



U.S. Department of Justice

March 5, 2020

MEMORANDUM FOR THE ENVIRONMENT & NATURAL RESOURCES DIVISION

FROM: Claire McCusker Murray *CM*
Principal Deputy Associate Attorney General

RE: **Ensuring Settlements Involving the Judgment Fund Comply with the Finality Requirement of 31 U.S.C. § 1304**

At ENRD's request, OASG has drafted this written memorandum to give guidance regarding whether the Judgment Fund can be used to pay settlements that propose to provide a sum certain now, combined with a mechanism for seeking additional unspecified funds in the future, all in order to provide eventual satisfaction of one underlying claim. It cannot. Under the finality requirement of 31 U.S.C. § 1304(a), payments from the Judgment Fund for settlements, as for judgments, must finally satisfy the underlying claim.

In creating the Judgment Fund, Congress appropriated funds to "pay *final* judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when" additional criteria (not relevant here) are met. 31 U.S.C. § 1304(a) (emphasis added).¹ Applicable regulations, 31 C.F.R. § 256.1(a), and the relevant statutory authorization for "compromise settlements," 28 U.S.C. § 2414, make clear that the finality requirement in 31 U.S.C. § 1304(a) applies equally to judgments and settlements.² The government must strictly comply with the Judgment Fund requirements, including the finality requirement.³

The Judgment Fund's finality requirement has two prongs: (1) cessation of judicial review and (2) final resolution regarding the amount to be paid to satisfy the claim. As explained in the GAO Red Book, "it is not in the government's interest to pay judgments while the claimant's entitlement and the government's obligation are still subject to change."⁴

¹ See 31 C.F.R. § 256.1(a); United States Government Accountability Office (GAO), *Principles of Federal Appropriations Law*, 14-32, 2008 WL 6969343, at *3 (3d ed. March 2015) ("GAO Red Book"); 73 Comp. Gen. 46, 48-49 (1993).

² See 31 C.F.R. § 256.1(a) (Department of Treasury Bureau of Fiscal Service must certify that "[a]wards or settlements are final"); 28 U.S.C. § 2414 (compromise settlements of claims referred to the Attorney General "shall be settled and paid in a manner similar to judgments in like causes and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements"); GAO Red Book 14-36, n. 64 ("Finality is also required for Judgment Fund payments made under 28 U.S.C. § 2414," which governs "compromise settlements").

³ GAO Red Book 14-63 (citing *Marathon Oil Co. v. United States*, 374 F.3d 1123, 1136-37 (Fed. Cir. 2004); *Dickerson v. United States*, 280 F.3d 470, 478-79 (5th Cir. 2002); 44 Comp. Gen. 421 (1965)).

⁴ *Id.*

Typically, a judgment against the United States is final with respect to the cessation of judicial review when there has been: (1) a determination by the court of last resort; (2) a determination by the parties not to seek further review; or (3) expiration of the time available for filing an appeal.⁵ In each case, the first prong of the Judgment Fund's finality requirement is satisfied: judicial review has ceased. However, that does not end the inquiry; the cessation of judicial review is a necessary, but not sufficient, condition for access to the Judgment Fund. In addition to determining liability, the judgment must also concretely resolve the amount of the payment necessary to satisfy the underlying claim. That is, a judgment that "becomes final but does not specify the dollar amount to be paid . . . is not in and of itself final for Judgment Fund certification."⁶ Rather, "[b]efore such a judgment is final, the parties must reach an agreed-upon amount (including any required deductions), together with written statement that the plaintiff will accept that amount in satisfaction of the judgment."⁷

Accordingly, GAO and the Comptroller General have indicated that a judgment that ordered the payment of back pay without including a dollar amount "is not, in and of itself, 'final' for purposes of our certification for payment, even though it may be final with respect to plaintiff's right to recover."⁸ Rather, "the judgment is not final for payment purposes until there is an agreed-upon amount. Disputes over the amount to be paid must be resolved—administratively or judicially—prior to the submission for payment."⁹ The Office of Legal Counsel has similarly indicated that a final judgment permits access to the Judgment Fund only where the judgment "require[s] the United States to pay *specified sums* of money to certain parties."¹⁰ The Judgment Fund should not be used to make intermediate, partial, or good faith payments—even upon the stipulation of the parties.¹¹

In short, to meet the Judgment Fund's finality requirement, settlements (like judgments) must involve both: (1) the cessation of judicial review; and (2) a means for final resolution—prior to submission to the Treasury Department for payment—regarding the total amount to be paid to satisfy the claim.¹² This Office will not approve settlements where one or both of those requirements is not met.

⁵ *Id.*

⁶ GAO Red Book 14-38 (citing 58 Comp. Gen. 311 (1979)).

⁷ *Id.*

⁸ 58 Comp. Gen. at 314.

⁹ *Id.*

¹⁰ 13 U.S. Op. Off. Legal Counsel 98, 101 (1989) (emphasis added).

¹¹ See GAO Red Book 14-36 (citing B-164766, June 1, 1979); B-164766, at 9 ("[O]ur authority to certify judgments for payment . . . [is] limited by [its] terms to *final* judgments. . . . We have no authority to make 'intermediate' payments.")

¹² To be sure, individual claims within a multi-claim case may be settled with sufficient finality to permit access to the Judgment Fund. In addition, nothing in the foregoing is intended to indicate that complex claims may not in some circumstances be broken into discrete sub-claims, each of which may be independently resolved with finality. Finally, the GAO Red Book has explained that access to the Judgment Fund by trusts and structured settlements is "legally unobjectionable," provided that the amount initially paid into the trust represents the government's *maximum obligation*, *i.e.*, no additional government payments to the trust for the same claim would be made. GAO Red Book 14-39 (citing B-162924, Dec. 22, 1967).