For subject line: OJP Docket No. 1478

[redacted]

I am an attorney, with a years-long litigation practice heavily concentrated on government claims. My perspective on this claims program, therefore, well may be different from that of most commentators, in that I am particularly interested in the rules applicable to the claims process. My comments on the proposed rules, in the order of their appearance in the regulations, are as follows:

1. You propose several changes to the definition of "Act" in section 32.3, with respect to which I have two comments:

(a) The current definition and the proposed changes, both, contain numerous references to the effective dates of statutory enactments where those enactments themselves specify precisely how and when they become effective, but the regulations contain no provision indicating the effective date, or the manner of application, where those enactments do not so specify. This is surprising, because the Federal Register notice expressly mentions the *Dawson* case, which involved the issue of when and how statutory enactments become effective. This failure to specify leaves a serious gap in the regulations that should be corrected, so that practitioners/claimants do not have to guess, or resort to litigation on the point.

(b) I am surprised that you did not clarify a confusing and somewhat inaccurate item currently in the definition: It is true that educational assistance benefits are available in connection with injuries occurring on or after January 1, 1978 (as the definition currently expresses), but it is true only where the injuries are fatal. In contrast, where the injuries are disabling but not fatal, educational assistance benefits are available only as of October 3, 1996. The definition should reflect this, so as not to mislead practitioners/claimants. By the way, this problem of lumping death and disability together indifferently, even where it makes no sense not to distinguish between them, also occurs in the definition of "Public employee" in that section: Disabled officers may be eligible receive disability benefits, but it is the survivors of deceased officers, not those officers themselves, despite what the regulation currently provides, who are eligible to receive death benefits.

2. You propose several changes to the definition of "Authorized commuting" in section 32.3. I think the definition may contain a latent ambiguity: The definition refers to a "situs," but it is unclear what the situs is. From the context, I gather that the situs is intended to be any place where public safety activity is officially supposed to be

performed, but other interpretations are possible. The definition should clarify this point, so that practitioners/claimants do not have to guess, or resort to litigating it.

3. You propose several changes to the definition of "Divorce" in section 32.3. I think the definition may contain a latent ambiguity: As written, it is divided into two parts, but the relationship between those parts is unclear. The definition should clarify that a legal divorce always trumps the de-facto-divorce provisions in the second half of the definition.

4. The Federal Register notice indicates that proposed changes to the current regulations result from the discovery of "previously unnoticed flaws, gaps, or ambiguities." In this vein, I think I should point out an ambiguity in paragraph 32.4(a), which states that "[t]he first three provisions of 1 U.S.C. 1 (rules of construction) shall apply." The intention of this provision seems to be that those rules of construction apply to the regulations, but by its terms I think the provision strictly indicates only that those rules apply to the PSOB Act. This should be clarified, so that practitioners/claimants do not have to guess.

5. You propose a new paragraph 32.5(d)(3). I think the proposed paragraph may contain a latent ambiguity: Is it sufficient merely to apply for the benefits in order to avoid the possibility of the adverse inference, or must the claimant also pursue the application as well? The paragraph should specify, one way or the other, so that practitioners/claimants do not have to guess, or resort to litigating the point.

6. You propose a new paragraph 32.5(f)(3). The proposed paragraph contains many individual elements, some in the disjunctive, others in the conjunctive, the upshot of which is confusing. The paragraph should be reformatted into separate subparagraphs, so that the individual elements, and their precise relationship to one another, will be more apparent. (A similar problem occurs in the definitions of "Nonroutine strenuous physical activity" and "Nonroutine stressful physical activity" in section 32.13: Some of the component elements of those definitions are "excluded," while others are listed as conditions. It would be far less confusing if all the elements of these definitions were formatted similarly, either all as exclusions, or all as conditions.)

7. You propose a definition of "Routine" in section 32.13. The proposed definition uses the term "decisive factor," which is bad syntax, in that "factors" themselves determine outcomes directly: Did you mean, instead, "…shall be dispositive in determining…"? Also, the proposed definition refers to "…a public agency…." If what you mean to refer to is a particular officer's public agency, the proposal contains a latent ambiguity, and the definition should be changed to refer to "…the public agency…." Finally, you specifically invite comment on whether the examples contained in the Bureau's "Nonroutine" policy memorandum of October 2, 2007, should be contained in the regulation. Those examples are not suitable as regulations. Examples of that sort are one of the things that preambles in Federal Register notices are for.

8. In response to your specific request, I offer the following comments on proposed new paragraph 32.14(c), which relates to the terms "Competent medical evidence" and "Risky behavior":

(a) Proposed paragraph 32.14(c)(2)(i) contains a reference to "…reckless behavior…," which is drawn from the Bureau's "Competent medical evidence" policy memorandum of October 2, 2007. The reference in that memorandum to "reckless" behavior was unfortunate, because the regulations refer only to "risky" behavior, but I put the difference off as legally insignificant, resulting from the simple fact that the memorandum plainly was not written as a regulation. For this reason, I was very surprised to see "reckless" behavior, a term found nowhere else in the regulations, suddenly appear in proposed paragraph 32.14(c)(2)(i). What made this particularly surprising is that the Federal Register notice itself goes on at considerable length to discuss the significant difference between regulatory language and non-regulatory language. If, as I suppose, it is intended to mean the same thing as "risky" behavior, then "risky" behavior is what the paragraph should refer to. But if it is not intended to mean the same thing, the distinction between the two terms should be defined in the regulations. In this vein, I note that using the term "risky" behavior here offers distinct advantages, in that the term, as defined in the regulation, has a very precise and strictly limited meaning, while "reckless" behavior, unless otherwise defined in some restrictive way, would seem to have a free ranging and very broad meaning.

(b) Proposed paragraph 32.14(c)(3) is very disturbing, and it is difficult to understand. By its terms, unless the extremely restrictive conditions specified at (c)(1) and (c)(2) are satisfied, it would seem to forbid the PSOB Office from informing a practitioner/claimant that there is a problem with the claim that medical history records could cure, even if the problem is only a minor one and easily curable. The President and the Attorney General publicly have stated over and over that they want to help claimants. I don't understand why they would allow a provision like this to be proposed, which would doom some claims to be denied at the initial level, when a simple notice to the claimants or their counsel could save them. Clearly the language of this proposed provision comes from the "Competent medical evidence" policy memorandum of October 2, 2007, but that memorandum was not a regulation, and the legal effect of language there is very different from what the legal effect would be of the same language in a regulation. This problem is bad enough as it is, but if some distinction actually is intended between "reckless" behavior and "risky" behavior, then the problem becomes even worse, with the PSOB Office being required to evaluate claims on the basis of the "risky" behavior standard, but being forbidden to communicate with practitioners/claimants on that basis, and instead being forced to limit its communications strictly under some untethered "reckless" behavior standard. A more perfect plan to deny claims, or make them more expensive by forcing appeals unnecessarily, could hardly be devised. I hope this was not intentional.

(c) Proposed paragraphs 32.14(c)(1) and (c)(3) both refer to a "request" for information. This is difficult to understand, since claimants have the burden of proving their claims, under section 32.5(a), and the Government never has any burden to "request" anything. If the "request" reference is intended to mean anything other than merely offering practitioners/claimants a reminder notice of their open and ongoing opportunity to file evidence in support of their claims, under sections 32.12(b), 32.22(b), 32.32(c), 32.42(b), and 32.52(b), then precisely what is intended should be made clear. On the other hand, if nothing but a reminder notice is intended, then the "request" references should be removed. Again, the "request" language obviously comes from the "Competent medical evidence" policy memorandum of October 2, 2007, but that memorandum was not a regulation, and it makes no sense to incorporate its specific language and structure into the regulation here.

(d) Proposed paragraph 32.14(c)(4) also is difficult to understand. One of the most bizarre features of the Federal Claims Court's *Bice* and *White* decisions was their strange misconception of PSOB claims as somehow being adversarial in nature. Is the Department of Justice now agreeing with this? I had thought the Department's job was to "consider" all the evidence filed in connection with a claim, whether supportive of the claim or not. Does this proposed provision mean that the Department will not be "considering" all evidence filed in connection with claims? If so, what, exactly, will the Department be doing with such evidence, and on what legal basis will it not be "considering" it? If not, what possible purpose can be served by specifying, in just this one limited circumstance, that the evidence will be considered? Has no lawyer in the Administration ever heard of the "*expressio unius exclusio alterius*" canon of construction? If the only reason for proposing this language here is that something like it was found in the "Competent medical evidence" policy memorandum of October 2, 2007, once again I point out that the memorandum was not a regulation, and it makes no sense at all to incorporate this specific language from it into the regulation here. Given the very disturbing effect of proposed section 32.14(c)(3), I regret to have to state that my apprehensions are aroused.

(e) The definition of "Risky behavior" in section 32.13, discussed above, should be amended to fill a gap in the statutory scheme. In principle, all PSOB claims are subject to the provisions of section 1202(1), (2), and (3) of the PSOB Act, but because those provisions are tied to injury, and because the provisions of section 1201(k) have no precise reference to injury, the relationship between those two sections remains unclear. Incorporation of these section 1202 provisions into the definition of "Risky behavior" would be a logical and effective means of defining that relationship.

9. You propose several changes to section 32.15. Does the term "ruling" in section 32.15(a)(2) (which also is found in section 32.25(a)(2)(ii)) mean only *formal* rulings, or does it also include *ordinary* findings?

10. You propose several changes to the provisions relating to training in subparts A and B of the regulation. I commend the Department for simplifying the somewhat confusing array of training related provisions that were instituted in the 2006 regulations, under which one set of rules seemed to apply to training in traditional PSOB cases, and another seemed to apply to training in cases under the Hometown Heroes Survivors Benefits Act of 2003. From my observations, however, it is clear that the apparent differences notionally were only apparent, and that the Department, as a general matter, in practice actually was reading and applying the two sets of rules together, as a single system. Your Federal Register notice itself concedes as much. Particularly after the Federal Circuit's *Groff* decision, from the perspective of practitioners it makes good sense for the Department to incorporate its actual practice into the body of the PSOB regulations, and it makes especially good sense here to have one consistent set of rules applicable to similar circumstances and thus eliminate pointless complexity in the program.

11. Generally speaking, the proposed changes to the current regulations appear overall to be a commendable effort to fill gaps, correct mistakes and oversights, clarify obscure or confusing or ambiguous points, and sort out the mess created by some of the Federal Claims Court decisions. Too often, agencies just let problems in their regulatory schemes fester, which makes the claims process more burdensome and expensive for claimants. Notwithstanding my specific criticisms and comments, above, I wish to stress that nearly all of the proposed changes are excellent, and the Department should be applauded for committing its resources to reviewing and keeping these regulations refreshed and upgraded. This program is too important to do otherwise.