



AUDITOR GENERAL

WILLIAM O. MONROE, CPA



DEPARTMENT OF LEGAL AFFAIRS

SETTLEMENTS

Operational Audit

SUMMARY

SETTLEMENT AGREEMENTS

The Attorney General may settle a case by conducting negotiations with a party under investigation, and then terminate the investigation or action upon acceptance of a settlement agreement or an assurance of voluntary compliance agreement. Our audit covered the period February 2004 through January 2005 and disclosed the following regarding Department procedures for settling cases and processing resulting payments.

Finding No. 1: The Department did not document the methodology used, and its case files did not document the factors considered, in its decisions to direct settlement contributions for purposes and to entities having no apparent relationship to the causes of action and associated injured persons. Additionally, settlement agreements did not include mechanisms to permit verifications that contributions were used for the intended purposes. The Legislature should provide statutory guidance as to the factors to be considered in directing such settlement contributions.

Finding No. 2: The Department had not established written general guidelines for the process of settling cases. Additionally, the Department did not always retain appropriate documentation reflecting that fees and costs were properly calculated or that settlement proceeds were distributed in accordance with the terms of the settlement agreement.

Finding No. 3: Department program offices did not always provide Finance and Accounting with complete and accurate information to enable the

proper recording of payments in the accounting records.

OTHER MATTERS

Finding No. 4: The Department had no formal procedures that addressed its statutory responsibilities for the identification and classification of controlled substances, including notification to the Legislature of the adoption of Department rules that scheduled substances that had potential for abuse.

BACKGROUND

Florida law establishes the Department of Legal Affairs, the head of which is the Attorney General. The Attorney General serves as the State's chief legal officer. His duties include appearing in and attending to suits or prosecutions, civil or criminal or in equity, in which the State may be a party.

In order to accomplish these duties, the Attorney General has established divisions to investigate and prosecute economic crimes, civil rights violations, antitrust violations, and multi-state issues. The Statewide Prosecutor is also housed within the Attorney General's office. The Statewide Prosecutor investigates and prosecutes multi-circuit organized crime and assists other law enforcement officials in their efforts against organized crimes.

FINDINGS AND RECOMMENDATIONS

Finding No. 1: Settlement Contributions

As part of his duties as the State's chief legal officer, the Attorney General has authority to settle cases,

including entering into settlements and assurances of voluntary compliance. During our audit period, the Attorney General closed 352 cases through settlement agreements or assurances of voluntary compliance: 278 by the Statewide Prosecutor, 64 by the Economic Crimes Office, 6 by the Civil Rights Office, 3 by the Antitrust Office, and 1 by the Multi-State Office.

Our review of ten cases closed through settlement agreements or assurances of voluntary compliance disclosed four cases in which the Department agreed to terms that directed settlement proceeds (contributions) to entities having no apparent relationship to the causes of action and associated injured persons. The Department did not document the methodology used, and the Department's case files did not document the factors considered, in its determinations of the purposes and receiving entities for the contributions resulting from these four cases.

- Three of the four cases were initiated by the Economic Crimes Office and involved alleged violations of the Florida Deceptive and Unfair Trade Practices Act. This Act specifies certain remedies, including requiring parties to the settlements to make contributions, although the Act is silent as to the factors to be considered in determining the purposes and receiving entities for the contributions. The three cases reviewed required the following contributions related to actions alleging:

- False billing. The settlement required the Attorney General to receive a maximum of 8,000 prepaid phone cards to be distributed through the Department of Military Affairs to each member of the U.S. Military serving in the war effort in Iraq and who otherwise resides in Florida or whose family currently resides in Florida.
- Telephone slamming. The settlement required the following contributions:
 - \$250,000 to the Florida State University (FSU) Foundation - FSU Connect Campaign, and
 - \$235,960 to the University Area Community Development

Corporation in Hillsborough County.¹

- Defective wireless telephones and failure to honor warrants. The settlement required a \$25,000 contribution to the Pat Thomas Law Enforcement Academy of Tallahassee Community College (TCC).

The contributions to FSU and TCC were constructed in a manner that allowed the schools to seek State matching funds for the amounts received.

- The remaining case was settled under the Florida Civil Rights Act and the Florida Deceptive and Unfair Trade Practices Act based on allegations of racial discrimination in a place of public accommodation. This settlement required that \$10,000 be contributed to a private college in Florida.

We noted that certain of the contributors voluntarily executed gift agreements with the receiving entities. However, neither the settlement agreements nor the gift agreements provided mechanisms for subsequently verifying that the contributions were used for the intended purposes.

Subsequent to audit inquiry, the Department provided explanations (see Exhibit A) regarding its decisions to direct contributions to the above-described entities. The Department indicated it had relied upon its broad discretion to settle these matters in the public interest. However, the Department's explanations regarding the above-described settlement contributions did not convincingly demonstrate that the contribution purposes and receiving entities were closely related to the causes of action and associated injured persons.

Recommendation:

- **The Department should document the methodology used and the factors considered in its decisions to direct contributions for purposes and to entities that, as near as possible, have a relationship to the causes of action and associated injured persons. We also recommend that the Legislature provide statutory guidance as to the factors to be**

¹ We noted another settlement in May 2005, related to price gouging for an influenza vaccine, that provided an additional \$150,000 to the Corporation (see Exhibit A).

considered in the Attorney General's decisions to direct contributions.

- When contributions are made, the Department should ensure that settlement agreements include mechanisms that permit the Department to subsequently verify the contributions are used for the intended purposes.

Finding No. 2: Settlement Guidelines

In negotiating settlements, consideration is given to factors, such as the needs and positions of the injured individuals, the strengths and weaknesses of the case, the uncertainty and delays of litigation, the public policy considerations of deterrence, and costs incurred or to be incurred by the Department. A settlement or an assurance of voluntary compliance may include various provisions, such as amounts to pay for civil penalties, attorney's fees and costs, and investigative costs; terms of payment; or other appropriate corrective action. In order to ensure that all provisions of such agreements are complied with, appropriate processes should be established and documentation should be retained.

The Department had not established general guidelines for settling cases; specifically, written guidelines had not been established addressing:

- Placement of authority for initiating, negotiating, and approving settlements and identifying the factors relied on in determining that the settlement and key provisions thereof are advantageous to the State.
- A process for determining amounts sought for recovery of costs incurred in conjunction with a case to ensure that the Department pursues statutorily available options to recover its costs.
- A process for distributing and handling funds received upon execution of a settlement through its satisfaction.

In response to our inquiry, the Department indicated that each case is unique and presents different settlement challenges. It would be difficult to set out parameters that would apply in all settlement situations. Department personnel also indicated that

guidelines that attempt to lay out a protocol dictating how every case is to be settled will only impede the Department's ability to achieve the most appropriate settlement presented by the circumstances and the consumer and public entities represented will be ill-served.

While we recognize that specific procedures would be impractical, general guidelines on when and at what level a settlement should be approved, how such approval should be documented, the identification of persons responsible for ensuring a settlement is properly executed, and how and when costs should be calculated and documented would aid the Department's ability to ensure and document that the settlements are in the best interest of the State and its citizens.

Our review of case files disclosed that guidelines would assist in ensuring proper support and documentation of Department activities. Specifically, we noted:

- The Department was unable to appropriately document the actual costs incurred in conjunction with five of the ten cases reviewed. Therefore, the Department cannot demonstrate that attorney's fees and costs were adequately and reasonably recovered when the case was settled. For example:
 - The Department entered a settlement providing for \$1,950,000 in fees and costs. However, our review of time recorded and costs incurred disclosed that only 119.30 hours were recorded and \$2,489 in costs were incurred. It appears that a portion of the moneys characterized as fees and costs should have been designated as some other type of fee or fine and ultimately deposited into the General Revenue Fund.
 - In another instance, the Attorney General entered into an assurance of voluntary compliance agreement which included a \$25,000 contribution to the Pat Thomas Law Enforcement Academy of Tallahassee Community College. However, the Department did not pursue or recover attorney's fees and costs.

- Additionally, for cases that were pursued by the Office of Statewide Prosecution, the Office had systematically assessed \$3,500 in fees and costs without appropriately calculating the actual costs incurred for each case.
- The Department did not retain appropriate documentation to demonstrate that payments due other persons or entities were distributed properly. Our review of five case files requiring distributions disclosed:
 - In one case, 8,000 prepaid phone cards were to be provided to the Department for distribution by the Department of Military Affairs (DMA). In response to our inquiry, the Department obtained information from DMA documenting the receipt and distribution of the phone cards.
 - For three cases, the Department was responsible for distributing payments due to other entities; however, no documentation was available documenting that the payments were received and distributed. Subsequent to our audit inquiry, the Department obtained documentation from the relevant entities evidencing that the payments had been received.

Recommendation: The Department should establish written general guidelines regarding the process for settling cases. Such guidelines should address, for example, the placement of authority for making settlements, the documentation of significant factors utilized in making the settlement, the determination of settlement amounts, and the distribution and handling of funds received. Additionally, the Department should ensure that documentation is maintained to support that fees and costs are properly calculated and distributions are made in accordance with the terms of the settlement.

Finding No. 3: Settlement Financial Records

Upon entering a settlement, the Department's program offices are responsible for providing information, such as the settlement agreement or the assurance of voluntary compliance, indicating the total amount owed, terms of payment, dates the payments should be made, method of payment, the fund where

the moneys should be deposited, etc., to Finance and Accounting (F&A) to enable the proper recording of the settlement amounts in the accounting records. Our review of the accounting records for ten cases disclosed three instances in which program offices did not provide sufficient information to F&A. Specifically:

- For two cases, no instructions were provided identifying the fund to which the fees and costs should be deposited. Ultimately, F&A deposited the checks in the proper fund.
- For one case, the program office instructed F&A to deposit \$10,000 designated as Florida's portion of the settlement in the Revolving Escrow Trust Fund. Pursuant to Section 16.53, Florida Statutes, the funds should have been deposited in the General Revenue Fund. The lack of information resulted in errors in the recording of the settlement in Department accounting records.

Recommendation: The Department should ensure F&A is provided with the necessary information to properly account for and record settlement payments.

OTHER MATTERS

Finding No. 4: Scheduling of Controlled Substances

While the regulation of controlled substances is primarily a legislative function, restricted statutory authority² is provided to the Attorney General to identify and classify by rule substances that have a potential for abuse. Rules so adopted are to be reported to the Legislature by March 1 following adoption and expire on the following June 30. We found that the Department had no formal procedures that addressed its responsibilities for the identification and classification of controlled substances, including notification to the Legislature of rules adopted.³ The most recent rule that scheduled a substance, Alphamethyltryptamine (AMT), was adopted by the

² Sections 893.035 and 893.0355, Florida Statutes.

³ Section 893.035(9), Florida Statutes

Department in December 2002⁴; however, this scheduling by rule was not reported to the Legislature by March 2003 and, as of October 2005, Florida law does not yet include AMT as a controlled substance.⁵ Even though AMT remains as a controlled substance in the rule, by law such rule expired the June 30 after adoption.

Recommendation: We recommend that the Department implement appropriate procedures regarding its statutory responsibilities for substances that have a potential for abuse.

Follow-Up to Management Response:

In its written response (see Exhibit B), the Department noted that its adoption of the Rule regarding AMT had been communicated to the Legislature's Joint Administrative Procedures Committee. While such communication complies with a procedural process applicable to all rules, reporting direct to the appropriate substantive committees of the Legislature would better ensure that controlled substances are timely considered for inclusion in the law.

OBJECTIVES, SCOPE, AND METHODOLOGY

The scope of this audit focused on Department procedures for settling legal actions. Our objectives were:

- To evaluate Department procedures for documenting the settlement of legal cases. Our audit did not include an examination of the appropriateness of the Department's decision to settle a case or the amount of the settlement.
- To determine whether selected management controls promoted and encouraged the achievement of management's objectives of compliance with controlling laws, administrative rules, and other guidelines; the economic and efficient operation of the Department; the reliability of records and reports; and the safeguarding of assets.

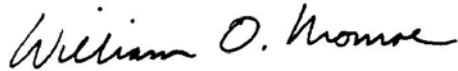
In conducting our audit, we interviewed Department personnel, observed processes and procedures, and completed various analyses and other procedures as determined necessary. Our audit included examinations of various transactions (as well as events and conditions) occurring during the period February 2004 through January 2005.

⁴ Rule 2-40.006, Florida Administrative Code, Addition of Alphamethyltryptamine (AMT) to Schedule I, Subsection 893.03(1), F.S.

⁵ As of October 2005, AMT was listed as a Schedule I Controlled Substance by the United States Department of Justice, Drug Enforcement Administration.

AUTHORITY

Pursuant to the provisions of Section 11.45, Florida Statutes, I have directed that this report be prepared to present the results of our operational audit.



William O. Monroe, CPA
Auditor General

MANAGEMENT RESPONSE

In a letter dated October 28, 2005, the Department provided a written response to our preliminary and tentative findings and recommendations, which is included in this report as Exhibit B.

To promote accountability in government and improvement in government operations, the Auditor General makes operational audits of selected programs, activities, and functions of State agencies. This operational audit was made in accordance with applicable **Government Auditing Standards** issued by the Comptroller General of the United States. This audit was conducted by Ying Ying Chen, CPA, and supervised by Lisa Norman, CPA. Please address inquiries regarding this report to Jane Flowers, CPA, Audit Manager, via E-mail at janeflowers@aud.state.fl.us or by telephone at **(850) 487-9136**.

This report and other audit reports prepared by the Auditor General can be obtained on our Web site (<http://www.state.fl.us/audgen>); by telephone (850 487-9024); or by mail (G74 Claude Pepper Building, 111 West Madison Street, Tallahassee, Florida 32399-1450).

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EXHIBIT A

**Settlement Contributions (Finding 1)
Explanations Provided by the Department of Legal Affairs**

The explanations presented below were provided by the Department of Legal Affairs in response to our inquiries regarding its decisions related to Settlement Contributions.

Alleged Violation	Department's Explanation
False Billing	The customers victimized by the alleged slamming were located in Florida, but the amount of restitution would have been small and many victims could not be located. Therefore, instead of restitution to individual Florida customers, the alleged violator was required to provide calling cards to GIs from Florida, sent to fight for our country. The wrong was done to Florida consumers, and the calling cards were distributed to Florida soldiers, fighting in foreign lands on behalf of all Floridians, and all Americans.
Telephone Slamming	The alleged violator, while it is a national corporation, has very strong ties to the Tallahassee area since it purchased the local phone company. The alleged wrongdoing involved slamming and cramming on customer's bills. A significant number of the complaints in this case were received from the Tallahassee area. For this reason a contribution was required that would benefit the local community as well as the state as a whole. The alleged violator was required to make contributions to the FSU Foundation and to the University Area Community Development Corporation, because the two organizations provide both local and statewide benefits.
Manufacture of defective wireless telephones and failure to honor product warranties	The purpose of the \$25,000 to the Pat Thomas Law Enforcement Academy at Tallahassee Community College was to create an endowed scholarship for the purpose of encouraging law enforcement officers to obtain a higher academic degree after graduation from a certification program. A large number of Florida law enforcement agencies use the equipment that was the subject of this complaint. Since restitution to individual victims would have been minimal, the next best thing was to require the alleged violator to support a law enforcement purpose. Also, since the alleged violator operates a facility in Leon County, and has strong ties to the local area, it was thought that the Pat Thomas Law Enforcement Academy was the appropriate institution of higher learning for the endowment of this scholarship.
Racial discrimination in a place of public accommodation	We targeted the donation to a nearby institution of higher learning that focuses, in part, on improving race relations. We looked particularly for an institution in Central Florida since that is where the case originated. Racial bigotry often results from ignorance. Education helps tremendously by dispelling the myths and misunderstandings.
Price gouging related to flu vaccine	This money was for the funding of the Teen Empowerment Training Program, providing job training, employability skills, cultural, recreational, and educational skills to at-risk youth in the Tampa/Hillsborough County area. The alleged wrongdoing involved the making of false statements to consumers, over the phone, regarding the availability and price of flu vaccine. The amount of restitution would have been minimal and victims difficult or impossible to locate. While adult businessmen made the business choices that resulted in this unfortunate case, it was felt that the best use of the funds should be the targeting of at-risk youth, in an attempt to make a difference in their young lives, and perhaps provide them with better decision making skills than those exercised by the businessmen in this case.

EXHIBIT B
MANAGEMENT RESPONSE



CHARLIE CRIST
ATTORNEY GENERAL
STATE OF FLORIDA

OFFICE OF THE ATTORNEY GENERAL

GEORGE LEMIEUX
Deputy Attorney General
The Capitol, Suite PL01
Tallahassee, Florida 32399-1050
Telephone (850) 245-0140, SunCom 205-0140
Fax (850) 487-2564, SunCom 277-2564

October 28, 2005

Mr. William O. Monroe
Auditor General
111 West Madison Street
G-74 Pepper Building
Tallahassee, FL 32399-1450

Dear Mr. Monroe:

In compliance with Section 11.45(4)(d), Florida Statutes, the Department is pleased to provide the following explanation regarding your preliminary and tentative audit findings pertaining to the audit of the Department of Legal Affairs. Our response relates to your audit of settlements obtained by this office for the period February 2004 to January 2005.

Finding No. 1: The Department did not document the methodology used, and its case files, did not document the factors considered, in its decision to direct settlement contributions for purposes and to entities having no apparent relationship to the causes of action and associated injured persons. Additionally, settlement agreements did not include mechanisms to permit verifications that contributions were used for the intended purposes. The Legislature should provide statutory guidance as to the factors to be considered in directing such settlement contributions.

Response: The Department provides the following explanation regarding this Preliminary and Tentative Finding:

1. The bulk of the Department's settlements are ones where the Attorney General is able to return monies directly to the consumers and public entities harmed by the conduct in question. However, there are instances where it is not possible or practicable to return settlement monies directly to those harmed. For example, the settlement amount may be too small (e.g., a few dollars per victim) to meaningfully distribute to individual consumers affected by the unlawful conduct or those consumers harmed by the unlawful conduct may not be readily or practicably identifiable. In those instances, the Department distributes the settlement monies to charitable or public entities that bear some relationship, albeit at times indirect, to the conduct which is the subject of the settlement. In such settlements, particularly in its antitrust settlements, the Department has documented the parameters used in selecting charitable and public entities to receive settlement funds.

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2. The Department has also in some settlements required written assurances from those entities receiving settlement funds that the funds were used for their intended purpose. However, the Department has not in every case where settlement funds have been directed to charitable or public organizations required documentation of the parameters it applied in determining which entities should receive contributions from certain settlement funds. The Department therefore accepts the Auditor General's recommendation that, going forward, it document the parameters it applies in each case in determining how and where settlement proceeds to charitable and public organizations are to be directed. Moreover, the Department will draft general parameters to be applied to settlements where contributions are to be made and provide those parameters to the Office of the Auditor General for evaluation so that it may, at that time, give further consideration to the need for statutory guidance.

Finding No. 2: The Department had not established written general guidelines for the process of settling cases. Additionally, the Department did not always retain appropriate documentation reflecting that fees and costs were properly calculated or that settlement proceeds were distributed in accordance with the terms of the settlement agreement.

Response: The Department provides the following explanation regarding this Preliminary and Tentative Finding:

1. The Medicaid Fraud Unit has some basic policies and procedures used in settling claims. These exist because Medicaid Fraud cases, unlike cases handled by the other four units involved in the Audit (Economic Crimes, Antitrust, Multistate Litigation, and Civil Rights), by their nature tend to give rise to similar, or at least, uniform sets of facts that allow for widespread practical application of some basic guidelines.
2. The other four units do not operate under such guidelines for several reasons. The primary reason is that specific written procedures would be impractical given the fact that each case presents unique and different settlement challenges. That said, the recommendation related to this preliminary finding appears to suggest that the Department establish only very general guidelines dealing with the settlement approval process through the Department's chain of authority and identifying those Department positions responsible for settlement approval and execution.
3. In an effort to promote more uniform transparency regarding these two areas within the Department, the Department will undertake the drafting of a general set of "guidelines with respect to settlement authority and execution" as they pertain to cases brought by the Department under its enforcement authority. Additionally, to the extent that it is not already done, the Department will require that appropriate documentation or other information be maintained in case files reflecting the manner in which fees and costs in each particular case were determined.

Finding No. 3: Department program offices did not always provide Finance and Accounting with complete and accurate information to enable the proper recording of payments in the accounting records.

Response: The Department provides the following explanation regarding this Preliminary and Tentative Finding:

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1. The Department's Lotus-Notes based system used to direct the deposit of settlement monies generally works well, as it did with respect to seven of the ten cases reviewed in the Audit. However, even though the errors described in the report with respect to the three other cases were ultimately corrected in a timely manner, the Department agrees that more can be done within the Department to ensure that Finance & Accounting is provided with the necessary information to properly account for and record settlement payments more promptly.

2. To ensure such errors, no matter how minor, are avoided in the future, consideration will be given to including in the general written guidelines described above further guidance beyond that already provided within the Department to ensure that settlement monies, fees, and costs are appropriately identified and directed to the proper funds in a timely manner.


Finding No. 4: The Department had no formal procedures that addressed its statutory responsibilities for the identification and classification of controlled substances, including notification to the Legislature of the adoption of Department rules that scheduled substances that had potential for abuse.

Response: The Department provides the following explanation regarding this Preliminary and Tentative Finding:

1. Since the beginning of this administration in the Attorney General's Office, January 7, 2003, the Department has not adopted any rules scheduling any controlled substances. Accordingly, there are no rules that needed to be reported to the Legislature as required by Sections 893.035(9) and 893.0355(6), Florida Statutes. Additionally, Chapter 893, specifically Section 893.035(2), does not impose an obligation upon the Attorney General to identify or classify controlled substances. Rather, the provision provides that the Attorney General "may" classify drugs when the Legislature is not in session, if necessary. Since January 3, 2003, the Office of the Attorney General has not received or developed any information warranting an invocation of its authority to schedule drugs in the absence of legislative action.

2. With regard to the rule relating to the scheduling of Alphamethyltryptamine, Rule 2-40.006, F.A.C. which was adopted by the Department during the prior administration in December 2002, attached is a copy of a letter sent from the Department to the Joint Administrative Procedures Committee notifying it of the adoption of the rule in accordance with statutory requirements. Adoption of the rule was published in Volume 29, Number 2, page 167, of the Florida Administrative Weekly.

Sincerely,



George LeMieux
Deputy Attorney General

GL/dmm

Enclosure



OFFICE OF THE ATTORNEY GENERAL

THE CAPITOL

TALLAHASSEE, FLORIDA 32399-1050

RICHARD E. DORAN
Attorney General
State of Florida

Reply to:

Administrative Law Section
(850)414-3300; SunCom 994-3300
Fax: (850)4922-6425; SunCom 292-6425

December 16, 2002

Matt Sirmans, Senior Attorney
Joint Administrative Procedures Committee
Room 120, Holland Building
Tallahassee, Florida 32399-1300

RE: Rule 2-40.006

Dear Mr. Sirmans:

Pursuant to subsection 120.54(3)(d)1., Florida Statutes, this is notification that the above-referenced rule is being prepared for final adoption. Since no hearing was requested on the rule, the rule is being adopted without change.

We anticipate filing the rule with the Secretary of State's office on **December 23, 2002**. Please forward certification pursuant to subsection 120.54(3)(e)4., Florida Statutes, so that the rule can be adopted on the date stated above. Thank you.

Sincerely,

Nancy A. Murphy, CLA
Senior Legal Assistant

cc: file

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AN AFFIRMATIVE ACTION/EQUAL OPPORTUNITY EMPLOYER