U.S. Chamber of Commerce

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Via Electronic Filing

Robert Hinchman
Senior Counsel, Office of Legal Policy
U.S. Department of Justice
Room 4252 RFK Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: Interim Final Rule; Request for Comments, Department of Justice, Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties; 87 Fed. Reg. 27936; Docket No. OAG 177

Dear Mr. Hinchman:

Please accept the attached comments on behalf of the U.S. Chamber of Commerce Institute for Legal Reform (ILR).

Sincerely,

Harold Kim
President, Institute for Legal Reform
Chief Legal Officer and
Executive Vice President
U.S. Chamber of Commerce

Comments Submitted to the Department of Justice Regarding Revocation of 28 C.F.R. § 50.28

The U.S. Chamber of Commerce Institute for Legal Reform ("ILR") submits this response to the Department of Justice ("DOJ") public notice seeking comments about the agency's reversal of its general prohibition on settlement agreements that direct funds to non-governmental third parties. ILR believes the abandonment of this policy would allow the DOJ and other federal agencies to revive an unjust approach to settling disputes in which agencies usurp Congress's spending power and effectively force defendants to fund Administration-favored advocacy groups that are not involved in the litigation.

A program of the U.S. Chamber of Commerce (the "Chamber"), ILR's mission is to champion a fair legal system that promotes economic growth and opportunity. The Chamber is the world's largest business federation, representing the interests of businesses of all sizes, sectors and regions, as well as state and local chambers and industry associations. For more than 100 years, the Chamber has advocated for pro-business policies that help businesses create jobs and grow our economy.

Background

On May 5, 2022, Attorney General Merrick Garland issued a memorandum to the heads of DOJ components and United States Attorneys entitled, "Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties." This memorandum revokes a DOJ policy, in place since 2017, which generally prohibited DOJ components from entering into settlement agreements that direct defendants to make payments to non-governmental third parties. Instead, the May 5 memorandum allows federal agencies to require defendants to make payments to organizations that are not involved in the litigation, subject to certain guidelines and limitations. Concurrent with issuing this memorandum, the DOJ rescinded 28 C.F.R. § 50.28, which had codified the 2017 policy.[1] Although the DOJ has provided an opportunity for public comment, the new guidance and revocation of the 2017 prohibition went into effect immediately.

Comment

I. Millions of Dollars of Federal Money Should Not Be Allocated Each Year by Unelected Officials with Little Accountability or Oversight

A basic principle of our system of government is that a representative and politically accountable Congress decides how federal money is spent. Attorney General Garland's decision to revive agency settlement practices that divert funds away from

[1] *See* 87 Fed. Reg. 27,936 (May 10, 2022).

the U.S. Treasury and into the hands of non-governmental advocacy groups and other third parties turns this governing principle on its head. The decision reinstates a practice that Congress,[2] senior DOJ officials, including a former Attorney General,[3] and numerous scholars and commentators[4] have recognized as an unjust tool for political favoritism—regardless of who controls the Executive Branch or what laudable project receives the funds—that subverts Congress's spending power.

The history leading up to the DOJ's prior prohibition on settlement agreements that direct funds to entities who are neither a party to the litigation nor a victim of a crime or tort demonstrates the abuse the current DOJ policy invites. For many years, the DOJ strong-armed defendants to direct settlement money, which would otherwise be recovered by the federal government, to outside organizations. The DOJ used a variety of tactics to fund favored organizations, including packaging settlement funds as "donations" to third parties in exchange for the settling defendant receiving double credit for each donated dollar that bypassed the government.[5] Many defendants, understandably eager to reduce the overall amount paid via settlement and take advantage of a tax deduction for the donated funds, acquiesced to the DOJ's settlement demands.

This DOJ scheme spanned hundreds of cases and involved *billions* of dollars.[6] A year-long investigation by the House Judiciary Committee revealed that the DOJ had used settlements with corporate defendants to funnel $880 million to third party organizations in two years alone.[7] The investigation, among other things, found:

- "DOJ is pushing and even requiring settling defendants to donate money to non-victim third parties."

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[2] *See* H. Rep. 114-694, at 3 (July 18, 2016) ("Congress' spending power is its most effective tool for oversight and reining in Executive overreach.").

[3] *See Attorney General Jeff Sessions Ends Third-Party Settlement Practice*, U.S. Dep't of Justice Office of Public Affairs, Press Release No. 17-613 (June 7, 2017); *see also* Daniel Huff, *Biden Plan to Restore the Corrupt DOJ Slush Fund Should Stop Now*, Washington Examiner, Feb. 1, 2021 (discussing "'vehement objections' of career attorneys").

[4] *See, e.g.,* C. Boyden Gray & Michael Buschbacher, *In The Name of 'Environmental Justice,' DOJ Betrays the Public Trust*, Newsweek, May 13, 2022; John Allison *et al.*, *Improper Third-Party Payments in U.S. Government Litigation Settlements*, Regulatory Transparency Project, Feb. 22, 2021; Paul J. Larkin, Jr., *The Justice Department's Third-Party Payment Practice, the Antideficiency Act, and Legal Ethics*, Federalist Soc'y Review, Vol. 17, Issue 3 (Aug. 2016).

[5] *See* H. Rep. 114-694, at 6; *see also id.* at 5 (explaining another "key tactic" to structure transactions as an "adjustment of penalty" whereby the government reduces the amount owed to it by the amount the settling defendant agrees to pay directly to a community service project).

[6] *See supra* notes 3 and 4.

[7] H. Rep. 114-694, at 2.

- "Donations can earn up to double credit against defendants' overall payment obligations, while credit for direct relief to consumers is merely dollar-for-dollar."
- "[G]roups that stood to gain from these mandatory donations lobbied DOJ to include them in settlements."
- "[I]n some cases, DOJ-mandated donations restore funding that Congress specifically cut."[8]

For example, in actions stemming from the 2008-09 financial crisis, settlements with financial institutions set aside money for advocacy groups that supported the Obama Administration's agenda. Financial institutions were directed to donate millions of dollars in settlement money to community development groups, housing nonprofits, and organizations operating programs to educate students on responsible credit card usage.[9] The DOJ also used settlement money to restore funding that Congress cut for a Department of Housing and Urban Development ("HUD") "housing counseling assistance" program by designating that settlement money go to organizations participating in that program.[10]

Another notable example is the DOJ's settlement with Volkswagen of the company's violations of emissions standards, which included a requirement that the company spend $2 billion to build electric charging stations.[11] Congress had previously denied Administration funding requests, so the DOJ used the settlement to fund the projects instead. Of the $2 billion that Volkswagen paid, $800 million went to the state of California.[12]

There are also many examples of other federal agencies effectively forcing settling defendants to pay settlement monies to politically-allied third parties instead of the government.[13] The Environmental Protection Agency, in particular, made a frequent practice of including "supplemental environmental projects" ("SEPs") in environmental enforcement settlements whereby settling defendants agreed to fund an

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[8] *Id.*

[9] *See id.* at 8.

[10] *See id.* at 8-9.

[11] *See* Kevin Stocklin, *Biden DOJ Brings Back Obama-Era Slush Funds*, Am. Conservative, May 30, 2022 (discussing settlement).

[12] *See id.*

[13] *See* Allison, *supra* note 4 (analyzing various settlements and stating that "[h]undreds of millions went to things like warm-water equestrian washing stations, propping up underfunded state pension funds, and a 'Real Housewives of New Jersey' cast member").

environmental project prosecutors liked, but Congress had not authorized.[14] Such payments have helped fund advocacy groups such as the Sierra Club, National Community Reinvestment Coalition, and National Council of La Raza.[15]

Unsurprisingly, third-party advocacy groups lobbied the DOJ and other federal agencies to participate in the scheme and share in settlement proceeds. This created a situation in which some DOJ officials arguably wielded more power than elected members of Congress because the agency official could unilaterally divert funds to favored groups. In one discovered email, an expected recipient of settlement funds suggested "build[ing] a statue" to honor a senior DOJ official who was responsible for directing money to certain third-party organizations.[16]

Congress's investigation into these federal agency settlement practices resulted in the consideration of legislation to bar such settlements. The Stop Settlement Slush Funds Act was first introduced in the 114th Congress and passed the House of Representatives by a wide margin in 2016.[17] The Act was reintroduced in the 115th Congress and passed the House again in 2017.[18]

In 2017, then-Attorney General Sessions announced that the DOJ would no longer engage in the practice of diverting settlement funds to non-governmental third parties.[19] He explained that "[w]hen the federal government settles a case against a corporate wrongdoer, any settlement funds should go first to the victims and then to the American people—not to bankroll third-party special interest groups or the political friends of whoever is in power."[20]

The DOJ should follow this rationale and reinstate its prohibition on the diversion of settlement funds to non-governmental entities who are neither victims nor parties to the litigation. Whether an Administration believes these funds support "worthy" causes

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[14] *See* Gray & Buschbacher, *supra* note 4.

[15] *See id.* (stating that under the Obama Administration, "it was DOJ policy to ensure that payments to third parties only benefitted Democratic Party supporters"); *see also* Allison, *supra* note 4 (stating that "agencies routinely violated their own internal guidelines" in approving settlements).

[16] H. Rep. 114-694, at 7.

[17] *See* H.R. 5063, 114th Cong. (2016).

[18] *See* H.R. 732, 115th Cong. (2017).

[19] *See* Memorandum from Attorney General Jeff Sessions to All Component Heads and United States Attorneys, *Re: Prohibition on Settlement Payments to Third Parties*, at 1 (June 5, 2017).

[20] U.S. Dep't of Justice, Office of Public Affairs, *Attorney General Jeff Sessions Ends Third-Party Settlement Practice*, Press Release No. 17-613 (June 7, 2017).

or programs is irrelevant.[21] The purpose of government enforcement actions is to stop violations of law and compensate victims and taxpayers for losses stemming from a defendant's actions. It is not to fund or subsidize programs favored by federal officials.

II. Under the New Policy, the DOJ Can Again Misuse Settlements to Circumvent Congress's Authority to Decide Funding Priorities

The DOJ justifies revocation of 28 C.F.R. § 50.28 on the basis that prohibiting settlement agreements with non-governmental third parties—a policy that effectively curbed the potential for misuse over the past five years—"is more restrictive and less tailored than necessary to address concerns."[22] The agency proposes to draw a new line by generally allowing agencies to divert settlement funds to outside organizations, provided the settling agency satisfies certain guidelines. These guidelines, however, represent little more than window-dressing that will reopen avenues of past abuse.

Pursuant to the DOJ's new guidelines, a settlement agreement can direct funds to a non-governmental third party where the favored project bears a "strong connection" to the underlying violation of federal law at issue in the enforcement action, which advances at least one of the objectives of the underlying enforcement statutes.[23] The DOJ and its client agencies cannot propose the selection of a particular third party to receive settlement payments, although they can specify the type of entity and disapprove of any entity selected by the defendant. Only settlement payments to third parties solely for general public education or awareness projects, generalized research, or unrestricted cash donations are expressly prohibited.[24]

These requirements provide little, if any, meaningful restrictions. First, what constitutes a "strong connection" between an underlying violation of federal law and the broad objectives of federal enforcement statutes is highly subjective. Second, and relatedly, this determination would presumably be made by the agency officials desiring to support a favored project or group. For instance, the Clean Air Act sets forth multiple sweeping objectives, including "to protect and enhance the quality of the Nation's air resources" and "to encourage or otherwise promote reasonable Federal, State, and local governmental actions . . . for pollution prevention."[25] Such provisions could be asserted

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[21] *See* H. Rep. 114-694, at 2 (funding decisions for "communities at large or community groups, however worthy, is a matter for the Legislative branch and is not to be conducted at the unilateral discretion of the Executive").

[22] Memorandum from Attorney General Merrick Garland to Heads of Department Components, United States Attorneys, *Re: Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties*, at 3 (May 5, 2022) [hereafter "DOJ Settlement Guidelines"].

[23] *Id.*

[24] *See id.*

[25] 42 U.S.C. § 7401(b), (c).

to provide the requisite connection to justify payment of settlement funds to virtually any non-governmental environmental advocacy group.

The new DOJ guidelines state that the selected project *should be* designed to reduce the detrimental effects of the underlying violation or reduce the likelihood of similar violations in the future, but this guideline appears to express only an aspirational preference, not a requirement of agency settlements. Consequently, an agency could divert settlement funds to a project or group that has nothing to do with reducing detrimental effects or violations of the enforcement statute at issue, so long as the payment does not implicate one of the three narrowly defined prohibited payments.

Further, although an agency is prohibited from proposing the specific favored project or group, the agency's ability to specify the type of recipient and disapprove of any entity selected by the settling defendant creates an obvious potential for the agency to effectively dictate that favored project or group. In the past, when Congress and others scrutinized agency settlement practices, the DOJ defended its practices as reasonable on the basis that "the [defendants] are responsible for choosing specific recipients of consumer relief funds."[26] History has shown that while the DOJ may purport to have no desire to "pick and choose" specific recipients of settlement funds, "it certainly did" in the way it structured agreements.[27] Advocacy groups can be expected to lobby the Administration, urging officials to include specific language in settlement agreements mandating donations of money to advance a policy goal matching the organization's mission.[28]

The guidelines provide that agency disapprovals be "based upon objective criteria for assessing qualifications and fitness outlined in the settlement agreement;"[29] however, the agency presumably determines that criteria for itself. The settling agency is also involved in drafting the settlement agreement on which the assessment of a non-governmental third party's qualifications and fitness would be based. Thus, the agency controls what criteria are used, what a settlement agreement says about the criteria vis-

[26] Larkin, Jr., *supra* note 4 (quoting Letter from Peter J. Kadzik, Ass't Att'y Gen'l, to Bob Goodlatte, Chair, H. Comm. on the Judiciary, & Jeb Hensarling, Chair, H. Comm. on Financial Servs. 1-2 (Jan. 6, 2015)).

[27] Allison, *supra* note 4 (discussing how the DOJ "parsed" the language of settlement agreements to intentionally exclude certain groups as beneficiaries); Jessica Karmasek, *Judiciary Chair Claims Internal Docs Reveal Obama DOJ 'Slush Fund'*, Forbes, Oct. 24, 2017 (reporting that DOJ "documents confirm the existence of a department 'slush fund' under the Obama Administration and that DOJ officials 'went out of their way' to exclude conservative groups") (quoting then-House Judiciary Chair Bob Goodlatte).

[28] *See* Alison, *supra* note 4, at 3.

[29] DOJ Settlement Guidelines, at 3.

à-vis potential third-party recipients of settlement funds, and whether a particular third party satisfies the criteria.

The additional conditions in the guidelines that no settlement payments may be used to satisfy a statutory obligation of the settling agency or provide resources to perform the same activity for which the agency receives a specific appropriation similarly ring hollow. To sidestep these guidelines, an outside group need only describe the project for which it may receive settlement funds in a manner that differentiates the project from an agency's appropriations or statutory obligations. As a practical matter, few if any organizations would be foolish enough to say they perform the same activity for which an agency receives a specific appropriation.

Even the guidelines' express prohibition of three types of settlement payments appears malleable and readily capable of circumvention. The guidelines prohibit payments "*solely* for general public educational or awareness projects" or "*solely* in the form of contributions to generalized research."[30] All an agency official or favored organization needs to do to skirt this limitation is allocate *any* amount of the settlement money to some other activity that is not public education, awareness, or generalized research. The remaining prohibition against "unrestricted cash donations" merely prevents an agency from literally giving a favored group a blank check or bag of money no questions asked;[31] the agency need only identify some purpose or condition to avoid offending the guideline.

Moreover, the guidelines appear predicated on agency self-restraint where the basic purpose behind the previous DOJ policy was that agencies demonstrated a clear lack of self-restraint and a willingness to engage in political favoritism. An agency inclined to revive a practice of funneling money to a favored third-party advocacy group will meet little resistance in accomplishing that goal.

The new DOJ policy provides that a settling agency must additionally obtain the approval of the Deputy Attorney General or Associate Attorney General, and explain how the proposed settlement complies with the guidelines, but this requirement similarly ignores that these senior DOJ officials often represented "the driving force" behind past misuse of settlement funds.[32] There is no reason to believe that the Deputy Attorney General or Associate Attorney General will be any more than a rubber stamp on revived agency efforts to divert settlement funds, especially because the Attorney General is responsible for rescinding what had been an effective DOJ policy. Agency

[30] *Id.* (emphasis added).

[31] *Id.*

[32] H. Rep. 114-694, at 7 (describing actions of former Associate Attorney General).

officials will receive the message loud and clear that it is open season again on diverting settlement funds to favored groups.

III. Directing Settlement Money to Third-Party Organizations Is Arguably Illegal

A final consideration, and reason the DOJ should reinstate its prior policy, involves the dubious legality of agency diversions of unappropriated funds to third parties. Analyses by experts both in and out the government have identified various constitutional, statutory, and ethical grounds in which agency settlements violate the law or at least the spirit of the law.[33]

The Appropriations Clause of the U.S. Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[34] This clause makes clear that Congress possesses the exclusive authority to make appropriations. The U.S. Supreme Court also has long recognized that the Appropriations Clause is specifically "intended as a restriction upon the disbursing authority of the Executive department."[35]

Additionally, Congress has enacted two statutes to implement the Appropriations Clause, the Antideficiency Act and the Miscellaneous Receipts Act. The Antideficiency Act was adopted to curtail the practice of Executive departments entering into vendor contracts without authorization, "knowing that Congress could not in good conscience deny payment once the goods were provided."[36] The Act states that a federal officer or employee may not "make or authorize an expenditure or obligation exceeding . . . an appropriation" or relevant fund.[37]

The Miscellaneous Receipts Act is similarly the product of Congress's efforts to stop Executive Branch attempts to circumvent the Appropriations Clause. The Act states that a federal official or agent "receiving money for the Government from any

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[33] *See id.* at 3-6 (examining past efforts by Executive Branch to circumvent Congress's spending power); Larkin, Jr., *supra* note 4 (concluding the DOJ's third-party settlement practice is illegal and creates ethical problems for DOJ attorneys); Allison *et al.*, *supra* note 4 (concluding the DOJ's third-party settlement practice usurps Congress's spending power and violates separation of powers principles); Gray & Buschbacher, *supra* note 4 (describing use of supplemental environmental projects in agency settlements as "corrupt and illegal practice").

[34] U.S. Const. art. I, § 9, cl. 7.

[35] *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937).

[36] H. Rep. 114-694, at 3.

[37] 31 U.S.C. § 1341(a)(1)(A).

source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."[38]

As the DOJ's Office of Legal Counsel explained decades ago, "money available to the United States and directed to another recipient is constructively 'received'."[39] Therefore, an agency's diversion of available settlement money away from the U.S. Treasury and into the hands of a favored non-governmental third party appears to represent a violation of the Miscellaneous Receipts Act.[40]

As part of the DOJ's attempt to "properly structure" settlements to direct money to third parties without violating these statutes, the new policy prohibits the Department and its client agencies from "retain[ing] post-settlement control over the disposition or management of the funds or any projects carried out under any such settlement."[41] As a result, unlike recipients of Congressionally-appropriated grant funds, organizations that receive agency settlement money are not subject to detailed financial and program reporting requirements that assure oversight and accountability. Even the identities of third-party beneficiaries of government settlements are sometimes not publically disclosed.

In sum, Attorney General Garland's memorandum establishing the new DOJ policy takes the position that a "properly structured" agency settlement can avoid illegality, but this view—hinged at best on technicality and strained interpretation—gives short shrift to the long-term adverse consequences the policy will have on the DOJ and our system of government. The policy will have the government agency whose mission is to "ensure fair and impartial administration of justice for all Americans"[42] compromised by unseemly, unchecked political favoritism.[43] It will undermine the public's respect and faith in the DOJ as an institution "dedicated to upholding the rule

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[38] 31 U.S.C. § 3302(b).

[39] *Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General*, 4B Op. O.L.C. 684, 688 (1980) (stating the fact that "no cash actually touches the palm of a federal official is irrelevant"); *see also* Gray & Buschbacher, *supra* note 3 (quoting same opinion).

[40] *See* Larkin, Jr., *supra* note 4 ("Several different sources of law—the Appropriations Clause and Antideficiency Act implicitly, the Miscellaneous Receipts Act and state ethical rules expressly—separately and together demand that government lawyers deposit into the U.S. Treasury funds they receive in the settlement of cases.").

[41] DOJ Settlement Guidelines, at 3.

[42] U.S. Dep't of Justice, Our Mission Statement, at https://www.justice.gov/about (last visited June 12, 2022).

[43] *See* Ian Prior, *Biden's DOJ Looks to Restart Slush Fund for Left-Wing Political Groups*, Washington Times, Feb. 3, 2021 ("The Department of Justice is not Congress, does not control the tax and spend power of the United States, and should not be distributing taxpayer money to any third-party groups, much less political ones.").

of law"[44] to instead be seen as a tool for administrations to circumvent the rule of law and will of Congress.[45] The Appropriations Clause and federal statutes such as the Antideficiency Act and Miscellaneous Receipts Act exist precisely to prevent that result.

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For all of the reasons discussed, the DOJ should reinstate its prior policy prohibiting federal agencies from using settlement agreements to divert funds to non-governmental third parties. Thank you for the opportunity to offer these thoughts and recommendations.

[44] U.S. Dep't of Justice, Office of the Attorney General, at https://www.justice.gov/ag (last visited June 12, 2022).

[45] *See* Karmasek, *supra* note 27 ("Regardless of which party is in the White House, subverting Congress to funnel money to outside organizations is unacceptable and unconstitutional.") (quoting former House Judiciary Chair Bob Goodlatte).