

# The American Conservative

## Biden DOJ Brings Back Obama-Era Slush Funds

*Merrick Garland has revoked a Trump-era rule prohibiting the redirection of corporate settlement money to third-party organizations.*

Kevin Stocklin

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President Biden's Department of Justice appears to be rebuilding a dubious money chain known as "settlement slush funds." The Obama DOJ used these funds to channel cash from corporate settlements to bankroll private progressive organizations, circumventing the budget and oversight authority of Congress.

On May 5, Attorney General Merrick Garland revoked a Trump-era rule that specifically prohibited the DOJ from directing funds from corporate settlements to finance third-party organizations and causes. The use of these so-called settlement slush funds became so rampant under the Obama administration that the House passed the Stop Settlement Slush Funds Act in 2017 in an attempt to end it. A similar bill was introduced in the Senate but failed to pass.

Under the Obama Justice Department, corporate fines were directed to organizations including the Sierra Club, the National Community Reinvestment Coalition, and the National Council of La Raza. Through arrangements known as Supplemental Environmental Projects (SEPs) and third-party payments, corporations could have their fines reduced if they paid money to organizations that, although not victims in the DOJ suit, were nonetheless approved as beneficiaries.

In addition to reducing fines, these arrangements also gave penalized companies a tax deduction for their charitable contributions, which bought corporate support for the practice and prevented legal challenges. There were hundreds of such arrangements under the Obama administration.

The most notable cases include Volkswagen's settlement of its emissions cheating scandal, which included a requirement that VW spend \$2 billion to build electric filling stations. The Obama administration had twice requested these funds from Congress and been denied, so it used the VW settlement to fund the project instead. Of the \$2 billion that VW paid, \$800 million went to the state of California.

Settlements with Wall Street banks after the mortgage crisis also featured payments to progressive groups that were favored by Obama's DOJ. A 2017 congressional hearing revealed internal DOJ memos regarding these settlements, one of which was addressed to then-Associate Attorney General Tony West, asking: "Can you explain to Tony the best way to allocate some money to an organization of our choosing?" Another DOJ email stated that the settlement with Citibank, which included third-party payments, should "not allow Citi to pick a

statewide intermediary like the Pacific Legal Foundation,” which the official said “does conservative property-rights free legal services.”

A 2016 congressional report found that:

a year-long Committee investigation has revealed that the DOJ is pushing and even requiring settling defendants to donate money to non-victim third parties. Donations can earn up to double credits against defendants’ overall payment obligations.... Documents show that groups that stood to gain from these mandatory donations lobbied DOJ to include them in settlements.... What is worse, in some cases, DOJ-mandated donations restore funding that Congress specifically cut.

The report further noted that “federal grants come with a litany of rules and procedures designed to ensure that funds are used as intended.... Such controls are entirely absent in DOJ’s banking settlements.” Third-party settlement payments include no provision to track where the funds went, how they were being used, or if they achieved the goals the DOJ intended when arranging the payments.

The DOJ itself was not forthcoming with information regarding these payments. Although the congressional investigation began in November 2014, the report noted that “for over a year, DOJ provided none of the requested internal communications pertaining to the controversial settlement provisions.”

The House Judiciary Committee, however, obtained emails from the president of one of the organizations that received donations from settlement funds, the National Association of Interest On Lawyer Trust Accounts (IOLTA) Programs, stating, “I would like to discuss ways we might want to recognize and show appreciation for the Department of Justice and specifically Associate Attorney General Tony West, who by all accounts was the one person most responsible for including the IOLTA provisions [in the settlement].”

In response, the executive director of the Hawaii Legal Aid Foundation, another recipient, wrote that he “would be willing to have us build a statue [of West] and then we could bow down to this statue each day after we get our \$200,000.”

In order to stop this practice, in June 2017 then-Attorney General Jeff Sessions enacted what has become known as the “Sessions Rule,” prohibiting third-party settlements at the DOJ.

Immediately upon assuming office in January 2021, however, President Biden directed his administration to review this rule, which his DOJ has now rescinded.

“The fact that they’re spending resources on getting rid of an anti-corruption regulation shows that they intend to engage in the corruption that the regulation was intended to prevent,” said Ted Frank, senior attorney at the Hamilton Lincoln Law Institute. “It’s a good way to avoid voter accountability, and it gives power to the DOJ that Congress didn’t give them. They can direct hundreds of millions or even billions of dollars to pet causes.”

Not only do these settlements “disrespect the Constitutional process in a way that is anti-democratic,” said Michael Buschbacher, a former DOJ attorney who helped draft the regulation codifying the Sessions Rule, “it’s also bad environmental policy. The way Congress set things up with the Clean Air Act and the Clean Water Act, the penalties for violating these statutes are

enormous. The goal there is designed as this massive deterrent, and what SEPs do is radically undercut that deterrence because penalties get dramatically reduced to pay for these projects.”

Buschbacher also pointed out the potential for corruption in this practice. “It discredits the government and law enforcement as faithful agents in enforcing the law and doing what’s right, and turns government power to the illegitimate end of rewarding one’s friends and punishing one’s enemies.”

When Garland announced his decision to revoke the Sessions Rule, he also declared that his DOJ would prioritize the pursuit of “environmental justice.” This statement coincided with a new ruling by the Securities and Exchange Commission (SEC) that it would require all publicly traded companies to file extensive public reports on their carbon emissions and other climate-related data. Taken together, these and other actions by the Biden Administration signal that they plan to be more aggressive in bringing environmental suits against companies, with less restraint or oversight over where those proceeds go or how they are used.

“It creates an incentive to engage in prosecutions,” Frank said. “It’s one thing if the money is going to the Treasury through the democratic process. That’s a lot less exciting than if you prosecute somebody and the money is going to your favorite pet cause.”

“I don’t think it’s lost on anyone that in the same speech in which [Garland] announced the policy, he suggests that environmental justice is one of the things they’re going to be taking on,” said William Yeatman, a research fellow at the Cato Institute. “They’ve tipped their hand with respect to which groups can expect to benefit. The only limit, unless Congress gets involved, is restraint by the President or by the Justice Department, and that’s in short supply.”

Garland’s memo on third-party settlements stated that “when used appropriately, these agreements allow the government to more fully compensate victims, remedy harm and punish and deter future violations.” The Sessions Rule, the memo states, “is more restrictive and less tailored than necessary to address concerns that these agreements could be used to inappropriately fund projects unrelated to the harm involved in the matter.”

Garland’s new policy includes provisions that the DOJ “shall not propose the selection of any particular third party to receive payments...although the Department may specify the type of entity,” and the DOJ “may also disapprove of any third-party implementor or beneficiary.” In addition, a senior DOJ official must approve third-party settlements.

But these provisions may fail to reassure those who are skeptical about the legality and legitimacy of reviving the Obama-era settlement policies.

A spokesperson for Sen. Tommy Tuberville of Alabama, the Republican who introduced the Senate’s Stop Settlements Slush Funds Act, stated “AG Garland’s memo rightfully recognized the practice under the Obama administration was flawed, but failed to recognize that Congress alone has the ability to direct federal funds, including those obtained as a result of a settlement. AG Garland’s policy is still an example of executive overreach. Settlement funds should go first to the victims, and then the Treasury. Funds should not go to a third party and be used to advance a political agenda.”

“There needs to be Congressional oversight on this,” Frank said. “There needs to be [Freedom of Information Act] requests, there needs to be somebody figuring out where this money is going.”

“I think the scrutiny that’s on it will probably keep them from doing some of the ridiculous stuff they did last time,” Buschbacher said, “but on the main, this is likely to be a return to the approach under President Obama. One of his key DOJ attorneys involved in these kinds of settlements, Vanita Gupta, has returned for a second tour. Now she’s the number three attorney in the Department and will have final decision-making authority over many of these settlements.”

The Department of Justice was asked to comment on this article but did not respond.