



DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 0

[Docket No. OAG 162; AG Order No. 4926-2020]

Approval of Civil Consent Decrees with State and Local Governmental Entities

AGENCY: Office of the Attorney General, Justice.

ACTION: Final rule.

SUMMARY: This final rule amends the regulations of the Department of Justice (“Department”) setting forth the approval procedures to be used when a civil action against a State or local governmental entity is resolved by consent decree, prior to the finalization of that agreement.

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

FOR FURTHER INFORMATION CONTACT: J. Taylor McConkie, Deputy Associate Attorney General, Department of Justice, Washington, DC 20530; telephone: (202) 514-9500 (not a toll-free number).

SUPPLEMENTARY INFORMATION: In enforcing Federal law, the Department may bring lawsuits against State and local governmental entities. State governments are sovereigns with special and protected roles under our constitutional order. Accordingly, the Department must ensure that its practices in such cases are in the interests of justice, transparent, and consistent with the impartial rule of law and fundamental constitutional principles, including federalism and democratic control and accountability.

On November 7, 2018, Attorney General Jeff Sessions issued a memorandum (“November 7 memorandum” or “memorandum”) to the heads of the Department’s civil litigating components and the United States Attorneys addressing many of the particular

considerations arising when a civil action against a State or local government is resolved by consent decree or settlement agreement. Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Government Entities (Nov. 7, 2018) (available at <https://www.justice.gov/opa/press-release/file/1109681/download>).

As that memorandum explained, while consent decrees may be necessary and appropriate to secure compliance with Federal law, Federal court decrees that impose wide-ranging and long-term obligations on, or require ongoing judicial supervision of, State or local governments are extraordinary remedies that “raise sensitive federalism concerns.” *Id.* at 2 (citing *Horne v. Flores*, 557 U.S. 433, 448 (2009)). It is appropriate that the Department should exercise special caution before entering into a consent decree with a State or local governmental entity. While such consent decrees can be appropriate settlement vehicles in limited circumstances, they should be employed carefully and only after review and approval of senior leadership of the Department. *Id.* at 3-4.

To that end, the November 7 memorandum set forth important principles to guide the development of consent decrees with State or local governmental entities, including limitations on the circumstances in which a consent decree with a State or local governmental entity may be appropriate, the substantive requirements for such consent decrees, internal notification requirements regarding the initiation of negotiation for consent decrees, and a requirement of review and approval of senior leadership of the Department before a consent decree is agreed to by the United States or submitted to the court for entry.

The principles of the November 7 memorandum are applicable, by its terms, to all civil litigation conducted by the Department that involves any civil consent decrees or settlement agreements with State or local governmental entities. However, it is appropriate to amend the Department’s settlement regulations to effectuate one aspect addressed by the memorandum, i.e., the requirement for leadership approval of consent

decrees prior to the agreement or submission to a court for entry. As noted in the memorandum (pages 2 n.3 and 3 n.4), the Department's existing regulations on the delegation of settlement authority govern the requirements for certain settlements to be approved by the Department's senior leadership. This final rule amends the existing settlement regulations to add a new paragraph codifying the requirement for the relevant Assistant Attorney General of the civil litigating division (or the United States Attorney to whom settlement authority has been redelegated under 28 CFR 0.168) to approve and submit consent decrees involving State or local government entities for approval by the Deputy Attorney General or the Associate Attorney General if the consent decree would (1) place a court in a long-term position of monitoring compliance by a State or local governmental entity; (2) create long-term structural or programmatic obligations, or long-term, indeterminate financial obligations, for a State or local governmental entity; or (3) otherwise raise novel questions of law or policy that merit review by senior Department leadership. However, consistent with the November 7 memorandum at page 3 n.5, this new approval requirement does not apply where use of a consent decree is required by statute or regulation or the consent decree is limited to the payment of a sum certain of money or performance of a specific environmental removal action.

Accordingly, to achieve the foregoing objectives, before a consent decree that comes within one of the categories set forth above is agreed to by the United States or submitted to a court for entry, it must be approved by the United States Attorney or the Assistant Attorney General for the litigating component responsible for the subject matter of the consent decree and by the Deputy Attorney General or the Associate Attorney General, in accordance with the standard reporting structure of the Department.

Regulatory Certifications

Administrative Procedure Act

This rule relates to a matter of agency management or personnel and is a rule of

agency organization, procedure, or practice. As such, this rule is exempt from the usual requirements of prior notice and comment and a 30-day delay in effective date. *See* 5 U.S.C. 553(a)(2), (b), (d).

Regulatory Flexibility Act

This regulation will not have an impact on small entities because it pertains to personnel and administrative matters affecting the Department. A Regulatory Flexibility Analysis was not required for this final rule because the Department was not required to publish a general notice of proposed rulemaking for this matter. *See* 5 U.S.C. 601(2), 604(a).

Executive Orders 12866, 13563, and 13771 - Regulatory Review

This regulation has been drafted and reviewed in accordance with Executive Order 12866, “Regulatory Planning and Review,” section 1(b), “The Principles of Regulation,” and Executive Order 13563, “Improving Regulation and Regulatory Review,” section 1, “General Principles of Regulation.”

This final rule is “limited to agency organization, management, or personnel matters” and thus is not a “rule” for purposes of review by the Office of Management and Budget. *See* Executive Order 12866, section 3(d)(3). Accordingly, this rule has not been reviewed by the Office of Management and Budget.

This rule is not subject to the requirements of Executive Order 13771 because it is “related to agency organization, management, or personnel” and thus not a “rule” under Executive Order 13771, section 4(b).

Executive Order 12988 - Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

Executive Order 13132 - Federalism

This rule provides for appropriate leadership review by the Department prior to

the finalization of consent decrees involving State or local governmental entities, in order to better ensure their special sovereign and protected roles under our constitutional order. This is not a substantive rule but is a rule of internal agency management, practice, and procedure regarding the delegation of the Attorney General's litigation authority for the internal review of certain consent decrees in litigation being conducted under the authority of the Attorney General. This rule will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, Federalism, the Department has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$120 million or more (adjusted for inflation) in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*

Congressional Review Act

This rule is not a major rule as defined by section 804 of the Congressional Review Act, 5 U.S.C. 804. This action pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a "rule" as that term is used by the Congressional Review Act, 8 U.S.C. 804(3)(B)-(C). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 28 CFR Part 0

Authority delegations (Government agencies), Government employees,

Organization and functions (Government agencies), Privacy, Reporting and recordkeeping requirements, Whistleblowing.

Accordingly, by virtue of the authority vested in me as Attorney General, including 5 U.S.C. 301 and 28 U.S.C. 509, 510, part 0 of title 28 of the Code of Federal Regulations is amended as follows:

PART 0--ORGANIZATION OF THE DEPARTMENT OF JUSTICE

1. The authority citation for part 0 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, 515-519.

2. Section 0.160 is amended by:

a. Removing the word “or” at the end of paragraph (d)(1);

b. Removing the word “or” at the end of paragraph (d)(4);

c. Removing the period at the end of paragraph (d)(5) and adding in its place “; or”; and

d. Adding paragraphs (d)(6) and (e).

The additions read as follows:

§ 0.160 Offers that may be accepted by Assistant Attorneys General.

* * * * *

(d) * * *

(6) When a proposed settlement of a civil action includes a consent decree with a State or local governmental entity that would:

(i) Place a court in a long-term position of monitoring compliance by a State or local governmental entity;

(ii) Create long-term structural or programmatic obligations, or long-term, indeterminate financial obligations, for a State or local governmental entity; or

(iii) Otherwise raise novel questions of law or policy that merit review by senior Department leadership.

(e) As used in paragraph (d)(6) of this section, “long-term” means that the obligations, on their face or in practice, are reasonably likely to take 24 months or longer to satisfy. Paragraph (d)(6) of this section does not apply where use of a consent decree is required by statute or regulation or the consent decree is limited to the payment of a sum certain of money or performance of a specific environmental removal action.

Dated: December 4, 2020.

William P. Barr,
Attorney General.

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