FactSheets/Choices_NGR_FS.pdf.

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III. Methodology

<p>How is the amount of compensation calculated for each victim?</p> <p>NACVCB: Compensation is for defined out-of-pocket expenses. Other than Tennessee, where up to \$3,000 can be awarded, there is no pain and suffering or emotional distress involved in calculations; therefore, tort concepts are irrelevant. Nor are there flat amounts simply because a claimant asserts or demonstrates victimization (except in Hawaii, where an \$800 “recognition award” is available).</p>	<p>In August, no recommendation was reached as to pain and suffering, but three Members agreed that if pain and suffering were made available, it be awarded in a flat amount in appropriate cases. <i>Transcript at 213-18.</i></p> <ul style="list-style-type: none">• How will medical bills be paid? As billed, or according to a medical fee guideline? If a medical fee guideline, what will the reference source be? Will the medical payment for a civilian victim be considered payment in full? Can a service provider bill a civilian victim for payment differences?• If a military member is the victim, will the DoD program pay lost wages from a second job?• Will the DoD program pay for attorney fees to a civilian attorney? What type of attorney fees would be considered? Divorce/family law?• How will the DoD program deal with military victims with injuries severe enough to preclude further service? Will the DoD program pay in addition to the VA? Who pays first, the VA or the DoD program?
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IV. Proof Requirements

<p>a. What documentation or other corroboration must claimants produce to demonstrate that they are entitled to compensation?</p> <p>NACVCB: The state CVC programs generally require a police report that to some degree “proves” that a crime against the claimant occurred, although some states routinely waive this requirement in sexual assault cases. Moreover, in recent years, a few states have explicitly adopted a lower standard for sexual</p>	<ul style="list-style-type: none">• How would reports from military victims move up the chains of command within the Services in order to reach the DoD program for consideration with the claim? (Currently, military victims must rely on cooperation from commands or MCIOs to assist them in providing documentation to state CVC
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<p>assault victims. For example:</p> <ul style="list-style-type: none"> • Submitting to a forensic exam, if it is released for testing, is sufficient in New York and Washington, DC. • A counselor’s evaluation may be sufficient in California and Connecticut. <p>But these are exceptions so far. Because the state programs are expense-based, not flat-fee payment systems, they are not likely to experience fraud or other problems.</p>	<p>programs, which sometimes takes months.)⁷</p> <ul style="list-style-type: none"> • Should CVC documentation mirror that used currently in the Services’ claims processes? • What about restricted reports, when the command is unaware of the case?
<p>b. Is there a jurisdictional deadline for submission of such proof and, if so, when is it?</p> <p>NACVCB: The most common filing deadline is one year after the incident. However, three state programs have no deadline, and four programs require that the claim be filed within 180 days (or 6 months).</p>	

V. Due Process

<p>a. Is the claimant entitled to a hearing? If so, how formal is it (e.g., is it transcribed)? Must the claimant appear and, if so, must the claimant’s testimony be under oath?</p> <p>NACVCB: Most state CVC programs do not require the claimant to appear and testify under oath. States with boards generally make initial decisions on eligibility (and payment, if the applicant is eligible), in the absence of the victim, though some do offer an opportunity for the victim to appear; but these boards, if they do deny a claim, always offer an opportunity for the victim to appear on appeal.</p> <p>b. What burden of proof must the claimant satisfy, and what procedures govern assertion of the claim?</p>	<p>✓ In August, all Members agreed that the civil standard of preponderance of the evidence would apply. <i>Transcript at 161-64, 168.</i></p>
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⁷ See Transcript of JPP Public Meeting 216 (June 18, 2015) (testimony of Mr. Dan Eddy, Executive Director, NACVCB).

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NACVCB: Most programs do not think in terms of “burden of proof,” and the term rarely appears in any compensation statutes. The victim is not required to independently gather and present evidence to support the claim. Generally, the claim adjudicator reviews a statement in the application from the victim about what happened and compares it to the police report. If the claim is denied, then the burden shifts to the victim to present further information supporting the claim.

c. Who adjudicates the claim?

NACVCB: About ¾ of the state programs are “administratively” operated, which is shorthand for not having a board or a commission make decisions; ¼ have those boards. A few programs have boards that sit for appeals only.

d. May, or must, the claimant be represented by counsel?

NACVCB: No state CVC program requires counsel. Assistance of counsel is very rare; it is just not necessary when so many claims are successful on their own merits, and so few claims ever go to an appeal or hearing where counsel would be advisable. Even board-based programs that deny a claim and offer an appeal basically just want to get more information so they can grant a claim. Counsel sometimes assist in filing a claim (although victim-witness advocate do just as good a job), and representation at a hearing may be desirable for someone asserting facts that differ from a police investigation’s findings. Many CVC programs will pay for limited amounts of counsel fees.

e. Is an adversarial party permitted to oppose the claim?

NACVCB: No.

- Are claims adjudicated within the Services (e.g., claims divisions), or is adjudication centralized at the DoD level?

✓ In August, four Members agreed that claimants may, but need not be, represented by counsel and that it will be the responsibility of SVCs to advise victims that DoD CVC funds are available and, when possible, to assist in applying for them. *Transcript at 170-77.*

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<p>f. If the claim is denied, does the claimant have the right to appeal?</p> <p>NACVCB: All state programs have avenues of appeal, usually a step within state government, then on to state courts; the appellate process varies according to the initial board/no-board distinction. Appeals in court systems are generally not de novo; the courts do not re-hear the facts of the case and witnesses are not called. Rather, the court evaluates whether the program/board applied the law correctly to the factual record. States without boards often use administrative law judges within state government to hear appeals; larger programs may have these ALJs assigned exclusively to the program, but others share these with other state agencies.</p> <p>g. If the claim is granted, does the claimant, by accepting compensation, thereby waive the right to file a lawsuit?</p> <p>NACVCB: No. The claimant, in signing the application, generally agrees to a paragraph giving the state subrogation rights to any amount won in a lawsuit, or earned in restitution, if it covers the same expenses paid for by the program. State CVC programs generally interpret this to include any amount awarded, including pain and suffering. But if the victim has incurred expenses beyond what the program can pay for, then the award first goes to cover those expenses. Amounts gained in restitution are handled the same way; this applies to amounts actually gained from restitution, not what is ordered, since restitution orders may never be fully enforced.</p>	<ul style="list-style-type: none">• Are appeals decided within the Services (e.g., claims divisions), or is the appellate process centralized at the DoD level? <p>✓ In August, all Members agreed not to require waiver. <i>Transcript at 190-92.</i></p>
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Basic Program Information

NOTE: Significant exceptions exist for many states' reporting and filing requirements. In general, most states can waive reporting and filing requirements for "good cause," and many have specific exceptions for child victims. With regard to the maximums listed below, nearly every state has limits below the maximum on some specific expenses, such as funerals, mental health counseling, and lost wages. Go to www.nacvcb.org and the Program Directory there to find more state information.

	<u>Reporting Requirement</u> <u>(in hours unless noted)</u>	<u>Filing</u> <u>Limit</u>	<u>Maximum</u> <u>Payment</u>
Alabama	72	1 year	20,000
Alaska	5 days	2 years	40,000; 80,000 in homicides with multiple victims
Arizona	72	2 years	25,000
Arkansas	72	1 year	10,000; 25,000 for catastrophic injuries
California	reasonable time	3 years	63,000
Colorado	72	1 year	20,000 (each district may set lower maximum)
Connecticut	5 days; no report req. for sex assault	2 years	15,000; 25,000 in homicides
Delaware	72	1 year	25,000; 50,000 when injuries are total and permanent
D.C.	7 days	1 year	25,000
Florida	72	1 year	15,000; 30,000 for catastrophic injuries
Georgia	72	1 year	25,000
Hawaii	72	18 months	10,000; 20,000 if only medical expenses are claimed
Idaho	72	1 year	25,000
Illinois	72/7 days sexual assault	2 years	27,000
Indiana	48	180 days	15,000, plus \$5,000 for funeral/burial
Iowa	72	2 years	No overall limit; maximums for each expense
Kansas	72	2 years	25,000
Kentucky	48	5 years	25,000
Louisiana	72	1 year	10,000; 25,000 when injuries are total and permanent
Maine	5 days	3 years	15,000
Maryland	48	3 years	45,000
Massachusetts	5 days	3 years	25,000; 50,000 for catastrophic injury
Michigan	48	1 year	25,000
Minnesota	30 days	3 years	50,000
Mississippi	72	3 years	20,000
Missouri	48	2 years	25,000
Montana	72	1 year	25,000
Nebraska	72	2 years	10,000
Nevada	5 days	1 year	100,000; policy generally limits awards to 35,000
New Hampshire	5 days	1 year	25,000
New Jersey	9 months	3 years	25,000; 60,000 for catastrophic injuries
New Mexico	30 days; 180 days d.v./sexual assault	2 years	20,000; 50,000 for catastrophic injuries
New York	7 days	1 year	No medical maximum; limits on other expenses
North Carolina	72	2 years	30,000; additional 5,000 for funeral expenses
North Dakota	72	1 year	25,000
Ohio	no limit	no limit	50,000
Oklahoma	72	1 year	20,000; 40,000 in catastrophic cases and homicides
Oregon	72	6 months	47,000
Pennsylvania	72	2 years	46,500 (35,000 plus 10,000 counseling; 1,500 other)
Puerto Rico	72	6 months	6,000 per person, 15,000 per family; 40,000 in catastrophic
Rhode Island	10 days	3 years	25,000
South Carolina	48	180 days	15,000; 25,000 in catastrophic cases
South Dakota	5 days	1 year	15,000
Tennessee	48	1 year	30,000
Texas	reasonable time	3 years	50,000; 125,000 when injuries are permanent and total
Utah	no limit	no limit	25,000; additional 25,000 medical if base amount exceeded
Vermont	no limit	no limit	10,000
Virgin Islands	24	2 years	25,000
Virginia	5 days	1 year	25,000
Washington	1 year	2 years	50,000
West Virginia	72	2 years	35,000; 50,000 in homicides; 100,000 in catastrophic cases
Wisconsin	5 days	1 year	40,000; additional 2,000 for funerals
Wyoming	reasonable time	1 year	15,000; 25,000 for catastrophic injuries