Office of the Attorney General
Washington, D. C. 20530

May 5, 2022

MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS
UNITED STATES ATTORNEYS

FROM: THE ATTORNEY GENERAL

SUBJECT: GUIDELINES AND LIMITATIONS FOR SETTLEMENT AGREEMENTS INVOLVING PAYMENTS TO NON-GOVERNMENTAL THIRD PARTIES

This Memorandum sets forth guidelines and limitations to govern the Justice Department's approach to entering into settlement agreements on behalf of the United States that include payments to non-governmental persons or entities that are not parties to the underlying litigation.

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The Department of Justice regularly settles civil and criminal matters to compensate victims, redress harms, and punish and deter unlawful conduct without the costs and delay that can accompany trials. For decades before 2017, some of these settlements included agreements requiring payments to non-governmental "third parties" as a means of addressing violations of federal law.[1]

It has been the consistent view of the Office of Legal Counsel, including in 2020 when the Justice Department's current regulation was promulgated, that settlements involving payments to non-governmental third parties, if properly structured, do not violate the Miscellaneous Receipts Act.[2] When used appropriately, these agreements allow the government to more fully compensate victims, remedy harm, and punish and deter future violations. For example, the harms caused by violations of federal environmental statutes, including harms to communities affected by environmental crime, can be difficult to redress directly in particular

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[1] As used in this Memorandum, the term "third parties" refers to non-governmental persons or entities that are not parties in the underlying litigation.

[2] *See* Memorandum for William P. Barr, Attorney General, from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, *Re: Final Rule Prohibiting Settlement Payments to Non-Governmental Third Parties* at 2 (Dec. 4, 2020) (citing *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)). Settlements in the context of class actions may be subject to separate considerations that this Memorandum does not address. *See* Brief for the United States as Amicus Curiae in Support of Neither Party, *Frank* v. *Gaos*, 139 S. Ct. 1041 (2019) (No. 17-961).

cases. In such circumstances, the Environment and Natural Resources Division has previously relied upon supplemental environmental projects, environmentally beneficial projects that a defendant has proposed and agrees to implement as part of the settlement of an enforcement action. Such projects further the aims of the federal environmental laws the Justice Department is responsible for enforcing by remedying the harms to communities most directly affected by violations of those laws.

In 2017, the Attorney General issued a Memorandum generally prohibiting Justice Department components from entering into settlement agreements that direct or provide for payments to non-governmental third parties. *See* Memorandum from the Attorney General, *Prohibition on Settlement Payments to Third Parties* (June 5, 2017) ("2017 Memorandum"). The prohibition was subsequently incorporated into the Code of Federal Regulations, *see* 28 C.F.R. § 50.28, and the Justice Manual, *see* Justice Manual §§ 1-17.000, 5-11.105, 9-16.325.

But the current policy is more restrictive and less tailored than necessary to address concerns that these agreements could be used to inappropriately fund projects unrelated to the harm involved in the matter. When used appropriately, settlement agreements that provide for payments to non-governmental third parties are critical tools for addressing violations of federal law and remedying the harms those violations cause. I am therefore rescinding the 2017 Memorandum and restoring the components' authority to enter into such settlements. To accommodate concerns these agreements may present, this Memorandum outlines new guidelines and limitations that will govern their use in the future. These new guidelines and limitations will ensure that settlements involving payments to non-governmental third parties have a strong connection to the violations and further the goals of the underlying statutes.

I further direct the Department to initiate the process to revise the current provisions of the Justice Manual at sections 1-17.000, 5-11.105, and 9-16.325 to conform to this Memorandum. An Interim Final Rule being issued contemporaneously with this Memorandum rescinds 28 C.F.R. § 50.28 and invites public comment on the new policy, including to inform any future changes to the Justice Department's approach.

This Memorandum provides internal Justice Department guidance only. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable by law by any party in any matter or proceeding. Nor does it place any limitations on otherwise lawful litigation prerogatives of the Department of Justice.

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The following guidelines and limitations will govern the Justice Department's approach to agreements on behalf of the United States in settlement of federal claims or charges in all civil and criminal cases litigated under the direction of the Attorney General that direct or provide 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:

- Any such settlement agreement shall define with particularity the nature and scope of the specific project or projects that the defendant has agreed to fund.

- All such projects must have a strong connection to the underlying violation or violations of federal law at issue in the enforcement action. In meeting this requirement, the project must be consistent with the underlying statute being enforced and advance at least one of the objectives of that statute. The project should also be designed to reduce the detrimental effects of the underlying violation or violations at issue to the extent feasible and reduce the likelihood of similar violations in the future.

- The Justice Department and its client agencies shall not propose the selection of any particular third party to receive payments to implement any project carried out under any such settlement. Similarly, the Justice Department and its client agencies shall not propose a specific entity to be the beneficiary of any projects carried out under any such settlement, although the Department and its client agencies may specify the type of entity. The Department and its client agencies may also disapprove of any third-party implementer or beneficiary that the defendant proposes for consideration, provided that the disapproval is based upon objective criteria for assessing qualifications and fitness outlined in the settlement agreement.

- Any such settlement must be executed before an admission or finding of liability in favor of the United States, and the Justice Department and its client agencies must not retain post-settlement control over the disposition or management of the funds or any projects carried out under any such settlement, except for ensuring that the parties comply with the settlement. *See 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).

- No such settlement shall be used to satisfy the statutory obligation of the Justice Department or any other federal agency to perform a particular activity. Nor shall any such settlement provide the Justice Department or any other federal agency with additional resources to perform a particular activity for which the Justice Department or any other federal agency, respectively, receives a specific appropriation.

- No such settlement shall require payments to non-governmental third parties solely for general public educational or awareness projects; solely in the form of contributions to generalized research, including at a college or university; or in the form of unrestricted cash donations.

Justice Department components proposing a settlement involving a payment to a non-governmental third party must obtain the approval of the Deputy Attorney General or the

Associate Attorney General, as appropriate, and explain how the proposed settlement complies with these guidelines and limitations. No approval is required for the following types of settlements, which were exempted from the current policy's prohibition and which do not raise the concerns addressed by these guidelines: (1) Otherwise lawful payments or loans, in cash or in kind, that provide restitution or compensation to a victim or that otherwise directly remedy the harm sought to be redressed; (2) in cases of foreign official corruption, payments to a trusted third party when required to facilitate the repatriation and use of funds to directly benefit those harmed by the foreign corruption; (3) payments for legal or other professional services rendered in connection with the case; and (4) payments that are expressly authorized by statute or regulation, including restitution and forfeiture.