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4-1.100 Responsibilities of the Attorney General re Civil Litigation

The Office of the Attorney General was established by the Judiciary Act of 1789. Act of September 24, 1789, 1 Stat. 73. Section 35 of that Act vested the Attorney General (AG) with plenary authority to "prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned" and to give advice and opinions upon questions of law when requested by the President or the heads of various Departments.

The AG's statutory authority to conduct litigation to which the United States, its departments or agencies is a party was expanded and more fully developed by Congress in 1870 in the same legislation that provided for the creation of the Department of Justice Act of June 22, 1870, 16 Stat. 162. Among other things, the Act forbade the Secretaries of the Executive Departments to employ other attorneys or outside counsel at government expense, and required them to

call upon the Department of Justice. . . and no counsel or attorney fees shall hereafter be allowed to any person. . . besides the respective district attorneys. . . for services in such capacity to the United States. . . unless hereafter authorized by law, and then only on the certificate of the Attorney-General that such services could not be performed by the Attorney-General. . . or the officers of the Department of Justice. . . .

Section 17, 16 Stat. 164.

The initial motivation for this legislation was the desire to centralize the conduct and supervision of all litigation in which the government was involved, as well as to eliminate the need for highly-paid outside counsel when government-trained attorneys could perform the same function. Other objectives of the legislation advanced in the congressional debates were to ensure the presentation of uniform positions with respect to the laws of the United States ("a unity of decision, a unity of jurisprudence in the executive law of the United States"), and to provide the AG with authority over lower court proceedings involving the United States so that litigation would be better handled on appeal, and before the Supreme Court. *See* Cong. Globe, 41st Cong., 2d Sess. 3035-39, 3065-66 (1870). *See generally* Bell, "The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, Or One Among Many?", 46 Fordham L. Rev. 1049 (1978); Key, "The Legal Work of the Federal Government," 25 Va. L. Rev. 165 (1938). *See also* *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888) (Attorney General "undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government"); *Perry v. United States*, 28 Ct. Cl. 483, 491 (1893); *Sutherland v. International Insurance Co.*, 43 F.2d 969, 970-71 (2d Cir. 1930), *cert. denied*, 282 U.S. 890 (1930).

The present statutory authority vesting plenary litigating authority with the Attorney General, including 28 U.S.C. §§ 516, 519 and 5 U.S.C. § 3106, parallels that found in the 1870 Act. Except as otherwise authorized by law, only attorneys of the Department of Justice under the supervision of the Attorney General may represent the United States or its agencies or officers in litigation. Counsel for other government agencies may not be heard in opposition. *See In re Confiscation Cases*, 74 U.S. 454, 458 (1868); *The Gray Jacket*, 72 U.S. 370, 371 (1866). Nor, in the absence of statutes to the contrary, may

any suit be brought on behalf of the United States except by the Attorney General or an attorney under his/her superintendence. *Sutherland v. International Ins. Co.*, *supra*; *F.T.C. v. Guignon*, 390 F.2d 323 (8th Cir. 1968); *I.C.C. v. Southern Railway Co.*, 543 F.2d 534 (5th Cir. 1976), reh. en banc denied, 551 F.2d 95 (5th Cir. 1977). The completeness of the Attorney General's authority is further illustrated by the fact that once a matter has been referred to the Department of Justice, the referring agency ceases to have control over it. See *United States v. Sandstrom*, 22 F. Supp. 190, 191 (N.D. Okla. 1938).

See USAM 4-3.000 et seq. for additional authorities with respect to the Attorney General's inherent authority to compromise and close civil cases. Presidential Reorganization Plan No. 2 of 1950, 64 Stat. 1261, effected a Hoover Commission type reorganization whereby all functions of other employees and units in the Department, including Presidential appointees, were placed in the Attorney General to be redelegated by him/her. See 28 U.S.C. § 509, which is of continuing effectiveness, parallels the language of Reorganization Plan No. 2, and provides that "[a]ll functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General. . . ."

4-1.200 Responsibilities of the Assistant Attorney General for the Civil Division

The Attorney General has delegated to the Assistant Attorney General for the Civil Division authority for the conduct, handling or supervision of the matters catalogued at 28 C.F.R. § 0.45, as well as those in 28 C.F.R. § 0.47 (alien property matters), 28 C.F.R. § 0.49 (international judicial assistance), 28 C.F.R. § 0.171(a) (collection of judgments, fines, penalties and forfeitures), and 28 C.F.R. § 0.46, "all other civil litigation including claims by or against the United States, its agencies or officers, in domestic or foreign courts, special proceedings, and similar civil matters not otherwise assigned. . . ." (emphasis supplied).

4-1.210 Responsibilities of Organizational Units in the Civil Division

The majority of civil litigation in certain categories is handled in the field by United States Attorneys (USA) under the ultimate and overall responsibility of the Assistant Attorney General for the Civil Division. The litigation not handled by United States Attorneys is assigned primarily to components within the Civil Division, subject to the supervision and direction of the Assistant Attorney General. These components are the Torts Branch, Commercial Litigation Branch, Federal Programs Branch, Office of Immigration Litigation, Office of Consumer Litigation, and the Appellate Staff, each of which is directed by a Deputy Assistant Attorney General and a management team of senior supervisory attorneys. The specific matters assigned to each component, insofar as they may be significant to the United States Attorneys, are summarized in USAM 4-1.211 through 4-1.217.

The compromise and closing authority exercised by the Assistant Attorney General and subordinate Civil Division officials is described in USAM 4-3.110.

4-1.211 Torts Branch

The Torts Branch represents the United States, its agencies, and persons sued in their individual capacities when government representation is appropriate in suits sounding in tort. This includes not only suits under the Federal Tort Claims Act, but also litigation under the Suits in Admiralty and Public Vessels Act, as well as suits seeking money damages against individual government employees. See 28 C.F.R. § 0.45. The Torts Branch also handles some contract matters in the environmental area.

Four Staffs are responsible for the Torts Branch's litigative responsibilities as follows:

Aviation and Admiralty

Post Office Box 14271
Benjamin Franklin Station
Washington, D.C. 20044-4271
(202) 616-4000

Constitutional and Specialized Torts

Post Office Box 7146
Benjamin Franklin Station
Washington, D.C. 20044
(202) 616-4140

**Environmental Torts (formerly Environmental
& Occupational Disease Litigation) Staff**

Post Office Box 340
Benjamin Franklin Station
Washington, D.C. 20044
(202) 616-4200

FTCA Staff

Post Office Box 888
Benjamin Franklin Station
Washington, D.C. 20044
(202) 616-4400

NOTE: Federal Torts Claims Act matters pertaining to aviation or environmental issues are within the responsibilities of the Aviation and Admiralty and Environmental Torts staffs, respectively. All other FTCA matters are the responsibility of the FTCA Staff.

4-1.212 Commercial Litigation Branch

The Commercial Litigation Branch is responsible for litigation arising principally from a broad variety of governmental undertakings of a "commercial" nature. The work of this Branch encompasses contract actions, whether brought by or against the government; most affirmative monetary and property claims (including foreclosures, reclamation claims, and actions to recover damages for conversion of government property) arising from government loan, grant, subsidy, and insurance programs; all non-tax bankruptcy litigation; and a broad variety of other monetary litigation, including patent or copyright infringement suits. The Branch is also responsible for the government's affirmative civil claims arising from fraud and bribery and other official misconduct, as well as for the collection of civil fines and penalties in the areas assigned to the Civil Division. Commercial Litigation Branch attorneys handle all commercial litigation in the United States Court of Federal Claims, the United States Court of Appeals for the Federal Circuit, and the United States Court of International Trade. *See* 28 C.F.R. § 0.45. The Office of Foreign Litigation is part of the Commercial Litigation Branch.

4-1.213 Federal Programs Branch

The Federal Programs Branch represents the United States, its agencies and officials in a broad range of litigation involving the constitutionality of federal statutes and the administration of statutory and other federal programs by federal agencies. This includes litigation against Cabinet officers and agencies under the Administrative Procedure Act, and institution of affirmative suits to enforce federal laws or

regulations or to impose civil penalties. The Branch handles cases involving national security and defense, personnel issues and discrimination claims, government information and privacy suits, housing and human services cases, and miscellaneous claims challenging other programmatic activities of agencies. Most of the defensive litigation seeks injunctive or declaratory relief.

4-1.214 Appellate Staff

The Appellate Staff is responsible for the appellate work within the jurisdiction of the Civil Division.

The basic functions performed by the Appellate Staff include:

- A. Briefing and arguing cases in the United States Courts of Appeals and various state appellate courts;
- B. Preparation of memoranda from the Assistant Attorney General to the Solicitor General recommending for or against appeal, or for or against rehearing en banc or certiorari in cases where the government has lost in the lower courts;
- C. Preparation of draft merits briefs, petitions for certiorari, and briefs in opposition in Civil Division cases in the Supreme Court;
- D. Providing advice and assistance to persons within the Civil Division, other components of the Department of Justice, United States Attorneys' offices, senior Department officials, and client agencies.

Contacts:

Robert E. Kopp, **Director**, (202) 514-3311.

William G. Kanter, **Deputy Director**, (202) 514-4575.

Assistant Directors: Barbara C. Biddle, (202) 514-2541; Robert S. Greenspan, (202) 514-5428; Barbara L. Herwig, (202) 514-5425; Leonard Schaitman, (202) 514-3441; Michael Jay Singer, (202) 514-5432; Anthony J. Steinmeyer, (202) 514-3388.

Appellate Litigation Counsel: Douglas N. Letter, (202) 514-3602; Mark B. Stern, (202) 514-5089.

Special Counsels: John F. Daly, (202) 514-2496; Marleigh D. Dover, (202) 514-3511; John C. Hoyle, (202) 514-3469; Jacob M. Lewis, (202) 514-5090; Scott R. McIntosh, (202) 514-4052.

Senior Appellate Counsels: Freddi Lipstein, (202) 514-4815; Alfred R. Mollin, (202) 514-0236.

4-1.216 Office of Consumer Litigation

All functions and responsibilities formerly assigned to the Consumer Affairs Staff of the Antitrust Division, including responsibility for criminal cases (48 Fed. Reg. 9522 (1983)), are now the responsibility of the Civil Division's Office of Consumer Litigation. The Office coordinates district court litigation referred to the Department by the Federal Trade Commission, the Food and Drug Administration, National Highway Traffic Safety Administration, and the Consumer Product Safety Commission. Pertinent statutes include the Federal Food, Drug, and Cosmetic Act, Federal Trade Commission Act, the Disclosure of Automobile Information Act, the odometer requirements section of the Motor Vehicle Information and Costs Savings Act, the Consumer Credit Protection Act, and the Consumer Product Safety Act. See 28 C.F.R. § 0.45(j).

4-1.217 Office of Immigration Litigation

Because of the transfer from the Criminal Division (48 Fed. Reg. 9522 (1983)) of certain litigation arising under the Immigration and Nationality Act, the Civil Division has established an Office of Immigration Litigation. The Office has assumed the Department's responsibility for virtually all civil litigation arising under the immigration laws, including court of appeals petitions for review of final removal orders, and citizenship and visa disputes, matters pertaining to legalization and employer sanctions under the Immigration Reform and Control Act, Pub.L. No. 99-603 (Nov. 6, 1986), 100 Stat. 3359, and cases arising under the enforcement reforms of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub.L. No. 104-828, 110 Stat. 3009 (Sept. 30, 1996). The Criminal Division retains jurisdiction over criminal cases, denaturalization cases concerning persons believed to have been involved in Nazi war crimes, civil INS forfeiture actions and remission petitions, and certain other civil matters bearing on criminal law enforcement. *See* 28 C.F.R. § 0.45(k). The Civil Rights Division has responsibility for discrimination claims under the 1986 reforms.

4-1.300 Division of Responsibility Between the Civil Division and the United States Attorneys for the Handling of Civil Litigation

The responsibility of the Attorney General for civil litigation which has been delegated to the Assistant Attorney General for the Civil Division (USAM 4-1.200), has in a great many instances been redelegated to the United States Attorneys (28 C.F.R. § 0.168). Civil Division Directive No. 14-95, published in the Appendix to Subpart Y immediately following 28 C.F.R. § 0.172, presently details this redelegation of authority to United States Attorneys, 60 Fed. Reg. 17456 (1995). Where authority for direct handling has been redelegated to the United States Attorneys, they are authorized to take all necessary steps to protect the interests of the United States without prior approval of the Assistant Attorney General, Civil Division, or his/her representative (*see* Directive 14-95 §§ 4(a) and 4(b)), except as may otherwise be specified in a redelegation letter or as provided in Directive 14-95, §§ 4(a) and 4(b). Compromise or closing of such redelegated cases is handled as set forth in USAM 4-3.000.

A great number of matters not specifically delegated to the United States Attorney will, in fact, be handled in the field by the United States Attorney's Office (USAO) under the supervision of the Assistant Attorney General of the Civil Division. Liaison between the United States Attorneys and the Civil Division on such cases is discussed at USAM 4-1.513. If an agency makes an emergency referral or request as to the nondelegated case to the USAO, and the United States Attorney is satisfied that the requested action is proper but time does not permit contact with the Civil Division, protective action should be taken by the United States Attorney. *See* USAM 4-1.514.

4-1.310 Direct Referral Cases

Pursuant to section 4(a) of Civil Division Directive No. 14-95, 60 Fed. Reg. 17456 (1995), and subject to the limitations of section 4(c), the following civil actions under the jurisdiction of the Assistant Attorney General, Civil Division, may be referred by the agency concerned directly to the United States Attorney for handling in trial courts, and United States Attorneys have been delegated the authority to take all necessary steps to protect the interests of the United States, without prior approval of the Assistant Attorney General, Civil Division, or his/her representatives. Agencies may, however, if special handling is desired, refer these cases to the Civil Division. Also, when constitutional questions or other significant issues arise in the course of such litigation, or when an appeal is taken by any party, the Civil Division must be consulted.

- A. Money claims by the United States (except penalties and forfeitures) where the gross amount of the original claim does not exceed \$1 million.
- B. Single family dwelling house foreclosures arising out of loans made or insured by the Department of Housing and Urban Development, the Department of Veteran Affairs and the Farmer's Home Administration, now called the Rural Housing and Community Development Service (RHCDs).
- C. Suits to enjoin violations of, and to collect penalties under the Agricultural Adjustment Act of 1938, 7 U.S.C. § 1376; Packers and Stockyards Act, 7 U.S.C. §§ 203, 207(g), 213, 215, 216, 222, and 228a; Perishable Agricultural Commodities Act, 1930, 7 U.S.C. §§ 499c(a) and 499h(d); Egg Products Inspection Act, 21 U.S.C. § 1031, *et seq.*; Potato Research and Promotion Act, 7 U.S.C. § 2611, *et seq.*; Cotton Research and Promotion Act of 1966, 7 U.S.C. § 2101, *et seq.*; Federal Meat Inspection Act, 21 U.S.C. § 601, *et seq.*; and Agricultural Marketing Agreements Act of 1937, *as amended*, 7 U.S.C. § 671, *et seq.*
- D. Suits by social security beneficiaries under the Social Security Act, 42 U.S.C. § 402, *et seq.*
- E. Social security disability suits under 42 U.S.C. § 423, *et seq.*
- F. Black lung beneficiary suits under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 921, *et seq.*
- G. Suits by Medicare beneficiaries under 42 U.S.C. § 1395ff.
- H. Garnishment actions authorized by 42 U.S.C. § 659 for child support or alimony payments and actions for general debt under 5 U.S.C. § 5520a.
- I. Judicial review of actions of the Secretary of Agriculture under the food stamp program, pursuant to the provisions of 7 U.S.C. § 2023 involving retail stores.
- J. Cases referred by the Department of Labor solely for the collection of penalties or for injunctive action under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, *et seq.*, and the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.*
- K. Cases referred by the Department of Labor solely for collection of civil penalties under the Farm Labor Contractor Registration Act of 1963, 7 U.S.C. § 2048.
- L. Cases referred by the United States Postal Service for injunctive relief under the non-mailable matter laws, 39 U.S.C. § 3001, *et seq.*

4-1.312 Delegated Cases

Where the circumstances warrant, the Assistant Attorney General, Civil Division, may delegate to United States Attorneys pursuant to section 4(b), Civil Division Directive No. 14-95, 60 Fed. Reg. 17456 (1995), suit authority for any claims or suits where the gross amount of the original claim does not exceed \$5 million, upon the recommendation of branch, office, or staff directors. United States Attorneys may compromise any case redelegated under section 4(b) in which the gross amount of the original claim does not exceed \$5,000,000, so long as the difference between the gross amount of the original claim and the proposed settlement does not exceed \$1,000,000. All delegations pursuant to section 4(b) must be in writing, and no United States Attorney has authority to compromise or close any such delegated case or claim except as is specified in the required written delegation or in section 1(e) of the Directive (discussed below at USAM 4-3.120). The limitations of section 1(e) of the Directive (discussed below at USAM 4-3.130) also remain applicable in any case or claim delegated under section 4(b).

4-1.313 Retained Cases

Pursuant to section 4(b) of the Civil Division Directive No. 14-95, 60 Fed. Reg. 17456 (1995), and regardless of the amount in controversy, the following matters will normally not be delegated to the United States Attorneys for handling but will be personally or jointly handled or monitored by the appropriate branch or office within the Civil Division:

- A. Civil actions in the United States Court of Federal Claims;
- B. Cases within the jurisdiction of the Commercial Litigation Branch involving patents, trademarks, copyrights, etc.;
- C. Cases before the United States Court of International Trade;
- D. Any case involving bribery, conflict of interest, breach of fiduciary duty, breach of employment contract, or exploitation of public office, or any fraud or False Claims Act case where the amount of single damages exceeds \$1 million.
- E. Any case involving vessel-caused pollution in navigable waters;
- F. Cases on appeal, except as determined by the Director of the Appellate Staff (*see* USAM, Title 2);
- G. Any case involving litigation in a foreign court;
- H. Criminal proceedings arising under statutes enforced by the Food and Drug Administration, the Consumer Product Safety Commission, the Federal Trade Commission, and the National Highway Traffic Safety Administration (relating to odometer tampering), except as determined by the Director of the Office of Consumer Litigation;
- I. Non-monetary civil cases, including injunction suits, declaratory judgment actions, and applications for inspection warrants, and cases seeking civil penalties, including, but not limited to those arising under statutes enforced by the Food and Drug Administration, the Consumer Product Safety Commission, the Federal Trade Commission, and the National Highway Traffic Safety Administration (relating to odometer tampering), except as determined by the Director of the Office of Consumer Litigation.
- J. Asbestos and other toxic tort litigation (i.e., Agent Orange, lead, groundwater contamination, etc.)
- K. Administrative claims arising under the Federal Tort claims Act.

4-1.320 United States Attorney Responsibilities -- Assistance Concerning Deposited Funds

In connection with the distribution of funds deposited in court, the United States Attorney may be asked to assist the court as *amicus curiae*. In the case of petitions for the return of funds of deceased or deserting sailors pursuant to 46 U.S.C. §§ 626 to 628, copies of the petition should be served on the United States Attorney, the Attorney General, and the United States Shipping Commissioner. In such cases, the United States Attorney should appear as attorney for the United States as another claimant to the funds. Information for use in asserting the government's claim will be provided by the United States Shipping Commissioner attached to the Coast Guard at the locale.

4-1.322 United States Attorney Responsibilities -- Assistance to Civil Division Attorneys

From time to time, Civil Division attorneys involved in the handling of litigation, including litigation before specialized courts, may need to perform their duties at places within various judicial districts. Such attorneys are asked to apprise the United States Attorney in advance of their visit to his/her district.

United States Attorneys are requested to aid such attorneys in obtaining office space, stenographic facilities, and related assistance on request, when this is feasible.

4-1.323 United States Attorney Responsibilities -- Briefs Amicus Curiae

An action in a state or federal court, to which neither the United States nor one of its officers or agencies is a party, may involve an issue affecting the interests of the United States. When the interpretation or application of an Act of Congress or a departmental regulation or the Attorney General's authority to conduct litigation is involved, the Department may wish to file a brief amicus curiae to inform the court of the government's position. *Cf. F.T.C v. Guignon*, 390 F.2d 323 (8th Cir. 1968); *Faubus v. United States*, 254 F.2d 797 (8th Cir. 1958), *cert. denied*, 358 U.S. 829 (1958). United States Attorneys are requested to notify the Civil Division promptly whenever they learn of such cases. If an amicus brief is filed, the Civil Division will forward a copy of the brief to the United States Attorney in the district in which the suit is pending.

4-1.324 United States Attorney Responsibilities -- Constitutional Questions -- Certification to the Attorney General

In any action, suit, or proceeding in a court of the United States, to which the United States or an agency or employee thereof is not a party, the court is required to certify to the Attorney General when the constitutionality of an Act of Congress is called into question, and the court must permit the United States to intervene to submit evidence or argument on the issue of constitutionality. *See* 28 U.S.C. § 2403. The Civil Division should be promptly advised of any case in which the United States Attorney learns that the pleadings challenge the constitutionality of an Act of Congress, a regulation or any other federal action.

4-1.325 United States Attorney Responsibilities -- Judicial Assistance to Foreign Tribunals

Section 1782 of Title 28 authorizes the United States district court for the district in which a person resides or is found to order such person to give his/her testimony or to produce documents or other things for use in a proceeding in a foreign or international tribunal. Requests for international judicial assistance are executed either on the basis of treaty obligations assumed by the United States (*see, e.g.,* the Convention between the United States and other Governments on the Taking of Evidence Abroad in Civil and Commercial Matters, TIAS 7444, 23 UST 2555) or on the basis of international comity and courtesy. Requests for international judicial assistance from foreign tribunals in civil matters will be referred to United States Attorneys by the Office of Foreign Litigation, Civil Division. *See* 28 C.F.R. § 0.49. United States Attorneys should not attempt to execute foreign evidence requests in civil cases without obtaining the approval of the Office of Foreign Litigation.

In addition to processing evidence requests, the Office of Foreign Litigation also performs the functions of the "Central Authority" under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Cases, TIAS 6638, and the Inter-American Convention on Letters Rogatory, *Treaties in Force, U.S. Department of State*, 351 (1993). USAOs will only infrequently become involved in service requests, which are referred to the United States Marshals Service for execution.

4-1.326 United States Attorney Responsibilities -- Protection of the Government's Fiscal and Property Interests

United States Attorneys are requested to report any infringement of, or dereliction with respect to, the property or other interest of the United States warranting the institution of civil proceedings, when such matters have not been referred for handling. Most non-fraud claims normally should be processed for collection by the administrative agency involved, pursuant to the Debt Collection Act, 31 U.S.C. § 3711, and implementing joint regulations, 4 C.F.R. §§ 101.1 to 105.5. *See* USAM 4-4.430, *infra*.

Non-fraud claims should normally be reported to the affected administrative agency. Fraud claims are excluded from the coverage of the joint regulations implementing the Debt Collection Act. *See* 31 U.S.C. § 3711(c)(1). United States Attorneys should be particularly alert to report to the Civil Division all claims involving fraud against the government that are not within the United States Attorneys' original authority, and all claims involving bribery, and the conversion of government property.

4-1.327 Settlement of Tort Claims Asserted Against the Department of Justice Administratively

In cases involving serious personal injuries, death, or major property damage, as to which a claim may possibly be asserted against the Department of Justice under the Federal Tort Claims Act, the responsible component should be notified as soon as possible after the accident and asked to cause an investigation to be commenced. Any tort claim arising from any USAO's employee's acts or omissions should be forwarded to EOUSA. Any tort claim alleging acts or omissions on the part of any other government employee should be forwarded to the appropriate agency.

4-1.410 Responsibilities of Client Agencies -- Compromise and Dismissal or Closing

Authority over the disposition of a civil matter, once it is referred to the Department of Justice, resides in the Attorney General or his/her delegate, and the client agency may not control its handling or disposition. *See United States v. Sandstrom*, 22 F. Supp. 190, 191 (N.D. Okla. 1938); *FTC v. Guignon*, *supra*; E.O. 6166 § 5, June 10, 1933. In rare cases a statute may provide continuing settlement or other authority in the referring agency. Cf. 28 U.S.C. § 2348. An agency's recommendation (which may be couched in terms such as "we have accepted the offer of settlement," for example) should not be construed as an acceptance but rather only as a recommendation. Such powers as other officials of the government had theretofore with respect to litigation were withdrawn by E.O. 6166, June 10, 1933, leaving the Attorney General with complete authority. *See Duncan v. United States*, 39 F. Supp. 962, 964 (W.D. Ky 1941); *Aviation Corp. v. United States*, 46 F. Supp. 491, 494 (Ct. Cl. 1942), *cert. denied*, 318 U.S. 771 (1943); 38 Op. Att'y Gen. 124, 125. Where the authority of the Attorney General has been redelegated to United States Attorneys, and the client agency involved objects to the compromise, dismissal, or closing, the case may not be compromised, dismissed, or closed without the consent of the Assistant Attorney General of the Civil Division. "Consult" within the meaning of Civil Division Directive 14-95, means to discuss with the agency in good faith, in order to decide or plan an appropriate course of action. In Tort cases, although all agencies should be consulted, the agency "involved" for purposes of requiring referral to the Assistant Attorney General, Civil Division does not construe "agency or agencies involved" to ordinarily encompass the agency whose acts or omissions gave rise to the tort since the agency is not a proper party to an FTCA suit.

4-1.420 Responsibilities of Client Agencies -- Court Appearances

No suit may be brought on behalf of the government, absent an unusual express statutory authorization, except by the Attorney General or an attorney under his/her supervision. *See Sutherland v. International Ins. Co., supra*; E.O. 6166 § 5, June 10, 1933. Accordingly, in matters assigned to United States Attorneys for handling, the responsibility is that of the United States Attorney, and that responsibility may not be delegated to agency counsel.

The same principles apply when the government (through government corporations or the Maritime Administration) enjoys the benefit of insurance. Underwriters may nominate trial counsel. However, such trial attorneys are only "of counsel" to the United States Attorney. They do not control or direct the conduct of cases, which must remain with the United States Attorney. The United States Attorney or one of his/her assistants should monitor the course of such litigation carefully.

4-1.430 Responsibilities of Client Agencies -- Litigation Reports

Agency personnel are generally in the best position to know the facts involved in a case arising in connection with the activities of their agency. Agency counsel should have a great familiarity with agency practices and the statutes and regulations of the agency which may be relevant to a particular case. Obviously, records of the agency relevant to the case can best be assembled and certifications obtained by agency counsel. Thus, it has been the policy of the Division that the involved agencies be asked to provide litigation reports and recommendations as to any affirmative relief which should be requested or defenses which should be asserted.

In cases being directly handled by Assistant United States Attorneys, agency counsel should be instructed to furnish copies of litigation reports directly to the USAOs. Copies of litigation reports should also be furnished to Civil Division components that request them. In suits brought against the government, United States Attorneys are encouraged to make early contact with appropriate agency counsel. Excessive delays by government agencies in furnishing litigation reports should be brought to the attention of the Assistant Attorney General for the Civil Division.

4-1.440 Responsibilities of Client Agencies -- Pleadings and Interrogatories

Agency counsel may offer to prepare suggested pleadings and papers for civil cases. It is appropriate to receive such suggestions, or even to request agency preparation of suggested pleadings and papers, if this will facilitate the disposition of litigation rather than delay it. However, agency counsel are not required to provide this service. Pleadings and papers prepared by agency counsel should be critically examined, and rewritten as necessary, to assert the proper litigating position for the government and conform with proper practice and local rules.

Agency representatives generally should prepare the answers to interrogatories and sign such answers. *See Fed. R. Civ. P. 33.* Agency answers to interrogatories, if any, should not be submitted to the court pro forma, but should be critically examined, and recast if necessary, to reflect accurately the facts and the appropriate litigating position which should be taken under the circumstances.

4-1.450 Responsibilities of Client Agencies -- Referrals

Agency referrals for litigation should be accompanied by sufficient information, whether in the form of a litigation report or otherwise, to permit an intelligent evaluation of the factual and legal merits of the case. Agency counsel should be alert to apprise the Department of anticipated defenses, their strengths, and the best rebuttal to them. Non-fraud referrals for the recovery of money should comply

with the Federal Claims Collection Standards (*see* 4 C.F.R. §§ 101.1 to 105.5) implementing the Debt Collection Act, 31 U.S.C. §§ 3701 to 3720A. Where they involve amounts coming within the United States Attorneys' authority, the referrals should be made by the agencies directly to the National Central Intake Facility. Referrals of cases in excess of the United States Attorneys' authority should be made through the Civil Division.

4-1.500 Liaison of United States Attorneys with Civil Division

The degree of liaison which should be maintained with the Civil Division varies substantially from one type of case to another. Most civil cases, claims, and judgments have been delegated to the United States Attorneys for handling, though the Assistant Attorney General for the Civil Division remains responsible for their effective handling. Little liaison is required as to these cases. However, the Civil Division remains ready to advise and assist on these cases upon request.

Significant matters of policy, important questions of first impression, serious differences of views with client agencies, and adverse court decisions, should be brought to the attention of the Civil Division, regardless of the amounts involved, the method of referral, or whether the case is delegated or nondelegated. The Civil Division will communicate with client agencies to effect changes, clarification or consistency in policies, endeavor to make available the latest precedents which may not otherwise be available, attempt to assure reasonable uniformity of positions and procedures among United States Attorneys, advise whether particular cases should be used to test new propositions, and make available expertise developed in certain specialties over the years.

4-1.511 Cases Delegated to United States Attorneys

Although the Civil Division does not monitor the conduct of delegated cases and, with the exceptions set forth below, is not to be advised of litigation events in such cases, the Civil Division stands ready to advise and assist on these cases. Communications regarding delegated cases should be directed to the section or unit in the Civil Division bearing responsibility for the particular type of case.

Copies of pleadings and other communications on delegated cases are not to be furnished to the Civil Division routinely, except that the Torts Branch should always be advised of the date and method of disposition of suits under the Federal Tort Claims Act, and be furnished copies of the order, opinion, or stipulation which resulted in the disposition of the suit, and that the Office of Immigration Litigation should always be similarly advised of the disposition of suites under the Immigration and Nationality Act, as amended. Also, with regard to qui tam False Claims Act cases, the Fraud Section of the Commercial Litigation Branch should be notified of (1) a decision whether the government has intervened, or declined to intervene, in the case, (2) any legal or procedural issues that arise concerning the qui tam provisions, (3) settlement proposals by the parties and (4) the resolution of the case. The Division generally has no individual files on delegated cases. Therefore, inquiries directed to the Division on these cases should be accompanied with sufficient background, copies of pleadings, and briefs, to permit an informed appraisal of the nature and posture of the case and the problem. If the United States Attorney has had a previous communication on a particular case or on a general problem, the file numbers and initials or names appearing in the upper corner of the Civil Division's last communication should be used when writing the Department again. Disposition of delegated cases, like the disposition of nondelegated cases, must be accurately reported on the Department's statistical reporting system. In particular, all money and property collected for the government should be reported. Advice (in writing) of final, appealable adverse court rulings and orders, and a recommendation as to appeal, with supporting documents and explanation, must be promptly furnished to the appropriate Branch Directors.

Cases in which an interlocutory appeal may be desirable pursuant to 28 U.S.C. § 1292 should be discussed with the Appellate Staff telephonically, in order that the proper certification can be obtained on a timely basis if it appears that strong consideration will likely be given to such an appeal. Final appealable orders whose review will be by the United States District Court, as in bankruptcy cases, or by trial de novo in a state tribunal, should be reported to the Branch (rather than the Appellate Staff) having cognizance of that type of litigation, preferably by telephone. Prompt determinations as to appeal will be quickly communicated to the United States Attorneys in these short-deadline cases.

See USAM, Title 2, for procedures pertaining to adverse decisions in individual cases in which the claim is for benefits under the Social Security Act.

4-1.512 Cases Monitored by Civil Division

In cases referred by the Civil Division to the United States Attorney for handling on a monitored basis, the United States Attorney is to advise the Civil Division of the ultimate disposition of the case and furnish a copy of any compromise or closing memorandum. If such a case is transferred to another judicial district, a copy of the memo transferring papers on the case should be furnished to the Civil Division. In False Claims Act cases, authority must be obtained from the Civil Division to file suit, close, or settle a monitored case. In foreclosure actions, United States Attorneys must promptly advise the Civil Division in writing of the dates of:

- A. The filing of the complaint;
- B. Entry of an order placing the client agency in possession as mortgagee in possession or appointing a receiver, as the case may be;
- C. The entry of a judgment or foreclosure decree;
- D. Sale of the mortgaged property; and
- E. The delivery of the marshal's deed to the client agency or other successful purchaser.

If there exists any conflict between these instructions and the terms of an initial letter referring the case from the Civil Division to the United States Attorney, the procedures outlined in the referral letter should be followed.

In monitored cases, attorneys of the Civil Division will assist in the discussion of legal and factual problems, briefing, and trial, to the extent that time will permit. The Civil Division must be kept currently advised concerning developments in non-delegated cases.

All complaints served upon the United States Attorneys in non-delegated cases must be promptly dispatched to the Civil Division. Unless the Civil Division requests a more formal or expedited means of communication because of the sensitive nature of a case or for other reasons, it is suggested that most other developments can be reported currently by mailing copies of communications, pleadings, briefs, orders, etc., without a covering memo but with the Department of Justice file number and the name of the Civil Division branch written on an upper corner thereof. In the case of an offer in compromise or other written communication which should have expedited attention, a red slip reading "SPECIAL" or "IMPORTANT AND URGENT" can be stapled to the communication. If it is important that the communication bypass the Department of Justice mail room, the envelope should be clearly marked "PERSONAL-DO NOT OPEN IN MAIL ROOM." Alternatively, such communication can be directly mailed to the Post Office Box of the Civil Division component responsible for the litigation.

If the complaint against the government fails to identify the government agency or agencies involved, this information should be obtained telephonically from plaintiff's counsel and relayed to the Civil

Division. Care should be taken to obtain an appropriate extension of time, if a pleading date cannot be met.

In complex, major, or sensitive cases, such as medical malpractice litigation and aviation crash litigation, pre-trial agreements under Rule 16, Federal Rules of Civil Procedure, proposed stipulations of fact or findings and conclusions, and judgments, should be reviewed by the Civil Division only at the request of a United States Attorney or if the proposed stipulations are tantamount to a stipulation of liability. In any event, care should be taken with respect to stipulations and pre-trial agreements that foreclose the government's assertion of an available position.

The "discretionary function" defense in FTCA suits should be discussed with the applicable component of the Torts Branch before it is asserted. If there is any question as to which component is involved, contact the FTCA Staff. In Freedom of Information Act and Privacy suits, the Federal Programs Branch of the Civil Division (202-514-3354) must be advised of all developments. Copies of all papers filed must be promptly sent to the Branch. Special contact should be made with the Branch Director (202-514-3354) or with the Assistant Branch Director (202-514-3395) in charge of the area if in camera inspection is demanded or considered in FOIA suits. If a stay of an order couched in terms of an injunction is refused in either a FOIA or Privacy Act suit, pending a determination as to appeal, both the Branch and the Appellate Section (202-514-3311) should be notified at once.

In admiralty cases, correspondence with the Torts Branch or its field offices should include in the caption the name of the vessel involved.

4-1.513 Cases Personally Handled by the Civil Division or Jointly Handled With United States Attorneys' Offices

Some cases will be the responsibility of the Civil Division. When a case is being handled by a Civil Division attorney, the United States Attorney shall assign an Assistant United States Attorney to act as local counsel. The local counsel shall assist the Civil Division attorney in some, or all, of the following ways:

- A. advising Civil Division counsel of local rules and procedures;
- B. signing court filings, if required by local court rules;
- C. immediately notifying Civil Division counsel of court orders;
- D. attending court hearings or conferences; and
- E. providing assistance in the litigation of the case if necessary.

Some cases, particularly in the fraud and other affirmative enforcement areas, will be handled jointly by attorneys from the Civil Division and a USAO. In such cases, the attorneys will coordinate their efforts in a manner which maximizes the efficient use of Departmental resources. In these instances, the Civil Division must authorize filing suit, closing or settling the case.

4-1.514 Emergency Referrals in Nondelegated Cases

Client agencies are counseled to process cases sufficiently in advance of deadlines to avoid the necessity of "emergency referrals." Nonetheless there will be cases in which "emergency referrals" are required from time to time, as well as injunction actions against government officials and other proceedings, in which emergency action or representation is necessary. Frequently these "emergencies" are cleared telephonically with the Civil Division by the client agency. United States Attorneys are

authorized to take appropriate action to protect the government's interests in an emergency, without prior authorization from the Civil Division. Copies of papers filed or received in connection with such emergency action, and an explanation, should be forwarded as soon as possible. Representation should not be afforded a government officer, member of the armed forces, or employee sued personally for money damages for acts done within his/her official duties, without authorization from the Civil Division pursuant to 28 C.F.R. Part 15. The employee must submit a written request to his/her agency for representation by the Department, and the agency must submit a written request to the Department.

4-1.520 Liaison of United States Attorneys with Client Agencies

Whenever a case involves an agency of the United States as a client of the USAO it shall be the responsibility of the Division or United States Attorney to ensure that the client agencies are kept fully informed of case progress, developments and decisions.

The following steps are recommended as a means toward that end:

- A. Promptly upon receipt of a complaint against an agency, the Division or USAO, as appropriate, should mail a notification letter to the General Counsel of the agency or to his/her designee. (Where time does not permit, e.g., where a motion for a TRO has been filed, it may be necessary to notify the agency by telephone.) At the same time, or as soon thereafter as possible, the agency should be provided with the name(s) and telephone number(s) of the Department or USAO attorney(s) to whom the case has been assigned. The agency should be requested, in turn, to provide the assigned attorney(s) with the name, direct mailing address, and telephone number of the agency attorney to whom communications with respect to the case should be directed.
- B. With respect to affirmative cases, receipt of a referral from a client agency should be acknowledged promptly and names of attorneys exchanged as in Paragraph A.
- C. Unless reasons of economy indicate otherwise, copies of all significant documents filed in court in both defensive and affirmative cases should be sent, immediately upon receipt or service, to the client agency. If a client agency specifically requests, copies of all documents filed should be sent. (Service of a summons and complaint on the client agency may normally be assumed, and copies of exhibits forwarded by the client agency need not be reproduced and returned.)
- D. In nondelegated cases, the United States Attorney should also send copies of all documents filed in court to the Division responsible for the case.
- E. An agency should be notified in advance of any significant hearings, oral arguments, depositions, or other proceedings.
- F. Appropriate steps should be taken to consult adequately with agencies in advance regarding positions we intend to urge in court. Under no circumstances should a case be compromised or settled without advance consultation with a client agency, unless the agency has clearly indicated that some other procedure would be acceptable.

4-1.600 Prior Approvals

SECTION	TYPE & SCOPE OF APPROVAL	WHO MUST APPROVE	COMMENTS
4-1.312	Compromise or close any delegated case or claim involving amounts up to \$1 million except as specified in the delegation or in section 1(e) of Civil Division Directive No. 14-95.	Civil Division	See section 4(b) Civil Directive No. 14-95, 28 C.F.R. Chapter I, Part O, Appendix to Subpart Y. See USAM 4-3.120.
4-1.325	Execute foreign evidence requests from foreign tribunals.	Office of Foreign Litigation, Civil Division	
4-1.513	The "discretionary function" defense in FTCA or Admiralty suits should be authorized by the monitoring or delegating component of the Torts Branch Staff before it is asserted. If any question as to which component is involved, contact the FTCA Staff.	Torts Branch Civil Division	
4-3.120	Close, other than by compromise or by entry of judgment any claim or case on behalf of the United States where the gross amount involved exceeds \$1 million, or accept and reject any offers in compromise of any such claim or case in which the gross amount of the original claim does not exceed exceed \$5 million and the difference between the gross amount of the original claim and the proposed settlement does	Civil Division	Civil Division Directive 14-95; 28 C.F.R., Chapter I, Part O, Appendix to Subpart Y.

4-3.120 cont'd	not exceed \$1 million or settlement of the claim would adversely impact other claims totaling more than \$1 million.		
4-3.120	Accept or reject any offers in compromise of any claim or case against the United States where the principal amount of the proposed settlement exceeds \$1 million.	Civil Division	
4-3.140	In cases where the authority of the Attorney General has been redelegated to the United States Attorney, and the client agency objects to the compromise, dismissal or closing, then the case may not be compromised, dismissed, or closed without the consent of the Civil Division.	Assistant Attorney General, Civil Division.	See section 1(d)(3), Civil Division Directive No. 14-95; 28 C.F.R., Chapter I, Part O, Appendix to Subpart Y.
4-4.430	An assignment of any interest of the government in any money judgment, lien, or chose in action involved in any case or matter within the general jurisdiction of the Civil Division.	Civil Division	
4-4.550	No compromise should be entered into with the mortgagor prior to liquidation of the security property in HUD multi-family foreclosures.	Civil Division	

4-5.200	The undertaking of representation of government employees in Bivens type actions.	Torts Section, Civil Division	
4-6.330	Where a government employee is served with a subpoena duces tecum in litigation and the interested agency wishes to resist production, by claiming "confidential privilege."	Federal Programs Branch, Civil Division	In emergency, United States Attorney should contact Federal Program Branch. The Agency employee seeking to resist production must have the General Counsel Counsel of the agency request authorization from the Civil Division.

4-2.000 INSTITUTING ACTION

4-2.100 Sovereign Immunity
4-2.120 Exhaustion of Administrative Remedies
4-2.130 Standing to Sue
4-2.140 Effect of Declaratory Judgment Act and Administrative Procedure Act
4-2.150 Indispensable Party
4-2.200 Venue
4-2.300 Service of Process
4-2.400 Removal

4-2.100 Sovereign Immunity

Guidance on governmental immunity issues can be found in the Civil Resource Manual:

Immunity of the United States from Suit, Absent Express Consent	<u>Civil Resource Manual at 30</u>
Consent to be Sued is Strictly Construed	<u>Civil Resource Manual at 31</u>
Government Agencies are not Subject to Suit, Absent Statutory Waiver of Immunity	<u>Civil Resource Manual at 32</u>
Immunity of Government Officers Sued as Individuals for Official Acts	<u>Civil Resource Manual at 33</u>

4-2.120 Exhaustion of Administrative Remedies

See Civil Resource Manual at 34.

4-2.130 Standing to Sue

See Civil Resource Manual at 35.

4-2.140 Effect of Declaratory Judgment Act and Administrative Procedure Act

See Civil Resource Manual at 36.

4-2.150 Indispensable Party

See Civil Resource Manual at 37.

4-2.200 Venue

Guidance on venue issues can be found in the Civil Resource Manual at 38 et seq.:

Government as Plaintiff	See <u>Civil Resource Manual at 39</u>
United States as a Defendant	See <u>Civil Resource Manual at 40</u>
Government Officers and Agencies as Defendants	See <u>Civil Resource Manual at 41</u>
Change of Venue	See <u>Civil Resource Manual at 42</u>

4-2.300 Service of Process

Service upon the United States requires: (1) service upon the United States Attorney in the manner specified by Fed. R. Civ. P. 4(i)(1)(A); and (2) "by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia." Fed. R. Civ. P. 4(i)(1)(B).

The Attorney General has designated the Assistant Attorney General for Administration, Justice Management Division, to accept service of summonses and complaints for him/her. See 28 C.F.R. § 0.77(j). United States Attorneys have no authority to accept service on behalf of the Attorney General. In any action attacking the validity of an order of an officer or agency of the United States not made a party to the suit, service must be made "by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency." Fed. R. Civ. P. 4(i)(1)(C).

For general information on service of process issues, see the Civil Resource Manual at 43. For information regarding service on government officers in official capacity, agencies and corporations, see the Civil Resource Manual at 44.

4-2.400 Removal

See Civil Resource Manual at 45.

4-3.000

COMPROMISING AND CLOSING

- 4-3.100 Authority of the Attorney General
 - 4-3.110 Delegations of the Attorney General's Authority to Compromise and Close
 - 4-3.120 General Redelegation of the Attorney General's Authority to Compromise and Close
 - 4-3.130 Ad Hoc Redelegations of the Attorney General's Authority to Compromise and Close
 - 4-3.140 Exceptions to the Redelegation of the Attorney General's Authority
 - 4-3.200 Bases for the Compromising or Closing of Claims Involving the United States
 - 4-3.210 Compromising Claims Against a Going Business Concern
 - 4-3.220 Claims in Conjunction With Bankruptcy Code Proceedings
 - 4-3.230 Bases for Closing Claims Arising Out of Judgments in Favor of the United States by Returning Those Claims to the Client Agencies
 - 4-3.231 Monitoring of Payment Agreements by the Department of Veterans Affairs Debt Management Center (DMC)
 - 4-3.300 Memoranda by United States Attorney Explaining the Compromising or Closing of Claims Within the United States Attorney's Authority
 - 4-3.320 Memoranda Containing the United States Attorney's Recommendations for the Compromising or Closing of Claims Beyond His/Her Authority
 - 4-3.400 Consummation of Compromise of Claims of the United States -- Generally
 - 4-3.411 Issuance of a Receipt Where Suit Has Not Been Filed
 - 4-3.412 Dismissal Where Suit Has Been Filed
 - 4-3.420 Consummation of Compromise of Judgments in Favor of the United States
 - 4-3.430 Payment of Compromises -- Compromise Payable by Client Agency or Insurer
 - 4-3.432 Payment of Compromises -- Federal Tort Claims Act Suits
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4-3.100 Authority of the Attorney General

The Attorney General has the inherent authority to dismiss any affirmative action and to abandon the defense of any action insofar as it involves the United States of America, or any of its agencies, or any of its agents who are parties in their official capacities. *See Confiscation Cases*, 7 Wall. 454, 458 (1868) (action brought by an informer with expectation of financial gain); *Conner v. Cornell*, 32 F.2d 581, 585-6 (8th Cir.), *cert. denied*, 280 U.S. 583 (1929) (dismissal of suit on behalf of restricted Indian wards of the United States); *Mars v. McDougal*, 40 F.2d 247, 249 (10th Cir.), *cert. denied*, 282 U.S. 850 (1930); 22 Op. Att'y Gen. 491, 494; 38 Op. Att'y Gen. 124, 126; *see United States v. Throckmorton*, 98 U.S. 61, 70 (1878); *United States v. Newport News Shipbuilding & Dry Dock Co.*, 571 F.2d 1283 (4th Cir.), *cert. denied*, 439 U.S. 875 (1978). This authority may be exercised at any time during the course of litigation.

The Attorney General also has the inherent authority to compromise any action insofar as it involves the United States of America, its agencies, or any of its agents who are parties in their official capacities. *See Halbach v. Markham*, 106 F. Supp. 475, 479-480 (D.N.J. 1952), *aff'd*, 207 F.2d 503 (3rd Cir. 1953), *cert. denied*, 347 U.S. 933 (1954); 38 Op. Att'y Gen. 124, 126. This

authority is not dependent upon any express statutory provision. *See* 38 Op. Att'y Gen. 98, 99. To the contrary, it exists to the extent that it is not expressly limited by statute. *See Swift & Co. v. United States*, 276 U.S. 311, 331-2 (1928).

Note the additional authority delegated to the Attorney General by the second paragraph of section 5 within Executive Order 6166.

4-3.110 Delegations of the Attorney General's Authority to Compromise and Close

The Attorney General has delegated settlement authority in civil cases to the several Assistant Attorneys General and certain other officials. The controlling regulations, found at 28 C.F.R. § 0.160, *et seq.*, should be consulted before authorization is sought to compromise or close a case, but it may be helpful to note that generally:

- A. The Assistant Attorney General for the Civil Division can compromise an affirmative claim when the difference between the gross amount of the original claim and the proposed settlement does not exceed \$2 million or 15% of the original claim, whichever is greater, 28 C.F.R. §§ 0.160(a)(1), 0.169;
- B. He/she can compromise (or settle administratively) a defense claim when the principal amount of the proposed settlement does not exceed \$2 million, 28 C.F.R. § 0.160(a)(2).
- C. He/she can compromise all nonmonetary cases, 28 C.F.R. § 0.160(a)(3);
- D. He/she can reject most offers, 28 C.F.R. § 0.162;
- E. He/she can close (other than by compromise or by entry of judgment) an affirmative claim when the gross amount of the original claim does not exceed \$2 million, 28 C.F.R. §§ 0.164, 0.169;
- F. The Solicitor General must approve compromise in all Supreme Court cases and in many other appellate matters, 28 C.F.R. § 0.163;
- G. The compromising or closing of cases beyond these limits must be approved by the Deputy Attorney General, or Associate Attorney General, as appropriate, 28 C.F.R. §§ 0.160(c), 0.161, 0.164(b), 0.165, 0.167; and
- H. The Deputy Attorney General or Associate Attorney General, as appropriate, is further specifically authorized to exercise the settlement authority of the Attorney General as to all affirmative and defensive civil claims, 28 C.F.R. § 0.161(b).

4-3.120 General Redelelegation of the Attorney General's Authority to Compromise and Close

The Assistant Attorney General for the Civil Division has redelegated portions of the Attorney General's authority to United States Attorneys, and also to Deputy Assistant Attorneys

General, branch directors, the Director of the Appellate Staff, the Director of the Office of Foreign Litigation, the Director of the Office of Consumer Litigation, the Director of the Office of Immigration Litigation, and Attorneys-in-Charge of field offices of the Civil Division. Civil Division Directive No. 14-95, published in the Appendix to Subpart Y immediately following 28 C.F.R. § 0.172, 60 Fed. Reg. 17456 (1995), presently details those redelegations. See Civil Division Directive No. 14-95, 28 CFR Part 0.

While the United States Attorneys should study that published Directive before compromising, closing, or seeking authorization for the compromising or closing of a civil claim, it may be generally said that, subject to the exceptions noted in USAM 4-3.140:

- A. The Deputy Assistant Attorneys General of the Civil Division are authorized to act for, and to exercise the authority of, the Assistant Attorney General with respect to the institution of suits, and acceptance or rejection of compromise offers, and the closing of claims or cases, unless any such authority is required by law to be exercised by the Assistant Attorney General personally or has been specifically delegated to another Department official.
- B. Civil Division Branch, Office and Staff Directors, and Attorneys in charge of field offices, are authorized, with respect to matters assigned to their respective components, (and subject to 28 C.F.R. §§ 0.160(c), and 0.164(a) and section 4 of Directive 14-95, and the authority of the Solicitor General set forth in 28 C.F.R. § 0.163), to reject any offer in compromise, to accept offers in compromise against the United States where the amount to be paid by the United States does not exceed \$500,000, or to accept offers in compromise on behalf of the United States, or close cases, where the gross amount of the original claim does not exceed \$500,000, or where the gross amount of the original claim was between \$500,000 and \$5,000,000, so long as the difference between the gross amount of the original claim and the proposed settlement does not exceed \$500,000 or 15 percent of the original claim, whichever is greater.
- C. United States Attorneys may reject any offer in compromise, accept offers in compromise against the United States where the amount to be paid by the United States does not exceed \$1 million, or accept offers in compromise on behalf of the United States, or close cases, where the gross amount of the original claim does not exceed \$1 million, or where the gross amount of the original claim does not exceed \$5 million and the difference between the gross amount of the original claim and the proposed settlement does not exceed \$1 million or 15 percent of the original claim, whichever is greater.

4-3.130 Ad Hoc Redelegations of the Attorney General's Authority to Compromise and Close

By virtue of section 4(b) of Directive 14-95, upon the recommendation of the appropriate Director, the Assistant Attorney General for the Civil Division may delegate to United States Attorneys any claims or suits involving amounts up to \$5 million, where the circumstances warrant such delegation. See Civil Division Directive No. 14-95, 28 CFR Part 0.

All delegations pursuant to section 4(b) must be in writing, and no United States Attorney

has authority to compromise or close any such redelegated case or claim except as is specified in the required written redelegation or in section 1(c) of the Directive. The limitations of section 1 of the Directive, discussed at USAM 4-3.140, also remain applicable in any case or claim redelegated under section 4(b). *See* Civil Division Directive No. 14-95, 28 CFR Part 0.

4-3.140 Exceptions to the Redelegation of the Attorney General's Authority

By virtue of section 1 of Directive 14-95 and notwithstanding the redelegations of authority to compromise cases, file suits, counterclaims, and cross-claims, or to take any other action necessary to protect the interests of the United States discussed above, such authority may not be exercised, and the matter must be submitted to the Assistant Attorney General for the Civil Division, when:

- A. For any reason, the proposed action, as a practical matter, will control or adversely influence the disposition of other claims totaling more than the respective amounts designated;
- B. Because a novel question of law or a question of policy is presented, or for any other reason, the proposed action should, in the opinion of the officer or employee concerned, receive the personal attention of the Assistant Attorney General;
- C. The agency or agencies involved are opposed to the proposed action (the views of an agency must be solicited with respect to any significant proposed action if it is a party, if it has asked to be consulted with respect to any such proposed action, or if such proposed action in a case would adversely affect any of its policies);
- D. The United States Attorney involved is opposed to the proposed action and requests that the decision be submitted to the Assistant Attorney General for decision, or
- E. The case is on appeal, except as determined by the Director of the Appellate Staff.

See Civil Division Directive No. 14-95, 28 CFR Part 0.

4-3.200 Bases for the Compromising or Closing of Claims Involving the United States

A United States Attorney should compromise or close a claim (the term "claim" is used in its broadest sense to include, for example, a claim that arises out of a judgment entered for or against the United States) pursuant to the authority described in USAM 4-3.120 only when one or more of the following bases for such action are present:

- A. The United States Attorney believes that a claim of the United States is without legal merit (*see* 16 Op. Att'y Gen. 248 (1879); 23 Op. Att'y Gen. 631 (1902); 38 Op. Att'y Gen. 98 (1934));
- B. The United States Attorney believes that a claim of the United States cannot be factually proven in court (*see* 16 Op. Att'y Gen. 259 (1879); 23 Op. Att'y Gen. 631 (1902); 38 Op.

Att'y Gen. 98 (1934));

- C. The United States Attorney believes that a different claim of the United States should be selected for the purpose of resolving an open issue of law;
- D. The United States Attorney believes that the full amount of a claim of the United States cannot be collected in full due to the financial condition of the debtor.
 - 1. There must be a real doubt as to the government's ability to collect in full. *See* 12 Op. Att'y Gen. 543 (1868); 16 Op. Att'y Gen. 248 (1879); 16 Op. Att'y Gen. 259 (1879); 36 Op. Att'y Gen. 40 (1929).
 - 2. Uncertainty as to the price which property will bring on execution sale may be treated as an uncertainty as to collection. *See* 38 Op. Att'y Gen. 194 (1935). However, claims secured by a mortgage should not be compromised until after sale of the mortgaged property, since the government is generally entitled to both the amount the property will sell for and a deficiency judgment. In the rare instance in which such a compromise may be appropriate, a thorough appraisal by an impartial appraiser is indicated, to determine the value of the mortgaged property and avoid criticism from those who may later say they would have offered more for the property.
 - 3. A valid and provable claim, which can be collected, cannot be voluntarily relinquished. *See* 16 Op. Att'y Gen. 248 (1879); 21 Op. Att'y Gen. 50 (1894); 36 Op. Att'y Gen. 40 (1929).
 - 4. Compromise requires some mutuality of concession. There must be room for the play of give and take. *See* 16 Op. Att'y Gen. 248 (1879); 23 Op. Att'y Gen. 18 (1900); 36 Op. Att'y Gen. 40 (1929); 38 Op. Att'y Gen. 94 (1933). The adequacy of the concession is to be determined by the exercise of sound discretion. *See* 38 Op. Att'y Gen. 98 (1934).
 - 5. Hardship, which does not involve inability to pay, is not a proper basis for settlement. *See* 23 Op. Att'y Gen. 18 (1900); 38 Op. Att'y Gen. 94 (1933).
- E. The United States Attorney believes that the cost of collecting a claim in favor of the United States will exceed the amount recoverable (see 4 C.F.R. § 103.4);
- F. The United States Attorney believes that compromising or closing a claim of the United States is necessary to prevent injustice (see 38 Op. Att'y Gen. 98 (1934); 38 Op. Att'y Gen. 94 (1933));
- G. The United States Attorney believes that the enforcement policy underlying a claim of the United States will be adequately served by a compromise (see 17 Op. Att'y Gen. 213 (1881); 29 Op. Att'y Gen. 217 (1911); 31 Op. Att'y Gen. 459 (1919); as restricted by 21 Op. Att'y Gen. 264 and 36 Op. Att'y Gen. 40);

- H. The United States Attorney believes that it is less costly to compromise a claim against the United States than to undertake further legal action in defense against the claim; or
- I. The United States Attorney believes that a compromise of a claim against the United States is substantially more favorable than the verdict or judgment that would probably result from further litigation.

4-3.210 Compromising Claims Against a Going Business Concern

If a compromise with a going business concern necessitates the acceptance of payments over a period of time, the United States Attorney should obtain adequate security for deferred payments. It is also generally advisable for the United States Attorney to require a waiver of any and all claims which such a business concern has against the United States, including rights under the net operating loss carry forward and carry back provisions of the Internal Revenue Code, at least insofar as these are affected by the compromise proposal. In some situations, it may be advisable to require written consent for the audit of the concern's books and records. Consideration should also be given to having an independent appraisal of business assets as "forced sale" and "fair market" value, conducted at the concern's expense by an appraiser whose selection is subject to the approval of the United States Attorney. The United States Attorney should not accept a percentage of net profits in settlement or partial settlement of a claim. Cf. 4 C.F.R. § 103.9. Such arrangements are speculative at best; policing is difficult; and there are too many ways in which the affairs of the debtor concern can be manipulated to avoid, minimize, or postpone realization of a net profit. Corporate stock should generally not be accepted in settlement or payment of a claim in favor of the United States. *Id.* Managing such stock holdings places unusual burdens on client agencies. Letters of credit provide an excellent method for securing payment.

4-3.220 Claims in Conjunction With Bankruptcy Code Proceedings

A United States Attorneys' acceptance of a plan for reorganization under the Bankruptcy Code amounts to the compromise of a claim in favor of the United States and is governed by the same limitations and standards. For purposes of determining the United States Attorneys' authority to accept a plan, the term gross amount of the original claim as used in Civil Division Directive No. 14-95, 60 Fed. Reg. 17456 (1995), means liquidation value. Liquidation value is the forced sale value of the collateral, if any, securing the claims plus the dividend likely to be paid for the unsecured portion of the claims in an actual or hypothetical liquidation of the bankruptcy estate. If the debtor fails to provide the information needed to consider the plan, or if inadequate time is allowed to obtain any required Department of Justice approvals for the compromise, the United States Attorney should file an objection to the plan with the bankruptcy court.

4-3.230 Bases for Closing Claims Arising Out of Judgments in Favor of the United States by Returning Those Claims to the Client Agencies

Claims arising out of judgments in favor of the United States which cannot be permanently closed as uncollectible (see USAM 4-3.200) should be returned to the referring federal agency whenever:

- A. All other claims arising out of the same transaction have also been reduced to judgment;
- B. All monies collectible upon the claim(s) are payable to a single referring federal agency; and
- C. The claim is uncollectible except by installment payments which debtors agree to make to the referring agency, or the claim can be enforced by other means, but such enforcement is forborne in consideration of the promise for installment payments; or the claim is presently uncollectible but has future collection potential, and the United States Attorney is not in a better position than the agency to keep the matter under surveillance.

Return is also subject to the following caveats:

- A. The United States Attorney should be satisfied that, as a practical matter, the transfer will not adversely affect the chances of collection or the amount that will be collected.
- B. The agency must be willing to accept the transfer and must understand that it is not authorized to undertake final settlement, reduction, or release of any unpaid balance without the specific authorization of the Department of Justice, and all judicial proceedings to enforce or release judgments are to be conducted by the United States Attorney; and
- C. The United States Attorney should consider it unlikely that the claim will be returned to him/her for further proceedings.

4-3.231 Monitoring of Payment Agreements by the Department of Veterans Affairs Debt Management Center (DMC)

In the event a payment agreement is reached, either prior to, or after, judgment in a case involving a Department of Veterans Affairs (VA) educational allowance claim, the United States Attorney may utilize the VA's Debt Management Center (DMC) in St. Paul, Minnesota, to monitor the payments and close the file pursuant to USAM 4-3.230. Guidance on using the DMC can be found in the Civil Resource Manual at 227.

4-3.300 Memoranda by United States Attorney Explaining the Compromising or Closing of Claims Within the United States Attorney's Authority

Whenever a United States Attorney compromises or closes a claim involving the United States, pursuant to the authority as described in USAM 4-3.120 and 4-3.130, he/she should place a memorandum in the office file fully explaining the basis for the action. A copy of this memorandum should be sent to the appropriate branch of the Civil Division. This requirement is set forth at § 2(a) of Civil Division Directive No. 14-95, published in the Appendix to Subpart Y immediately following 28 C.F.R. § 0.172, 60 Fed. Reg. 17456 (1995).

4-3.320 Memoranda Containing the United States Attorney's Recommendations for the Compromising or Closing of Claims Beyond His/Her Authority

The compromising of cases or closing of claims which a United States Attorney is not authorized to approve should be referred to the Civil Division official having the requisite approval authority. The referral memorandum should contain a detailed description of the matter, the United States Attorney's recommendation, and a full statement of the reasons therefor. This requirement is set forth at § 2(b) of Civil Division Directive No. 14-95, *supra*.

4-3.400 Consummation of Compromise of Claims of the United States -- Generally

When a claim of the United States is compromised, the compromise should be effected and evidenced in the manner provided in USAM 4-3.300, et seq. No further evidence of settlement should be required, although a written settlement agreement between the debtor and the United States Attorney should be prepared. That agreement should be specifically limited to the immediate subject matter of the claim which was in fact compromised. In no case should a general release be issued to the debtor, since it is not possible to know whether the debtor owes debts to other agencies such as the Internal Revenue Service. If a compromise cannot be effected without the execution of a release, the release should be narrowly drawn, limited to the specific debt that is compromised, and should contain a specific reservation of the United States' right to proceed against other obligors.

If the compromise is made for the purpose of clearing title to a particular property, the release executed should be limited to the release of the United States' judgment lien or right of redemption as to that specific property. No release of a lien or a right of redemption should be executed without some appropriate consideration, even if the claim is questionable. If a compromise is effected with less than all obligors, care should be taken to reserve the United States' right to proceed against, or collect from, the others. A covenant not to sue, containing a specific reservation of such right, is preferable to a release (even when specifically limited) in this situation.

4-3.411 Issuance of a Receipt Where Suit Has Not Been Filed

When a compromise proposal has been accepted, and the consideration therefor has been received, no further action is required to consummate the compromise if suit has not been filed. The agency should be contacted in order to issue an IRS Form 1099-G as appropriate.

4-3.412 Dismissal Where Suit Has Been Filed

If a compromise is agreed to in a case in which the United States has filed suit, dismissal of the suit with prejudice is all that is required to evidence the settlement. If the settlement is to be paid in installments, judgment may be entered, with the defendant's permission, as security for the deferred installments. However, if this procedure has not been agreed upon as part of the compromise arrangement, and it is necessary to dismiss the suit, the dismissal should be without prejudice. See Fed. R. Civ. P. 41(a). Tort suits brought on behalf of the United States should not be dismissed in such circumstances without a written waiver of limitations, since partial payments do not toll the running of the statute of limitations.

4-3.420 Consummation of Compromise of Judgments in Favor of the United

States

If the United States' claim has been reduced to judgment, and the settlement is intended by both parties to satisfy the judgment obligation in full, a satisfaction of judgment should be filed upon full payment by the debtor under the compromise. This should be sufficient to evidence the consummation of settlement. However, if more than one obligor is bound by the judgment and the settlement is only as to one obligor's debt, only a partial satisfaction of the judgment can be executed. It is appropriate to release the judgment lien as to the settling debtor's property, but not as to the property of the nonsettling debtors.

4-3.430 Payment of Compromises -- Compromise Payable by Client Agency or Insurer

In a limited number of instances, compromises may be payable by an insurer, surety, title insurance company, or indemnitor. In such cases, the client agency should be asked to arrange for payment, or, with the agency's acquiescence, arrangements for payment can be made directly with the insurer, surety, or indemnitor. Some "sue and be sued" officials or agencies can pay claims from appropriations or revolving funds. In such cases, payment should be obtained from the client agency. It is preferable that compromises of claims arising out of the operations of certain government corporations and the shipping operations of the Maritime Administration be handled in the same manner as claims in favor of the government. Should circumstances warrant, these claims may be compromised by entry of an order approving the compromise.

Compromises of suits under the Tucker Act (28 U.S.C. § 1346(a)(2)) and the Suits in Admiralty Claims Act (46 U.S.C. § 741, et seq.) may, in unusual circumstances, be payable from appropriated funds of the client agency. However, generally it will be necessary to enter a consent judgment upon compromise, in order to obtain payment. Compromise of suits involving minors and other persons under legal disability, or by executors or administrators, should be approved by the local probate, orphan's, surrogate's, or other court of competent jurisdiction, where such approval is required by applicable state law. It is preferable that the amount of proper attorneys' fees which are to be paid from the settlement proceeds be specified in the settlement agreement. If this is not done, a separate check cannot be issued payable to the attorney. Arrangements should be made for all payments of compromises to be made through the USAO, in order that the check may be exchanged for dismissal of suit with prejudice, or an appropriate release or covenant not to sue.

4-3.432 Payment of Compromises -- Federal Tort Claims Act Suits

Compromises of suits in excess of the United States Attorneys' delegated authority must receive explicit and advance approval through the Civil Division of the Department of Justice, regardless of whether or not the case otherwise has been delegated for direct handling to the USAO. A memorandum setting forth the basis for the compromise should be forwarded to the Civil Division along with all material, including pleadings, necessary to understand the litigation and the basis for the settlement. Thereafter, the USAO will be advised of the action taken on the recommendation of the settlement.

After approval, the settlement agreement may be forwarded by the United States Attorney

directly to the Department of the Treasury (or, 1. in Postal Service cases, to the Postal Service; or 2. in Federally Supported Health Center cases, to HHS). Compromises in suits under the Federal Tort Claims Act, the Suits in Admiralty Act or the Public Vessels Act, are payable in the same manner as judgments. In no event should the settlement be forwarded to Treasury, the Postal Service, or HHS prior to approval from the Justice Department, except when cases are settled within the United States Attorneys' delegated authority.

See Section USAM 4-10.000 of this manual for the letters and forms to be used when sending compromises or settlements to the Treasury, the Postal Service, or HHS for payment.

COMMERCIAL LITIGATION

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4-4.543 Removal of Actions Brought in State Courts

4-4.544 Responsive Pleadings

4-4.545 Priority of Liens

4-4.550 Foreclosure of Government-Held Mortgages

4-4.600 Assistance on Questions of Foreign Law

4-4.620 Extraterritorial Service

4-4.630 Obtaining Testimony and Documents Abroad

4-4.100 Civil Fraud Cases—Contacts

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4-4.110 Civil Fraud Litigation

Civil statutory remedies available for fraud against the government are set forth in the False Claims Act, *as amended*, 31 U.S.C. § 3729 *et seq.*, the Anti-Kickback Enforcement Act, *as amended*, 41 U.S.C. §§ 51 to 58, 42 U.S.C. § 5157 (misapplication of disaster relief funds), 12 U.S.C. § 1715z-4a(a) to (e) (violation of HUD Multifamily regulatory Agreement), and section 5 of the Contract Disputes Act, 41 U.S.C. § 604. Common law actions for fraud, money paid under mistake, unjust enrichment, conversion, and/or breach of contract also should be pursued if applicable. The Fraud Section of the Commercial Litigation Branch has prepared a monograph on civil fraud litigation which has been distributed to all USAOs.

The False Claims Act allows private parties to file complaints on behalf of the United States. These are referred to as "qui tam suits." The Act requires that the qui tam complaint be served on the Attorney General and the United States Attorney for the district in which the complaint has been filed. Immediately after a qui tam complaint is received attorneys from the USAO and the Fraud Section should confer to ensure that both offices have received the complaint and to decide how the case will be handled.

The government is entitled to the fruits of an employee's dereliction, if there has been a betrayal of trust. *See United States v. Carter*, 217 U.S. 286 (1910). If an employee takes any gift, gratuity, or benefit in violation of his/her duty, accepts employment or acquires any interest adverse to his/her employer without a full disclosure, this is a betrayal of his/her trust and a breach of confidence for which the employee must account. *See United States v. Drumm*, 329 F.2d 109 (1st Cir. 1964); *United States v. Drisko*, 303 F. Supp. 858 (E.D. Va. 1969).

Civil sanctions against fraud should be vigorously enforced. Expeditionary enforcement of civil sanctions should be undertaken to make the government whole, if possible, and to provide a strong deterrent to fraudulent conduct in similar circumstances. Such enforcement is important to the promotion of the highest ethical standards among those who have dealings with the government or who are employed by it. Flagrant frauds, justifying the initiation of suits for multiple damages and penalties under relevant statutes generally, should not be compromised for less than multiple damages and some forfeitures. *See* 28 C.F.R. Subpart Y and Appendix for current delegations of compromise authority to United States Attorneys. Criminal and civil fraud investigations by the FBI and other investigative agencies should be carried out concurrently, including investigations as to the extent of the government's damage. Care should be taken to utilize grand jury

materials in connection with civil actions only pursuant to Fed. R. Crim. P. 6e. See *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983). Review the Memorandum from the Attorney General dated July 28, 1997, regarding Coordination of Parallel Criminal, Civil, and Administrative Proceedings. Likewise, review the Memorandum from the Attorney General to All United States Attorneys dated July 16, 1986, regarding Coordination of Criminal & Civil Fraud, Waste & Abuse Proceedings.

4-4.120 Civil Penalties And Civil Monetary Forfeitures

Congress has provided by statute for a myriad of civil penalties and civil monetary forfeitures. Responsibility as to particular penalties and forfeitures may be assigned to one of several divisions in the Department of Justice, including the Criminal Division (Asset Forfeiture and Money Laundering), since such sanctions are often an alternative to criminal sanctions. Civil penalty and forfeiture cases, which are not specially assigned to other divisions, are generally assigned to the Commercial Litigation Branch of the Civil Division; in a few instances, penalty cases may be assigned to the Federal Programs or Torts Branches of the Civil Division. Care should be taken to examine the statute under which the penalty or forfeiture is assessed to ascertain whether enforcement requires a trial de novo and whether any other special conditions attach. If a trial de novo is required, either party may demand a jury. See *Union Insurance Co. v. United States*, 73 U.S. 759 (1867). Some statutes may provide an administrative review procedure, with limited review in a court of competent jurisdiction. In such cases, a jury trial can be avoided if the procedure is properly structured. See, e.g., *Weir v. United States*, 310 F.2d 149 (8th Cir. 1962); *United States v. Sykes*, 310 F.2d 417 (5th Cir. 1962). Even in such cases, the courts will inquire as to whether the action taken was within the agency official's statutory authority, whether there was evidence before him/her in support of his/her determination to satisfy elementary standards of fairness and reasonableness. See *Lloyd Sabaudo Societa Anomina Per Azioni v. Elting*, 287 U.S. 329 (1932).

Courts may limit the imposition of statutory civil penalties as a violation of a defendant's constitutional rights. Penalties may be held to constitute a second punishment in violation of the Fifth Amendment's protection against double jeopardy, see *United States v. Halper*, 490 U.S. 435 (1989). A civil penalty imposed under the penalty provisions of the False Claims Act also may be held to be so large in comparison to the government's damages that it violates the excessive fines clause of the Eighth Amendment. See *Austin v. United States*, 509 U.S. 602 (1993); *United States v. Advanced Tool Co.*, 902 F. Supp. 1011 (W.D. Mo. 1995). In seeking civil monetary penalties or forfeitures, consideration should be given to challenges which may be raised based on either of these constitutional provisions.

4-4.200 Court of Federal Claims and Federal Circuit—Contacts

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4-4.210 Court of Federal Claims

Commercial Litigation Branch attorneys handle virtually all non-tax cases in the United States Court of Federal Claims. United States Attorneys should be vigilant in moving to dismiss or transfer cases brought in the district court over which the Court of Federal Claims has exclusive jurisdiction. Reference should be made to *Bowen v. Massachusetts*, 487 U.S. 879, 910, n.48 (1988); *North Star Alaska v. United States*, 14 F.3d 36, 37 (9th Cir.), cert. denied, 114 S. Ct. 2706 (1994); *Transohio Savings Bank v. Director, Office of Thrift Savings*, 967 F.2d 598 (D.C. Cir. 1992). Reference should be made to the Civil Division Monograph

entitled "Transfer of Cases to the Court of Federal Claims." For further discussion of Court of Federal Claims litigation see Civil Resource Manual at 47.

NOTE: Cases asserting implied warranties or indemnities arising out of contracts for government purchase of products made in conformity with Government specifications where those products' alleged toxicity caused personal injuries should be referred to the Environmental Torts staff of the Torts Branch. In addition, cases where government contractors seek to invoke indemnity provisions to be held harmless from environmental regulatory claims and tort claims should be referred to the same staff. See USAM 4-5.500.

4-4.220 Federal Circuit

Commercial Litigation Branch attorneys handle the majority of cases in the United States Court of Appeals for the Federal Circuit. The Federal Circuit possesses exclusive jurisdiction to entertain an appeal from a final decision of a district court if the jurisdiction of the district court is based "in whole or in part" on the Little Tucker Act. See 28 U.S.C. § 1295(a)(2); *United States v. Hohri*, 482 U.S. 64 (1987). Commercial Branch attorneys also represent the United States and its agencies in appeals to the Federal Circuit from decisions of the boards of contract appeals, the Court of Federal Claims, the Merit Systems Protection Board, and the Court of International Trade. 28 U.S.C. § 1295.

4-4.300 Intellectual Property—Contacts

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4-4.310 Intellectual Property—Copyright Suits

The exclusive remedy of the owner of material protected by statutory copyright (17 U.S.C. § 101, *et seq.*) against unauthorized use by the government or its contractors is by suit against the United States in the Court of Federal Claims. 28 U.S.C. § 1498(b). The use by the contractor must have been with the authorization or consent of the government.

Suits for copyright infringement against the United States Postal Service may be brought in the district courts. See 39 U.S.C. § 409(a). Such suits are defended by the Department of Justice on behalf of the Postal Service. See 39 U.S.C. § 409(d). Any suit for copyright infringement brought against the government in a United States district court should be brought to the attention of the Commercial Litigation Branch. Such a suit will be handled or monitored by that Branch.

A suit for infringement of an unregistered copyright may be brought against a private party provided the Register of Copyrights is also named as a party defendant. See 17 U.S.C. § 411(b). Any such complaint should be immediately brought to the attention of the Commercial Litigation Branch and the General Counsel, Copyright Office, Washington, D.C. 20540. If the Register of Copyrights decides to appear and defend such suit, the litigation will be handled by the Commercial Litigation Branch or under its supervision.

4-4.320 Patent Suits

The exclusive remedy of the owner of a patented invention used or manufactured by or for the government without the permission of the owner is by suit against the United States in the Court of Federal Claims. See 28 U.S.C. § 1498(a). Such use or manufacture by a contractor for the United States must be with the authorization and consent of the United States. An authorization and consent clause is usually included in contracts issued by Department of Defense agencies.

The district courts have concurrent jurisdiction with the Court of Federal Claims when the use or manufacture by or for the United States arises out of the furnishing of equipment to foreign governments in

connection with mutual security agreements (22 U.S.C. § 2356) or as the result of the imposition of an order requiring the invention to be kept secret for national security reasons. *See* 35 U.S.C. § 183.

By 39 U.S.C. § 409(a), the district courts are given original but not exclusive jurisdiction over all suits involving the United States Postal Service. Suits for patent infringement against the Postal Service are defended by the Department of Justice. *See* 39 U.S.C. § 409(d).

Any suit for patent infringement brought against the government in a United States district court should be brought to the attention of the Commercial Litigation Branch. Such a suit will be handled or monitored by that Branch.

4-4.330 Suits Involving Trademarks, Trade Secrets, or Technical Data

Suits may be brought from time to time charging the government with infringement of a trademark or with misappropriation of trade secrets or technical data. There is no express jurisdictional statute for such suits, and they may be brought in the district courts as either contract or tort actions. The district courts have, under 39 U.S.C. § 409(a), original jurisdiction of such suits involving the United States Postal Service; the Department of Justice defends on behalf of that Service. *See* 39 U.S.C. § 409(d).

Any suit brought against the government, involving trademarks, trade secrets, or technical data, should be brought to the attention of the Commercial Litigation Branch. Such suits will be handled or monitored by that Branch.

4-4.400 General Commercial Litigation—Contacts

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4-4.410 Bankruptcy Proceedings; Claims in Bankruptcy

The United States is frequently a creditor in bankruptcy proceedings. Because of the technical rules which obtain in bankruptcy, and the short deadlines for action and appeals, United States Attorneys should take unusual care to see that no rights of the United States are lost by default. The three most frequently invoked types of bankruptcy proceedings are described in the Civil Resource Manual at 48.

See also the following outlines in the Civil Resource Manual

The Bankruptcy "Players"	Civil Resource Manual at 48.
Bankruptcy Jurisdiction and Sovereign Immunity	Civil Resource Manual at 185 et seq.
Bankruptcy and the Government as Regulator	Civil Resource Manual at 54 et seq.
Avoidance Powers	Civil Resource Manual at 57 et seq.
Executory Contracts in Bankruptcy	Civil Resource Manual at 59 et seq.
Claims in Bankruptcy	Civil Resource Manual at 62 et seq.

4-4.413 Plans of Reorganization as Compromises

The purpose of "chapter proceedings" is to work out a compromise or extension of indebtedness. Thus, a proposed plan under Chapters 11, 12, or 13 amounts to a compromise offer or request for extension, as the case may be. If the plan proposes payment of the government's claim over a longer period of time than was originally called for, but there will be no reduction in the amount of the government's claim, and no release of security is required, no compromise is deemed involved. In some instances, plans provide for a cash deposit to pay the government's claims in full. Such proposals do not require the Civil Division's approval as a compromise of the government's claims.

Proposed plans which call for the government to accept less than the full amount due it, or for the release or substitution of security, amount to compromise proposals, and should be processed as any other compromise offer. If the offeror insists on an answer before necessary financial data, proper recommendations, and clearances can be obtained, the United States Attorney should object to the plan. The amount that would be realized by the government in the event of liquidation is a relevant consideration in judging the adequacy of an offer of compromise by way of a plan. Plans which call for the government to accept stock in a debtor or successor corporation in payment or partial payment of its claims, or which call for the government to accept a percentage of net profits, should be avoided.

4-4.414 Appellate Procedures in Bankruptcy

Appeals from all final judgments, orders and decrees of a bankruptcy court, as well as discretionary interlocutory appeals, are heard in the district court, 28 U.S.C. § 158(a) or before a bankruptcy appellate panel, 28 U.S.C. § 158(b), except for direct certified appeals, 28 U.S.C. Section 158(d)(2). Appeals from decisions of a bankruptcy court are controlled by Part VIII, Federal Rules of Bankruptcy Procedure. Interim Bankruptcy Rules for direct certified appeals have been approved. See 8001(f) and 8003(d). See also the "Who, What, When, Where, Why, and How" of Appeals in Bankruptcy Proceedings, Civil Resource Manual at 96-97.

Generally, in an appeal from the bankruptcy court, the district court sits as an appellate court. 28 U.S.C. § 1334(b). The district court may affirm, reverse, or modify the bankruptcy court's ruling or remand the case for further proceedings. Fed. R. Bankr. P. 8013. For further information about appellate procedures in bankruptcy, see Civil Resource Manual at 69.

For further information about appellate procedures in bankruptcy, see the Civil Resource Manual at 69.

4-4.420 Contracts

Affirmative government claims arising out of a contract subject to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 601 *et seq.*, must be the subject of a contracting officer's decision. If no appeal of the contracting officer's decision is taken by the contractor either to an appropriate Board of Contract Appeals within 90 days, or to the United States Court of Federal Claims within one year, that decision is final and not subject to further review. In such circumstances, an affirmative CDA suit may be filed in a district court to reduce the decision to an enforceable judgment. *See generally*, Civil Division Monograph entitled "Affirmative Claims by the government under the Contract Disputes Act" (1985). The Commercial Litigation Branch should be contacted prior to a suit being filed. Defensive contract litigation is discussed at USAM 4-4.210.

Guidance on contract issues can be found in the Civil Resource Manual

The Contract Disputes Act	Civil Resource Manual at 70
Protest of Contract Awards	Civil Resource Manual at 71
Principles of Contract Interpretation	Civil Resource Manual at 72
Ambiguities	Civil Resource Manual at 73
Validity and Construction of Liquidated Damages Provisions	Civil Resource Manual at 74
Claims of Mistakes in Bids	Civil Resource Manual at 75
Nonappropriated Fund Instrumentality Claims	Civil Resource Manual at 76
Quasi-Contractual Claims	Civil Resource Manual at 77

4-4.430 Collections

A major responsibility of the Attorney General, the Civil Division, and the United States Attorneys is recovering sums owed the United States. Prompt action should be taken to collect such debts, including the filing of suits, obtaining judgments, and enforcing judgments. Prompt and effective action is necessary if debtors are to respect the government's ability and will to collect these debts and if the public is to have confidence in the institutions of government. Prompt and effective action is also important to avoid a statute of limitations barring a claim. *See* 28 C.F.R. § 0.171. It is important that agency referrals be screened to ensure compliance with the Federal Claims' Collection Standards, the joint regulations promulgated to implement the Debt Collection Act. 31 U.S.C. §§ 3711 *et seq.* In particular, all referrals of money claims which come within the United States Attorneys' delegated authority up to \$1,000,000 should be made through the National Central Intake Facility. Referrals beyond that amount should continue to be made directly to the Commercial Litigation Branch of the Civil Division.

An appropriate supersede as bond should be required in every appeal by a defendant in a collection case. In no case should there be an assignment of any interest of the government in any money judgment, lien, or chose in action involved in any case or matter within the general jurisdiction of the Civil Division, without express approval from the Civil Division. Appropriate action should be taken to perfect judgment liens and to renew such liens before their expiration. In no event should a debtor be advised that a claim or judgment is being closed or inactivated. The Commercial Litigation Branch of the Civil Division should be consulted with respect to the collection of judgments against States and other governmental bodies. In such instance, pre-filing notice to the appropriate official is usually required as a matter of comity.

4-4.440 Conversion of Property Mortgaged to the Government

See Civil Resource Manual at 78.

Litigation Section) supervises the defense in any 2410 action involving eminent domain, partition or property over which the government owns or leases.

If the nature of the government's lien is not disclosed by the complaint, its nature should be ascertained by an informal inquiry to the plaintiff's attorney. If that fails, formal discovery should be used. 28 U.S.C. § 2410 requires that the interest of the United States be set forth in the complaint "with particularity." See *City Bank of Anchorage v. Eagleston*, 110 F. Supp. 429 (D. Alaska 1953).

4-4.541 Actions Not Within 28 U.S.C. § 2410

Section 2410 of title 28 does not apply if the plaintiff seeks an injunction, see *Shaw v. Rippel*, 224 F. Supp. 77 (E.D. Ill. 1963), or a money judgment. Such relief must be sought, if at all, under other statutes which waive the government's sovereign immunity. If the relief sought is foreclosure, 28 U.S.C. § 2410 requires that the plaintiff ask for a judicial sale. Such a sale is not required in the other four types of action permitted by 28 U.S.C. § 2410. If the interest of the United States is not a lien but rather a fee title or a leasehold, 28 U.S.C. § 2410 does not apply, but the plaintiff may be able to invoke 28 U.S.C. §§ 2409 or 2409a.

United States v. Brosnan, 363 U.S. 237 (1960), held that, in States which permit nonjudicial foreclosure of mortgages without actual notice to junior lienors (giving notice merely by advertising or by posting notices), such foreclosures can also destroy government junior liens without the service of process prescribed by 28 U.S.C. § 2410. Senior liens are not affected by such foreclosures, see 59 C.J.S. 1030, Mortgages § 596(a). *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), held that in tax foreclosure by state and local bodies, advertising and posting are not constitutionally adequate and that notice by mail was the minimum required.

Kasdon v. G.W. Zierden Landscaping, Inc., 541 F. Supp. 991 (D. Md. 1982), held that, if there has been a foreclosure by a local taxing authority, the purchaser of a title in that proceeding cannot bring an action under section 2410 to clear title and remove a federal lien unless the state tax foreclosure included a "judicial sale," that is, a sale ordered by a court judgment. If the state tax foreclosure did not include a judicial sale, the plaintiff who seeks to remove a federal lien must describe his/her action as a foreclosure and seek in that action the judicial sale which was lacking in the previous foreclosure by the taxing authority.

4-4.542 Screening New Actions Under 28 U.S.C. § 2410

The following items should be checked before filing a responsive pleading in an action brought under 28 U.S.C. § 2410.

- A. Has the Attorney General been served by certified or registered mail?
- B. Has the United States Attorney been served?
- C. Does the summons allow 60 days to file a response?
- D. Does the complaint set forth the interest of the United States with particularity?
- E. If the action is a foreclosure, does the complaint seek a judicial sale?

All these are required by 28 U.S.C. § 2410; the requirements are jurisdictional. See *Messenger v. United States*, 231 F.2d 328 (2d Cir. 1956). There are no rulings as to exactly what detail will meet the requirement of "particularity," but usually the United States Attorney's prime need is to know the agency involved in order to secure a litigation report.

4-4.450 Decedent's Estate

Guidance on decedent's estate issues can be found in the Civil Resource Manual

Decedent's Estate	Civil Resource Manual at 79
Devises and Bequests to the Government	Civil Resource Manual at 80
VA Escheat Claims	Civil Resource Manual at 81
VA Vesting Claims	Civil Resource Manual at 82

4-4.460 Grants—Breach of Conditions

See Civil Resource Manual at 83.

4-4.470 Guaranty Agreements

See Civil Resource Manual at 84.

4-4.480 Medicare Overpayment Cases

See Civil Resource Manual at 85.

4-4.510 Sureties

See Civil Resource Manual at 86.

4-4.520 VA Loan Claims

See Civil Resource Manual at 87.

4-4.530 Warranties

See Civil Resource Manual at 88.

4-4.533 Warranty of Prior Endorsements on Checks

See Civil Resource Manual at 89.

4-4.540 Defense of Foreclosure, Quiet Title, and Partition Actions—28 U.S.C. § 2410

Section 2410 of Title 28 waives the government's immunity from suit in five types of action as to real and personal property on which the United States has a lien. The nature of the lien determines which unit of the Department may be looked to by the United States Attorney for support, coordination and supervision.

If the government's lien is for federal taxes, the Tax Division will supervise the case. If the government's lien is for a criminal fine or bond forfeiture, the Criminal Division supervises. If the government holds a non-tax, non-criminal lien, such as a mortgage, judgment lien, or other lien, the Commercial Litigation Branch of the Civil Division supervises. The Environment and Natural Resources Division (General

4-4.543 Removal of Actions Brought in State Courts

Usually the Commercial Litigation Branch of the Civil Division will leave the decision as to removal of actions brought under 28 U.S.C. § 2410 to the United States Attorney.

Removal of actions brought in state courts under 28 U.S.C. § 2410 is authorized by 28 U.S.C. § 1444. Removal is an absolute right and there is no right of remand in these cases. *See Vincent v. P.R. Matthews Co.*, 126 F. Supp. 102 (N.D.N.Y. 1954); *Hamlin v. Hamlin*, 237 F. Supp. 299 (N.D. Miss. 1964). Removal should be accomplished within thirty days of receipt of a copy of the initial pleading, whether by service of process or otherwise.

4-4.544 Responsive Pleadings

Informal requests to opposing counsel to correct deficiencies, such as those cited in USAM 4-4.542 will often obviate filing a preliminary motion. Answers should assert the interests of the United States and claim priority in accordance with the federal rule of "first in time, first in right." *See* USAM 4-4.545. If the government holds a first lien position and the client agency does not wish foreclosure of that lien, the answer should pray that the sale on plaintiff's lien foreclosure should be "subject to" the prior lien of the government. If the client agency desires a sale free and clear, the prayer in the answer should so state.

In some instances, the client agency may advise that it can find no identifiable interest in the property described in the complaint. Any disclaimer filed on this account should be carefully limited to the particular property and government agency described in the complaint. No disclaimer should be filed merely because the government's lien interest is subordinate to that of the plaintiff.

4-4.545 Priority of Liens

See Civil Resource Manual at 95.

4-4.550 Foreclosure of Government-Held Mortgages

Agencies which can safely foreclose security instruments nonjudicially under appropriate federal or state law, or pursuant to a power of sale in a deed of trust, should do so without referring such matters to the Department of Justice or the United States Attorneys for handling.

The Department of Housing and Urban Development (HUD) may also foreclose nonjudicially pursuant to the Multi-Family Foreclosure Act of 1981. *See* 12 U.S.C. § 3701 *et seq.*

If judicial foreclosure is required, suit should be brought in the name of the United States and filed in the United States district court, unless, for exceptional reasons, the Civil Division has authorized utilization of the state courts. An officer or agency of the United States should not be joined as a defendant. Rather, the respective claims and liens of the federal agencies affected should be set forth as claims of the United States. If difficulty is encountered in obtaining the prompt agreement of another agency to have its lien foreclosed in the same proceeding as that requested by the referring agency, contact the Commercial Litigation Branch.

Judicial foreclosure should be given priority attention. Client agencies claim a substantial dollar loss for each month of delay in completing foreclosure through the delivery of the Marshal's deed. Suit should be filed immediately, without making further demand on the mortgagor, unless additional notice is otherwise required under the mortgage or applicable statute or regulation. If the agency desires an order placing it in possession of the mortgaged property as "mortgagee in possession," or the appointment of a receiver, prompt action should be taken. Motions for summary judgment should be utilized when appropriate to expedite the entry of foreclosure decrees. In HUD multi-family foreclosures no compromise should be entered into with the mortgagor prior to liquidation of the security property without the express approval of the Civil Division.

See generally, "Affirmative Multi-Family Mortgage Litigation: Foreclosure, Deficiencies, and Interlocutory Relief (Mortgagee-In-Possession and Receiver)" (1983).

4-4.600 Assistance on Questions of Foreign Law

The Office of Foreign Litigation of the Civil Division (202/514-7455) is often able to provide advice concerning questions of international or foreign law which may arise in connection with the trial in this country of civil cases. Such assistance should be requested as far in advance of trial as possible.

4-4.620 Extraterritorial Service

Guidance may be obtained from the Office of Foreign Litigation at (202) 514-7455, concerning the procedures to be followed in effecting extraterritorial service of process (including subpoenas directed to United States nationals or residents abroad under 28 U.S.C. § 1783). D.J. Memo No. 386, Rev. 3, July 1979, "Instructions for serving foreign judicial documents in the United States and for processing requests by litigants in this country for service of American judicial documents abroad."

4-4.630 Obtaining Testimony and Documents Abroad

Guidance in obtaining testimony and documents from abroad may be obtained from the Office of Foreign Litigation (202/514-7455).

The Office of Foreign Litigation is able in many instances to provide collateral assistance to United States Attorneys by instituting suits in foreign courts to collect debts owed to the United States and to attach foreign bank accounts or other property ancillary to such suits.

TORT LITIGATION

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4-5.100 Tort Litigation—Generally

Tort litigation against the Federal Government is under the general supervision of the Civil Division's Torts Branch. The Torts Branch has four different litigation offices or staffs, each of which specializes in a different area.

- The *Aviation and Admiralty* Staff handles claims arising out of the government's role as aircraft or ship owner and as regulator of both air traffic and the nation's coastal and inland waterways.
- The *Constitutional and Specialized Torts* Staff represents federal employees sued in their individual capacities for actions taken within the scope of their employment and handles matters arising out of claims under the Vaccine and Radiation Exposure compensation programs.
- The *Environmental Torts* (formerly Environmental and Occupational Disease Litigation) Staff handles property and personal injury cases involving toxic substances in the environment, the workplace, and government-owned housing.
- The *Federal Tort Claims Act Staff* handles all other tort claims, including traditional actions against the government for personal injury and property damage.

Cases brought under the Federal Tort Claims Act may be the responsibility of any one of the four staffs, depending upon the subject matter. Although different categories of tort cases are the responsibility of the different staffs of the Torts Branch, many aspects of defending a federal tort lawsuit are common to all, or several, categories of tort cases. For example, many of the defenses available under the Federal Tort Claims Act may be equally applicable in aviation cases, general tort cases, and cases involving exposure to hazardous substances. Similarly, it is not uncommon for a single case to present alternative causes of action which cross the boundary between particular categories. For example, a single case will often include both a constitutional tort claim against individuals and a general tort claim against the government. In addition, as will be discussed, *infra*, some related contract issues may be handled by the Torts Branch, and, in some circumstances, cases may be the joint responsibility of the Torts Branch and other components of the Civil Division or other Divisions of the Department.

4-5.110 Torts Branch Components—Aviation and Admiralty

The Aviation and Admiralty staff represents the government in its role as owner of ships and regulator of the nation's coastal waters and inland waterways. Admiralty litigation may involve suits under statutes such as the Suits in Admiralty Act, the Public Vessels Act, and the Contract Disputes Act. Issues in admiralty may involve cargo damage, ship collision, contracts, and pollution in navigable waters. Aviation litigation arises from private and military air carrier operations and from the government's ownership and operation of both civil and military aircraft. The government's role in air traffic control, aircraft and airport certification, and dissemination of weather information is often involved in these cases.

4-5.120 Torts Branch Components—Constitutional and Specialized Torts

The Constitutional and Specialized Torts staff represents current and former Government officials who are personally sued for monetary damages as a result of actions taken in the course of their official duties. An exception to this is that all cases relating to the delivery or failure to deliver medical care to prisoners, including Bivens actions, should be sent to the FTCA staff. This staff also represents the government in claims brought against the Secretary of Health and Human Services under the National Vaccine Injury Compensation Program. Cases under the Program are litigated in the U.S. Court of Federal Claims and involve allegations of injuries and death attributable to the receipt of certain childhood vaccines. Further, this section is responsible for reviewing claims and compensating victims of radiation exposure from atmospheric nuclear testing and uranium mining under the Radiation Exposure Compensation Act.

4-5.130 Torts Branch Components—Environmental Torts (formerly Environmental and Occupational Disease Litigation)

The Environmental Torts (ET) staff defends the United States in cases arising from allegations of personal injuries and property damage due to exposure to toxic materials resulting from federal activities. Ongoing litigation addresses complaints of injuries caused by air, surface-water, or groundwater contamination; housing and facility construction/renovation programs; and radiation experimentation. These cases include exposure to substances such as TCE, PCBs and dioxins, asbestos, lead-based paint, Agent Orange, Legionella bacteria, radiation, electric magnetic fields and biological agents. Tort cases alleging toxic injury to persons or property in the course of EPA's clean-up activities are the responsibility of ET.

4-5.140 Torts Branch Components—Federal Tort Claims Act Staff

The Federal Tort Claims Act Staff defends the government against tort suits including, for example, such areas as medical malpractice, personal injuries attributed to the actions of government employees, and Governmental Regulatory activities. This staff is also responsible for affirmative tort claims not encompassed within another staff's responsibilities. Any tort suit not within the responsibility of the other three staffs is the responsibility of the FTCA Staff.

4-5.200 Torts Branch Procedures—Conduct of FTCA Litigation

Upon service of a complaint sounding in tort, the United States Attorney shall promptly forward a copy of that complaint to the appropriate component within the Torts Branch. The forwarding letter should indicate the date of service on the United States Attorney's Office and the name of the judge to whom the case has been assigned.

After receiving a copy of the summons and complaint in a suit under the Federal Tort Claims Act the appropriate staff of the Torts Branch will notify the United States Attorney by letter of whether litigation responsibility for the case is designated as "primary," "joint," "monitored," or "delegated" within the Torts Branch. See USAM 4-1.310 *et seq.*

If an adverse judgment is received in a delegated FTCA case, the amount of the judgment is less than \$500,000 and no significant issue is presented by the adverse decision, and both the United States Attorney and the affected agency recommend against appeal, the judgment can be promptly forwarded to the Tort Branch Director responsible for the matter who is authorized to determine against appeal, provided the determination is made within thirty days after entry of judgment. All other matters involving adverse judgments, the adverse judgments along with comments and supporting materials must be forwarded to the Appellate Staff; a copy of these materials also should be forwarded to the Torts Branch.

Copies of all compromise memoranda should be forwarded to the appropriate Torts Branch staff. Addresses are provided in USAM 4-5.300, 400, 500, and 600.

4-5.220 Torts Branch Procedures—Substantive Considerations in FTCA Litigation

The Assistant United States Attorney assigned to a tort suit is expected to assume full responsibility for preparation of an aggressive, professional defense to the suit, unless the suit is one assigned to be handled directly by a component of the Torts Branch. The initial letter from the Torts Branch will request the agency to forward a litigation report to the Assistant United States Attorney. This litigation report will be the starting point for development of the facts and legal position to be taken in the litigation. However, the Assistant United States Attorney is responsible for ensuring that each reasonable legal and factual defense is pursued regardless of whether the agency litigation report identifies the defense. The Torts Branch Monographs and, particularly the FTCA Staff's Monograph "Checklist of FTCA Defenses," provide assistance.

The Assistant United States Attorney should obtain approval from the appropriate Torts Branch Staff prior to raising the "discretionary function exception" defense in any case and may well desire to consult with the Branch when a difficult issue pertaining to any of the exceptions or exclusions to the Federal Tort Claims Act arises. If the case is designated as a monitored case, Assistant United States Attorney may seek assistance from the Torts Branch attorney or reviewer designated in the initial letter from the Torts Branch to the agency.

requesting a litigation report. If the case is designated as a delegated case, the author of the appropriate Monograph, if any, should be contacted or inquiry may be made by calling the responsible Director's office.

The FTCA is the exclusive remedy for common law torts committed by federal employees acting in the scope of employment. United States Attorneys are authorized to make the certification required by law (28 U.S.C. § 2679(d)(1)) in order to substitute the United States for a federal employee against whom a common law tort suit is brought. *See* 28 C.F.R. § 15.3.

4-5.230 Torts Branch Procedures—Settlement of Federal Tort Claims Act Suits

United States Attorneys responsible for the defense of FTCA or other tort litigation (e.g., Suits in Admiralty Act or Vessels Act) are currently delegated \$1,000,000 in settlement authority, subject to the limitations set forth in Civil Division Directive No. 14-95, 28 C.F.R. Pt. O, Sub. Pt. Y, App. If a United States Attorney seeks to settle for an amount in excess of the delegated authority, a detailed justification for the settlement must be forwarded to the Torts Branch. The responsible Director will then make a recommendation to the Assistant Attorney General (or if the proposed amount is in excess of \$2,000,000 to the Associate Attorney General). Although the Torts Branch endeavors to expedite consideration of settlement proposals, opposing counsel and, if necessary, the court should be informed that immediate action cannot be guaranteed on any settlement proposal. It is customary to consult with the Torts Branch during settlement negotiations when any concern arises regarding the advisability of settlement or of the amount of the settlement. Although authority to settle a case can be obtained in exceptional cases prior to submission of an authorized offer from the other party(ies) to the case, this procedure is highly disfavored and should not be used unless special justification for its use is provided. However, the Torts Branch will provide counsel as to what amount it will recommend to the Assistant Attorney General in advance of initiation or completion of settlement negotiations.

Stipulations for admissions which are tantamount to a stipulation of liability must be approved by whatever level of authority is appropriate based on the highest reasonably predictable judgment that the court could enter predicated upon the stipulation or admission.

4-5.240 Torts Branch Procedures—FTCA Payment Procedure

The procedures for payment of an FTCA settlement should not be initiated until after all required approvals are obtained. Most FTCA settlements are paid by means of a Treasury check issued upon making a request to the Department of the Treasury. Forms for use in transmitting requests for payment to the Treasury Department are included in the Civil Resource Manual at 224 *et seq.*

Structured settlement agreements require careful attention to the terms and provisions of the agreement. The Torts Branch is available to be consulted regarding the particular terms of a structured settlement. Copies of the final settlement papers should be forwarded to the Torts Branch for retention. In the event that a reversionary trust provision is included in a structured settlement, the trust should include a requirement that the reversionary interest be paid to the United States Treasury in care of the Torts Branch pursuant to the terms of the agreement. Further information on the format and provisions for structured settlements is included in the Torts Branch Handbook entitled "Damages Under the FTCA."

4-5.300 Aviation and Admiralty Litigation—Contacts and Mailing Information

Gary W. Allen, **Director**, (202) 616-4000, SS07(ALLEN).

Admiralty: David v. Hutchinson, Assistant Director for Admiralty, (202) 616-4126, SS07(HUTCHINS); Debra J. Kossow, Senior Admiralty Counsel, (202) 616-4070, SS07 (KOSSOW); Scott R. Blaze, Senior Admiralty Counsel, (202) 616-4042, SS07(BLAZE).

Aviation: Kathlynn Fadely, Assistant Director for Aviation, (202) 616-4044, SS07(FADELY); Steven J. Riegel, Senior Aviation Counsel, (202) 616-4049, SS07(RIEGEL); James C. Wilson, Senior Aviation Counsel, (202) 616-4055, SS07(WILSON); Barbara B. O'Malley, Special Litigation Counsel, (202) 616-4081, SS07(OMALLEY).

New York Field Office: Janis Schulmeisters, Attorney in Charge, (212) 264-0480, civ20(jschulme); Jack S. Rockafellow, Assistant Attorney in Charge, (212) 264-0482, civ20(jrockafe). **Mailing & Delivery:** Aviation & Admiralty Litigation, Torts Branch, Civil Division, 26 Federal Plaza, Suite 320, New York, NY 10278-0140.

West Coast Field Office: Philip A. Berns, Attorney in Charge, (415) 436-6630, civ21(pberns); Warren A. Schneider, Assistant Attorney in Charge, (415) 436-6645, civ21(wschneid). **Mailing:** Aviation & Admiralty Litigation, Torts Branch, Civil Division, West Coast Field Office, 450 Golden Gate Ave., P.O. Box 36028, San Francisco, CA 94102-3463.

4-5.310 Admiralty Litigation

The Admiralty staff of the Torts Branch specializes, on the defensive side, in cases involving collisions at sea, groundings, seamen's injuries, search and rescue and other actions relating to the government's regulation of the nation's waterways. On the affirmative side, the cases include mortgage foreclosure, oil pollution and damage to government property. The admiralty staff also handles cases filed in district courts involving maritime contracts, both defensive and affirmative. The Admiralty staff generally retains primary responsibility for the defense of admiralty litigation, including preparation and trial. In any admiralty case handled primarily by an Assistant United States Attorney, there should be close cooperation with the Admiralty staff.

Two field offices handle the bulk of New York area and West Coast maritime cases because of the number of cases arising in these port areas and the active presence of major client agencies in these areas. Maritime cases involving New York or nearby environs generally are handled by the New York Field Office located in New York City. Cases brought in West Coast states, as well as in Alaska, Hawaii and Guam, are generally handled by the West Coast Field Office in San Francisco.

4-5.320 Aviation Litigation

The Aviation staff specializes in the defense of aviation cases arising primarily out of the activities of the FAA, NWS, NOAA and the military services. The Aviation staff generally retains primary responsibility for the defense of aviation litigation, including preparation and trial, particularly if questions of broad national import with particular precedential significance are involved, or if the litigation will raise questions concerning the use of air traffic control services or dissemination of weather and in-flight information to operators of commercial and private aircraft. In any aviation case handled primarily by an Assistant United States Attorney, there should be close cooperation with the Aviation Staff.

4-5.400 Constitutional and Specialized Torts—Contacts and Mailing Information

Helene M. Goldberg, Director, (202) 616-4140, civ10(hgoldbe).

Nicki L. Koutsis, Assistant Director, (202) 616-4150, civ10(nkoutsis).

Gordon W. Daiger, Senior Trial Counsel, (202) 616-4330, civ10(gdaiger); Timothy P. Garren, (202) 616-4171, civ10(tgarren); R. Joseph Sher, Senior Trial Counsel, (202) 616-4328, civ10(jsher).

Mailing:

Civil Division
United States Department of Justice
P.O. Box 7146
Benjamin Franklin Station
Washington, D.C. 20044

4-5.410 Constitutional and Specialized Torts—Introduction

The Constitutional Torts staff defends present and former government officials in suits seeking damages against them in their official and individual capacities based upon official conduct. Pursuant to 28 U.S.C. §§ 516 to 519, the Attorney General and the Department of Justice are responsible for attending to the interests of the United States in litigation which includes providing representation to present and former government employees who are sued for actions taken within the scope of their employment. Policy

guidelines for Department of Justice representation are published at 28 C.F.R. §§ 50.15 and 50.16. The Constitutional Torts staff processes the majority of representation requests in suits against individual federal employees, and questions regarding representation requests should be directed to that staff.

Personal damages claims against individuals raise special concerns that are critical to their defense and with which the government attorney must be able to deal effectively. These are discussed briefly in subsequent sections.

4-5.412 Constitutional Torts—Representation Process

A. Generally. Personal representation of government employees is necessary only when they are sued in an individual capacity, for damages. When a government employee is sued in an official capacity, the real defendant is the United States. Should relief be awarded, it would be against the resources of the United States. The Department of Justice represents federal officials sued in their official capacities for declaratory, injunctive or other forms of relief. No formal request for representation is necessary in such cases.

When an employee (present or former) is sued in his or her individual capacity, he or she is the personal target of the lawsuit. The plaintiff seeks recovery from the personal assets of the employee as opposed to the assets of the United States. Additionally, it is noted that in most instances a federal employee providing testimony (i.e. deposition), and who is not a party to the action, does not need personal representation and Department of Justice representation will not be authorized. In any case in which there is doubt as to whether an employee is sued in his individual capacity for constitutional or federal statutory violations, authority to represent the official individually should be secured from the Department pursuant to 28 C.F.R. § 50.15.

B. Criteria. Department of Justice representation is generally not available in a federal criminal proceeding or investigation. 28 C.F.R. § 50.15(a)(4). Nor is it available in a civil case if the employee is the subject of a federal criminal investigation concerning the act or acts for which he seeks representation. *See* 28 C.F.R. § 50.15(a)(5) to (7). In such a civil case, however, private counsel may be provided to the employee at federal expense, provided no decision has been made to seek an indictment or file an information against the employee. 28 C.F.R. § 50.15(a)(7).

The criteria for personal representation of an employee are:

1. Scope of employment. The employee's actions giving rise to the suit must reasonably appear to have been performed within the scope of his/her federal employment.

2. Interest of the United States. It must also be in the interest of the United States to provide the requested representation. 28 C.F.R. § 50.15(a). The Department of Justice is ultimately responsible for making the "scope" and "interest" determinations after benefitting from the agency recommendation. Because the Executive Branch is responsible for determining the interests of the United States in litigation, decisions of this nature are precluded from Judicial Branch scrutiny by the doctrine of separation of powers. *Falkowski v. Equal Employment Opportunity Commission*, 764 F.2d 907 (D.C. Cir. 1985), *reh'g denied*, 783 F.2d 252 (D.C. Cir.), *cert. denied*, 478 U.S. 1013 (1986).

C. Procedure for Requesting Department of Justice Representation.

1. Generally. Department of Justice representation is neither automatic nor compulsory; federal employees are free to retain counsel of their choice at their own expense. Every individual defendant who desires Department of Justice representation must request it in writing. The written request should be submitted to the individual's employing agency (usually the Office of the General Counsel, Chief Counsel, or Solicitor) along with a copy of the Summons and Complaint or other legal papers. The agency should then forward the request with all available factual information to the Department of Justice with a recommendation as to whether representation should be provided based upon the criteria of "scope" and "interest." It is also suggested that a courtesy copy of the papers be provided to the United States Attorney in the district where the suit is filed.

2. Conditional Representation. Frequently, a representation request must be resolved quickly. In such cases, telephone approval may be secured from the Director, Assistant Director, or Senior Trial Counsel of the Constitutional Torts Staff. *See* 28 C.F.R. § 50.15(a)(1). This approval is conditional and must be supplemented by the aforementioned written materials. Additionally, United States Attorneys have automatic authority to seek extensions of time in which to respond to a complaint.

D. Representation Agreements. Upon formal approval of representation, the litigating attorney should forward a Form 399 to the client for signature and return. The form sets forth the limitations of Department of Justice representation so that the client may be fully informed before he or she enters into the attorney-client relationship. See Department of Justice Order 2770.5.

E. Appellate Review. Whenever the Solicitor General declines to authorize an appeal on behalf of an employee or representation of the employee involves assertion of a position that conflicts with the interest of the United States, the Department may not continue to represent the employee if: (1) the employee does not knowingly agree to forego appeal or waive assertion of the position; or (2) the assigned attorney determines, after consultation with his or her supervisor (and, if appropriate, with the litigating division) that an appeal or assertion of the position is necessary to the employee's adequate representation. 28 C.F.R. § 50.15(a)(11). However, in appropriate cases, private counsel may be provided at federal expense. 28 C.F.R. § 50.15(a)(11)(iii).

F. Payment of Adverse Judgments. Regardless of whether representation is provided by the Department of Justice, a federal employee remains personally responsible for the satisfaction of a judgment entered solely against the employee; there is no right to compel indemnification from the United States or an agency thereof in the event of an adverse judgment. However, the Attorney General may authorize indemnification of Department of Justice employees for adverse judgments or, in exceptional circumstances, for adverse settlements. See 28 C.F.R. § 50.15 (c). Some other agencies have similar regulations allowing indemnification of their employees.

G. Private Counsel. Where conflicts in the factual or legal positions of a number of defendants make representation by a single attorney impossible, retention of private counsel at government expense may be authorized, provided the scope and interest criteria have been satisfied and subject to the availability of funds. See 28 C.F.R. § 50.15(a) (10) and 50.16. Special written agreements between the Department of Justice and private counsel are required. See Administrative Directive 2120.

4-5.415 Constitutional Torts—Appealability of Immunity Claims

The current immunity doctrines not only are designed to protect officials from liability but from the burdens of litigation as well. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Accordingly, an order denying an absolute immunity defense is immediately appealable, to the extent that it turns on an issue of law. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). In *Johnson v. Jones*, 515 U.S. 304 (1995), the Supreme Court held that a pretrial order denying qualified immunity is not immediately appealable to the extent that the order "determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." 515 U.S. at 319. Nevertheless, appellate jurisdiction will still exist over the district court's determination that a violation of clearly established law has been shown on a given set of facts, or that a factual dispute is material to the issue of qualified immunity. See *Behrens v. Pelletier*, ___ U.S. ___, 116 S.Ct. 834, 842 (1996). Regarding any possible appeal of a denial of immunity, very close contact should be maintained with the Torts Branch and Appellate Staff. See 28 C.F.R. § 50.15(a)(11).

4-5.420 National Vaccine Injury Compensation Program—Contacts and Mailing Information

John L. Euler, (202) 616-4088, Deputy Director.

Charles R. Gross, (202) 616-4131, Assistant Director.

Gerard W. Fischer, (202) 616-4090, Assistant Director.

Mailing:

National Vaccine Injury Compensation Program
Torts Branch, Civil Division
United States Department of Justice
P.O. Box 146
Benjamin Franklin Station
Washington, D.C. 20044-0146

4-5.421 National Vaccine Injury Compensation Program—Introduction

The National Vaccine Injury Compensation Program (42 U.S.C. §§ 300aa-10 through 17) (the "Program"), which is part of the National Childhood Vaccine Injury Act of 1986 (the "Vaccine Act"), establishes a compensation system for persons injured by routine pediatric vaccines. The Program recognizes and furthers the public interest in encouraging the availability and use of these vaccines by offering an alternative to traditional tort actions against vaccine administrators and manufacturers for alleged serious adverse reactions.

The Vaccine Litigation Group in the Torts Branch of the Civil Division defends all claims brought against the Secretary of Health and Human Services under the Vaccine Act. These Vaccine Act cases are filed in the United States Court of Federal Claims by individuals claiming to have suffered injuries as a result of the receipt of certain specified vaccines. The cases routinely involve claims of catastrophic injuries or death. As a result, the cases present unique challenges and require diverse litigation skills of the Department of Justice trial attorneys who defend them.

4-5.422 Disposition of Cases Under the Vaccine Program

The Vaccine Act established within the United States Court of Federal Claims an Office of Special Masters. When a petition for vaccine compensation is filed, the chief special master assigns the case to a special master who makes an initial determination as to whether entitlement to an award should be granted. In many cases, a trial is necessary to decide the issue of entitlement under the Program. Although the court is located in Washington, D.C., the entitlement hearing is usually held in the state where the vaccine-injured party resides.

After the special master enters the entitlement decision, either party may appeal the outcome to the United States Court of Federal Claims. The Court of Federal Claims reviews the decision and enters judgment. The decision of the Court of Federal Claims may then be appealed to the United States Court of Appeals for the Federal Circuit.

A finding of vaccine-causation is made in one of two ways. The claimant may show vaccine-causation by proving a specified injury occurred within a specified time period following vaccination. This entitles the claimant to a presumption of vaccine-causation that can only be rebutted if we establish, by preponderant evidence, a cause for the alleged injury other than the vaccine. If the claimant cannot meet the requirements for a presumptively vaccine-related injury, the claimant must prove vaccine-causation under more traditional standards of proof used in tort litigation. In either situation,

these cases require the development of detailed factual evidence and medical evidence from various medical specialties, such as neurology, pediatrics, immunology, rheumatology, epidemiology, infectious diseases, pathology and virology.

Once a determination of vaccine-causation is made, the claimant is generally entitled to compensation for all future unreimbursable medical expenses related to the vaccine injury. For cases arising after the date of the Vaccine Act, claimants are also entitled to lost wages, pain and suffering up to a jurisdictional maximum of \$250,000, and reasonable attorney's fees and costs. For cases involving vaccinations administered prior to the Vaccine Act's effective date, there is a cap of \$30,000 on the combined items of pain and suffering, lost wages and reasonable attorneys' fees and costs. There is no provision for punitive damages. In all cases resulting in a vaccine-related death, a fixed payment of \$250,000 is provided.

Because of the severity of most vaccine injuries and the likelihood of lifelong future damages, vaccine cases require a complex economic analysis of the damage payments to be made to the injured party through lump sum payments, annuities, or reversionary trusts. The damages analysis includes interpretation of statutory compensation provisions and legal precedent for pain and suffering, medical care, residential care, attendant care, therapies, and lost wages. Consideration must also be given to other primary benefits to which the injured party is entitled such as private insurance, Medicaid, Medicare, and benefits under the Individuals With Disabilities Education Act (IDEA). Under the statute, these benefits may be offset against the award.

4-5.423 Action Following Receipt of a Vaccine Case

Any vaccine injury compensation case received in the office of a United States Attorney should be forwarded immediately to the Vaccine Litigation Section of the Constitutional and Specialized Tort Branch for handling. If such a proceeding has been filed in the United States District Court or a state court for resolution, rather than the appropriate forum of the United States Court of Federal Claims, similar action should be taken to notify the Vaccine Litigation Section so appropriate steps may be taken in cooperation with the United States Attorney to either dismiss the case, or remove it to the Court of Federal Claims.

4-5.430 Radiation Exposure Compensation Program—Contacts and Mailing Information

Gerard W. Fischer, (202) 616-4090, civ10(gfischer), Assistant Director.

Lori Beg, (202) 616-4377, civ10(lbeg), Trial Attorney.

Mailing:

Radiation Exposure Compensation Program

United States Department of Justice

P.O. Box 146

Benjamin Franklin Station

Washington, D.C. 20044-0146

4-5.431 Radiation Exposure Compensation Program—Introduction

On October 15, 1990, Congress passed the Radiation Exposure Compensation Act (the "Act"), 42 U.S.C. § 2210 note (Supp. 1995), which provides for compassionate payments to, or on behalf of, individuals who contracted certain cancers and other serious diseases following exposure to radiation that was released during above-ground nuclear weapons tests or as a result of their exposure to radiation during employment in uranium mines.

The Radiation Exposure Compensation Program (the "Radiation Program"), part of the Torts Branch, Civil Division, is responsible for administering the Act. The procedures established in the implementing regulations are designed to utilize existing records so that claims can be quickly resolved in a reliable, objective, nonadversarial manner with little administrative cost to the United States or to the person filing the claim. Part 79 of Title 28, Code of Federal Regulations.

4-5.432 Radiation Exposure Compensation Program—Categories and Criteria

There are three categories of claims: uranium miners, downwinders, and onsite participants. There are two major eligibility criteria for each category of claims: exposure to radiation and subsequent development of a compensable disease.

The uranium miner provisions of the Act provide a payment of \$100,000 to, or on behalf of, underground uranium miners who worked in Arizona, Colorado, New Mexico, Wyoming or Utah during the years 1947 to 1971. The miner must have been exposed to certain threshold levels of radiation measured by working level months of radiation ("WLMs") during the course of his underground uranium mining activities. The miner also must have subsequently developed primary cancer of the lung or one of the following non-malignant respiratory diseases: pulmonary fibrosis, fibrosis of the lung, cor pulmonale related to fibrosis of the lung, and moderate or severe silicosis and pneumoconiosis. § 5(b)(3), 42 U.S.C. § 2210, 28 C.F.R. §§ 79.31(h), (i).

The downwinder provisions of the Act provide a payment of \$50,000 to, or on behalf of, individuals who lived or worked downwind of atmospheric nuclear tests in certain geographical areas in Utah, Nevada and Arizona for at least 24 months (cumulative or consecutive) during the time period of January 21, 1951, and ending on October 31, 1958, or the entire period from June 30, 1962, to July 31, 1962. In order to receive compensation under the "downwinder" provisions of the Act it must also be demonstrated that, after the requisite length of exposure, one of the following specified compensable diseases was developed: leukemia

(but not chronic lymphocytic leukemia), lymphoma (but not Hodgkin's disease), multiple myeloma, or primary cancer of the thyroid, female breast, esophagus, stomach, pharynx, small intestine, pancreas, bile duct, gall bladder, or liver. § 4(b)(2), 42 U.S.C. § 2210, 28 C.F.R. § 79.21(d). Each disease has its own additional requirements such as age at first exposure, latency period, and absence of heavy smoking and drinking. 28 C.F.R. § 79.22(b).

The onsite participant provisions of the Act provide a payment of \$75,000 to, or on behalf of, individuals who contracted a compensable disease after being present onsite, as a participant, during a period of atmospheric nuclear testing between July 16, 1945 and December 31, 1962. The test site locations where atmospheric nuclear testing occurred are: (1) the Nevada Test Site; (2) the Pacific Test Sites; (3) the Trinity Test Site; and (4) the South Atlantic Test Site. § 4(a)(2)(C), 42 U.S.C. § 2210, 28 C.F.R. §§ 79.42(a), (b). The onsite participant also must have developed one of the 13 cancers identified under the downwinder provisions.

4-5.437 Action Following Receipt of a Radiation Program Claim

The Act also affords the right to seek judicial review of a final action in a United States District Court. §6(l). If a case appealing a denial decision to a United States District Court is received, please notify Gerard Fischer, Assistant Director, at 202-616-4090, or Lori Beg, staff attorney, at 202-616-4377.

4-5.500 Environmental Torts (Formerly Environmental and Occupational Disease Litigation (EODL))—Contacts and Mailing Information

J. Patrick Glynn, (202) 616-4200, civ05(pglynn), Director.

JoAnn J. Bordeaux, (202) 616-4204, civ05(jbordeau), Deputy Director.

David S. Fishback, (202) 616-4206, civ05(dfishbac), Assistant Director.

Mailing:

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P.O. Box 340
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Washington, D.C. 20044

4-5.510 Environmental Torts (Formerly Environmental and Occupational Disease Litigation (EODL))—Introduction

The Environmental Torts staff (formerly Environmental and Occupational Disease Litigation (EODL) staff) defends the United States in FTCA and other toxic tort actions arising from contamination of the environment or exposure in the workplace and elsewhere to chemicals or substances. Some of the most visible examples of the litigation over the past few years have been those cases dealing with groundwater contamination, radiation experimentation on human subjects, and exposure to asbestos. Other ongoing litigation addresses complaints of injuries allegedly caused by PCBs and dioxins, lead-based paint, Agent Orange, Legionella bacteria and other "sick building" toxins, electric magnetic fields and biological agents. Many of these cases arise out of activities of the military, but may stem from other agencies' activities, as well.

Toxic tort litigation involves direct personal injury and/or property damage actions and third-party claims by manufacturers and suppliers for contribution and indemnity. Claims are filed under the Federal Tort Claims Act, the Suits in Admiralty and Public Vessels Acts, the Little Tucker Act, and against individual government employees seeking monetary damages. The ET staff litigates in the district courts and the U.S. Court of Federal Claims. Tort cases alleging negligence in the course of EPA'S Clean-Up Activities are the responsibility of ET. Vessel-caused pollution and clean-up cost recovery cases are handled by the Aviation & Admiralty staff.

Inquiries regarding toxic tort and asbestos litigation may be made by calling 202-616-4200 or writing to the Environmental Torts section at Post Office Box 340, Benjamin Franklin Station, Washington, D.C.

20044. Federal Express deliveries should be mailed to EODL, Torts Branch, 1331 Pennsylvania Avenue, N.W., Suite 800 South, Washington, D.C. 20004.

4-5.520 Conduct of Toxic Tort and Asbestos Litigation

Environmental and related product liability tort actions, whether involving mass numbers of parties or only a few, pose special case management problems and thus are generally designated as "primary" to be handled by Department of Justice attorneys. Given long latency periods, the litigation often is not filed until decades after exposure. The cases can require massive and prolonged discovery involving millions of documents and the analysis of convoluted and complex fact situations. For example, in the asbestos litigation, fact issues have spanned a period since prior to World War II. All asbestos cases are designated for primary handling by ET and as a general rule will not be assigned to United States Attorneys.

Environmental tort litigation also requires familiarity with specialized scientific and medical issues. The source of contamination in any particular case may be chronic and latent, as with asbestos exposure or progressive groundwater contamination, or may be readily apparent, as with chemical or industrial spills. Disease or injury often manifests itself only following cumulative or repeated exposure, and in many instances, the effects of exposure have not been definitively scientifically or medically documented. Like the asbestos cases, fact issues can span decades, some spanning periods before World War I.

United States Attorneys confronted with environmental and related product liability tort claims against the United States should contact ET as early as possible, preferably before suit. ET is prepared to assume "primary" responsibility for toxic tort litigation as described within USAM 4-5.510.

It should be noted that tort suits alleging breaches of duty arising directly from *regulatory* activities of the government generally are within the purview of the Federal Tort Claims Act staff, and should be directed to that staff. See USAM 4-5.600. Matters involving clean-up activities of the Environmental Protection Agency, however, should immediately be brought to the attention of ET. Such cases should be handled jointly with the Environment and Natural Resources Division. Also, matters involving the Oil Pollution Act of 1990 should be referred to the Aviation and Admiralty staff.

ET's expertise developed in the asbestos litigation has led to the assignment of certain contract (Little Tucker Act and Tucker Act) cases to ET. Cases asserting implied warranties or indemnities arising out of contracts for government purchase of products made in conformity with government specifications where said products' alleged toxicity caused personal injuries should be referred to ET. See, e.g., *Hercules v. United States*, 516 U.S. 417, 116 S.Ct. 981 (1996) (Agent Orange); *Lopez v. A.C. & S.*, 858 F.2d 712 (Fed. Cir. 1988), *cert. denied*, 491 U.S. 904 (1989) (asbestos). In addition, cases where government contractors seek to invoke indemnity provisions to be held harmless from environmental regulatory claims and tort claims should be referred to ET.

4-5.600 Federal Tort Claims Act Staff—Contacts and Mailing Information

Jeffrey Axelrad, (202) 616-4400, civ05(jaxelrad), Director.

Paul Figley, (202) 616-4248, civ05(pfigley), Deputy Director.

Assistant Directors: Roger D. Einerson, (202) 616-4250, civ05(reinerso); Phyllis J. Pyles, (202) 616-4252, civ05(ppyles).

Mailing:

Civil Division
United States Department of Justice
P.O. Box 888
Benjamin Franklin Station
Washington, D.C. 20044

4-5.610 FTCA Staff—Introduction

The Federal Tort Claims Act (FTCA) Staff litigates cases filed against the United States under the FTCA (except for aviation and most environmental tort suits); tort suits filed in district courts under legislation extending the FTCA to Community and Migrant Health Centers and to Indian tribes; and affirmative tort suits on behalf of federal agencies. The Staff is also responsible for the administration of the FTCA.

The FTCA Staff litigates seminal suits filed under the FTCA and related statutes authorizing tort suits against the United States. Representative cases include AIDs litigation, medical malpractice, mine inspection, and banking litigation. The Staff initiates changes in Department regulations implementing the FTCA, which apply throughout the government. The Staff provides guidance to all federal agencies, subject to oversight by Department officials, on policy issues arising under the FTCA. In addition, the Staff resolves administrative claims arising from Department of Justice activities to the extent that such claims are not delegated for direct handling to units within the Department.

Although most of the Staff's work consists of handling litigation directly, the Staff also provides oversight and guidance to United States Attorneys' offices for FTCA litigation handled by those offices.

4-5.620 FTCA Staff—Research and Guidance Materials

The Torts Branch has prepared Monographs and a Handbook covering many recurring substantive issues pertaining to Federal Tort Claims Act (FTCA) litigation. The current FTCA Monographs are:

1. Actionable Duty
2. Administrative Claim Sum Certain Requirement and the Ad Damnum Limitation
3. Administrative Claims
4. Checklist of FTCA Defenses
5. Claims Under Wrongful Death and Survival Statutes and Claims for Loss of Consortium
6. Discretionary Function Exception, Part A and Part B
7. FTCA Exception: Claims Arising in a Foreign Country
8. FTCA Statute of Limitations
9. Indemnity and Contribution
10. Law Enforcement Torts under the FTCA
11. The Doctrines of Loss of Chance and Increased Risk
12. Prejudgment and Postjudgment Interest in Federal Tort Claims Act Litigation
13. The Assault and Battery Exception
14. The FTCA'S Contractor Exclusion and Related Issues
15. The Misrepresentation Exception and the Interference with Contract Rights Exception
16. The Feres Doctrine

Each United States Attorney has received copies of the foregoing Monographs. If an Assistant United States Attorney needs an additional copy of a particular Monograph, it can be obtained by calling (202) 616-4233 or by writing to the Torts Branch, Post Office Box 888, Ben Franklin Station, Washington, D.C. 20044. In addition, a looseleaf handbook entitled "Damages Under the Federal Tort Claims Act" has been sent to each USAO and updated periodically. Contributions to the Damages Handbook are solicited from Assistant United States Attorneys.

4-5.630 FTCA Staff—Substitution of the United States for Federal Employees

United States Attorneys are authorized to make the certification provided for in 10 U.S.C. § 1089(c), 22 U.S.C. § 817(c), 28 U.S.C. § 2679(d), 38 U.S.C. § 4116(c), and 42 U.S.C. §§ 233(c) and 2458a(c), in

order to substitute the United States as defendant in place of federal employees acting within the scope of their federal employment who have been sued under state tort law. *See* 28 C.F.R. § 15.3.

4-5.640 FTCA Staff—Medical Care Recovery Act Cases

Sections 2651 to 2653 of Title 42 authorize the recovery of the reasonable value of hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) which the United States is authorized or required by law to furnish or has furnished to a person who is injured or suffers a disease under circumstances creating tort liability upon the part of a third party.

Administrative agencies are bound by regulations promulgated by the Attorney General (28 C.F.R. §§ 43.1 to 43.4) and generally will prevail upon the insured person to assert the government's claim in his/her own name for the use and benefit of the United States. 42 U.S.C. § 2651(b)(1) authorizes the government to intervene in the insured person's tort suit as of absolute right. If intervention is necessary, the injured person can normally be counted on to establish the defendant's basic tort liability. Intervention should be utilized as a measure of last resort only if private counsel do not cooperate with the agency to protect our right to participate in agency recovery.

If advice is needed, the FTCA staff may be contacted at (202) 616-4400.

4-5.650 FTCA Staff—Medicare Recovery Cases

Section 1395y(b)(1) of Title 42 provides that Medicare shall be a secondary payor in certain circumstances, including automobile accident cases or other instances where a third party would otherwise be liable for medical costs. This provision also expressly authorizes the United States to bring an independent action to recover from an insurer the cost of Medicare payments needed as a result of an automobile accident, or to join or intervene in any such action.

If advice is needed, the FTCA staff may be contacted at (202) 616-4296.

4-6.000 FEDERAL PROGRAMS

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4-6.010 Federal Programs Branch -- Subject Matter Areas

The Federal Programs Branch litigates on behalf of approximately 100 departments and federal agencies, Cabinet officers, and other government officials. The Branch's caseload consists primarily of defending suits that challenge actions of Government agencies and officers in which the plaintiffs seek injunctive or declaratory relief. Since the enactment of the amendments to the Civil Rights Act in 1991, however, the Branch has seen an increase in Title VII litigation. In addition, the Federal Programs Branch brings actions in the name of the United States or federal agencies to enforce Government rights, functions and certain claims for monetary relief. The Branch's eleven subject matter areas are as follows:

--Affirmative Litigation and Regulatory Enforcement

Director: David J. Anderson, Room 1064, 901 E Street, (202) 514-3354.

Assistant Director: Arthur R. Goldberg, Room 1066, 901 E Street, (202) 514-4783.

Area 2 -- Non-Discrimination Personnel Litigation Director: Felix V. Baxter, Room 972, 901 E Street, (202) 514-4651.

Assistant Director: Susan K. Rudy, Room 970, 901 E Street, (202) 514-2071.

Area 3 -- Government Information (Includes Freedom of Information Act, Privacy Act, Government in Sunshine Act, Federal Advisory Committee Act and Defense to Third Party Subpoena Litigation)

Director: David J. Anderson, Room 1064, 901 E Street, (202) 514-3354.

Assistant Director: Anne L. Weismann, Room 1034, 901 E Street, (202) 514-3395.

Area 4 -- Human Resources (Includes Department of Health and Human Services and Department of Education)

Director: David J. Anderson, Room 1064, 901 E Street, (202) 514-3354.

Deputy Director: Sheila Lieber, Room 974, 901 E Street, (202) 514-3786.

Area 5 -- Housing and Community Development (Includes Department of Housing and Urban Development and Federal Emergency Management Agency)

Director: Dennis G. Linder, Room 980, 901 E Street, (202) 514-3314.

Assistant Director: Michael Sitcov, Room 1022, 901 E Street, (202) 514-1944.

Area 6 -- National Security, Military and Foreign Relations

Director: David J. Anderson, Room 1064, 901 E street, (202) 514-3354.

Deputy Director: Vincent M. Garvey, Room 1062, 901 E Street, (202) 514-3449.

Area 7 -- Agriculture, Energy and Interior

Director: Dennis G. Linder, Room 980, 901 E Street, (202) 514-3314.

Assistant Director: Thomas W. Millet, Room 982, 901 Street, (202) 514-3313.

Area 8 -- Foreign and Domestic Commerce (Includes Departments of Commerce, Labor, Treasury and Transportation)

Director: Dennis G. Linder, Room 980, 901 E Street, (202) 514-3314.

Assistant Director: Sandra Schraibman, Room 976, 901 E Street, (202) 514-3315.

Area 9 -- Government Corporations and Regulatory Agencies

Director: Dennis G. Linder, Room 980, 901 E Street, (202) 514-3314.

Assistant Director: Theodore Hirt, Room 906, 901 E Street, (202) 514-4785.

Area 10 -- Employment Discrimination Litigation

Director: Felix V. Baxter, Room 972, 901 E Street, (202) 514-4651.

Assistant Directors: Anne M. Gulyassy, Room 968, 901 E Street, (202) 514-3527; Jennifer D. Rivera, Room 978, 901 E Street, (202) 514-3671.

Area 11 -- Disability Benefits and Employment Litigation

Director: Felix V. Baxter, Room 972, 901 E Street, (202) 514-4657.

4-6.100 Defensive Litigation

With the exception of the categories of Direct Reference Cases discussed in Section 4-1.310, as soon as a USAO is served with a summons and complaint in a new action which falls within the jurisdiction of the Federal Programs Branch, the USAO should transmit copies of the pleadings to the Branch. Upon receipt of the pleadings, the Branch will determine the type of handling the case is to receive. Federal Programs Branch cases will be designated for one of the following types of handling:

- **Personally Handled (P)** cases are handled by Branch attorneys. These cases will often involve serious or novel constitutional or statutory challenges to federal programs, cases challenging a nationwide program, with potentially far-reaching implications, cases in which either the client agency or the USAO has requested assistance, or cases that for whatever additional reason justify the use of resources of the Civil Division from Washington, D.C. Where practical, the Federal Programs Branch will consult with the United States Attorney before designating a case to be personally handled. See section 4(c) of Civil Division Directive No. 163-86 (published in the Appendix to Subpart Y immediately following 28 C.F.R. § 0.172) for types of cases that are frequently retained for personal handling by Civil Division attorneys.
- **Jointly Handled (JH)** cases are those in which both a Branch attorney and an Assistant United States Attorney will each personally handle aspects of the litigation.
- **Monitored (M)** cases are handled by Assistant United States Attorneys, with Civil Division attorneys responsible for being knowledgeable about case developments and strategy and available for advice and consultation.
- **Delegated (D)** cases are handled by Assistant United States Attorneys, with involvement by Branch attorneys only on request. See Section 4(b) of Civil Division Directive No. 163-86, for criteria for delegation of cases to USAOs.

As soon as the type of handling is determined, the Federal Programs Branch will request that the client agency prepare a litigation report for the case, and a copy of that request will be forwarded to the appropriate USAO. In delegated and monitored cases, the litigation report request letter will be the first official notification to the USAO that office, rather than the Civil Division, will have primary litigation responsibility for the case. That request letter from the Branch will request that the agency forward the litigation report, with supporting documents, to the appropriate USAO.

In personally handled and jointly handled cases, the Assistant Branch Director assigned to the case will notify the USAO that the Civil Division will retain litigation responsibility for the case. In those cases, the Federal Programs Branch attorney assigned to the case will receive the litigation report from the client agency.

4-6.200 Affirmative Litigation

Two basic differences between affirmative and defensive suits require particular attention. First, with the exception of the Direct Reference Cases discussed in Section 4-1.310 et seq., all affirmative cases must be authorized by the Civil Division. Second, several categories of affirmative cases are routinely handled by client agencies, pursuant to Memoranda of Understanding with the Justice Department.

To receive authorization for commencement of an affirmative suit, the client agency should prepare a written referral to the Civil Division. See USAM 4-1.450 for discussion of contents of referrals. If a referral is made directly to a USAO and the case is not within the category of Direct Reference cases, the USAO should request that the agency formally refer the matter to the Civil Division for suit authorization. Upon receipt of a referral, the Branch will assign the referral to a Branch attorney for preparation of a suit authorization recommendation.

Once suit authorization is received, the Federal Programs Branch will determine whether the suit will be handled by the Branch, by a USAO, or by the client agency. The most common categories of affirmative suits in the Branch, and the procedures for suit authorization and case handling, are discussed below.

4-6.210 Delegated Affirmative Cases

Delegated affirmative cases will usually be of three types: (1) those delegated to USAOs for handling by those offices; (2) those for which the agency has statutory litigating authority; and (3) those for which the agency is delegated litigating authority pursuant to a Memorandum of Understanding with the Justice Department. The most common delegated affirmative cases are:

- A. Department of Labor** (cases brought under the Employee Retirement Income Security Act, the Occupational Health and Safety Act, the Migrant and Seasonal Agricultural Worker Protection Act, and the Federal Coal Mine Health and Safety Act). Suits under each of these statutes will normally be handled by Labor Department attorneys. In such cases, a Branch attorney will review the referral and proposed pleadings for form and content. If the papers indicate that the proposed suit has an adequate factual and legal basis, after conferring with the Assistant Director for Area I, the Branch attorney will prepare letters to the agency and United States Attorney authorizing the filing of the suit, and delegating the case to the agency. (In those cases where time will not permit a letter authorizing that suit be filed, after conferring with the reviewer, authorization may be given by phone, with confirmation letters to follow.) In most cases under these statutes, it will not be necessary to obtain formal authorization for the suit from the Assistant Attorney General. However, if any of these cases present novel or sensitive issues, it may be appropriate to notify the Assistant Attorney General of the proposed litigation.
- B. Cases under the Labor Management Reporting and Disclosure Act.** Most LMRDA suits are handled by the USAOs. After reviewing the referral and proposed pleadings for an LMRDA suit, the Branch attorney will confer with the Assistant Director about whether the proposed litigation has an adequate factual and legal basis. If it is appropriate to authorize suit, the Branch attorney will prepare a letter to the appropriate United States Attorney, indicating that the suit is authorized and is delegated to that office, and requesting that a referral acknowledgement form be returned, which shows the date of

filing and the name of the Assistant United States Attorney to whom the case is assigned. A copy of the letter will be sent to the Labor Department. In most cases, the letter to the United States Attorney will request that the suit be filed within two weeks of receipt, unless extenuating circumstances are present.

- C. Subpoena Enforcement Suits.** Most routine subpoena enforcement actions are handled by the USAOs and are authorized by the Director in charge of Area 1. A Branch attorney will review the referral and proposed pleadings, and then prepare a memorandum from the assistant director to the director, recommending whether the suit should be filed.

If the subpoena enforcement action is approved by the director, the Branch attorney will write the agency and the United States Attorney, stating whether the suit has been authorized or not, and, if so, that it is delegated to the United States Attorney. In cases in which suit is authorized, a referral acknowledgement form will also be sent to the United States Attorney, as well as a copy of papers received from the agency.

- D. Other Delegated Affirmative Suits.** For all other delegated affirmative cases, such as Department of Energy enforcement actions, suits under the various Department of Agriculture statutes, and miscellaneous affirmative litigation, the assigned Branch attorneys will review the litigation request and analysis, and prepare a suit authorization memorandum for the Assistant Attorney General. If the suit is authorized, the Branch attorney will prepare a delegation letter with acknowledgement form to the United States Attorney, and a follow-up letter to the agency.

4-6.220 Monitored Affirmative Cases

Referrals of monitored affirmative cases will be handled in the same manner as delegated case referrals. However, the letter to the USAO or to the agency will advise that a Branch attorney will follow the litigation closely and request that the Branch attorney be kept informed about the status of the case.

4-6.230 Personally Handled and Jointly Handled Affirmative Cases

Personally handled and jointly handled affirmative cases are referred and authorized in the same manner as delegated and monitored cases. The Assistant Director for affirmative litigation in the Federal Programs Branch will notify the appropriate USAO that the Branch will retain primary litigation responsibility in these cases. On occasion, it may become necessary for the Branch to request assistance from the USAOs in filing the summons and complaint in affirmative cases.

4-6.240 Affirmative Cases -- Suits Against State Governments, Agencies or Entities

It is the policy of the Justice Department that, prior to filing suit against a state government, agency or entity, each Division will undertake the following steps:

- A. Advise the governor and attorney general of the affected state of the nature of the

contemplated action or claim and the terms of the remedy sought;

- B. Notify the Deputy Attorney General and, if appropriate, the Associate Attorney General that such prior notification has been given; and
- C. Ensure that such prior notice is given sufficiently in advance of the filing of the suit or claim to:
 - 1. Permit the state government, agency or entity to bring to the Department's attention facts or issues relevant to whether the action or claim should be filed or,
 - 2. Result in settlement of the action or claim in advance of its filing on terms acceptable to the United States.

See Attorney General Policy Directive, Litigation Against State Governments, Agencies or Entities, August 7, 1981.

When referrals are received for suits against states, the Branch will prepare a suit authorization memorandum to the Assistant Attorney General for the Civil Division, and will also prepare notification letters to the governor and attorney general of the state. Suit will be filed in such cases only after written suit authorization is given, prior notification has been provided the state, the Deputy (and, where appropriate, Associate) Attorney General has been notified, and the state has been given the opportunity to confer and attempt to compromise the claim without litigation. The Civil Division will supply the interested United States Attorney with copies of the notification letters.

4-6.250 Affirmative Cases -- Counterclaims, Amicus Participation and Motions to Intervene

Client agency requests to assert counterclaims in pending defensive litigation, to participate as amicus curiae, or to intervene in on-going state or federal court litigation are authorized in the same manner as affirmative cases. The Civil Division should also be provided the factual and legal basis supporting the cause of action or position the client wishes to assert. Referrals for such litigation must be made as expeditiously as possible, since the federal government's right to participate in on-going litigation will often depend on the status of the underlying case.

4-6.300 Area 1 -- Affirmative Litigation and Regulatory Enforcement

This area includes all affirmative litigation assigned to the Branch in which the United States or an agency or official of the United States initiates a legal action to enforce compliance with federal statutory and regulatory programs, including, for example, actions to enforce administrative subpoenas, suits by the Department of Labor to enforce the Employee Retirement Income Security Act, the Occupational Health and Safety Act, the Migrant and Seasonal Agricultural Worker Protection Act, the Federal Coal Mine Health and Safety Act, and the Labor Management Reporting and Disclosure Act, enforcement actions brought on behalf of the National Highway Traffic Safety Administration, affirmative Department of Agriculture

litigation, suits on behalf of the Department of Housing and Urban Development to enjoin violations of the Interstate Land Sales Full Disclosure Act, and suits to enjoin state and local interference with federal functions.

4-6.320 Area 2 -- Nondiscrimination Personnel Litigation

This area includes suits arising from federal governmental employment including constitutional and other issues of appointment and removal of officers and employees of the United States. Also included in this area are cases challenging Office of Personnel Management regulations, actions under the Federal Employee Health Benefits Act, and actions challenging various disciplinary and adverse actions brought by employees pursuant to the Civil Service Reform Act and the Whistleblower Protection Act. Litigation in this area arises primarily in district court and before the Merit Systems Protection Board.

4-6.330 Area 3 -- Government Information

- A. Contacts in Civil Division:** General: Anne L. Weismann, Assistant Director (514-3395); David J. Anderson, Director (514-3354). Right to Financial Privacy Act: Arthur R. Goldberg (514-4783). Federal Advisory Committee Act: Eric Goulian (514-4686).
- B. Civil Division Policies regarding handling of these types of cases:** United States Attorneys should inform the appellate staff (Leonard Schaitman, 514-3441) immediately if a stay pending appeal of an order couched in terms of an injunction is denied in FOIA or Privacy Act suits. Otherwise, the cases should be handled administratively like any other defensive cases.

4-6.332 Area 3 -- Government Information -- General Information for Particular Case Types (Including Jurisdiction and Exhaustion of Administrative Remedies)

A. FOIA.

Pre-litigation FOIA Requests for Documents. See 28 C.F.R. §§ 16.1 through 16.10, for detailed instructions for responding to pre-litigation Freedom of Information Act requests. *See also* 5 U.S.C. § 552, *as amended*. Nine categories of government records are exempt from disclosure under the FOIA. See 28 C.F.R. § 16.10(b)(3), as to the necessity for referring requests for information classified by another agency to that agency.

In the event of a request for documents from a USAO, the request should be forwarded to the Executive Office for United States Attorneys, FOIA/PA Unit, pursuant to 28 C.F.R. Part 16.3(a). The Federal Programs Branch is responsible for litigation and does not have any responsibilities relating to the administrative processing of FOIA or Privacy Act requests for documents in USAOs.

FOIA Suits. Expedited handling is essential in FOIA suits, inasmuch as the Act provides that such litigation is to take precedence. *See* 5 U.S.C. § 552(a)(4)(D). Because the time for serving an Answer or Motion to Dismiss is reduced to thirty days, care should be taken to ensure that the government's time to respond is protected. The Federal

Programs Branch can provide advice and assistance if necessary. Interim relief is generally not permitted under the FOIA; therefore, in the event an emergency hearing is scheduled, the relief requested should ordinarily be opposed.

Branch attorneys directly handle a number of FOIA cases. However, United States Attorneys should anticipate that the majority of FOIA cases filed in their respective districts will be assigned to the United States Attorneys for handling. This responsibility contemplates that the Assistant United States Attorney assigned to the case will conduct a full review of the withheld documents to determine whether withholding is legally justified. The Assistant United States Attorney is also responsible, with assistance from the agency General Counsel, for drafting and reviewing affidavits, preparing responses to interrogatories, preparing pleadings, and oral argument.

A general discussion of the requirements of the FOIA and current caselaw is available in the "Freedom of Information Case List" published by DOJ's Office of Information and Privacy each September. Copies can be ordered from that office (514-4251).

Exhaustion of administrative remedies is required before suit may be brought, but exhaustion may be deemed to have occurred if the agency exceeds statutory time limits in processing FOIA requests or appeals. *See* 5 U.S.C. § 552(a)(6). The statute generally provides for de novo review without reference to any administrative record made in the agency. 5 U.S.C. § 552(a)(4)(B). You should note, however, that in challenges to agency determinations regarding waiver of fees for processing FOIA requests, the 1986 amendment to the statute provides for de novo review on the record made before the agency. 5 U.S.C. § 552(a)(4)(vii). "Reverse" FOIA cases, in which a submitter of information sues to prevent an agency's proposed release of the information under the FOIA are brought pursuant to the APA, and the APA standard of review applies.

Orders for disclosure in FOIA suits will ordinarily be phrased as injunctions. Thus, it is necessary to seek a stay from such an adverse order to preserve the right of appeal. If a stay is denied, telephonic notice should be given the Federal Programs Branch. It is important to furnish immediately to the Branch a copy of all opinions and orders entered. This is essential to assure appropriate appellate consideration and to enable the Department to satisfy its statutory reporting requirements. *See* 5 U.S.C. § 552(e).

- B. Privacy Act.** The Privacy Act imposes stringent requirements affecting the maintenance of records concerning individuals. *See* 5 U.S.C. § 552a. Subsection (b) sets forth eleven circumstances under which records concerning an individual can be disclosed without the individual's prior written consent. Subsection (e)(8) requires that there be "reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record." Subsection (g) establishes judicial remedies available to persons aggrieved under the Act. OMB guidelines are published at 40 Fed. Reg. 28948, et seq.

Exhaustion of administrative remedies is required. *See* 5 U.S.C. § 552a(g)(1). Jurisdiction for Privacy Act suits covers suits for both money and specific relief. Access to government records of an individual, and the amendment of such records, are provided for

by 5 U.S.C. 552a(g). A plaintiff is entitled to a trial de novo. Jurisdiction includes express authorization for injunctive actions, both to prevent a government agency from withholding records and to compel their production. *See* 5 U.S.C. § 552a(g)(3). In an action brought for failure to maintain an individual's record with accuracy, or for failure to comply with any of the Act's other provisions in such a way as to have an adverse effect on the individual, the individual can recover damages if the agency acted intentionally or willfully. Damages can in no event be less than \$1000 together with costs and reasonable attorney fees. Venue is set forth in 5 U.S.C. § 552a(g)(5), as is the limitations provision.

If a court order is adverse and phrased as an injunction, a stay should be timely sought to preserve the right of appeal. It is important to furnish immediately to the Branch a copy of all opinions and orders entered.

Awareness of the Privacy Act is also important during discovery in non-Privacy Act cases since documents requested in discovery in a variety of cases can be subject to the Privacy Act. This is particularly true in cases involving personnel issues or personnel files. Documents subject to the Privacy Act should not be produced in discovery until the Act's requirements involving disclosure of such information have been met. Note that many agencies have published "routine uses" under the Act (5 U.S.C. § 552a(b)(3)) which provide for the release of certain records to the Department of Justice or to parties in litigation. The agency should be able to provide citations in the federal register to such publications.

- C. Right to Financial Privacy Act.** There are no administrative remedies to be exhausted as a prerequisite to litigation under the Right to Financial Privacy Act. Jurisdiction for such suits covers actions for both money damages and specific injunctive relief. The Act prohibits any agency or department from obtaining (or any private "financial institution" as defined in 12 U.S.C. § 3401(1) from disclosing) the financial records of a financial institution's "customer" as defined in 12 U.S.C. § 3401(5), except where access is authorized by one of the express exceptions to the Act or is accomplished through one of the five access mechanisms mandated by the Act: (1) customer authorization; (2) administrative summons or subpoena; (3) search warrant; (4) judicial subpoena; or (5) formal written request. For further information on transfer restrictions and remedies under the Act, see Civil Resource Manual at 90.
- D. Government In The Sunshine Act.** The Government in the Sunshine Act, 5 U.S.C. § 552b, sets forth specific requirements pertaining to notices of agency meetings and requirements for record keeping of such meetings. Sunshine Act litigation is discussed in the Civil Division Practice Manual at § 3-46.1, et seq. *See also* Berg and Klitzman. An Interpretive Guide to the Government in the Sunshine Act, published by the Administrative Conference of the United States in June 1978.
- E. Production of Documents of Other Departments and Agencies in Non-FOIA Litigation.** On occasion, litigants in private lawsuits may issue a subpoena for deposition or trial testimony, or a subpoena duces tecum requiring production of information or documents which a client agency deems confidential or otherwise privileged from disclosure. Protection against the compulsory disclosure of such documents or information is recognized in various circumstances. *See* 5 U.S.C. § 301; *Jencks v. United States*, 353

U.S. 657 (1957); *United States v. Reynolds*, 345 U.S. 1 (1953); *Touhy v. Ragen*, 340 U.S. 462 (1951); *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951); *Saunders v. Great Western Sugar Co.*, 396 F.2d 794 (10th Cir. 1968).

If a government employee served with such a subpoena seeks advice from the United States Attorney, he/she should be told to contact his/her own agency for instructions, because, if the agency does not object to compliance, the Department of Justice usually will not. If the agency wishes to object, however, it usually will have pertinent regulations (promulgated under 5 U.S.C. § 301), similar to the DOJ regulations at 28 C.F.R. § 16.21, et seq., instructing employees not to produce or testify unless authorized to do so by a designated official (usually the head of the agency or his/her designee). Such regulations are ordinarily recognized as a valid basis on which to refuse to produce documents or testify. See *Touhy v. Ragen*, 340 U.S. at 657; *Saunders v. Great Western Sugar Co.*, 396 F.2d at 794. State courts also usually honor such regulations. See *People v. Parham*, 60 Cal.2d 378, 384 P.2d 1001, cert. denied, 377 U.S. 945, reh'g denied 379 U.S. 873 (1964). For the procedure to be followed in the event of an adverse decision, see *North Carolina v. Carr*, 264 F. Supp. 75 (W.D.N.C.), appeal dismissed, 386 F.2d 129 (4th Cir. 1967).

Requiring compliance with such regulations is not considered to be a claim of privilege, and the regulations do not create a privilege against discovery. There are, however, several common law privileges available only to the government. These include the military or state secrets privilege, which is absolute if validly claimed, and the deliberative process, informant's, law enforcement evidentiary, and required reports privileges, which are qualified. There are also privileges available for certain types of presidential documents.

In certain instances, a formal claim of privilege may be required to be made by the head of the agency involved. See *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967). It is not necessary to make a "formal" claim of privilege in objecting to production of documents, but it is necessary in opposing a motion to compel or moving to quash a subpoena. United States Attorneys should not make a formal claim of a privilege available only to the government in any case without approval from the Civil Division.

- F. Justice Department Materials and Witnesses.** 28 C.F.R. §§ 16.21 to 16.28 regulate the production of DOJ information or records pursuant to subpoena or court demands when the United States is not a party to the lawsuit:

(N)o employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official status without prior approval of the proper Department official in accordance with 16.24 and 16.25 of this part.

4-6.340 Area 4 -- Human Resources

This area includes all suits involving Medicare and Medicaid, and the various state-federal cash assistance or welfare programs (e.g., Aid to Families with Dependent Children, foster care, emergency assistance programs), as well as Public Health Service cases, Indian Health Service cases, and Randolph Shepard Act cases.

4-6.350 Area 5 -- Housing

This area includes all equitable housing and housing-related cases involving the Department of Housing and Urban Development and other government agencies. It includes cases involving Title VIII-Fair Housing, suspension or debarments of HUD contractors and agents, Federal Housing Administration Insured Housing Programs (single and multifamily), Government National Mortgage Association (GNMA), National Flood Insurance Act, Federal Crime Insurance Act, McKinney Act, Interstate Land Sales Act-defensive suits, Housing and Community Development Act-Section 8 leased housing program, Community Development Block Grant Program, conventional low rent public housing program, tenants' rights, procedures and grievances regarding rent increases, utility rate conversions, evictions, etc., disaster relief (mobile homes), HUD relocation benefits, challenges to HUD refusal to expend funds, nonjudicial foreclosure, miscellaneous HUD program litigation and Farmers Home Administration and Veterans Administration Housing Program litigation, and litigation under the McKinney Act.

4-6.360 Area 6 -- National Security, Military and Foreign Relations

This area includes suits involving the Department of Defense, including the military departments, the Department of State, the Central Intelligence Agency, the Selective Service, cases arising out of federal law enforcement activities, "Bivens" litigation against Executive Branch officials, Legislative Branch officials and Judicial Branch officials where the main issue is not money damages, military base closing and realignment litigation, military discharge, enlistment contracts, and correction of military records cases, National Security Act, secrecy agreements, and miscellaneous intelligence litigation, miscellaneous law enforcement litigation, challenges to the Child Protection Restoration and Penalties Enhancement Act of 1990, Radiation Exposure Compensation Act claims, miscellaneous military litigation, foreign relations litigation, Selective Service System, Army Corps of Engineers projects, military non-promotion and missing in action litigation, Military Medical Program challenges, and enforcement of intelligence subpoenas.

4-6.370 Area 7 -- Energy, Agriculture, Interior

This area includes cases involving the programs of the Departments of Energy, Agriculture and Interior. Among the Agriculture cases in this area are those involving the Food Stamp Program, the Agricultural Adjustment Act, Commodity Marketing Orders, Packers & Stockyards Act, Federal Crop Insurance Corporation, Animal Welfare Act, Federal Meat Inspection Act, Poultry Products Inspection Act, and Commodity Price Support programs. Area 7 does not include housing programs of the Farmers Home Administration, which fall within Area 5. Energy Department cases in this area include those involving nuclear energy policy, and other energy research and development programs. A limited number of cases arising from energy price control programs also remain. Most Interior Department litigation is within the jurisdiction of the

Environment and Natural Resources Division. A limited number of cases not relating to environmental issues, such as First Amendment cases on the use of public property, are within this area.

4-6.380 Area 8 -- Foreign and Domestic Commerce

This area includes challenges to the programs of the Department of Treasury, Labor, Commerce, and Transportation and other matters involving interstate and foreign commerce that cross agency lines, such as the Davis-Bacon Act, the Service Contract Act, unemployment compensation and other programs. Treasury Department matters include representation of the Office of Foreign Assets Control in cases brought under the Trading with the Enemy Act, International Emergency Economic Powers Act, and Foreign Assets Control Regulations; the Bureau of Alcohol, Tobacco and Firearms in cases under the Brady Act, the semiautomatic assault weapons ban of the 1994 Crime Act, firearms license litigation and miscellaneous ATF cases; miscellaneous Customs Service litigation; and miscellaneous Treasury litigation and matters. Labor Department representation includes Employment and Training Administration alien worker (H-1A, 1B, 2A) programs and other litigation; Fair Labor Standards Act; Labor Management-Reporting & Disclosure Act; Davis-Bacon Act; Office of Workers Compensation Programs/ Federal Employees Compensation Act; Occupational Safety & Health Act; and miscellaneous Labor program challenges. Commerce Department cases and matters involve Bureau of the Census; Export Administration Act; National Weather Service; and miscellaneous Commerce litigation and matters. Department of Transportation representation includes litigation and matters involving Federal Aviation Administration, Coast Guard; Federal Highway Administration; Maritime Administration; Federal Railroad Administration; and miscellaneous other Transportation programs and issues.

4-6.385 Area 9 -- Government Corporations and Regulatory Agencies

This area includes actions against various regulatory agencies and corporations, and suits involving agencies or matters not otherwise covered by the above subject matter areas which are handled by the Federal Programs Branch, including Small Business Administration cases, Farm Credit Administration cases, Federal election laws, postal fraud and obscenity, Federal Communications Act, miscellaneous GSA cases, veterans benefits cases, other Veterans Administration litigation, Railway Labor Act, NASA cases, miscellaneous Postal Service matters, Federal Trade Commission, Religious Freedom Restoration Act and other religion issues, National Endowment for the Arts and Humanities cases, postal rates and classifications, TVA cases, miscellaneous cases involving White House agencies and officials, and actions against the Legislative and Judicial branches and officials of those branches.

4-6.390 Area 10 -- Employment Discrimination Litigation

This area includes all suits challenging government employment decisions or regulations affecting employment on the basis of prohibited discrimination, including Title VII, Equal Pay Act, Age Discrimination in Employment Act, Rehabilitation Act (handicapped discrimination-federal employees), Executive Order 11246, Title VI, Title IX, Civil Rights Attorneys' Fee Awards, and Equal Education Opportunities litigation.

The passage of the Civil Rights Act of 1991 has significantly affected the defense of employment discrimination suits by the Department. The advent of compensatory damages for intentional discrimination and the availability of jury trials have resulted in a greater number of cases being filed and a marked increase in the number of cases settled. While *Landgraf v. USI Film Products, Inc.*, ___ U.S. ___, 114 S.Ct. 1483 (1994), held that substantive changes to the law are not retroactive, numerous issues remain to be resolved regarding compensatory damages, taxability, interest, bifurcation of pre- and post-Act claims, etc. In addition, there is a compelling need for coordination between the Civil Division and the Civil Rights Division on issues which affect the Department's enforcement and defensive litigation. Accordingly, Assistant United States Attorneys should raise issues of first impression with one of the Assistant Directors who supervise Area 10 cases.

Frequently, plaintiffs also sue individual employees for damages in sexual harassment cases. When the individual defendant seeks departmental representation, close examination of the facts and circumstances is necessary to determine whether the employee's action is within the scope of employment and whether representation is in the interest of the United States. In presenting such requests, the individual defendant must deny the allegations of sexual harassment or explain the circumstances. Please assist agency counsel in obtaining all the necessary information in a timely manner to process such requests for representation.

4-6.391 Retaliation Claims Made By Federal Employees Under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Rehabilitation Act

Regulations issued by the Equal Employment Opportunity Commission expressly provide that claims of retaliation by federal employees are actionable under Title VII of the Civil Rights Act, 42 U.S.C. 2000e *et seq.*, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 633a, and the Rehabilitation Act, 42 U.S.C. 791. *See* 29 C.F.R. 1614.101; 1614.103(a). Moreover, the Solicitor General has argued in the Supreme Court that such claims are actionable. *See* Brief for the Respondent in *Hunt v. Secretary of the Army*, Sup. Ct. No. 95-5801 (Nov. 29, 1995).

Questions may be directed to Anne Gulyassy of the Federal Programs Branch at (202) 514-3527; civ04(agulyass) or Marleigh Dover of the Appellate Staff at (202) 514-3511; civ08 (mdover).

4-6.392 Compensatory Damages Cap Under Section 102 of the Civil Rights Act of 1991, 42 U.S.C. 1981a(b)

In Section 102 of the Civil Rights Act of 1991, 42 U.S.C. 1981a(b), Congress for the first time made compensatory damages available to federal employees who establish that they have been victims of intentional discrimination prohibited by Title VII and the Rehabilitation Act. Section 1981a(a)(1)(b)(3) provides that "[i]n an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 * * * the complaining party may recover compensatory * * * damages as allowed in subsection (b) of this section * * *." Subsection (b) provides that in the case of an employer with more than 500 employees, "[t]he sum of the amount of compensatory damages shall not exceed, for each complaining party" \$300,000.

The Acting Solicitor General has determined that the \$300,000 cap applies per lawsuit, such that a plaintiff cannot recover more than \$300,000 in a single lawsuit, no matter how many claims are alleged in the complaint.

Questions may be directed to Jennifer Rivera of the Federal Programs Branch at (202) 514-3671; civ04(jrivera) or Marleigh Dover of the Appellate Staff at (202)514-3511; civ08 (mdover). Ms. Rivera or Ms. Dover should be advised of any decisions issued which address this issue.

4-6.395 Area 11 – Disability Benefits and Employment Litigation

Area 11 has two primary sub-units. Well over half of the cases involve challenges to the \$52 billion a year social security benefits program. This includes Social Security Act Title II (disability insurance) and Title XVI (supplemental security income) benefits litigation. Individual claims for benefits are delegated to the USAOs, with the Civil Division handling large class actions or other significant challenges to the administrative scheme. Defense of employment disability-related cases involving the Rehabilitation Act of 1973, the Americans with Disabilities Act, and the Family and Medical Leave Act are the other large group of cases in this area. In 1992, Congress amended the Rehabilitation Act to make the employment standards of Title I of the Americans with Disabilities Act (ADA) applicable to discrimination actions under sections 501 and 504 of the Rehabilitation Act, 29 U.S.C. 791(g), 794(d). The Civil Division coordinates with the Civil Rights Division on cases affecting the latter's enforcement responsibilities under the ADA. Finally, discrete areas of litigation involving the Social Security Administration, such as challenges to the Coal Industry Retiree Health Benefits Act of 1992, are under this section.

4-6.396 Social Security Act Review Procedure

Over eight thousand actions were brought in federal district courts in 1995 challenging administrative determinations of the Commissioner of the Social Security Administration. *See* 42 U.S.C. § 405, for judicial review, 42 U.S.C. § 409 to 411, 416, for definitions, and 42 U.S.C. § 423, for disability cases. Regulations promulgated under the authority of 42 U.S.C. § 405(a) dealing with disability cases appear in 20 C.F.R. Parts 400 to 499.

Title 42 U.S.C. § 405(g) contemplates an administrative review proceeding. Title 42 U.S.C. § 405(b) imposes on the Commissioner of Social Security the duty of making findings of fact and a decision as to the rights of any individual applying for payments. Title 42 U.S.C. § 405(g) requires that a certified copy of the transcript of the administrative record be filed with the government's answer to the complaint and after completing administrative proceedings in certain remand cases. Judicial review must be had in accordance with 42 U.S.C. § 405(g). *See Heckler v. Ringer*, 466 U.S. 602 (1984).

Only "final decisions" of the Commissioner of Social Security are reviewable. 42 U.S.C. § 405(g) Normally a claimant must exhaust his or her administrative remedies. The Commissioner can waive the exhaustion requirement, and the courts can waive the requirement upon a showing that the claim is collateral to a claim for benefits and that irreparable harm would ensue absent immediate relief. *See Mathews v. Eldridge*, 424 U.S. 323 (1976). 42 U.S.C. § 405(g) provides

that judicial review must be sought within 60 days of the Commissioner's final decision. The Supreme Court has held that this is not a jurisdictional requirement but is a period of limitations which can be tolled by the Commissioner and, in rare cases, by the courts. *Bowen v. City of New York*, 106 S.Ct. 2022, 90 L.Ed.2d 426 (1986). If a motion to dismiss is to be filed for failure to exhaust administrative remedies or untimely filing, the Office of Appellate Operations, Office of Hearings and Appeals of the Social Security Administration (SSA), can provide an affidavit reciting the relevant facts. Pursuant to P.L. No. 103-296, the Social Security Independence and Program Improvements Act of 1994, the function of the Secretary of Health and Human Services in Social Security cases was transferred to the Commissioner of Social Security effective March 31, 1995. In accordance with section 106(d) of P.L. 103-296, Commissioner of Social Security, was substituted for the Secretary of Health and Human Services, as the defendant in cases during the transition period further action needed to continue pending suits. For additional information on Social Security Act review procedures, see the Civil Resource Manual at 93.

4-6.397 Judgment Authorized

Section 405(g) of Title 42 provides that a court may affirm, reverse, or remand the decision of the Commissioner. Often plaintiffs' counsel will move for remand in order to adduce further evidence for the record. There must, however, be "good cause" for a remand (i.e., the proffered evidence must be new and material, and that good cause must be shown by the proponent for the failure to incorporate such evidence into the record during the prior proceedings). See *Cotton v. Bowen*, 799 F.2d 1403, 1409 (9th Cir. 1986); *Willis v. Secretary of Health and Human Services*, 727 F.2d 551, 553 (6th Cir. 1984); *Chandler v. Secretary of Health and Human Services*, 722 F.2d 369 (8th Cir. 1983). The circuits have held that in order for the proffered evidence to be "material" there must be a reasonable possibility that it would have changed the outcome of the administrative determination had it been considered earlier. See, e.g., *Cotton v. Bowen*, 799 F.2d 1403; *Chaney v. Schweiker*, 659 F.2d 676, 679 (5th Cir. 1981). A lost or inaudible recording tape of the administrative hearing is also good cause for remand. H.R. Rep. No. 944, 96th Cong., 2d Sess. 59 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 1392, 1406-07. For additional information on the types of judgments authorized under the Social Security Act, see the Civil Resource Manual at 94.

4-6.398 Social Security Act Attorney Fees

Section 406(b) of Title 42 authorizes the award of reasonable attorney fees, up to a maximum of 25 percent of past due benefits, for successful representation of social security claimants before the court. The majority rule is that the court can award fees only for services rendered in connection with proceedings before the court and may not award fees for services before the Social Security Administration. See *Gardner v. Menendez*, 373 F.2d 488, 490 (1st Cir. 1967); *Burgo v. Harris*, 527 F. Supp. 1157 (E.D.N.Y. 1981); *Guido v. Schweiker*, 775 F.2d 107 (3d Cir. 1985); *Ray v. Gardner*, 387 F.2d 162, 165 (4th Cir. 1967); *Gardner v. Mitchell*, 391 F.2d 582, 583 (5th Cir. 1968); *Horenstein v. Secretary of Health and Human Services*, 35 F.3d 261 (6th Cir. 1994) (en banc); *Smith v. Sullivan*, 986 F.2d 232 (8th Cir. 1993); *MacDonald v. Weinberger*, 512 F.2d 144, 146 (9th Cir. 1975); and *Harris v. Secretary of Health and Human Services*, 836 F.2d 496 (10th Cir. 1987).

The Social Security Act § 206 fee is not in addition to the benefits, but is subtracted from the claimant's award. Several courts of appeals have condemned the practice of routinely

awarding the 25 percent statutory maximum without examination of what fee is reasonable in the particular case. *MacDonald v. Weinberger*, 512 F.2d 144, 146-47 (9th Cir. 1975); *Webb v. Richardson*, 472 F.2d 529, 537-38 (6th Cir. 1972) overruled on other grounds by *Horenstein v. Secretary of Health and Human Services*, 35 F.3d 261 (6th Cir. 1994) (en banc); *McKittrick v. Gardner*, 378 F.2d 872 (4th Cir. 1967). Equal Access to Justice Act fees, 28 U.S.C. § 2412, are not paid out of the claimant's award. Additional cases which oppose routine 25-percent fee awards include: *Wells v. Sullivan*, 907 F.2d 367 (2d Cir. 1990); *Coup v. Heckler*, 834 F.2d 313 (3d Cir. 1987); *McGuire v. Sullivan*, 873 F.2d 974 (7th Cir. 1989); *Cotter v. Bowen*, 879 F.2d 359 (8th Cir. 1989); *Starr v. Bowen*, 831 F.2d 359 (9th Cir. 1987); but see *Rodriguez v. Bowen*, 865 F.2d 739 (6th Cir. 1989) (25 percent contingent fee agreement is rebuttable presumption of reasonable fee).

All applications for fee awards should, as a routine matter, be forwarded to the General Counsel's office in the Social Security Administration for review and determination of whether the application should be opposed. When the court enters an order awarding attorney fees in a Social Security Act review case, SSA will release the § 206 fees to plaintiff's attorney unless the United States Attorney advises the Civil Division and SSA within thirty days of SSA's receipt of the fee award that the award exceeds statutory limits or is excessive under the circumstances.

4-6.399 Telefax Critical Mail Procedures

Because of the large volume of Social Security cases filed each year, it is imperative that the Office of General Counsel (OGC), Social Security Administration (SSA) receive notification of suit within three days from service of the Summons and Complaint on a United States Attorney. The telefax should be routed to Answer Staff of OGC (703) 305-1271 and to the Office of Hearings and Appeals (703) 305-0623 (4th, 5th, 6th, 7th, and 10th Cir.); (703) 305-0739 (1st, 2d, 3rd, 8th, 9th, 11th and D.C. Cir.) please provide the following information:

1. Case caption;
2. Plaintiff's Social Security number;
3. District court where case was filed;
4. Date complaint was filed;
5. Date United States Attorney was served;
6. Name and telephone number of Assistant United States Attorney handling the case; and
7. Date a petition in forma pauperis was filed, if applicable.

Similarly, when a USAO is served with an order requiring compliance and action by SSA during the trial of the case, the following information should be telefaxed via the same routing indicator as above:

1. Case caption;
2. Plaintiff's Social Security number;
3. Type of order issued;
4. Operative time limits for SSA action; and
5. Name and telephone number of the Assistant United States Attorney handling the case.

Copies of summonses and complaints and other pleadings and material filed prior to the government's initial responses should be mailed to:

Office of the General Counsel
Social Security Division
Answer Staff
5107 Leesburg Pike
Room 1704 Skyline Towers
Falls Church, VA 22041-3255

In addition, SSA has designated certain items as "critical" and such items are to be forwarded to a special post office box. Items considered to be "critical" include: adverse court orders such as Magistrate and court reversals, remands, motions for, or threats or contempt or default, or any court order which contains a time limit for action to be commenced or completed by the Commissioner. Such items should be forwarded to:

Office of the General Counsel
Social Security Administration
Post Office Box 17054
Baltimore, Maryland 21203

All other, non-critical items including non-program matters, such as tort actions, employment laws against SSA, should be addressed to:

Office of the General Counsel
Social Security Administration
6401 Security Boulevard
Room 611, Altmeyer Building
Baltimore, Maryland 21235

**IMMIGRATION
LITIGATION**

-
- 4-7.010 Immigration Litigation—Generally**
 - 4-7.100 Reporting of Decisions**
 - 4-7.200 Revocation of Naturalization**
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4-7.010 Immigration Litigation—Generally

The Office of Immigration Litigation litigates in the federal district courts and circuit courts of appeals on behalf of the Immigration and Naturalization Service, the Department of State, the Department of Labor, and all other agencies involved in the regulation of aliens seeking to enter or remain in the United States. Additionally, the Office is responsible for litigation involving citizenship and passport matters, as well as the employer sanctions/employment authorization provisions of the Immigration Reform and Control Act of 1986 (Pub.L. No. 99-603, 100 Stat. 3359), as amended.

Immigration litigation may be either defensive or affirmative in character. No affirmative civil immigration suit should be instituted by the United States Attorney without prior consultation with the Office of Immigration Litigation. Copies of all immigration-related complaints and other pleadings served upon the United States Attorney should be promptly forwarded to the Office, including petitions by aliens for habeas corpus. Similarly, the Office shall endeavor to provide prompt notification to United States Attorneys of significant developments concerning aliens involved in federal court litigation in their districts. Certified records of proceedings before immigration judges are prepared by the Executive Office of Immigration Review; requests for such records should be made through the Office of Immigration Litigation.

For alien-related litigation, the principal governing statute is the Immigration and Naturalization Act of 1952, *as amended*, 8 U.S.C. §§ 1101, *et seq.*, which establishes critical distinctions between aliens based upon their status as immigrants or nonimmigrants and, until 1996, based upon whether the individual in question has "entered" the United States (a legal fiction which resulted in separate avenues of deportation and exclusion for the expulsion of aliens lacking authority to enter/remain in the United States). Under recent reforms, "admission" has replaced "entry" as the pertinent inquiry. Special statutory provisions limit the courts' jurisdiction to review immigration disputes. *E.g.*, 8 U.S.C. § 1105a, replaced by 8 U.S.C. 1252, as amended. The Immigration and Nationality Act was significantly rewritten by the Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. 104-828, 110 Stat. 3009, much of which became effective April 1, 1997.

Contact: Thomas W. Hussey, (202-616-4852), Director.

Deputy Directors: Donald E. Keener, (202-616-4878); David J. Kline, (202) 616-4856; David M. McConnell (202-616-4881).

Mail:
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20004

Delivery:
Suite 7025S, National Place
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

4-7.100 Reporting of Decisions

The outcomes of all civil proceedings arising under the immigration and nationality laws (including the disposition of habeas corpus petitions by aliens) should be reported to the Office of Immigration Litigation. In all cases in which the decision is adverse to the government, copies of the pleadings and other documents, except insofar as previously supplied to the Office, should be promptly submitted along with an appeal recommendation. *See* USAM Title 2, Appeals.

United States Attorneys should promptly advise the appropriate District Directors of the Immigration and Naturalization Service of all decisions and interlocutory orders in litigation to which the Service is a party. Such notification should be particularly prompt in the case of an adverse decision or interlocutory rulings in which an appeal, rehearing en banc or certiorari might be taken or sought. Timely notification will enable the General Counsel to formulate the Service's recommendation to the Department with respect to any further action which might be taken in the litigation.

Similarly, prompt notification should be given to appropriate officials of the Departments of Labor and State of decisions or rulings in immigration and nationality cases whenever either Department is a party to the action.

4-7.200 Revocation of Naturalization

No suit shall be instituted by the United States Attorney to revoke naturalization under 8 U.S.C. § 1451 without prior consultation with the Office of Immigration Litigation. Notwithstanding that under 8 U.S.C. § 1421(b) jurisdiction also lies in various courts of the states, all such actions shall be filed in the federal district courts. There is no objection to the payment of the expenses of filing in state courts certified copies of judgments in accordance with 8 U.S.C. § 1451(f).

In all cases involving the revocation of naturalization, service may be had upon absentees from the United States or the judicial district in which the defendant last had his/her residence by publication or by any other method permitted by the laws of the state or place where the suit is brought. If the state statute permits service upon absentees by registered mail only, no publication is necessary. If service can only be effected by publication, publication must be in strict compliance with the state statute.

Title 8 U.S.C. § 1451(f) provides that a person holding a certificate of naturalization or citizenship which has been canceled under the provision of that section shall, upon proper notice, surrender the certificate to the Attorney General. All complaints for revocation of naturalization filed pursuant to Section 1451 should contain a demand that the certificate of naturalization be surrendered to the United States Attorney, and all proposed orders to be signed by the court in such cases should provide for surrender of the certificate of naturalization to the United States Attorney.

Upon receipt of the certificate, the United States Attorney should forward it to the District Director, Immigration and Naturalization Service, who has jurisdiction over the area in which the certificate is surrendered.

In proceedings under 8 U.S.C. § 1451(d) that involve persons who are outside of the United States, the United States consular officer in the area, as the representative of the Attorney General, will demand surrender of the certificate.

4-7.300 Plea Agreements Involving Deportation, Exclusion, or Removal

United States Attorneys should also be cognizant of the sensitive areas where plea agreements involve the deportation, exclusion, or removal of aliens. The regulation at 28 C.F.R. § 0.197 provides that,

The Immigration and Naturalization Service (Service) shall not be bound, in the exercise of its authority under the immigration laws, through plea agreements, or other agreements with or for the benefit of alien defendants, witnesses, or informants, or other aliens cooperating with the United States Government, except by the authorization of the Commissioner of the Service or the Commissioner's delegate. Both the agreement itself and authorization must be in writing to be effective, and the authorization shall be attached to the agreement.

Notification should also be provided to the Office of Immigration Litigation.

CONSUMER LITIGATION

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4-8.010 Introduction

The Civil Division's Office of Consumer Litigation (OCL) is responsible for criminal and civil litigation and related matters arising under the Federal Food, Drug, and Cosmetic Act (FDCA) and other federal statutes that protect public health and safety. The Office also enforces, through civil actions, statutes that regulate unfair and deceptive trade practices, and it defends the government programs and policies in consumer-related areas.

OCL, created in 1971, has been central in developing the case law under the various esoteric statutes over which OCL has jurisdiction pursuant to 28 C.F.R. § 0.45(j). These statutes give rise to felony and misdemeanor prosecutions, as well as civil cases. USAOs should contact OCL as soon as possible after receiving a case in one of these areas for advice and assistance, and to obtain authorization to file the case.

OCL serves several functions for cases developed by USAOs: (1) to ensure that Assistant United States Attorneys do not overlook unique policy or factual concerns that frequently affect litigation under OCL's statutes; (2) to ensure that Assistant United States Attorneys do not have to "reinvent the wheel," when OCL already has jury instructions, briefs, and other pleadings on relevant points; and (3) to obtain the Assistant Attorney General's approval that is needed before filing cases in these areas.

When a client agency refers a case to the Department of Justice, OCL receives the referral and will either retain it or ask a USAO to handle the case. However, in two areas Assistant United States Attorneys sometimes receive cases directly from investigative agencies without OCL's involvement. These are cases under the FDCA and the odometer tampering statutes. Accordingly, the focus below will be to provide guidance and models in these two areas. USAOs should consult with OCL when cases are first received in either area.

For a complete listing of the statutes assigned to OCL in 28 C.F.R. § 0.45(j) see the Civil Resource Manual at 101.

4-8.100 Persons to Contact at OCL

Thirolf, Eugene, Director, (202) 307-3009.

Jost, Kenneth, Deputy Director, (202) 307-0048.

Lahaie, Henry, Assistant Director, (202) 307-0053.

Jill Furman, Assistant Director, (202) 307-0090.

4-8.200 Federal Food, Drug, and Cosmetic Act Litigation

FDCA matters can be initiated in USAOs by an agent seeking a search warrant, a grand jury subpoena, or a prosecution. These matters are not always coordinated among all affected parties. Accordingly, notifying OCL of such a contact may be the only way to ensure that USAOs are fully informed of the context in which a request arises—a context that may involve other investigative agencies or cases. In addition, FDA initiates civil seizure actions under the FDCA by direct referral to USAOs.

Intense outside scrutiny of FDCA prosecutions has occurred in recent years. This adds to the general need for consistency in how similar cases in different locations are charged. OCL can bring expertise to FDCA matters that helps maintain critical consistency in enforcement decisions.

The discussions below focus on the major types of FDCA cases, and significant issues that are common to most FDCA matters.

4-8.205 Felony Prosecutions—"Intent to Defraud"

Any person who commits a prohibited act set forth in 21 U.S.C. § 331 violates the FDCA. A person committing such an act "with the intent to defraud or mislead" is guilty of a three-year felony. 21 U.S.C. § 333(a)(2). Intent to defraud or mislead can be established by demonstrating a fraud upon either the ultimate consumer of the product, or upon the FDA, or both. That is, a person whose fraudulent conduct is directed at the FDA, as is common in black market and other contexts, is guilty of felony behavior, and should be prosecuted on that basis. For a discussion of "materiality" under the FDCA after *Neder v. United States*, 527 U.S. 1 (1999), see the Civil Resource Manual at 98.

See the Civil Resource Manual at 103, and section IV (C) of the trial memorandum reproduced in the Civil Resource Manual at 27. See also Civil Resource Manual at 20 for a caveat regarding relating intent to the specific crime charged.

4-8.210 "Park" Misdemeanor Liability

A misdemeanor conviction under the FDCA, unlike a felony conviction, does not require proof of fraudulent intent, or even of knowing or willful conduct. OCL attempts wherever possible to bring felony charges to deal with fraudulent behavior. Nevertheless, misdemeanor liability can attach to behavior that, due to lack of proof or other problems with a case or defendant, may not merit felony prosecution. See Civil Resource Manual at 104 for a discussion of misdemeanor elements, 105 and 106 for potential jury instructions, and 107 for a brief discussing a similar principle in other contexts.

4-8.215 Grand Jury Subpoena Practice

For a model subpoena, and practice tips for an FDCA investigation, see Civil Resource Manual at 108.

4-8.220 FDCA Criminal Prosecution of "Black Marketeers"

Several black markets in unapproved pharmaceuticals generate direct agent to USAO contacts. OCL should be advised when such matters are initiated. Common matters include drugs such as GHB, Human Growth Hormone, and various animal drugs. Agents sometimes suggest conducting "buy-bust" scenarios as are common with controlled substances. Important guidance in these areas, and sample pleadings, are included in the Civil Resource Manual at 15 *et seq.*

4-8.225 Prosecutions of Manufacturers of Drugs, Devices, and Biologics

FDA commonly coordinates complex investigations involving the industries it regulates through OCL. Nevertheless, USAOs may receive such matters directly. OCL should be notified when this occurs for advice and assistance. Issues regarding medical devices and adulteration or misbranding claims are discussed in the Civil Resource Manual at 109.

4-8.230 The Prescription Drug Marketing Act ("PDMA")

The PDMA deals with a "grey market" in prescription drugs. This grey market includes diverted sample drugs and diverted drugs originally sold to hospitals. The PDMA is codified in the FDCA, with prohibited acts listed at 21 U.S.C. § 331(t). When contacted by an investigative agency concerning a potential PDMA matter, USAOs should contact OCL. The PDMA is a complex statute with numerous exceptions. OCL will provide advice and assist in developing an effective case strategy.

For a very general description of the PDMA, see the Civil Resource Manual at 113. See the Civil Resource Manual at 114 *et seq.* for model charging documents.

4-8.235 "Food Fraud" Prosecutions

OCL has litigated numerous prosecutions in which a food was "stretched" with cheaper ingredients that are difficult to detect, leading consumers to pay higher prices for lower quality foods. Where evidence of fraud exists, the deliberate cheating of consumers in this fashion should be prosecuted under the felony provisions of the FDCA, or as mail or wire fraud, or both. Sample indictments are included in the Civil Resource Manual at 118 *et seq.* See the Civil Resource Manual at 124 *et seq.* for sample jury instructions. Also included in the Manual at 126 are practice tips and a brief regarding one use of evidence of scientific testing in this type of case.

4-8.240 Motions Commonly Filed

Defendants commonly challenge FDCA indictments alleging a variety of defects that the courts have held do not exist. The Civil Resource Manual contains a number of sample briefs opposing several such motions.

Civil Resource Manual at 127 et seq. Responses to motions to strike surplusage from indictments. These motions challenge primarily the introductory paragraphs of FDCA indictments.

Civil Resource Manual at 131 and 132. Responses to motions to dismiss counts or require or require election due to multiplicity where the adulteration and misbranding of a food or drug are alleged in separate counts. This is the common method of charging, and the courts have accepted it, so it should be continued. (If an indictment were to allege adulteration and misbranding in the same count, the defendant would allege that the counts were duplicitous. Accordingly, the well-worn path of charging separate counts, which has successfully been defended, should be followed.).

Civil Resource Manual at 133. This memorandum, in addition to dealing with a multiplicity challenge, lays out differences between violations of the FDCA contained in 21 U.S.C. § 331(a) and § 331(k).

Civil Resource Manual at 134 and 135. This trial brief sets forth the elements of violations of the FDCA contained in 21 U.S.C. § 331(a) and § 331(k). It also deals with evidentiary issues including the admissibility of summaries, foreign records, plea agreements, and scientific evidence, and chain of custody issues.

Civil Resource Manual at 136. Opposition to defense motions including to dismiss due to purported due process/vagueness, "Van Liew," and "Minarik" problems.

Civil Resource Manual at 137. An exhaustive analysis of Minarik.

Civil Resource Manual at 138 and 139. Defendants may allege that FDA acquiesced in their violations, or that the government engaged in selective prosecution in choosing whom to prosecute. These samples support government motions in limine to preclude evidence or argument at trial on these issues.

Civil Resource Manual at 140. Willfulness is not an element of an FDCA felony, and the good faith defense is thus somewhat limited.

Civil Resource Manual at 141. A sentencing memorandum discussion demonstrating that a veterinarian who dispenses drugs unlawfully should receive an abuse of trust enhancement under U.S.S.G. § 3B1.3.

4-8.245 Jury Charges

The Civil Resource Manual contains a number of sample jury instructions. Note that some of the instructions cover topics such as "interstate commerce" and other definitions which have broader applicability than the specific type of case identified.

Civil Resource Manual at 24 and 25. Animal drug cases.

Civil Resource Manual at 106. Misdemeanor instruction defining "responsible person."

Civil Resource Manual at 105. Misdemeanor instructions in adulterated food case. Request No. 5 deals with the issue of liability under a Park theory.

Civil Resource Manual at 124. Food fraud case.

4-8.250 Sentencing Considerations in FDCA Prosecutions

Any violation of the FDCA committed with "intent to defraud or mislead" is a felony. 21 U.S.C. § 333(a)(2). In virtually all felony FDCA prosecutions, U.S.S.G. § 2F1.1 is the applicable Chapter Two offense guideline by virtue of the cross-reference at U.S.S.G. § 2N2.1(b)(1). Section 2N2.1 applies to FDCA misdemeanors, which do not involve fraud. In structuring any FDCA investigation, consideration must be given to issues affecting sentencing, such as identifying the persons defrauded and the risk to public health. Particular effort should be made to learn the full extent of the fraud. Defendants have been sentenced to significant incarceration based largely on the amount of fraud. For a sample analysis estimating loss based on savings to defendants see Civil Resource Manual at 142. For a discussion of significant factors that affect sentencing in FDCA cases, see the Civil Resource Manual at 143. For an appellate brief regarding loss that takes account of recent significant cases analyzing loss in various FDCA drug contexts, see the Civil Resource Manual at 144.

4-8.255 Indictments and Information

The following sample charging documents for FDCA cases are in the Civil Resource Manual:

Civil Resource Manual at 121. *United States v. Mays*, an indictment with seven defendants and 33 counts (orange juice concentrate stretched with sugar).

Civil Resource Manual at 118. *United States v. Peninsular Products*, an indictment with nine defendants, 33 counts, (orange juice concentrate stretched with sugar; unlabeled preservatives; false declaration to grand jury).

Civil Resource Manual at 123. *United States v. Rubino*, one defendant, two counts (olive oil stretched with canola oil).

Civil Resource Manual at 17. GHB prosecution (potential charges).

Civil Resource Manual at 111. *United States v. Cottone*, one defendant (medical device violations; false statement to agency).

Civil Resource Manual at 112. *United States v. Chan*, one defendant (medical device violation focused on false statements and obstruction of justice).

Civil Resource Manual at 22. *United States v. Van Damme*, two defendants, seven counts (animal drug prosecution with conspiracy, adulterated and misbranded drug counts, and an unregistered drug manufacturing facility count).

Civil Resource Manual at 23. *United States v. Minneman*, one defendant, four counts (animal drug prosecution with conspiracy and misbranded drug counts).

4-8.260 Seizures Under the FDCA

FDA routinely recommends seizure actions under the FDCA (authorized by 21 U.S.C. § 334) by direct referral to USAOs. Most of these actions are routine, involving filthy storage conditions at food warehouses, and similar clear violations of the FDCA. However, some seizure recommendations are based on novel or difficult theories under the FDCA. USAOs should notify OCL if they receive such a referral, or if any seizure action is contested. Case law and procedures applicable to FDA seizure cases are discussed in the Civil Resource Manual at 146 *et seq.*

4-8.300 Odometer Fraud Prosecutions

OCL should be contacted when an odometer fraud investigation is opened so that information regarding potential overlaps with other cases can be shared. OCL should also be provided a copy of any proposed indictment or information at least one week before presentation or filing, so that necessary approvals can be obtained. In general, unless a USAO requests more active assistance on such investigations, OCL will merely monitor the case thereafter. See the Civil Resource Manual at 149 for a discussion of the agencies involved in these matters, who should be contacted, and investigative resources available through OCL.

4-8.305 Recodification of the Odometer Fraud Statutes

Effective July 5, 1994, the odometer tampering statutes were recodified from Title 15, U.S.C., to Title 49. The change was not substantive, though the statutes were reworded. Charging documents for offenses occurring on or after July 5, 1994, should cite Title 49 rather than Title 15. See the Civil Resource Manual at 150 for a detailed description of the recodification, and at 151 for the text of the former Title 15 offenses.

4-8.310 From Investigating to Sentencing

Included in the Civil Resource Manual are a variety of materials that will serve as resources and models for every step in an odometer fraud case. Included are guides for investigations, computerization help, sample indictments, trial briefs, responses to motions, and matters relevant to sentencing.

Other Offenses Commonly Charged	Odometer tampering implicates several federal criminal statutes. It is generally desirable to charge defendants with offenses in addition to odometer fraud. Such charges more accurately depict the totality of the illegal conduct, and provide theories of liability that may lead to conviction where, for example, a jury is not convinced that a defendant was responsible for some aspect of the conduct reflected in a single count. Included is a discussion of the types of charges that can be alleged with odometer tampering charges, along with some pertinent citations.	Civil Resource Manual at 152
Subpoenas to "Targets"— Forensic Evidence	Forensic evidence is frequently effective. Targets often forge other people's writing to conceal their role in a scheme. It is advisable to obtain handwriting exemplars from targets. In addition, fingerprints may remain on a fraudulent document. No Fifth Amendment privilege protects handwriting, fingerprints, or photographs. There should be no reluctance to subpoena such items. Sample language for a subpoena is included.	Civil Resource Manual at 153.

Subpoenas to "Targets" Required Records	It is good practice to subpoena targets for records relating to purchase and sale of automobiles, including odometer statements. Because such documents are "required records" for a used car dealer, targets cannot assert their Fifth Amendment privilege in resisting a subpoena seeking such materials.	Included in the Civil Resource Manual are a sample target subpoena at 153, an appeal brief from "required records" case at 154, and a letter that can be sent to counsel explaining why a target must provide "required records" to the grand jury at 155.
Indictments	Included are sample indictments or informations.	Civil Resource Manual at 156 et seq.
Trial Briefs	Trial briefs can explain unusual aspects of odometer fraud trials. The samples explain evidence from auto auctions, dealer records, and titling documents and procedures. They also lay out theories such as Pinkerton, and evidentiary matters, such as that title histories are self-authenticating and the admissibility of summary charts, plea agreements, and video and audio plea agreements, and video and audio tapes.	Civil Resource Manual at 159 et seq.
Jury Instructions	Sample jury instructions from odometer tampering cases are included.	Civil Resource Manual at 162.
Commonly Filed Defense Motions	Deals with the sufficiency of proof of mailing as to conspiracy to commit mail fraud counts, and with the adequacy of a state department of motor vehicle mailing of a title as satisfying the mailing element.	Civil Resource Manual at 163.
	An omnibus response in a multi-defendant odometer fraud prosecution. Included (Section B starting at p. 12) is an analysis of why odometer tampering, mail fraud, and ITSP are properly charged as separate offenses.	Civil Resource Manual at 164.
	Proposed findings that can be used to support a complex case finding and exclusion of time under the Speedy Trial Act.	Civil Resource Manual at 164.
	Brief arguing that false odometer certifications, securities fraud, and mail fraud counts are not multiplicitous.	Civil Resource Manual at 165.
Restitution and Victim Notification	Restitution for consumers should be sought when possible, though the defendant's resources frequently limit restitution. The need for restitution must be considered in choosing charges. Restitution orders should ordinarily use loss figures developed under U.S.S.G. §2F1.1. In addition, victims should be notified of the rollbacks. 42 U.S.C. §10607. Included at the end of the discussion is a motion and order that can be used to obtain a Fed. R. Crim. P. 6(e) order related to victim notification.	Civil Resource Manual at 167.

Evaluating the "Amount of Loss" for sentencing in odometer fraud cases	Odometer fraud cases are sentenced under the fraud guideline. The most commonly litigated issues are the number of vehicles to attribute to the defendant, and the loss per vehicle to use in arriving at a total loss figure. OCL has developed a variety of analyses that are useful in this regard for obtaining loss findings that properly reflect the impact on consumers of odometer fraud schemes. A description of and guide to, these materials is included.	Civil Resource Manual at 170.
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4-9.000 COMMON LITIGATION ISSUES

Guidance on common litigation issues is available in the Civil Resource Manual

Jury Trials In Civil Cases	Civil Resource Manual at 201
Laches	Civil Resource Manual at 202
Limitations Statutes Applicable to Suits Against the Government	Civil Resource Manual at 203
Offset	Civil Resource Manual at 204
Recoupment and Setoff	Civil Resource Manual at 205
Priority for the Payment of Claims Due the Government	Civil Resource Manual at 206
Counterclaims Against the United States	Civil Resource Manual at 207
Counterclaim in Suits on Notes and Mortgages	Civil Resource Manual at 208
Estoppel	Civil Resource Manual at 209
Choice of Law	Civil Resource Manual at 210
Interest Recoverable by the Government	Civil Resource Manual at 211
Interest Recoverable from the Government	Civil Resource Manual at 212
Declaratory Actions	Civil Resource Manual at 213
Injunctions	Civil Resource Manual at 214
Mandamus	Civil Resource Manual at 215
Reformation	Civil Resource Manual at 216
Replevin	Civil Resource Manual at 217
Rescission	Civil Resource Manual at 218
Specific Performance	Civil Resource Manual at 219
Attorney's Fees	Civil Resource Manual at 220
Court Costs	Civil Resource Manual at 221
Costs Recoverable by the United States	Civil Resource Manual at 222
Costs Recoverable from the United States	Civil Resource Manual at 223

JUDGMENTS AGAINST THE GOVERNMENT

- 4-10.010 **Judgment Against the Government—Generally**
4-10.100 **Payment and Satisfaction of Judgement Against the Government**
4-10.110 **Payment of Judgments by the Department of the Treasury and Postal Service**
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4-10.010 **Judgment Against the Government—Generally**

To prevent difficulties in payment and unnecessary appeals due to the irregularity of form or the inclusion of items of recovery which are improper, the United States Attorney should arrange to prepare the form of judgment to be entered whenever possible, or, if this is not possible, be sure to review the form of the proposed judgment before its entry. See Civil Resource Manual at 212 as to the allowance of interest. The limited circumstances in which court costs may be included in judgments is discussed in the Civil Resource Manual at 221. See Civil Resource Manual at 220 as to attorneys' fees for plaintiff's counsel.

Except when a judgment is entered by consent in order to provide for the payment of an agreed compromise, all adverse judgments should be brought to the attention of the Civil Division immediately, with the United States Attorney's reasoned recommendation for or against appeal. *See* USAM Title 2, for appeals generally.

The GAO has taken the position that it is without authority to offset or withhold tax claims from "backpay" judgments rendered against the United States, unless the judgment specifically states the amount of such withholding. The Internal Revenue Service, which views such awards as taxable income, has nevertheless requested that appropriate steps be taken to ensure that applicable taxes are collected therefrom. Accordingly, whenever a judgment for back pay (or for any other amount deemed to be taxable income) is being entered, the attorney handling the case for the government should either request the court to specify that applicable taxes may be withheld, or separately agree with the plaintiff (in writing) concerning an appropriate offset.

4-10.100 **Payment and Satisfaction of Judgement Against the Government**

A check in payment of an adverse judgment may be obtained in some cases from the client agency, if it has an appropriation or other source of funds available. Government corporations and "sue and be sued" officials and agencies may have such an appropriation, or a revolving fund, from which payment can be made. Adverse National Service Life Insurance (NSLI) judgments (as distinguished from those which are entered as a result of compromise) are payable by the Department of Veterans Affairs (VA) from insurance trust funds. However, if the loss is due to the extra hazards of war, the VA will pay the NSLI judgment from appropriations. Judgments in Federal Tort Claims Act cases, with few exceptions, are paid with treasury funds after certification by the Department of the Treasury. If the FTCA judgment is based upon the activities of a Federally Supported Health Center, the judgment is paid by the Department of Health and Human Services rather than by the Treasury. Likewise, the Postal Service pays judgments for its torts. In a few instances, funds for the payment of a judgment may be provided by an insurer, surety, or indemnitor. Normally, the Civil Division's communication advising that further appellate review will not be sought will provide information as to the method of payment. If payment cannot be obtained from the sources indicated above, payment of final judgments will be made pursuant to 31 U.S.C. § 1304. *See* USAM 4-10.110. In the past, the judgment fund, which pays judgments pursuant to 31 U.S.C. § 1304, was administered by the General Accounting Office. Effective June 30, 1996, that authority was transferred to the Office of Management and Budget (OMB) pursuant to § 211 of the Legislative Appropriation Act of 1996, and redelegated by OMB to the Department of the Treasury, Financial Management Service.

In tort actions, parties in addition to the injured plaintiff may have a legal interest in the funds generated by a judgment or settlement. *See United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366 (1949). For example, a workers' compensation carrier may have a lien for insurance payments it has already sent to the injured plaintiff. Any party which is subrogated to an interest of a party plaintiff can separately assert its rights. If the government pays the injured plaintiff the full amount of damages, it may still be liable for payment to the subrogated party for the amount the subrogated party paid out. Therefore, United States Attorneys should design settlement documents and documents for release of judgment so as to extinguish all claims arising from the subject matter of the lawsuit, including not only the claim of the primary plaintiff but also of all parties having a subrogated interest. If necessary, the Department of the Treasury should be requested to issue separate checks to insure extinguishment of separate interest.

National Service Life Insurance judgments are frequently payable in installments over a long period. In such cases, the installments payable to the beneficiary and the beneficiary's attorney will be paid directly (and separately) to them by the Department of Veterans' Affairs. *See* 38 U.S.C. § 3020.

4-10.110 Payment of Judgments by the Department of the Treasury and Postal Service

Final judgments adverse to the United States can sometimes be paid by the client agency, or an insurer, surety, or indemnitor. If payment cannot be effected in that manner, payment can usually be made from the funds appropriated pursuant to 31 U.S.C. § 1304. Thus, judgments (and certain compromise settlements, *see* USAM 4-3.200), payable in accordance with 28 U.S.C. §§ 2414 or 2517, which are final or of which further appellate review will not be sought, may be paid by the Department of the Treasury, Financial Management Service (FMS) or the Postal Service, as appropriate. (As noted earlier, prior to June 30, 1996, the General Accounting Office ("GAO") was responsible for the administration of the Judgment Fund, 31 U.S.C. § 1304. That authority was transferred to OMB by § 211 of the Legislative Appropriations Act of 1996, and redelegated to the Department of the Treasury, Financial Management Service.)

In cases delegated to them by the Civil Division, United States Attorneys should submit adverse final money judgments or compromises which cannot be paid by the client agency, insurer, surety, or indemnitor, to FMS or the Postal Service as appropriate. Note that judgments adverse to the United States are not "final" until the Solicitor General has determined that no further appellate review will be sought and no judgments should be sent to the FMS or Postal Service for payment until such a determination has been made. (*See* USAM 2-2.121 *et seq.*) Also note that unique payment procedures make it necessary to forward Swine Flu settlements through the Civil Division for distribution to the FMS.

In order to facilitate prompt payment of such judgments or compromises, standardized transmittal letters should be used whenever the Assistant United States Attorney forwards final judgments or settlements to the FMS or the Postal Service, as appropriate, for payment. Sample transmittal letters may be found in the Civil Resource Manual at 224 *et seq.* In addition, an FMS Form 196, Adverse Judgment Data Sheet, must be completed and submitted with the transmittal letter. Copies of the FMS Form 196 can be obtained directly from FMS. These transmittal letters and the FMS Form 196 will also be used by other Divisions of the Department so that the FMS will receive the same basic data whenever payments are requested.

Note that a different letter is to be used in cases forwarding a backpay award for payment because deductions for certain items to be withheld from such award must be made. *See* Civil Resource Manual at 225.

There is also a separate data sheet required for awards of attorney fees to enable FMS and OMB to gather specific data on the number and amounts of such fees being paid by the government. Copies of that data sheet can also be obtained from FMS.