



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

December 4, 2020

MEMORANDUM FOR WILLIAM P. BARR Attorney General

*Re: Final Rule Prohibiting Settlement Payments
to Non-Governmental Third Parties*

ACTION MEMORANDUM

The attached proposed Attorney General Order was prepared by the Office of Legal Policy and submitted to this Office for review with respect to form and legality.

The proposed Order would adopt as a final rule, with certain changes, a Department of Justice ("Department") policy first put into place on June 5, 2017, by an Attorney General memorandum titled "Prohibition on Settlement Payments to Third Parties." Under that policy, as later incorporated into the Justice Manual, *see Justice Manual* § 1-17.000 (2018), "[d]epartment attorneys shall not enter into any agreement on behalf of the United States in settlement of federal claims or charges, including agreements settling civil litigation, accepting plea agreements, or deferring or declining prosecution in a criminal matter, that directs or provides for a payment to any non-governmental person or entity that is not a party to the dispute." *Id.* The policy allowed for three exceptions to this prohibition, including, for example, when an "otherwise lawful payment or loan provides restitution to a victim or otherwise directly remedies the harm that is sought to be redressed." *Id.*

The proposed Order would alter the pre-existing policy by expanding the scope of the prohibition and revising and supplementing the exceptions to the prohibition. It would expand the prohibition such that it would explicitly apply to third-party payments (or loans) whether "in cash or in kind." The proposed Order notes that, under the Miscellaneous Receipts Act ("MRA"), 31 U.S.C. § 3302(b), any government official "receiving money for the Government from any source shall deposit that money with the Treasury." It further notes that this requirement applies in circumstances in which "a federal agency could have accepted possession and retains discretion to direct the use of the money." *See Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General*, 4B Op. O.L.C. 684, 688 (1980). In such circumstances, the MRA requires the money to be deposited in the Treasury as a "constructive receipt." *Id.* The proposed Order explains that the rule "similarly forbids circumvention of the policy reflected in this statute via the use of in-kind payments." This revision thus prohibits in-

kind payments or loans to third parties to the same extent that cash payments or loans to third parties are prohibited under the rule.

The proposed Order's prohibition on third-party payments is consistent with the policy underlying the MRA—that Congress, and not the agency, should determine when government resources may be spent on behalf of third parties. But the proposed Order does not reflect an interpretation of the statute itself and thus prohibits certain payments to third parties that this Office has concluded that the MRA otherwise allows. *See, e.g., Application of the Government Corporation Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Settlement Agreement*, 30 Op. O.L.C. 111, 119 (2006).

The proposed Order also departs from the earlier Department policy by revising and supplementing the exceptions. The proposed Order would make several revisions to the first exception. First, it would narrow the exception by permitting third-party payment only for “restitution or compensation to a victim,” rather than, as in the previous policy, payment for “restitution or that otherwise directly remedies the harm that is sought to be redressed.” Second, it would drop two examples expressly mentioned in the text of the first exception, including one related to “public corruption” cases. The public-corruption example had been included in the earlier policy to preserve the Department’s ability in foreign-corruption cases to route restitution and victim compensation payments through third-party intermediaries, such as the World Bank, to prevent corrupt foreign officials from receiving the benefits of those payments. To confirm that this practice may continue, the proposed Order would provide specifically for this kind of foreign official corruption settlement in a new, second exception. Finally, the proposed Order would revise the first exception to bar “agreements requir[ing] defendants in environmental cases, in lieu of payment to the federal government, to expend funds to provide goods or services to third parties for Supplemental Environmental Projects.”

The proposed Order would also expand the final exception to permit payments to third parties when such payments are “expressly authorized by . . . regulation.” Under the former policy, this exception reached only express statutory authorization.

The attached proposed Attorney General Order is approved with respect to form and legality.

A handwritten signature in blue ink, appearing to read 'S. Engel', with a long horizontal flourish extending to the right.

Steven A. Engel
Assistant Attorney General



U.S. Department of Justice

Office of Legal Policy

Assistant Attorney General

Washington, D.C. 20530

April 21, 2020

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

JR/AL 12-4-20

THROUGH THE PRINCIPAL DEPUTY ASSOCIATE ATTORNEY GENERAL

FROM: Beth A. Williams BETH WILLIAMS
Assistant Attorney General
Office of Legal Policy

Digitally signed by BETH WILLIAMS
Date: 2020.04.22 12:07:59 -04'00'

CMM 12/4/20

Mark Champoux MARK CHAMPOUX
Principal Deputy Assistant Attorney General

Digitally signed by MARK CHAMPOUX
Date: 2020.04.21 15:26:43 -04'00'

Jordan L. Von Bokern JORDAN VON BOKERN
Senior Counsel

Digitally signed by JORDAN VON BOKERN
Date: 2020.04.22 13:39:50 -04'00'

SUBJECT: Incorporation of Prohibition on Settlement Payments to Third Parties into Department of Justice Regulations

PURPOSE: To obtain the approval and signature of the Attorney General for a proposed rule to be published in the *Federal Register*.

TIMETABLE: Approval is requested as soon as possible.

SYNOPSIS: This final rule amends the Department's regulations to set forth the principles of the Attorney General's Memorandum of June 5, 2017, prohibiting the inclusion of provisions in settlement agreements providing or directing payments or loans to third parties except in defined circumstances.

DISCUSSION: On June 5, 2017, Attorney General Jefferson B. Sessions issued a memorandum regarding settlement practices in the Department of Justice (the "Department"). That memorandum set forth a policy that, with three limited exceptions, prohibits the Department from entering into settlements that include payments to non-governmental, third-party organizations. Such settlements had been criticized for diverting potential recovery away from victims and the public fisc and toward interest groups and other inappropriate recipients of settlement funds. That policy applies to all civil and criminal cases brought by the Department, and since its promulgation it has been incorporated into the Justice Manual.

The attached document would incorporate the Department's policy on these "third-party settlements" into the Department's regulations. The language of the regulation would closely track the current language of the Justice Manual. The proposed regulation would make only two changes to the language of that policy

(b) (5)



(b) (5)



(b) (5)



(b) (5)



¹ Jeffrey Bossert Clark, *Supplemental Environmental Projects ("SEPs") in Civil Settlements with Private Defendants*, U.S. Department of Justice (Mar. 12, 2020), online at <https://www.justice.gov/enrd/page/file/1257901/download>.

² *Id.* at 5.

Memorandum for the Attorney General
Subject: Incorporation of Prohibition on Settlement Payments to Third Parties
into Department of Justice Regulations

(b) (5)



In every other respect, the proposed regulation uses the precise language set forth in the 2017 policy memo, as reflected currently in the Justice Manual.

RECOMMENDATION: That you approve the final rule to incorporate the 2017 policy regarding the prohibition of settlement payments to third-parties.

APPROVE *UPBarr*
Dated: December 4, 2020
DISAPPROVE _____

Concurring Components
OLC SE 12-4-20

OTHER _____

DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 50

Docket No. OAG 163; AG Order No.

RIN 1105-AB62

Prohibition on Settlement Payments to Non-Governmental Third Parties

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This final rule amends the Department’s regulations to set forth the principles of the Attorney General’s Memorandum of June 5, 2017, prohibiting the inclusion of provisions in settlement agreements directing or providing for a payment or loan to a non-governmental person or entity that is not a party to the dispute, except in defined circumstances.

EFFECTIVE DATE: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Robert Hinchman, Senior Counsel, Office of Legal Policy, U.S. Department of Justice, Room 4252 RFK Building, 950 Pennsylvania Avenue, NW, Washington, DC 20530, telephone (202) 514-8059 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

On June 5, 2017, then-Attorney General Sessions issued a Memorandum to the Heads of all Department of Justice Components and to all United States Attorneys titled, “Prohibition on Settlement Payments to Third Parties.” In this Memorandum, he stated: “Our Department is privileged to represent the United States and its citizens in courts across our country. We take this responsibility seriously. In the course of this representation, there may come a time when it is in the best interests of the United States to settle a lawsuit or end a criminal prosecution.

Settlements, including civil settlement agreements, deferred prosecution agreements, non-prosecution agreements, and plea agreements, are a useful tool for Department attorneys to achieve the ends of justice at a reasonable cost to the taxpayer. The goals of any settlement are, first and foremost, to compensate victims, redress harm, or punish and deter unlawful conduct.”

However, certain previous settlement agreements involving the Department included provisions requiring payments to various non-governmental, third-party organizations as a condition of settlement with the United States. Those third-party organizations were neither victims nor parties to the lawsuits.

The June 5, 2017, Memorandum announced that the Department would no longer engage in this practice. Pursuant to the June 5, 2017, Memorandum, except in specific limited circumstances, “Department attorneys may not enter into any agreement on behalf of the United States in settlement of federal claims or charges, including agreements settling civil litigation, accepting plea agreements, or deferring or declining prosecution in a criminal matter, that directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute.” This policy is already incorporated into the Justice Manual at <https://www.justice.gov/jm/jm/1-17000-settlement-payments-third-parties>.

This final rule amends the Department’s regulations to reflect this policy, with certain changes from the June 5, 2017, Memorandum to clarify the scope of exceptions. This rule specifically clarifies that the policy extends to a payment or loan, whether in cash or in kind, to any non-governmental person or entity that is not a party to the dispute. The Miscellaneous Receipts Act provides that government officials “receiving money for the Government from any source shall deposit that money with the Treasury.” *See* 31 U.S.C. § 3302(b). “Receiving money for the Government” includes the “constructive receipt” of money “if a federal agency could have accepted possession and retains discretion to direct the use of the money.” *See* Effect

of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General, 4B Op. O.L.C. 684, 688 (1980). This rule thus similarly forbids circumvention of the policy reflected in this statute via the use of in-kind payments.

This rule also revises the exceptions to the prohibition. Under the rule, there are four limited exceptions to the policy's prohibition. First, the prohibition does not apply to an otherwise lawful payment or loan that provides restitution or compensation to a victim, though in no case shall any settlement agreement require defendants in environmental cases, in lieu of payment to the federal government, to expend funds to provide goods or services to third parties for Supplemental Environmental Projects. Second, the prohibition does not apply when, in cases of foreign official corruption, a trusted third party is required to facilitate the repatriation and use of funds to directly benefit those harmed by the foreign corruption. Third, the prohibition does not apply to payments for legal or other professional services rendered in connection with the case. Fourth, the prohibition does not apply to payments expressly authorized by statute or regulation, including restitution and forfeiture. Finally, this rule also deletes some examples of exception (c)(1).

The policy set forth in this final rule applies to all civil and criminal cases litigated under the direction of the Attorney General and includes civil settlement agreements, *cy pres* agreements or provisions, plea agreements, non-prosecution agreements, and deferred prosecution agreements.

Regulatory Certifications

Administrative Procedure Act

This rule relates to a matter of agency management or personnel and is a rule of agency organization, procedure, or practice. Accordingly, this rule is exempt from the usual requirements of prior notice and comment and a 30-day delay in effective date. *See* 5 U.S.C.

553(a)(2), (b), and (d).

Regulatory Flexibility Act

This regulation will not have an impact on small entities because it pertains to personnel and administrative matters affecting the Department. An analysis under the Regulatory Flexibility Act was not required for this final rule because the Department was not required to publish a general notice of proposed rulemaking for this matter. *See* 5 U.S.C. 601(2), 604(a).

Executive Orders 12866, 13563, and 13771 - Regulatory Review

This regulation has been drafted and reviewed in accordance with section 1(b) of Executive Order 12866, “Regulatory Planning and Review,” and section 1(b) of Executive Order 13563, “Improving Regulation and Regulatory Review.”

This final rule is “limited to agency organization, management, or personnel matters” and thus is not a “rule” for purposes of review by the Office of Management and Budget under section 3(d)(3) of Executive Order 12866. Accordingly this rule has not been reviewed by the Office of Management and Budget.

This rule is not subject to the requirements of Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs,” because it is not a significant regulatory action under Executive Order 12866, and because it is “related to agency organization, management, or personnel” and thus not a “rule” under Executive Order 13771, section 4(b).

Executive Order 12988 - Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, “Civil Justice Reform.”

Executive Order 13132 - Federalism

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities

among the various levels of government. It is a rule of internal agency practice and procedure. Therefore, in accordance with Executive Order 13132, "Federalism," the Department has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*

Congressional Review Act

This action is not a major rule as defined by the Congressional Review Act, 5 U.S.C. 804. This action pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a "rule" as that term is used by the Congressional Review Act, 5 U.S.C. 804(3)(B),(C). Therefore, the reporting requirements of 5 U.S.C. 801 do not apply.

List of Subjects in 28 CFR Part 50

Accordingly, by virtue of the authority vested in me as Attorney General, including 5 U.S.C. 301 and 28 U.S.C. 509, 510, part 50 of title 28 of the Code of Federal Regulations is amended as follows:

PART 50-- STATEMENTS OF POLICY

1. The authority citation for Part 50 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 1162; 28 U.S.C. 509, 510, 516, and 519; 42 U.S.C. 1921 *et seq.*, 1973c; and Pub. L. 107-273, 116 Stat. 1758, 1824.

2. Add § 50.28 to read as follows:

§ 50.28 Prohibition on settlement payments to non-governmental third parties.

(a) The goals of a settlement agreement between the Department of Justice and a private party are to compensate victims, redress harm, or punish and deter unlawful conduct. It is generally not appropriate to use a settlement agreement to require, as a condition of settlement, payment to non-governmental, third-party organizations who are not victims or parties to the lawsuit.

(b) Except as provided in paragraph (c) of this section, Department attorneys shall not enter into any agreement on behalf of the United States in settlement of federal claims or charges, including agreements settling civil litigation, accepting plea agreements, or deferring or declining prosecution in a criminal matter, that directs or provides for a payment or loan, in cash or in kind, to any non-governmental person or entity that is not a party to the dispute.

(c) Department attorneys may only enter into such agreements in four specific situations:

(1) When the otherwise lawful payment or loan, in cash or in kind, provides restitution or compensation to a victim, though in no case shall any such agreements require defendants in environmental cases, in lieu of payment to the federal government, to expend funds to provide goods or services to third parties for Supplemental Environmental Projects;

(2) When, in cases of foreign official corruption, a trusted third party is required to facilitate the repatriation and use of funds to directly benefit those harmed by the foreign corruption;


(3) When payment is for legal or other professional services rendered in connection with the case; or

(4) When payment is expressly authorized by statute or regulation, including

restitution and forfeiture.

(d) This policy applies to all civil and criminal cases litigated under the direction of the Attorney General and includes civil settlement agreements, *cy pres* agreements or provisions, plea agreements, non-prosecution agreements, and deferred prosecution agreements.

December 4, 2020
Date


William P. Barr
Attorney General