Office of the Attorney General
Washington, D. C. 20530
April 16, 2021

MEMORANDUM FOR: HEADS OF CIVIL LITIGATING COMPONENTS
UNITED STATES ATTORNEYS

FROM: THE ATTORNEY GENERAL

SUBJECT: CIVIL SETTLEMENT AGREEMENTS AND CONSENT DECREES WITH STATE AND LOCAL GOVERNMENTAL ENTITIES

I. Introduction

In certain contexts, Congress has authorized the Department of Justice to file lawsuits against state and local governmental entities to obtain legal and equitable relief to remedy violations of federal law. The Department has used such authorities to secure equal opportunity in education, protect the environment, ensure constitutional policing practices, defend the free exercise of religion, eliminate discriminatory housing practices, redress sexual harassment and other forms of discrimination in the workplace, make water safe to drink, increase access for people with disabilities, guard voting rights, and vindicate the rights of servicemembers.

When the Department identifies a violation of federal law by a state or local governmental entity, the Department generally seeks to reach a resolution that avoids litigation.[1] A resolution can take the form of a settlement agreement or consent decree.[2] A consent decree ensures independent judicial review and approval of the resolution and, if necessary, allows for prompt and effective enforcement if its terms are breached. In some cases, monitors are used to provide technical assistance and assess compliance with a settlement agreement or consent decree.[3]

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[1] As used in this memorandum, the term "state and local governmental entities" includes territorial and tribal entities.

[2] As used in this memorandum, the term "settlement agreement" means an out-of-court resolution, including a memorandum of agreement or memorandum of understanding, that requires performance by a state or local governmental entity and is enforced through the filing of a lawsuit for breach of contract. The term "consent decree" means a negotiated resolution that is entered as a court order and is enforceable through a motion for contempt. This memorandum only addresses resolutions that concern violations or alleged violations of law and does not apply to other categories of resolutions.

[3] As used in this memorandum, the term "monitor" includes any third party whose job is to monitor a state or local governmental entity's compliance with the terms of any settlement agreement or consent decree, whether the third party is called a "monitor," "trustee," "auditor," or other name.

This memorandum addresses certain general principles regarding the Department's use of settlement agreements, consent decrees, and monitors in cases involving state and local governmental entities.

This memorandum provides internal Department guidance only. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable by law by any party in any matter or proceeding. Nor does it place any limitations on otherwise lawful litigation prerogatives of the Department of Justice.

II. Rescission of the November 2018 Memorandum Regarding Settlement Agreements and Consent Decrees with State and Local Governmental Entities

With limited exceptions, the Department has long placed authority to determine the form and substance of civil resolutions with state and local governmental entities in the heads of litigating components and United States Attorneys. It has done so because they are the Department officials most familiar with and best able to assess each particular case. A November 2018 Attorney General memorandum changed that Department practice by creating new review and approval conditions, and placing new restrictions and requirements, on the use of settlement agreements, consent decrees, and monitors in cases involving state and local governmental entities. *See* Memorandum from the Attorney General, *Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities* (Nov. 7, 2018) ("November 2018 Memorandum"). These changes were incorporated into the *Justice Manual* in March 2020 and the Code of Federal Regulations in December 2020. *See* JM 1-21.100 to 1-21.600; 28 C.F.R. §§ 0.160(d)(6)-(e) (2020).

By this memorandum, I am rescinding the November 2018 Memorandum. I further direct that the provisions of the *Justice Manual* incorporating the November 2018 Memorandum be withdrawn and that the process to revise the *Justice Manual* and 28 C.F.R. §§ 0.160(d)(6)-(e) to be consistent with the guidance set forth in this memorandum be initiated.

III. Approval of Settlement Agreements, Consent Decrees, and the Use of Monitors in Cases Involving State and Local Governmental Entities

The Department will return to the traditional process that allows the heads of litigating components to approve most settlement agreements, consent decrees, and the use of monitors in cases involving state and local governmental entities.

In keeping with longstanding regulations, protocols, and practices, the relevant Assistant Attorney General will generally handle such approvals. *See, e.g.*, 28 C.F.R. §§ 0.160(a), 0.50(a), and 0.65(a); JM 5-1.300 and 8-2.100. That approval authority may be delegated to the United States Attorneys, generally on a case-by-case basis. *See, e.g.*, JM 5-1.322; *see also*

Memorandum from the Assistant Attorney General, *Proposed Authorization of Case by Case Redelegation of Civil Civil Rights Matters to United States Attorney's Offices* (July 19, 2013).

Pursuant to Department regulations that predate the November 2018 Memorandum, however, a settlement agreement or consent decree with a state or local governmental entity must be referred to the Deputy Attorney General or the Associate Attorney General if the component head "is of the opinion that[,] because of a question of law or policy presented . . . or for any other reason, the proposed [resolution] should receive the personal attention of the Deputy Attorney General or the Associate Attorney General, as appropriate." 28 C.F.R. § 0.160(d)(2).

IV. Resolving Civil Matters with State and Local Governmental Entities by Settlement Agreements and Consent Decrees

If Department attorneys believe that an investigation of a state or local governmental entity may result in a civil settlement agreement or consent decree, they must, at an appropriate time, notify the subject jurisdiction of the material allegations against it and afford the jurisdiction an opportunity to respond.

Before presenting a consent decree with a state or local governmental entity to a court for approval, Department attorneys must ensure that the remedies outlined in the decree are designed to "protect[] federal interests." *Frew v. Hawkins*, 540 U.S. 431, 437 (2004). "[A] federal consent decree must spring from, and serve to resolve, a dispute within the court's subject-matter jurisdiction; must come within the general scope of the case made by the pleadings; and must further the objectives of the law upon which the complaint was based." *Id.* (citing *Firefighters v. Cleveland*, 478 U.S. 501, 525 (1986)).

In cases in which entering into either a settlement agreement or a consent decree with a state or local governmental entity would be lawful, reasonable, and serve the public interest, the following factors may help Department attorneys assess which type of resolution to pursue. These factors are designed to help guide internal decisionmaking about whether to propose, or agree to, a particular resolution. In many cases, only a few of these factors will be relevant. Not all factors must be present and no one factor is determinative in guiding whether to pursue a settlement agreement or consent decree.

- The nature of the underlying violation(s). Attorneys should consider the nature of the federal interest and underlying violation or violations and whether: (i) a jurisdiction's unlawful conduct is egregious or widespread; (ii) the violation or violations are ongoing; and (iii) there is a risk or likelihood of a future violation or violations.

- The nature and scope of the proposed remedies. Attorneys should consider the time reasonably required to durably implement the proposed remedies. Attorneys should also consider whether: (i) implementation of the remedies will span the term or tenure of multiple state or local officials; (ii) implementation of the remedies requires

coordination between or supervision by various persons or organizations; (iii) protection against third-party challenges is necessary; (iv) the jurisdiction has failed to demonstrate sufficient commitment to implementing the remedies; and (v) implementation of the remedies requires preemption of state or local law.

- The Government's interest in the form of the resolution. In light of the potential complexity, length, expense, and risk of litigation accompanying the settlement agreement or consent decree, attorneys should consider whether: (i) the resolution is likely to gain court approval under applicable legal standards; and (ii) the remedies and termination provisions are specific, clear, and well understood by the parties.

- The nature of the public interest in the violation(s) and remedies. Attorneys should consider whether the public interest will be best served by: (i) the process of publicly lodging a consent decree with the court and participating in a public process to enter the decree; and (ii) the transparency of a court-administered resolution throughout the course of its implementation.

V. Ensuring that Monitors are Independent, Highly Qualified, and Free of Conflicts of Interest

Some settlement agreements and consent decrees with state and local governmental entities may involve the use of a monitor. The Department has a significant interest in ensuring that the monitor selected is independent, highly qualified, and free of conflicts of interest.

In 2016, the Acting Associate Attorney General issued a memorandum regarding the selection of monitors in civil cases. *See* Memorandum from the Acting Associate Attorney General, *Statement of Principles for Selection of Corporate Monitors in Civil Settlements and Resolutions* (Apr. 13, 2016) ("April 2016 Memorandum"). The April 2016 Memorandum encouraged component heads "to prepare component-specific guidance – or to revise and/or supplement any such existing guidance – that enhances and implements [the principles in the April 2016 memorandum] in light of the component's own needs and practices." *Id.* at 2.

The Associate Attorney General will review the April 2016 Memorandum and associated component-specific guidances to determine whether further guidance regarding the use of monitors in settlement agreements and consent decrees involving state and local governmental entities is warranted. Within 120 days of this memorandum, the Associate Attorney General will provide any recommendations that arise from this review.

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Together, we will continue the Department's legacy of promoting the rule of law, protecting the public, and working collaboratively with state and local governmental entities to meet those ends. Thank you for your continued dedication to achieving these goals.