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BLOG

New DOJ Policy Clouds Future Use of Supplemental Environmental Projects

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On June 7, 2017, United States Attorney General Sessions issued a memorandum to the Department of Justice (DOJ) and U.S. Attorneys prohibiting them from entering into on behalf of the United States any settlement of federal claims or charges that directs or provides payment to a non-governmental third party that was not directly harmed by the conduct that is the subject of the settlement.

The memorandum details three limited exceptions to the policy:

1. The policy does not apply to an otherwise lawful payment or loan that provides restitution to a victim "or that otherwise directly remedies the harm that is sought to be redressed, including, for example, harm to the environment."
2. The policy does not apply to payments for legal or other professional services rendered in connection with the case.
3. The policy does not apply to payments expressly authorized by statute, including restitution and forfeiture.

Prior to the issuance of the memorandum, DOJ settlements occasionally required or allowed defendants to make payments to third parties as a condition of the settlement For example, such payments were included in a number of DOJ settlements with banks following the 2008 financial crisis. Such payments were pejoratively referred to as "slush funds" by critics of the practice.

Notwithstanding the first exception listed above, the new policy calls into question defendants' ability going forward to utilize settlement provisions that historically have funded projects known as Supplemental Environmental Projects (SEPs). SEPs are often sought in exchange for penalty mitigation, and whether or not SEPs are a viable settlement feature in the future will depend upon how DOJ applies the exception for a payment that "directly remedies" the "harm to the environment" "that is sought to be redressed." EPA's SEP policy currently defines SEPs as "environmentally beneficial projects which a defendant agrees to undertake in settlement of an enforcement action, but which the defendant, or any other third party, is not legally required to perform." The current policy also requires that a SEP must have a "sufficient nexus" and "must relate to the underlying violation(s) at issue in the enforcement action." As of yet, it is unclear if the current "sufficient nexus" requirement will satisfy the exception established in

the memorandum, or whether the new policy will require a different, more stringent standard be applied in environmental settlements. DOJ is reportedly preparing guidance addressing this issue.

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