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DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 50

[Docket No. OAG 177; AG Order No. 5384-2022]

RIN 1105-AB62

Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties

AGENCY: Department of Justice.

ACTION: Interim final rule; request for comments.

SUMMARY: This interim final rule ("rule") revokes regulations of the Department of Justice ("Department") that codified a prohibition, subject to limited exceptions, on the inclusion of provisions in settlement agreements directing or providing 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. For further information on how the Department intends to approach such settlements going forward, interested parties should consult an Attorney General Memorandum that the Department is issuing on its website in conjunction with this rule. Comments are requested both as to this rule and as to that Memorandum.

DATES: Effective date: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Applicability date: May 5, 2022

Comments: Comments are due on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: To ensure proper handling of comments, please reference Docket No. OAG 177 on all electronic and written correspondence. The Department encourages the electronic submission of all comments through https://www.regulations.gov using the electronic comment form provided on that site. For ease of reference, an electronic copy of this document is also

available at that website. It is not necessary to submit paper comments that duplicate the electronic submission, as comments submitted to https://www.regulations.gov will be posted for public review and are part of the official docket record. However, should you wish to submit written comments through regular or express mail, they should be sent to Robert Hinchman, Senior Counsel, Office of Legal Policy, U.S. Department of Justice, Room 4252 RFK Building, 950 Pennsylvania Avenue NW, Washington, DC 20530. Comments received by mail will be considered timely if they are postmarked on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The electronic Federal eRulemaking portal will accept comments until Midnight Eastern Time at the end of that day.

FOR FURTHER INFORMATION CONTACT: Robert Hinchman, Senior Counsel, Office of Legal Policy, U.S. Department of Justice, telephone (202) 514–8059 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at https://www.regulations.gov. Information made available for public inspection includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

You are not required to submit personal identifying information in order to comment on this rule. Nevertheless, if you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also locate all the personal identifying information that you do not want posted online in the first paragraph of your comment and identify what information you want the agency to redact. Personal identifying information identified and located as set forth above will be placed in the agency's public docket file, but not posted online.

If you want to submit confidential business information as part of your comment but do

not want it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify the confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, the agency may choose not to post that comment (or to post that comment only partially) on https://www.regulations.gov. Confidential business information identified and located as set forth above will not be placed in the public docket file, nor will it be posted online.

If you want to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** section.

II. Discussion

A. Overview

This rule revokes the Department's regulations at 28 CFR 50.28. Going forward, the Department's approach to settlement agreements that direct or provide for a payment or a loan, in cash or in kind, to a non-governmental person or entity that is not a party to the dispute will be governed by a new Attorney General Memorandum being issued on the Department's website concurrently with this rule.

B. Background

For decades prior to 2017, Department components had entered into settlement agreements that involved payments to certain third parties as a means of addressing harms arising from violations of Federal law, particularly in the environmental context but in other contexts as well. In 2017, the Attorney General issued a memorandum prohibiting Department attorneys from "enter[ing] 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," subject only to certain specified exceptions. Memorandum from the Attorney General,

"Prohibition on Settlement Payments to Third Parties" at 1 (June 5, 2017) (the "2017 Memorandum"). Provisions reflecting the 2017 Memorandum were added to the Justice Manual (https://www.justice.gov/jm/justice-manual) at sections 1-17.000, 5-11.105, 9-16.325.

In December 2020, the Department amended its regulations to add a new 28 CFR 50.28, reflecting the prohibition set forth in the 2017 Memorandum "with certain changes . . . to clarify the scope of the exceptions." 85 FR 81409. The Department specified that the prohibition "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." 85 FR 81410.

C. Revocation of 28 CFR 50.28

After having considered the views of the Department's components and their experience with the regulations at 28 CFR 50.28, the Attorney General has concluded that the regulations at 28 CFR 50.28 are more restrictive and less tailored than necessary and should therefore be revoked.

When used appropriately, agreements providing for payments to third parties are lawful and allow the United States to more fully accomplish the primary goals of civil and criminal enforcement: compensating victims, remedying harm, and punishing and deterring unlawful conduct.

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 cases. In such circumstances, the Environment and Natural Resources Division has previously relied upon supplemental environmental projects to help achieve an enforcement action's goals. Such projects further the aims of Federal environmental laws the Justice Department is responsible for enforcing by remedying the harms to the communities most directly impacted by violations of those laws. For this reason, they are particularly powerful tools for advancing environmental justice.

In revoking 28 CFR 50.28, the Department is not departing from the principle that the goals of settlements include compensating victims, redressing harms, and punishing and deterring unlawful conduct. 85 FR 81409. But policies in service of this principle have traditionally been addressed through memoranda from Department leadership rather than through regulations. The Department is therefore revoking 28 CFR 50.28 in its entirety, and the Attorney General is concurrently issuing a new Memorandum setting forth the Department's policy going forward. That Memorandum also directs that the current provisions of the Justice Manual at sections 1-17.000, 5-11.105, and 9-16.325 be revised to conform to the new policy.

Regulatory Certifications

A. Administrative Procedure Act

This rule relates to a matter of agency management or personnel and is a rule of agency organization, procedure, or practice. As such, 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). The rule is effective upon signature. In its discretion, the Department is seeking post-promulgation public comment on this rulemaking.

B. Regulatory Flexibility Act

An analysis under the Regulatory Flexibility Act was not required for this 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).

C. Executive Orders 12866 and 13563 - Regulatory Review

This rule 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 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.

D. 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."

E. 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.

F. 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*.

G. Congressional Review Act

This rule 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. Accordingly, it is not a "rule" as that term is used in the Congressional Review Act, 5 U.S.C. 804(3)(B), (C), and the reporting requirements of 5 U.S.C. 801 do not apply.

H. Paperwork Reduction Act of 1995

This final rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521.

List of Subjects in 28 CFR Part 50

Administrative practice and procedure.

Accordingly, for the reasons set forth in the preamble, and 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 ofthe 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.

§ 50.28 [Removed and Reserved]

2. Section 50.28 is removed and reserved.

Dated: May 5, 2022.

Merrick B. Garland,
Attorney General.

[FR Doc. 2022-10036 Filed: 5/5/2022 4:15 pm; Publication Date: 5/10/2022]