



U.S. Department of Justice

Office of the Associate Attorney General

Associate Attorney General

Washington, D.C. 20530

May 2, 2023

MEMORANDUM FOR: HEADS OF CIVIL LITIGATING COMPONENTS
FROM: THE ASSOCIATE ATTORNEY GENERAL *W*
SUBJECT: Rescission of Memorandum Titled “Ensuring Settlements Involving the Judgment Fund Comply with the Finality Requirements of 31 U.S.C. § 1304.”

This memorandum rescinds a March 5, 2020, memorandum titled “Ensuring Settlements Involving the Judgment Fund Comply with the Finality Requirements of 31 U.S.C. § 1304” (the “March 2020 Memo”). That memorandum interpreted the Judgment Fund’s finality requirement, which is a necessary condition for payment of a judgment or compromise settlement from the Fund, to “involve both: (1) the cessation of judicial review; and (2) a means for a final resolution . . . regarding the total amount to be paid to satisfy the claim.” March 2020 Memo 2. The memorandum stated that the Office of the Associate Attorney General would not approve settlements, including “settlements that propose to provide a sum certain now, combined with a mechanism for seeking additional unspecified funds in the future, all in order to provide eventual satisfaction of one underlying claim,” where one or both of those requirements was not met. *Id.* at 1–2.

I have determined that the March 2020 Memo should be rescinded because it contains a potential internal inconsistency and resolved broad legal questions with insufficient analysis and in a manner that has created confusion for litigating divisions.

By regulation, the Attorney General has delegated significant authority to conduct litigation on behalf of the United States to the Assistant Attorneys General for the litigating divisions. These delegations include the authority to “[a]ccept offers in compromise of, or settle administratively, claims against the United States in all cases in which the principal amount of the proposed settlement does not exceed \$4,000,000,” 28 C.F.R. § 0.160(a)(3), and to “[a]ccept offers in compromise in all nonmonetary cases,” *id.* § 0.160(a)(4). Litigating divisions must refer settlements to the Deputy or Associate Attorney General in certain instances, including when a settlement exceeds the dollar limits of the delegation to the litigating divisions, or when a settlement involves questions of law or policy that should receive the personal attention of Department leadership. *See id.* § 0.160(d)(2).

Congress has established the Judgment Fund, a permanent and indefinite appropriation available under certain conditions “to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law” that are payable under one of a specified list of statutory provisions. 31 U.S.C. § 1304(a). In one of those provisions, Congress provided for the payment of final judgments rendered against the United States. 28 U.S.C. § 2414. Under that provision, “[w]hen the Attorney General determines that no appeal shall be taken from a judgment or that no further review will be sought from a decision affirming the same, he shall so certify and the judgment shall be deemed final.” *Id.*

Compromise settlements “shall be settled and paid in a manner similar to judgments in like causes and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements.” *Id.* The Executive Branch has put procedures in place to ensure that the Department of the Treasury certifies payment from the Judgment Fund only in appropriate circumstances. *See generally* 31 C.F.R. §§ 256.0–256.60. As part of that certification process, the Department of the Treasury’s Bureau of the Fiscal Service considers whether “[a]wards or settlements are final” and will certify payment only if that criterion is met. *Id.* § 256.1(a)(1).

Opinions of the Office of Legal Counsel (“OLC”) further explicate the circumstances in which the Department of Justice may approve a proposed settlement instrument and when the Judgment Fund will be available to pay for any settlement. A settlement must conform to any applicable statutory limitations and serve the “best interests” of the United States. *Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*, 23 Op. O.L.C. 126, 135–37 (1999). The President’s constitutional obligation to take care that the laws be faithfully executed “necessarily serves to limit the exercise of the Attorney General’s settlement authority so that it does not become a dispensing power.” *Id.* at 138. OLC has therefore concluded that the Department may compromise claims only if the Department makes a “good faith assessment” that a court could find the government liable. *Waiver of Statutes of Limitations in Connection with Claims Against the Department of Agriculture*, 22 Op. O.L.C. 127, 139–40 (1998). Further, the Judgment Fund is available for the payment of a settlement only if “the cause of action that gave rise to the settlement could have resulted in a final money judgment.” *Availability of Judgment Fund in Cases Not Involving a Money Judgment Claim*, 13 Op. O.L.C. 98, 104 (1989). And, relatedly, the Judgment Fund may not be used to pay for the settlement of claims that, if they resulted in a judgment against the government, would “impose costs on the government, but [would] not require the United States to make specific cash disbursements” to certain parties, such as a “judgment[] that required the United States to furnish subsidized housing, or that required the United States to correct structural defects in housing.” *Id.* at 101 (footnote omitted). These strictures ensure that the potential use of the Judgment Fund does not “encourage settlements that would not otherwise be in the interest of the United States.” *Id.* at 104.

The March 2020 Memo’s interpretation of those statutes, regulations, and interpretive authorities has led to confusion. On the one hand, the March 2020 Memo concluded that the Judgment Fund’s finality requirement is met only where there is a “final resolution . . . regarding the total amount to be paid to satisfy the claim,” and that “settlements that propose to provide a sum certain now, combined with a mechanism for seeking additional unspecified funds in the future, all in order to provide eventual satisfaction of one underlying claim” are not permissible. March 2020 Memo 1–2. The memorandum also acknowledged in a footnote, however, that “complex claims” may be broken into “discrete sub-claims, each of which may be independently resolved with finality,” and that “individual claims within a multi-claim case may be settled with sufficient finality to permit access to the Judgment Fund.” *Id.* at 2 n.12. Litigating divisions have advised me that there are potential settlement structures that contain some type of mechanism for paying additional amounts in the future, subject to appropriate procedures and safeguards. And they have informed me that, in considering those settlement structures, they have found it difficult to understand the lines that the March 2020 Memo’s footnote attempts to draw and how broadly certain of the more unequivocal statements in its text should be read.

Consider, for example, one mechanism that the Environment and Natural Resources Division has historically used to resolve claims against the United States under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* Under that mechanism, the Division has agreed to pay a sum certain for initial cleanup of a contaminated site, followed by subsequent payments that will be presented to the Judgment Fund only once they are liquidated to a sum certain. The procedures for liquidating subsequent payments typically include dispute-resolution mechanisms to ensure that the final sums accurately reflect the cleanup costs and cannot be subject to further judicial review. These arrangements are beneficial in appropriate circumstances because they provide funds for immediate environmental remediation, and because they eliminate the substantial risk of overpayment that would arise if the parties were required to agree to a sum certain upon signing a settlement.* And I am advised that the Treasury Department has certified payments from the Judgment Fund for payments under settlement agreements of this nature.

The Division perceives a lack of clarity regarding how the March 2020 Memo treats these and similar agreements. If the March 2020 Memo prohibits these agreements, *see* March 2020 Memo 1 (stating that “settlements that propose to provide a sum certain now, combined with a mechanism for seeking additional unspecified funds in the future” will not be approved), it resolves a range of complex legal issues with only a cursory analysis and without addressing the Treasury Department’s past practice or analyzing any particular settlement terms. On the other hand, if the March 2020 Memo’s footnoted statement that “complex claims may . . . in some circumstances be broken into discrete sub-claims, each of which may be independently resolved with finality” covers this settlement arrangement, it is hard to discern how the March 2020 Memo’s text and its footnote should properly be harmonized. *Id.* at 2 n.12. I understand that this uncertainty complicates litigating divisions’ efforts to achieve settlements on terms favorable to the United States.

In reaching its broader conclusions, moreover, the March 2020 Memo relied on inapposite authorities without sufficient analysis. The memorandum relied largely on a single Comptroller General opinion cited in a Government Accountability Office publication, but that opinion arose in an entirely different context. *Id.* at 2 & nn.6–9 (citing 3 Government Accountability Office, *Principles of Federal Appropriations Law* 14-38 (3d ed. 2008); 58 Comp. Gen. 311 (1979)). The opinion addressed a judgment that directed the payment of “back pay in accordance with the Back Pay Act” but did not contain a specific amount. 58 Comp. Gen. at 312. The Comptroller General concluded that such a judgment was payable from the Judgment Fund, but not until the agency’s computation of back pay and the final resolution of any resulting dispute, because “[d]isputes over the amount to be paid must be resolved . . . prior to the submission for payment.” *Id.* at 314. The opinion did not address the finality of a compromise settlement, let alone the full range of settlement types that the March 2020 Memo purported to address, which could, among other things, contain a variety of mechanisms for finalizing any sums to be paid before actually submitting a request for payment under the settlement agreement. The March 2020 Memo also relied on out-of-context language from an OLC opinion. March

* I am advised that, before approving or recommending approval of a settlement that does not include a sum certain for the total settlement, litigating divisions project both the likely cost and the maximum potential cost of the settlement based on the best information available at the time. This Office will not approve a proposed settlement unless it is reasonably certain that these projections are accurate and concludes that the exercise of settlement authority is otherwise warranted. Litigating divisions evaluating settlements under their delegated authority should follow the same practice.

2020 Memo 2 & n.10 (citing *Availability of Judgment Fund in Cases Not Involving a Money Judgment Claim*, 13 Op. O.L.C. at 101). As noted above, that OLC opinion addressed whether the Judgment Fund was available to pay for judgments that do not require the government to make monetary payments to individuals but do require the government to take actions—like providing housing—that will result in the expenditure of government funds. 13 Op. O.L.C. at 98. The opinion concluded that such settlements were not eligible for Judgment Fund payment, and it contrasted those types of settlements with settlements that “require the United States to make cash payments to individuals”—or, put otherwise, settlements requiring “the direct payment of specified sums of money” to others. *Id.* In using the phrase “specified sums,” the OLC opinion did not address the possibility of Judgment Fund payments for monetary settlements that do not specify the precise amount of all payments at the time the settlement is entered.

In light of the foregoing, I have concluded that the issues potentially covered by the March 2020 Memo are better considered in the context of specific settlement proposals, on which the Associate Attorney General can seek the views of OLC as to any uncertain questions concerning the Judgment Fund. This Office will seek OLC’s views on any proposed settlement instrument that raises novel issues concerning the Judgment Fund’s finality requirement. (OLC was not consulted in connection with the March 2020 Memo, but I have consulted with OLC in connection with this rescission. OLC agrees with the statements of law contained in this memorandum.)

Accordingly, I hereby rescind the March 2020 Memo. In considering proposed settlement instruments, this Office will continue to ensure that each settlement complies with legal requirements and best serves the interests of the United States.