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Cynthia E. Grigsby,

Chief, Regulations Unit, Assistant Chief Counsel (Corporate).

[FR Doc. 99-17297 Filed 7-8-99;8:45am]

BILLING CODE 4830-01-P

DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Parts 0 and 600

[A.G. Order No. 2232-99]

Office of Special Counsel

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This order amends the Code of Federal Regulations to provide regulations concerning Attorney General appointment of Special Counsel to investigate and, when appropriate, to prosecute matters when the Attorney General concludes that extraordinary circumstances exist such that the public interest would be served by removing a large degree of responsibility for a matter from the Department of Justice. These regulations replace the procedures for appointment of independent counsel pursuant to the Independent Counsel Reauthorization Act of 1994.

EFFECTIVE DATES: July 1, 1999.

FOR FURTHER INFORMATION CONTACT: John C. Keeney, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, Washington, D.C. 20530, (202) 514-2621.

SUPPLEMENTARY INFORMATION:

Background

The Attorney General is promulgating these regulations to replace the procedures set out in the Independent Counsel Reauthorization Act of 1994. These regulations seek to strike a balance between independence and accountability in certain sensitive investigations, recognizing that there is no perfect solution to the problem. The balance struck is one of day-to-day independence, with a Special Counsel appointed to investigate and, if appropriate, prosecute matters when the Attorney General concludes that extraordinary circumstances exist such that the public interest would be served by removing a large degree of responsibility for the matter from the Department of Justice. The Special Counsel would be free to structure the investigation as he or she wishes and to exercise independent prosecutorial

discretion to decide whether charges should be brought, within the context of the established procedures of the Department. Nevertheless, it is intended that ultimate responsibility for the matter and how it is handled will continue to rest with the Attorney General (or the Acting Attorney General if the Attorney General is personally recused in the matter); thus, the regulations explicitly acknowledge the possibility of review of specific decisions reached by the Special Counsel.

The regulations also remove § 0.14, setting forth procedures for Special Independent Counsels for members of Congress. The regulations in that section have been suspended since April 19, 1989. 54 FR 15752.

Section-by-Section Discussion

Section 600.1 Grounds for Appointing a Special Counsel

“The Attorney General, or in cases in which the Attorney General is recused, the Acting Attorney General, will appoint a Special Counsel when he or she determines that criminal investigation of a person or matter is warranted and—

(a) That investigation or prosecution of that person or matter by a United States Attorney’s Office or litigating Division of the Department of Justice would present a conflict of interest for the Department or other extraordinary circumstances; and

(b) That under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.”

Section 600.2 Alternatives Available to the Attorney General

“When matters are brought to the attention of the Attorney General that might warrant consideration of appointment of a Special Counsel, the Attorney General may:

(a) Appoint a Special Counsel;

(b) Direct that an initial investigation, consisting of such factual inquiry or legal research as the Attorney General deems appropriate, be conducted in order to better inform the decision; or

(c) Conclude that under the circumstances of the matter, the public interest would not be served by removing the investigation from the normal processes of the Department, and that the appropriate component of the Department should handle the matter. If the Attorney General reaches this conclusion, he or she may direct that appropriate steps be taken to mitigate any conflicts of interest, such as recusal of particular officials.”

Discussion

There are occasions when the facts create a conflict so substantial, or the exigencies of the situation are such that any initial investigation might taint the subsequent investigation, so that it is appropriate for the Attorney General to immediately appoint a Special Counsel. In other situations, some initial investigation, whether factual or legal, may be appropriate to better inform the Attorney General’s decision. This provision is intended to make it clear that a variety of approaches, even in cases that might create an apparent conflict of interest, may be appropriate, depending on the facts of the matter.

Section 600.3 Qualifications of the Special Counsel

“(a) An individual named as Special Counsel shall be a lawyer with a reputation for integrity and impartial decisionmaking, and with appropriate experience to ensure both that the investigation will be conducted ably, expeditiously and thoroughly, and that investigative and prosecutorial decisions will be supported by an informed understanding of the criminal law and Department of Justice policies. The Special Counsel shall be selected from outside the United States Government. Special Counsels shall agree that their responsibilities as Special Counsel shall take first precedence in their professional lives, and that it may be necessary to devote their full time to the investigation, depending on its complexity and the stage of the investigation.

“(b) The Attorney General shall consult with the Assistant Attorney General for Administration to ensure an appropriate method of appointment, and to ensure that a Special Counsel undergoes an appropriate background investigation and a detailed review of ethics and conflicts of interest issues. A Special Counsel shall be appointed as a ‘confidential employee’ as defined in 5 U.S.C. 7511(b)(2)(C).”

Section 600.4 Jurisdiction

“(a) *Original Jurisdiction.* The jurisdiction of a Special Counsel shall be established by the Attorney General. The Special Counsel will be provided with a specific factual statement of the matter to be investigated. The jurisdiction of a Special Counsel shall also include the authority to investigate and prosecute federal crimes committed in the course of, and with intent to interfere with, the Special Counsel’s investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses;

and to conduct appeals arising out of the matter being investigated and/or prosecuted.

“(b) *Additional Jurisdiction.* If in the course of his or her investigation the Special Counsel concludes that additional jurisdiction beyond that specified in his or her original jurisdiction is necessary in order to fully investigate and resolve the matters assigned, or to investigate new matters that come to light in the course of his or her investigation, he or she shall consult with the Attorney General, who will determine whether to include the additional matters within the Special Counsel’s jurisdiction or assign them elsewhere.”

Discussion

Under these regulations, it is intended that a Special Counsel’s jurisdiction will be stated as an investigation of specific facts. The regulations also recognize, however, that accommodations can be made as necessary throughout the course of the investigation, with the Attorney General’s approval. This provision establishes a protocol whereby Special Counsels are provided with an appropriate description of the boundaries of their investigation, with the full recognition that adjustments to that jurisdiction may be required.

Paragraph (b) establishes a single procedure through which a variety of different jurisdictional issues can be resolved. For example, a Special Counsel assigned responsibility for an alleged false statement about a government program may request additional jurisdiction to investigate allegations of misconduct with respect to the administration of that program; a Special Counsel may conclude that investigating otherwise unrelated allegations against a central witness in the matter is necessary to obtain cooperation; or a Special Counsel may come across evidence of additional, unrelated crimes by targets of his or her investigation. Rather than leaving the issue to argument and misunderstanding as to whether the new matters are included within a vague category of “related matters,” the regulations clarify that the decision as to which component would handle such new matters would be made by the Attorney General. The Special Counsel would report such matters to the Attorney General, and the Attorney General would decide whether to grant the Special Counsel jurisdiction over the additional matters.

“(c) *Civil and Administrative Jurisdiction.* If in the course of his or her investigation the Special Counsel determines that administrative

remedies, civil sanctions or other governmental action outside the criminal justice system might be appropriate, he or she shall consult with the Attorney General with respect to the appropriate component to take any necessary action. A Special Counsel shall not have civil or administrative authority unless specifically granted such jurisdiction by the Attorney General.”

Discussion

Paragraph (c) is intended to clarify that the Special Counsel’s jurisdiction will cover only the criminal aspects of the matters within his or her jurisdiction, unless other jurisdiction is specifically granted by the Attorney General.

Section 600.5 Staff

“A Special Counsel may request the assignment of appropriate Department employees to assist the Special Counsel. The Department shall gather and provide the Special Counsel with the names and resumes of appropriate personnel available for detail. The Special Counsel may also request the detail of specific employees, and the office for which the designated employee works shall make reasonable efforts to accommodate the request. The Special Counsel shall assign the duties and supervise the work of such employees while they are assigned to the Special Counsel. If necessary, the Special Counsel may request that additional personnel be hired or assigned from outside the Department. All personnel in the Department shall cooperate to the fullest extent possible with the Special Counsel.”

Discussion

This provision, providing for the assignment of appropriate personnel to assist the Special Counsel, also includes assignment of needed investigative resources from the Federal Bureau of Investigation. It is anticipated that most personnel will be Department of Justice employees provided by detail to the Special Counsel, although the regulation provides for additional employment from outside the Department when necessary.

Section 600.6 Powers and Authority

“Subject to the limitations in the following paragraphs, the Special Counsel shall exercise, within the scope of his or her jurisdiction, the full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney. Except as provided in this part, the Special Counsel shall determine

whether and to what extent to inform or consult with the Attorney General or others within the Department about the conduct of his or her duties and responsibilities.”

Section 600.7 Conduct and Accountability

“(a) A Special Counsel shall comply with the rules, regulations, procedures, practices and policies of the Department of Justice. He or she shall consult with appropriate offices within the Department for guidance with respect to established practices, policies and procedures of the Department, including ethics and security regulations and procedures. Should the Special Counsel conclude that the extraordinary circumstances of any particular decision would render compliance with required review and approval procedures by the designated Departmental component inappropriate, he or she may consult directly with the Attorney General.”

Discussion

Review and approval procedures are the way in which the Department typically addresses the most sensitive legal and policy issues facing its prosecutors. Such matters are usually not dealt with by mandatory substantive rules; rather, the Department recognizes that even the most controversial and risky investigative or prosecutorial steps might in extraordinary circumstances be justified. Therefore, such issues are generally handled by requiring a variety of levels of review and approval before the step can be taken. Were Special Counsels to be exempt from these procedural requirements, they would be left without relevant controls and without Departmental guidance in the most sensitive situations.

There are often sound institutional reasons for review and approval provisions that transcend the merits of any particular case. For example, the Department has concluded over time that the long-term interests in case law development, served by the requirement that the Solicitor General personally approve Departmental appeals, may outweigh the importance of any single prosecution. Finally, requiring compliance with review and approval procedures ensures that the Department’s institutional judgment will be available to inform the Special Counsel’s decisionmaking process in the particular case.

This provision therefore will allow a wide range of independent decisionmaking by the Special Counsel, while at the same time it will help to guard against a Special Counsel becoming too insulated and narrow in

his or her view of the matter under investigation. Most review and approval procedures are conducted by and through long-term career Departmental officials with substantial and invaluable institutional memory and historical perspective.

At the same time, this provision permits the Special Counsel in extraordinary circumstances to proceed without complying with the Department's required review and approval procedures by consulting with the Attorney General. This provides a substantial degree of independent decisionmaking to the Special Counsel, while enhancing his or her accountability for the decision. Should the Special Counsel determine that the extraordinary circumstances of a particular decision make it inappropriate to comply with the established rules, regulations, procedures, practices and policies of the Department, the review and approval process may be bypassed through direct consultation with the Attorney General.

“(b) The Special Counsel shall not be subject to the day-to-day supervision of any official of the Department. However, the Attorney General may request that the Special Counsel provide an explanation for any investigative or prosecutorial step, and may after review conclude that the action is so inappropriate or unwarranted under established Departmental practices that it should not be pursued. In conducting that review, the Attorney General will give great weight to the views of the Special Counsel. If the Attorney General concludes that a proposed action by a Special Counsel should not be pursued, the Attorney General shall notify Congress as specified in § 600.9(a)(3).”

Discussion

Paragraph (b) permits the Attorney General to determine, after a review in which substantial deference is given to the views of the Special Counsel, that an action is so inappropriate or unwarranted under established Departmental practices that it should not be pursued.

“(c) The Special Counsel and staff shall be subject to disciplinary action for misconduct and breach of ethical duties under the same standards and to the same extent as are other employees of the Department of Justice. Inquiries into such matters shall be handled through the appropriate office of the Department upon the approval of the Attorney General.

(d) The Special Counsel may be disciplined or removed from office only by the personal action of the Attorney General. The Attorney General may

remove a Special Counsel for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies. The Attorney General shall inform the Special Counsel in writing of the specific reason for his or her removal.”

Discussion

Paragraphs (c) and (d) provide protection for a Special Counsel by providing that the Attorney General may remove the Special Counsel only for good cause, several examples of which are provided in the regulation. Violation of Departmental policies is specifically identified as a ground that may warrant removal. The willful violation of some policies might warrant removal or other disciplinary action, and a series of negligent or careless overlooking of important policies might similarly warrant removal or other disciplinary action. Such conduct also would be encompassed within the articulated standard of misconduct or dereliction of duty. There are, of course, other violations of Departmental policies and guidelines that would not ordinarily be grounds for removal or other disciplinary action.

Section 600.8 Notification and Reports by the Special Counsel

“(a) *Budget.* (1) A Special Counsel shall be provided all appropriate resources by the Department of Justice. Within the first 60 days of his or her appointment, the Special Counsel shall develop a proposed budget for the current fiscal year with the assistance of the Justice Management Division for the Attorney General's review and approval. Based on the proposal, the Attorney General shall establish a budget for the operations of the Special Counsel. The budget shall include a request for assignment of personnel, with a description of the qualifications needed.

(2) Thereafter, 90 days before the beginning of each fiscal year, the Special Counsel shall report to the Attorney General the status of the investigation, and provide a budget request for the following year. The Attorney General shall determine whether the investigation should continue and, if so, establish the budget for the next year.”

Discussion

The annual report to the Attorney General and budget request for the coming year will help to ensure that a Special Counsel investigation does not continue indefinitely; it will be reviewed at least annually to determine whether the investigation should

continue, or whether it has reached a point where it should be closed or where responsibility for the matter can be returned to the normal processes of the Department. This annual review will provide an opportunity for the Special Counsel to present his or her budget request for the upcoming year as well. It should be emphasized that this annual report is intended to be only a status report. The Special Counsel will not be subject to the day-to-day supervision of the Attorney General or any other Departmental official, and the annual report will not serve as a vehicle for ongoing supervision. Rather, the Attorney General will use the report to determine whether the investigation should continue, and what the budget for the coming year should be. For example, there may be no need for the Special Counsel to remain in office to handle final details, such as a routine appeal following a conviction.

“(b) *Notification of Significant Events.* The Special Counsel shall notify the Attorney General of events in the course of his or her investigation in conformity with the Departmental guidelines with respect to Urgent Reports.”

Discussion

Paragraph (b) requires Special Counsels to notify the Attorney General in certain circumstances. Those circumstances are defined using the same standard as that governing United States Attorneys, who are required to notify the Attorney General or other Department officials before seeking an indictment in sensitive cases and at other significant investigative steps. A Special Counsel will be dealing with issues that are sensitive, with many possible repercussions, and experience has shown that such prosecutions are often as sensitive legally as they are politically. Given this sensitivity, notification of proposed indictments and other significant events in the course of the investigation, with the resulting opportunity for consultation, is a critical part of the mechanism through which the Attorney General can discharge his or her responsibilities with respect to the investigation.

“(c) *Closing Documentation.* At the conclusion of the Special Counsel's work, he or she shall provide the Attorney General with a confidential report explaining the prosecution or declination decisions reached by the Special Counsel.”

Discussion

Much legitimate concern has been expressed about the Final Report requirement of the Independent Counsel Act, with respect to both the incentives

it creates to over-investigate a matter and the fact that, since it often becomes a public document, it can do harm to legitimate privacy interests. On the other hand, it is appropriate for any federal official to provide a written record upon completion of an assignment, both for historical purposes and to enhance accountability—particularly a federal official who has functioned with substantial independence and little supervision. In major cases, federal prosecutors commonly document their decisions not to pursue a case, explaining the factual and legal reasons for the conclusions they have reached.

The principal source of the problems with the Final Report requirement as set forth in the Independent Counsel Act is the fact that the Report typically has been made public, unlike the closing documentation of any other criminal investigation. This single fact both provides an incentive to over-investigate, in order to avoid potential public criticism for not having turned over every stone, and creates potential harm to individual privacy interests.

Therefore, these regulations impose a limited reporting requirement on all Special Counsels, in the form of a summary final report to the Attorney General. This report will be handled as a confidential document, as are internal documents relating to any federal criminal investigation. The interests of the public in being informed of and understanding the reasons for the actions of the Special Counsel will be addressed in the final set of reporting requirements, discussed below.

Section 600.9 Notification and Reports by the Attorney General

“(a) The Attorney General will notify the Chairman and Ranking Minority Member of the Judiciary Committees of each House of Congress, with an explanation for each action—

(1) Upon appointing a Special Counsel;

(2) Upon removing any Special Counsel; and

(3) Upon conclusion of the Special Counsel’s investigation, including, to the extent consistent with applicable law, a description and explanation of instances (if any) in which the Attorney General concluded that a proposed action by a Special Counsel was so inappropriate or unwarranted under established Departmental practices that it should not be pursued.

(b) The notification requirement in paragraph (a)(1) of this section may be tolled by the Attorney General upon a finding that legitimate investigative or privacy concerns require

confidentiality. At such time as confidentiality is no longer needed, the notification will be provided.

(c) The Attorney General may determine that public release of these reports would be in the public interest, to the extent that release would comply with applicable legal restrictions. All other releases of information by any Department of Justice employee, including the Special Counsel and staff, concerning matters handled by Special Counsels shall be governed by the generally applicable Departmental guidelines concerning public comment with respect to any criminal investigation, and relevant law.”

Discussion

To help ensure congressional and public confidence in the integrity of the process, the regulations impose on the Attorney General these reporting requirements to the Judiciary Committees of the Congress. These reports will occur on three occasions: on the appointment of a Special Counsel, on the Attorney General’s decision to remove a Special Counsel, and on the completion of the Special Counsel’s work. These reports will be brief notifications, with an outline of the actions and the reasons for them.

Section 600.10 No Creation of Rights

“The regulations in this part are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law or equity, by any person or entity, in any matter, civil, criminal, or administrative.”

Certifications and Determinations

Administrative Procedure Act

This rule relates to matters of agency management or personnel, and is therefore exempt from the usual requirements of prior notice and comment and a 30-day delay in the effective date. See 5 U.S.C. 553(a)(2). Moreover, to the extent that rulemaking procedures would otherwise be applicable, the Department finds that this rule would be exempted from the requirements of prior notice and comment as a rule of agency organization, procedure, or practice. See 5 U.S.C. 553(b)(A). Similarly, the effective date of the rule need not be delayed for 30 days after publication because the rule is not a “substantive rule.” See 5 U.S.C. 553(d); 5 U.S.C. 552(a)(1)(D). In any event, because the provisions of the Independent Counsel Reauthorization Act of 1994 expire on June 30, 1999, the Attorney General has determined that it is imperative to have

these rules governing the appointment and service of a Special Counsel in place as soon as possible. Accordingly, even if the rule were not exempt from the usual requirements of prior notice and comment and a 30-day delay in the effective date, there would be “good cause” for issuing this rule without prior notice and comment and without a 30-day delay in the effective date. See 5 U.S.C. 553(b)(B); 5 U.S.C. 553(d)(3).

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, 5 U.S.C. 804. It is a rule relating to agency management or personnel and is therefore excluded from the scope of a covered “rule” for purposes of Chapter 8 of Title 5, U.S.C. See 5 U.S.C. 804(3)(B). Moreover, to the extent that this rule would be considered to be a rule of agency organization, procedure, or practice, it is excluded from the scope of a covered “rule” pursuant to 5 U.S.C. 804(3)(C). The provisions of Part 600 relate to the Attorney General’s appointment of a Special Counsel as an employee of the Department of Justice, the procedures for defining the jurisdiction of the Special Counsel, and the requirements for consultation or approval within the Department. If the Attorney General determines, in some particular case, to appoint a Special Counsel, the Special Counsel would assume responsibility for an investigation or prosecution that would otherwise be under the responsibility of a litigating Division of the Department or a United States Attorney’s Office, but the Special Counsel would nevertheless be serving under the Attorney General’s authority as provided in this rule. For these reasons, the Department has determined that this rule does not substantially affect the rights or obligations of non-agency parties.

Accordingly, because this action is not a covered “rule,” it is exempt from the requirement for the Department to submit a report to each House of Congress and to the Comptroller General before this rule can take effect, as provided in 5 U.S.C. 801(a)(1).

Regulatory Flexibility Act

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

Executive Order 12866

This regulation has been drafted and reviewed in accordance with Executive Order 12866, Regulatory Planning and Review. The Department of Justice has determined that this is not a "significant regulatory action" under section 3(f) of Executive Order 12866, and that it relates to a matter of agency organization, management, or personnel. See Executive Order 12866, 3(d)(3). Accordingly, this rule has not been reviewed by the Office of Management and Budget.

Executive Order 12612

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988—Civil Justice Reform

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

Unfunded Mandates Reform Act of 1995

This regulation will not result in the expenditure by State, local, and tribal government, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

List of Subjects*28 CFR Part 0*

Authority delegations (Government agencies), Government employees, Organization and functions (Government agencies), Whistleblowing.

28 CFR Part 600

Authority delegations (Government agencies), Conflict of interests, Crime, Government employees, Investigations.

Accordingly, by virtue of the authority vested in me as Attorney General, including 5 U.S.C. 301 and 28 U.S.C. 509 and 510, chapters I and VI of title 28 of the Code of Federal Regulations, are amended as follows:

PART 0—ORGANIZATION OF THE DEPARTMENT OF JUSTICE

1. The authority citation for part 0 continues to read as follows:

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

§ 0.14 [Removed]

2. Section 0.14 is removed.
3. Part 600 is revised to read as follows:

PART 600—GENERAL POWERS OF SPECIAL COUNSEL

Sec.

- 600.1 Grounds for appointing a Special Counsel.
600.2 Alternatives available to the Attorney General.
600.3 Qualifications of the Special Counsel.
600.4 Jurisdiction.
600.5 Staff.
600.6 Powers and authority.
600.7 Conduct and accountability.
600.8 Notification and reports by the Special Counsel.
600.9 Notification and reports by the Attorney General.
600.10 No creation of rights.
Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, 515–519.

§ 600.1 Grounds for appointing a Special Counsel.

The Attorney General, or in cases in which the Attorney General is recused, the Acting Attorney General, will appoint a Special Counsel when he or she determines that criminal investigation of a person or matter is warranted and—

(a) That investigation or prosecution of that person or matter by a United States Attorney's Office or litigating Division of the Department of Justice would present a conflict of interest for the Department or other extraordinary circumstances; and

(b) That under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.

§ 600.2 Alternatives available to the Attorney General.

When matters are brought to the attention of the Attorney General that might warrant consideration of appointment of a Special Counsel, the Attorney General may:

- (a) Appoint a Special Counsel;
(b) Direct that an initial investigation, consisting of such factual inquiry or legal research as the Attorney General deems appropriate, be conducted in order to better inform the decision; or
(c) Conclude that under the circumstances of the matter, the public interest would not be served by removing the investigation from the

normal processes of the Department, and that the appropriate component of the Department should handle the matter. If the Attorney General reaches this conclusion, he or she may direct that appropriate steps be taken to mitigate any conflicts of interest, such as recusal of particular officials.

§ 600.3 Qualifications of the Special Counsel.

(a) An individual named as Special Counsel shall be a lawyer with a reputation for integrity and impartial decisionmaking, and with appropriate experience to ensure both that the investigation will be conducted ably, expeditiously and thoroughly, and that investigative and prosecutorial decisions will be supported by an informed understanding of the criminal law and Department of Justice policies. The Special Counsel shall be selected from outside the United States Government. Special Counsels shall agree that their responsibilities as Special Counsel shall take first precedence in their professional lives, and that it may be necessary to devote their full time to the investigation, depending on its complexity and the stage of the investigation.

(b) The Attorney General shall consult with the Assistant Attorney General for Administration to ensure an appropriate method of appointment, and to ensure that a Special Counsel undergoes an appropriate background investigation and a detailed review of ethics and conflicts of interest issues. A Special Counsel shall be appointed as a "confidential employee" as defined in 5 U.S.C. 7511(b)(2)(C).

§ 600.4 Jurisdiction.

(a) *Original jurisdiction.* The jurisdiction of a Special Counsel shall be established by the Attorney General. The Special Counsel will be provided with a specific factual statement of the matter to be investigated. The jurisdiction of a Special Counsel shall also include the authority to investigate and prosecute federal crimes committed in the course of, and with intent to interfere with, the Special Counsel's investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses; and to conduct appeals arising out of the matter being investigated and/or prosecuted.

(b) *Additional jurisdiction.* If in the course of his or her investigation the Special Counsel concludes that additional jurisdiction beyond that specified in his or her original jurisdiction is necessary in order to fully investigate and resolve the matters

assigned, or to investigate new matters that come to light in the course of his or her investigation, he or she shall consult with the Attorney General, who will determine whether to include the additional matters within the Special Counsel's jurisdiction or assign them elsewhere.

(c) *Civil and administrative jurisdiction.* If in the course of his or her investigation the Special Counsel determines that administrative remedies, civil sanctions or other governmental action outside the criminal justice system might be appropriate, he or she shall consult with the Attorney General with respect to the appropriate component to take any necessary action. A Special Counsel shall not have civil or administrative authority unless specifically granted such jurisdiction by the Attorney General.

§ 600.5 Staff.

A Special Counsel may request the assignment of appropriate Department employees to assist the Special Counsel. The Department shall gather and provide the Special Counsel with the names and resumes of appropriate personnel available for detail. The Special Counsel may also request the detail of specific employees, and the office for which the designated employee works shall make reasonable efforts to accommodate the request. The Special Counsel shall assign the duties and supervise the work of such employees while they are assigned to the Special Counsel. If necessary, the Special Counsel may request that additional personnel be hired or assigned from outside the Department. All personnel in the Department shall cooperate to the fullest extent possible with the Special Counsel.

§ 600.6 Powers and authority.

Subject to the limitations in the following paragraphs, the Special Counsel shall exercise, within the scope of his or her jurisdiction, the full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney. Except as provided in this part, the Special Counsel shall determine whether and to what extent to inform or consult with the Attorney General or others within the Department about the conduct of his or her duties and responsibilities.

§ 600.7 Conduct and accountability.

(a) A Special Counsel shall comply with the rules, regulations, procedures, practices and policies of the Department of Justice. He or she shall consult with

appropriate offices within the Department for guidance with respect to established practices, policies and procedures of the Department, including ethics and security regulations and procedures. Should the Special Counsel conclude that the extraordinary circumstances of any particular decision would render compliance with required review and approval procedures by the designated Departmental component inappropriate, he or she may consult directly with the Attorney General.

(b) The Special Counsel shall not be subject to the day-to-day supervision of any official of the Department. However, the Attorney General may request that the Special Counsel provide an explanation for any investigative or prosecutorial step, and may after review conclude that the action is so inappropriate or unwarranted under established Departmental practices that it should not be pursued. In conducting that review, the Attorney General will give great weight to the views of the Special Counsel. If the Attorney General concludes that a proposed action by a Special Counsel should not be pursued, the Attorney General shall notify Congress as specified in § 600.9(a)(3).

(c) The Special Counsel and staff shall be subject to disciplinary action for misconduct and breach of ethical duties under the same standards and to the same extent as are other employees of the Department of Justice. Inquiries into such matters shall be handled through the appropriate office of the Department upon the approval of the Attorney General.

(d) The Special Counsel may be disciplined or removed from office only by the personal action of the Attorney General. The Attorney General may remove a Special Counsel for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies. The Attorney General shall inform the Special Counsel in writing of the specific reason for his or her removal.

§ 600.8 Notification and reports by the Special Counsel.

(a) *Budget.* (1) A Special Counsel shall be provided all appropriate resources by the Department of Justice. Within the first 60 days of his or her appointment, the Special Counsel shall develop a proposed budget for the current fiscal year with the assistance of the Justice Management Division for the Attorney General's review and approval. Based on the proposal, the Attorney General shall establish a budget for the operations of the Special Counsel. The budget shall include a request for

assignment of personnel, with a description of the qualifications needed.

(2) Thereafter, 90 days before the beginning of each fiscal year, the Special Counsel shall report to the Attorney General the status of the investigation, and provide a budget request for the following year. The Attorney General shall determine whether the investigation should continue and, if so, establish the budget for the next year.

(b) *Notification of significant events.* The Special Counsel shall notify the Attorney General of events in the course of his or her investigation in conformity with the Departmental guidelines with respect to Urgent Reports.

(c) *Closing documentation.* At the conclusion of the Special Counsel's work, he or she shall provide the Attorney General with a confidential report explaining the prosecution or declination decisions reached by the Special Counsel.

§ 600.9 Notification and reports by the Attorney General.

(a) The Attorney General will notify the Chairman and Ranking Minority Member of the Judiciary Committees of each House of Congress, with an explanation for each action—

(1) Upon appointing a Special Counsel;

(2) Upon removing any Special Counsel; and

(3) Upon conclusion of the Special Counsel's investigation, including, to the extent consistent with applicable law, a description and explanation of instances (if any) in which the Attorney General concluded that a proposed action by a Special Counsel was so inappropriate or unwarranted under established Departmental practices that it should not be pursued.

(b) The notification requirement in paragraph (a)(1) of this section may be tolled by the Attorney General upon a finding that legitimate investigative or privacy concerns require confidentiality. At such time as confidentiality is no longer needed, the notification will be provided.

(c) The Attorney General may determine that public release of these reports would be in the public interest, to the extent that release would comply with applicable legal restrictions. All other releases of information by any Department of Justice employee, including the Special Counsel and staff, concerning matters handled by Special Counsels shall be governed by the generally applicable Departmental guidelines concerning public comment with respect to any criminal investigation, and relevant law.

§ 600.10 No creation of rights.

The regulations in this part are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law or equity, by any person or entity, in any matter, civil, criminal, or administrative.

Dated: June 30, 1999.

Janet Reno,

Attorney General.

[FR Doc. 99-17327 Filed 7-8-99; 8:45 am]

BILLING CODE 4410-AR-P

DEPARTMENT OF JUSTICE**48 CFR Part 2832**

[Justice Acquisition Circular 99-1]

RIN 1105-AA68

Amendment to the Justice Acquisition Regulations (JAR) Regarding: Electronic Funds Transfer

AGENCY: Justice Management Division, Justice.

ACTION: Final rule.

SUMMARY: The Department of Justice is amending the Justice Acquisition Regulations (JAR) to provide flexibility to contractors in the timing of receipt of Electronic Funds Transfer (EFT) information from them. The Debt Collection Improvement Act of 1996, Public Law (P.L.) 104-134, mandates payment by EFT in most situations. In order to make the payment by EFT, the Department needs certain information from contractors. This rule gives the Department's contracting officers discretion in determining when contractors must submit the required information. Without the changes made by this rule, contractors would have to submit their EFT information no later than 15 days prior to their first request for payment.

DATES: Effective date: This rule is effective July 9, 1999.

FOR FURTHER INFORMATION CONTACT: Janis A. Spostao, Procurement Executive, Justice Management Division (202) 514-3103.

SUPPLEMENTARY INFORMATION:**Why Is the Department Changing the Justice Acquisition Regulations?**

Public Law 104-134 amended 31 U.S.C. section 3332, to require that beginning January 2, 1999, all Federal payments (other than payments under the Internal Revenue Code of 1986) shall be made by EFT. The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are

responsibilities for issuing Federal Acquisition Circulars (FACs) and the Federal Acquisition Regulations (FAR) which are binding on other Federal Agencies. On March 4, 1999, these councils published Federal Acquisition Circular (FAC) 97-11, in the **Federal Register** (64 FR 10538-10544) as a final rule with an effective date of May 3, 1999. A portion of this final rule—Item IV—Electronic Funds Transfer—amended the FAR to address the use of EFT for Federal contract payments and to facilitate the implementation of P.L. 104-134.

Who Is Affected by the Changes Made by Item IV—Electronic Funds Transfer?

Before the latest FAR revision, contractors who sell to Federal agencies were required to furnish EFT information no later than 15 days prior to the submission of their first request for payment. Some contractors furnish their EFT information by registering in the Central Contractor Registration database. Agencies use that database to obtain EFT information. Other contractors are not registered in the Central Contractor Registration database, or agencies elect not to use the database. Under those circumstances, agencies collect EFT information directly from contractors.

What Changes Does This Rule Make?

When collecting EFT information directly from contractors, Item IV of FAC 97-11 allows the heads of Federal agencies to issue procedures that allow contracting officers discretion in determining when contractors' EFT information must be submitted in order to comply with P.L. 104-134 and to make timely payments. In the absence of this regulation, contractors of the Department would have to submit EFT information no later than 15 days prior to the submission of the first request for payment. This rule gives the Department's contracting officers discretion in determining when contractors must submit the required information. This flexibility will allow components of the Department to receive the EFT information with the first invoice, rather than 15 days before the first invoice. For those components that adopt such a procedure, contractors will only have to make one submission (the EFT information along with the invoice) rather than two submissions (the EFT information and—at least 15 days later—the invoice.) The flexibility proposed by this rule should be a benefit to contractors.

Regulatory Certifications

Administrative Procedure Act, 5 U.S.C. 553

This rule enhances the ability of Department contracting officers to allow contractors flexibility as to when to submit information required by current statute law and regulations. Further, this rule imposes no new restrictions. Accordingly, the Department of Justice finds good cause for exempting this rule from the provision of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public comment, and delay in effective date.

Regulatory Flexibility Act

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council published FAC 97-11 on March 4, 1999 at 64 FR 10538. In conjunction with the publication of that final rule, these councils performed a Final Regulatory Flexibility Analysis and submitted a copy to the Chief Counsel for Advocacy of the Small Business Administration.

The Assistant Attorney General for Administration in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities because this regulation merely sets forth internal procedures of the Department relating to the timing of receipt of EFT information from contractors.

Executive Order 12866

This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review", § 1(b), Principles of Regulation. The Department of Justice has determined that this rule is not a "significant regulatory action" under Executive Order 12866, § 3(f), and accordingly this rule has not been reviewed by the Office of Management and Budget.

Executive Order 12612

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.