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## DEPARTMENT OF JUSTICE

### 28 CFR Part 0

#### CIV Docket No. 152; AG Order No. 3330-2012

#### **Authorization to Redelegate Settlement Authority for Claims Submitted Under the Federal Tort Claims Act**

**AGENCY:** Department of Justice.

**ACTION:** Final rule.

**SUMMARY:** The Department of Justice is amending its internal organizational regulations to clarify the authority of the respective agency heads of the Bureau of Prisons, the Federal Prison Industries, the United States Marshals Service, the Drug Enforcement Administration, the Federal Bureau of Investigation, and the Bureau of Alcohol, Tobacco, Firearms, and Explosives to settle claims under the Federal Tort Claims Act.

**DATES:** This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Phyllis J. Pyles, Director, Torts Branch, Civil Division, Department of Justice, 1331 Pennsylvania Avenue, NW, Washington, DC 20004; telephone: 202-616-4400.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, provides a remedy for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or

employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. Prior to filing suit, a claimant must file an administrative tort claim with the appropriate agency. 28 U.S.C. 2675. Pursuant to 28 U.S.C. 2672, the head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle FTCA claims.

In the present organizational regulations of the Department of Justice, the Attorney General delegated his authority to settle FTCA claims for amounts of \$50,000 or less to the Director of the Bureau of Prisons, the Commissioner of Federal Prison Industries, the Commissioner of the Immigration and Naturalization Service (INS), the Director of the United States Marshals Service, and the Administrator of the Drug Enforcement Administration (28 CFR 0.172), and to the Director of the Federal Bureau of Investigation (FBI) (28 CFR 0.89a) and the Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) (28 CFR 0.132). The Director of the FBI is further authorized to redelegate this authority to the FBI General Counsel or his designee within the Office of the General Counsel or to the primary legal advisers of the FBI field offices.

This rule amends §§ 0.89a, 0.132, and 0.172 in order to ensure conformity across the different components of the Department of Justice, to update agency references, and to clarify the scope of the delegated FTCA settlement authority. In addition, the FTCA settlement authority of the Director of the FBI, currently contained in § 0.89a, and of the Director of ATF, currently contained in § 0.132, are being transferred by this rule to § 0.172, where the FTCA settlement authority of the other specified Department component heads is located.

Section 0.172 is being amended to remove a reference to the Commissioner of the INS.

Pursuant to the Homeland Security Act of 2002, the functions of the former INS were transferred to the Department of Homeland Security. Section 0.172 also is being amended to clarify that the approval of the Assistant Attorney General in charge of the Civil Division will be required if two or more claims arise from the same subject matter and the aggregate amount of the settlement would exceed \$50,000. In addition, § 0.172 is being amended to clarify when proposed settlements, regardless of amount, should be referred to the Assistant Attorney General in charge of the Civil Division. In particular, § 0.172 is being amended to require the referral of settlements to the Assistant Attorney General in charge of the Civil Division or his delegatee, if the settlement, as a practical matter, would or may control or adversely influence the disposition of other claims and the total settlement value of all claims would or may exceed \$50,000; or if, in the opinion of the head of the referring component, the settlement presents a question of law or policy or other issue that should receive the personal attention of the Assistant Attorney General or his delegatee. Section 0.172 also is being amended to more closely conform to the language contained in 28 U.S.C. 2672 by clarifying that the Attorney General's delegates have the authority to consider or ascertain claims involving their respective agencies, in addition to their authority to adjust, determine, compromise, and settle such claims.

Finally, § 0.132 is being amended to allow the Director of ATF to delegate this authority under § 0.172 to the agency's Chief Counsel and to allow the Chief Counsel to redelegate this authority to attorneys within the Office of Chief Counsel, but not below the Associate Chief Counsel level, provided that the settlement of any one claim does not exceed \$50,000. Without this provision for delegation and redelegation, the ATF Director must personally approve all submitted FTCA claims, regardless of size or merit. This rule provides flexibility to the Director

of ATF and is consistent with the redelegation authority of the FBI Director under current § 0.89a(c) (which is being redesignated by this rule as § 0.89a(b)). With this flexibility, the ATF can more efficiently process FTCA claims.

The Attorney General believes that consolidating under § 0.172 the authority of heads of certain components within the Department of Justice to settle FTCA claims and ensuring uniform language across §§ 0.89a, 0.132, and 0.172 that is consistent with 28 U.S.C. 2672 will facilitate more consistent treatment of these claims.

#### Administrative Procedure Act (APA)

Notice and comment rulemaking is not required for this final rule. Under the APA, “rules of agency organization, procedure or practice,” 5 U.S.C. 553(b)(A), that do not “affect[] individual rights and obligations,” Morton v. Ruiz, 415 U.S. 199, 232 (1974), are exempt from the general notice and comment requirements of section 553. See JEM Broad. Co. v. FCC, 22 F.3d 320, 326 (D.C. Cir. 1994) (holding that the procedural exception applies to “agency actions that do not themselves alter the rights or interests of parties, although [they] may alter the manner in which the parties present themselves or their viewpoints to the agency” (quoting Batterton v. Marshall, 648 F.2d 694, 707 (D.C.Cir.1980) (internal quotation marks omitted))). The revision to 28 CFR 0.89a, 0.132, and 0.172 is purely a matter of agency organization, procedure, and practice. The final rule will not affect substantive rights or interests of persons presenting their FTCA claims to the relevant agencies of the Department of Justice.

#### Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this rule and, by approving it, certifies that it will not have a significant economic impact on a substantial number of small entities because it pertains to personnel and

administrative matters affecting the Department. Further, a Regulatory Flexibility Analysis is not required for this final rule because the Department was not required to publish a general notice of proposed rulemaking for this matter.

**Executive Orders 12866 and 13563 - Regulatory Review**

This rule has been drafted and reviewed in accordance with Executive Order 12866, Regulatory Planning and Review, section 1(b), Principles of Regulation, and in accordance with Executive Order 13563, Improving Regulation and Regulatory Review, section 1(b), General Principles of Regulation. This rule is limited to agency organization, management, or personnel matters as described by Executive Order 12866, section 3(d)(3), and therefore is not a “regulation” or “rule” as defined by Executive Order 12866. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Department has assessed the costs and benefits of this rule and believes that the regulatory approach selected maximizes net benefits.

**Executive Order 12988**

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

**Executive Order 13132**

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, Federalism, the Department has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

### Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 et seq.

### Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

### Congressional Review Act

This action pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of non-agency parties. Accordingly, it is not a “rule” for purposes of the reporting requirement of 5 U.S.C. 801.

### **List of Subjects in 28 CFR Part 0**

Authority delegations (Government agencies), Government employees, Organization and functions (Government agencies), Privacy, Reporting and recordkeeping requirements, Whistleblowing.

### **Authority and Issuance**

Accordingly, by virtue of the authority vested in me as Attorney General, including 5 U.S.C. 301, and 28 U.S.C. 509, 510, and for the reasons set forth in the preamble, part 0 of title 28 of the Code of Federal Regulations is amended as follows:

## **PART 0--ORGANIZATION OF THE DEPARTMENT OF JUSTICE**

- 1.** The authority citation for 28 CFR Part 0 continues to read as follows:

**Authority:** 5 U.S.C. 301; 28 U.S.C. 509, 510, 515-519.

### **§ 0.89a [Amended]**

- 2.** Section 0.89a is amended by—

- a. Removing paragraph (a);
  - b. Redesignating paragraphs (b) and (c) as paragraphs (a) and (b), respectively;
  - c. Removing the word “further” from newly redesignated paragraph (a);
  - d. Adding a comma after the parenthetical “(31 U.S.C. 3274)” in newly redesignated paragraph (a); and
  - e. Removing the words “by paragraphs (a) and (b) of this section” from newly redesignated paragraph (b) and adding in their place the words “by paragraph (a) of this section and by 28 CFR 0.172”.

### **§ 0.132 [Amended]**

- 3.** Section 0.132 is amended by—

- a. Removing paragraph (a);
  - b. Redesignating paragraphs (b) and (c) as paragraphs (a) and (b), respectively;
  - c. Adding a comma after the word “personnel” in newly redesignated paragraph (a); and

d. Removing the words “in paragraph (b) of this section” from newly redesignated paragraph (b) and adding in their place the words “by paragraph (a) of this section and by 28 CFR 0.172”.

**4.** Section 0.172 is revised to read as follows:

**§ 0.172 Authority: Federal tort claims.**

(a) Delegation of authority. Subject to the limitations set forth in paragraph (b) of this section, the Director of the Bureau of Prisons, the Commissioner of Federal Prison Industries, the Director of the United States Marshals Service, the Administrator of the Drug Enforcement Administration, the Director of the Federal Bureau of Investigation, and the Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives shall have authority under section 2672 of title 28, United States Code, relating to the administrative settlement of Federal tort claims, to consider, ascertain, adjust, determine, compromise, and settle any claim involving their respective components, provided that any award, compromise, or settlement shall not exceed \$50,000.

(b) Limitations on authority. Any proposed award, compromise, or settlement under section 2672 of title 28, United States Code, must be referred to the Assistant Attorney General in charge of the Civil Division, or his delegatee, when—

- (1) Because a significant question of law or policy is presented, or for any other reason, the head of the referring component is of the opinion that the proposed award, compromise, or settlement should receive the personal attention of the Assistant Attorney General or his delegatee;
- (2) Two or more claims arise from the same subject matter and the total amount of any award, compromise, or settlement of all claims will or may exceed \$50,000; or

(3) The award, compromise, or settlement of a particular claim, as a practical matter, will or may control or adversely influence the disposition of other claims and the total settlement value of all claims will or may exceed \$50,000.

(c) Subject to the provisions of § 0.160, the Assistant Attorney General in charge of the Civil Division shall have authority to consider, ascertain, adjust, determine, compromise, and settle any other claim involving the Department under section 2672, of title 28, U.S. Code, relating to the administrative settlement of Federal tort claims.

April 27, 2012 \_\_\_\_\_  
Date \_\_\_\_\_  
Eric H. Holder, Jr.  
Attorney General

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