



Office of the Attorney General
Washington, D. C. 20530

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MEMORANDUM FOR: HEADS OF CIVIL LITIGATING COMPONENTS
UNITED STATES ATTORNEYS

FROM: THE ATTORNEY GENERAL  11/7/18

SUBJECT: Principles and Procedures for Civil Consent Decrees and Settlement
Agreements with State and Local Governmental Entities

I. INTRODUCTION

In enforcing federal law, the Department of Justice (“Department”) sometimes brings lawsuits against state and local governmental entities.¹ 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.

This memorandum’s purpose is to provide direction to all civil litigating components and United States Attorneys’ Offices (“USAO”) concerning several important issues arising when a civil action against a state or local governmental entity is resolved by consent decree or settlement agreement.² In particular, it requires that the Department provide state and local governmental entities an adequate opportunity to respond to any allegations of legal violations; requires special caution before using a consent decree to resolve disputes with state or local governmental entities; provides guidance on the limited circumstances in which such a consent decree may be appropriate; limits the terms for consent decrees and settlement agreements with state and local governmental entities, including terms requiring the use of monitors; and amends the process for the approval of these mechanisms in cases in which they are permissible.

¹ As used in this memorandum, the term “state and local governmental entities” also includes territorial and tribal entities, as federal consent decrees and settlements with such entities raise many of the same concerns regarding democratic autonomy and accountability.

² As used in this memorandum, the term “consent decree” means a negotiated agreement that is entered as a court order and is enforceable through a motion for contempt. The term “settlement agreement” means an out-of-court resolution that requires performance by the defendant, including a memorandum of agreement (“MOA”) or memorandum of understanding (“MOU”), enforcement of which requires filing a lawsuit for breach of contract.

This memorandum provides a general statement of principles. The Office of the Associate Attorney General is available for consultation on its application in specific cases.³

II. INVESTIGATIONS AND REPORTS OF ALLEGATIONS

Pursuant to federal statutes and regulations, the Department may investigate allegations of legal violations by state and local governmental entities in anticipation of potential litigation. In conducting these investigations, Department personnel must afford the subject governmental entity the respect and comity deserving of a separate sovereign, and shall afford the entity an opportunity to respond to the material allegations against it. To the extent such an investigation results in a notice, letter, report, or similar document, that document must make clear that the Department's conclusions are allegations only and have not been proven in a court of law. For consent decrees and settlement agreements subject to the notice and approval requirements set forth in Part III of this policy, the required justification memorandum must explain how the defendant state or local governmental entity was afforded an opportunity to respond.

III. CONSENT DECREES AND SETTLEMENTS IN CIVIL LITIGATION AGAINST STATE AND LOCAL GOVERNMENTAL ENTITIES

A. Constitutional and Policy Considerations

While consent decrees are sometimes 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." *Horne v. Flores*, 557 U.S. 433, 448 (2009). Such concerns are most acute when a federal judge, directly or through a court-appointed monitor, effectively superintends the ongoing operations of the governmental entity subject to the decree. This supervision can deprive the elected representatives of the people of the affected jurisdiction of control of their government. Consent decrees can also have significant ramifications for state or local budget priorities, effectively taking these decisions, and accountability for them, away from the people's elected representatives. *See id.* ("When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs."). In addition, consent decrees that are "not limited to reasonable and necessary implementations of federal law" may "improperly deprive future officials of their designated legislative and executive powers." *Frew v. Hawkins*, 540 U.S. 431, 441 (2004).

³ This memorandum provides only internal Department of Justice policy directed at Department components and employees. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. All prior Department memoranda or policies are superseded to the extent they are inconsistent with this memorandum. To the extent portions of this memorandum require amendments to Department regulations governing settlement authority, those portions do not apply until such time as the Attorney General amends the regulations.

In addition to these constitutional concerns, consent decrees involving state and local governmental entities can raise policy concerns. First, a consent decree can reduce long-term flexibility in how the defendant remedies the legal violation, especially if the passage of time has resulted in changed circumstances. Second, if terms are not carefully and appropriately crafted, a consent decree can subject defendants to ongoing judicial supervision long after it is no longer necessary to ensure compliance with the decree's terms—in some cases even after the Department believes the purposes of the decree have been achieved. Third, in some circumstances, a consent decree can significantly increase litigation costs for all parties, including the taxpayers who fund the Department, the federal courts, and state and local governments.

B. Notice and Approval Requirements for Consent Decrees with State and Local Governmental Entities

In light of the foregoing concerns, 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 as discussed further below, they should be employed carefully and only after review and approval of senior leadership of the Department, as described below.⁴

Absent an applicable exception,⁵ the Deputy Attorney General or the Associate Attorney General, in accordance with standard reporting structure of the Department, must be notified of any decision by a litigating component or USAO to initiate negotiations with a state or local governmental entity for a consent decree that 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. As used herein, "long-term" means that the obligations, on their face or in practice, are reasonably likely to take twenty-four months or longer to satisfy. The

⁴ By way of comparison, the Department's regulations have long required that monetary settlements exceeding certain thresholds be approved at the highest leadership levels of the Department. See 28 C.F.R. §§ 0.160, 0.161. For the constitutional and policy reasons discussed above, a consent decree with a state or local governmental entity can be as significant as, if not more significant than, a high-dollar settlement. Such decrees should likewise receive approval by senior Department leadership.

⁵ The notification and approval requirements set forth herein do not apply where (1) use of a consent decree is required by statute or regulation or (2) the consent decree is limited to the payment of a sum certain of money or performance of a specific environmental removal action (as is often the case, for example, when the defendant is liable as a potentially responsible party under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.*, or is liable as a responsible party for reimbursement of government removal costs or natural resource damages under the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701 *et seq.*). As noted above, Department regulations already address approval requirements for monetary settlements exceeding certain dollar thresholds.

notification should include a description of the alleged violations and an explanation of why the litigating component or USAO believes that resolution of the claims in the case through negotiation of a consent decree is necessary and appropriate based on the factors listed below and any other relevant factors.

Before the final consent decree is agreed to by the Department or submitted to the court for entry, it must be approved by the U.S. 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 standard reporting structure of the Department. In seeking the required approvals, the case team must draft a justification memorandum attaching the draft consent decree and explaining the reasons for the request and why a consent decree is necessary and consistent with the principles set forth herein. The justification memorandum should set forth the factual and legal basis for concluding that the defendant has violated federal law, a summary of the defendant's anticipated defenses, and an explanation of how the defendant was afforded an opportunity to respond to the material allegations against it. It should also evaluate the estimated costs of compliance with the consent decree and explain why the consent decree's benefits justify those costs. Any significant modifications to the material terms of a consent decree covered by this policy must be approved in the same manner.

Entering a consent decree with a state or local governmental entity may be appropriate if one or more of the following factors is present:

1. The defendant has an established history of recalcitrance or is known to be unlikely to perform because, for example, the defendant has violated other related administrative orders, judicial orders, settlement agreements, or consent decrees.
2. The defendant has unlawfully attempted to obstruct the investigation by, for example, engaging in spoliation.
3. The defendant has engaged in a pattern or practice of deprivations of rights or other violations of federal law, and other remedies have proven ineffective, such that ensuring compliance without the ongoing supervision of a court is unrealistic.
4. A consent decree is necessary to secure statutory protection or relief for the defendant, such as statutory protection against challenges and claims by third parties or statutory relief that preempts state law.

Neither the presence nor absence of any one of these factors, nor any particular combination thereof, will guarantee approval of a consent decree. The determination will be made based on analysis of the law and facts applicable in each case.

C. Substantive Requirements for Consent Decrees with State and Local Governmental Entities

For cases in which a consent decree is appropriate, the consent decree must adhere to the following requirements. Any exceptions to these requirements must be approved along with the proposed consent decree as set forth in the preceding section, and an explanation providing the justification for such an exception must be provided in the justification memorandum.

1. The duration of the consent decree must be specified in the decree and must be no longer than necessary to achieve an effective and durable remedy. Absent a compelling justification, such as where state or local governments have sought extended compliance schedules for significant capital investments, the obligations imposed by the decree should, if feasible, generally last for no more than three years.
2. The consent decree must include specific and measurable actions that trigger the decree's termination. In addition, the consent decree must include a "sunset" provision providing that, regardless of the decree's specific requirements, the decree terminates upon a showing by the defendant that it has come into durable compliance with the federal law that gave rise to the decree. The consent decree must also provide for partial termination when the state or local government can demonstrate durable compliance with particular provisions of the consent decree.
3. The consent decree must require the parties to return to court at appropriate intervals to report on compliance or noncompliance.
4. The provisions of the consent decree must be narrowly tailored to remedy the injury caused by the alleged legal violation.
5. The consent decree must not be used to achieve general policy goals or to extract greater or different relief from the defendant than could be obtained through agency enforcement authority or by litigating the matter to judgment.
6. A consent decree involving federal control of a state or local governmental institution should be limited in scope and must be structured to ensure that responsibility for discharging the duties of the institution is returned to the relevant officials as soon as the injuries caused by the legal violations alleged have been remedied.

C. Requirements for Settlement Agreements with State and Local Governmental Entities

Many of the concerns discussed above apply not only to court-enforceable consent decrees, but also to settlement agreements that create long-term obligations for state and local governmental entities. When entering into such settlements, the Department should be sensitive to these concerns and seek to avoid or minimize interference with democratic control.

The approval of the U.S. Attorney or the Assistant Attorney General for the litigating component responsible for the subject matter is required for any settlement agreement that would (1) place the Department or another federal agency 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. The Office of the Deputy Attorney General or the Associate Attorney General, in accordance with standard reporting structure of the Department, must be notified and consulted before any such agreement is finalized. For significant modifications to the material terms of any such agreement, the same process must be followed.

The terms of such settlement agreements must adhere to the same substantive requirements set forth above for consent decrees, except that the required periodic assessment of compliance or noncompliance may be handled by consultation of the parties without involving a court.

IV. USE OF MONITORS FOR STATE AND LOCAL GOVERNMENTAL ENTITIES

A. Constitutional and Policy Considerations

In resolving civil suits against state and local governmental entities—whether through a settlement agreement or by consent decree—the federal government has often required the use of a monitor. Unconstrained use of a monitor may, in some cases, effectively turn over partial control of the state or local governmental entity to the monitor, and therefore may raise or exacerbate many of the same constitutional and policy concerns raised by the use of a consent decree.

Monitors should operate with sufficient accountability and oversight, and should adhere to a code of ethics so that conflicts of interest—including a financial interest in prolonging the duration or expanding the scope of the monitorship—are avoided.

Just as it would be extraordinary for a federal agency to consent to the use of a monitor to oversee its operations or policies, in most cases there is little reason to expect or require a state or local government, equally a democratically accountable entity, to do so.

B. Limits on Use of Monitors for State and Local Governmental Entities

In most cases, the Department should take direct responsibility for ensuring a defendant's compliance with the terms of a settlement agreement rather than delegating that responsibility to a monitor. If, in light of the circumstances of a given case, it is prohibitively difficult for the Department or its client agency to directly oversee compliance, a monitor may be considered.⁶

⁶ Inadequate Department resources, standing alone, will usually not constitute a circumstance that justifies the use of a monitor. If a settlement agreement or consent decree is so complicated or long-term that Department officials cannot effectively monitor compliance, that may be an

In light of the monitor's role in overseeing compliance with a settlement that the Department believes is necessary to remedy a legal violation and is otherwise in the interests of justice, good government principles require that the Department structure agreements to ensure that monitors have appropriate incentives to work efficiently and effectively to bring the defendant into compliance with the terms of the settlement agreement or consent decree and to ensure that monitors act in the interests of justice and not in their own interest.

Before provision is made for a monitor as part of a civil settlement or consent decree with a state or local governmental entity, the relevant component head or U.S. Attorney must secure permission from the Deputy Attorney General or the Associate Attorney General, in accordance with standard reporting structure of the Department. For cases in which a monitor is appointed, the following guidelines must be followed, unless an exception is approved by the Deputy Attorney General or the Associate Attorney General:

1. The settlement agreement or consent decree must create incentives for the monitor to encourage early compliance with and conclusion of the settlement agreement or consent decree.
2. In most cases, the monitor must be replaced at an appropriate interval, usually of no more than two to three years.
3. Payment of costs and fees for the monitor's services must be specified in the settlement agreement or consent decree and capped at a reasonable amount (requiring the monitor to complete remaining tasks even if the cap is met).
4. The monitor must be selected in accordance with the guidance set forth in the Memorandum from Acting Associate Attorney General Stuart F. Delery dated April 13, 2016, entitled, *Statement of Principles for Selection of Corporate Monitors in Civil Settlements and Resolutions*, to avoid conflicts of interest and ensure that monitors are independent and highly qualified.

Where a monitor is proposed in the context of a consent decree, the decree proposed to the court must include the limits stated above, unless an exception is approved by the Deputy Attorney General or the Associate Attorney General.

indication that the settlement agreement or consent decree is not appropriately cabined or respectful of the state or local governmental entity's interest in local control and accountability.