



AUDIT OF THE DEPARTMENT OF JUSTICE'S OVERSIGHT OF COSTS INCURRED THROUGH THE FEES AND EXPENSES OF WITNESSES APPROPRIATION

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EXECUTIVE SUMMARY

On an annual basis, the Department of Justice (Department) receives the Fees and Expenses of Witnesses (FEW) appropriation, which is intended to provide a centralized funding source for certain costs associated with the legal proceedings of the federal government, such as the fees, expenses, and protection of witnesses, and the defense of government employees sued in their official capacity. The FEW is a mandatory, no-year appropriation, meaning that it does not need further authorization by Congress to be provided to the Department each year. In addition, the Department can carry forward any remaining balance of the funds from one fiscal year (FY) to the next. Since FY 2011, the Department has received an annual appropriation of \$270 million and the Department's carry forward amount has increased dramatically, from \$18.6 million to \$202 million in FY 2014.

We found that nearly 80 percent of the annual FEW appropriation is used by the Department to pay for the fees and expenses for expert and fact witnesses. Because over 90 percent of this amount is used to fund expert witness contracts, the objective of this audit was to review the Department's management and use of the expert witness portion of the FEW appropriation. The Department's use of the FEW appropriation for expert witnesses is primarily governed by the *Guiding Principles for Obtaining Witness Services Under the Fees and Expenses of Witnesses Appropriation* (FEW Guiding Principles). The current version of the FEW Guiding Principles was developed by a working group that included the Justice Management Division's (JMD) Procurement Services Staff (PSS) and Office of General Counsel, along with six Department litigating divisions and the Executive Office for United States Attorneys (EOUSA).

During our audit we reviewed a sample of 729 expert witness contract files at 6 litigating divisions and 12 United States Attorneys' Offices (USAO) nationwide to determine if the FEW Guiding Principles were being followed and worked effectively to ensure FEW funds were managed and spent properly. We found that 74, or 10 percent, of the contract files we reviewed did not satisfy the FEW Guiding Principles. For example, in 43 of these 74 cases the contracted services paid with FEW funds were provided before or without a court docket date, which is required by the FEW Guiding Principles. The other 31 cases involved contracts where: (1) there was no indication that expert testimony was anticipated, (2) expert services were provided for cases heard outside of the federal judicial system; or (3) administrative services were the primary purpose. These 74 contracts totaled \$15.2 million, representing about 9 percent of the more than \$178 million in FEW funds we tested.

We also identified an additional 39 expert witness contracts where we could not determine whether the intent of the FEW Guiding Principles was satisfied because the underlying contract was vague or the FEW Guiding Principles were

ambiguous or silent about the circumstances presented in the particular case. These 39 contracts totaled over \$10 million in fees and expenses paid with FEW funds. JMD staff raised similar concerns to the OIG, acknowledging that some sections of the FEW Guiding Principles are ambiguous or overly restrictive, and as a result, would benefit from clarification to better meet the stated purposes of the FEW Guiding Principles. Based on our findings that over 9 percent of the dollars we tested were used for purposes inconsistent with the FEW Guiding Principles and over \$10 million was spent on fees and expenses where we could not determine the allowability of the funds used, we believe that the FEW Guiding Principles should be strengthened to ensure that the allowable uses of FEW funds are clear and that all Department attorneys and their staffs understand the necessary elements of an expert witness contract to be paid with FEW funds.

We also found instances of unallowable or unsupported travel expenses paid with FEW funds. Specifically, we identified over \$24,000 in excess hotel charges and 26 instances of first class travel in violation of the FEW Guiding Principles' requirement that expert witnesses abide by the Federal Travel Regulation. In addition, we identified one component that used more than \$100,000 in FEW funds to purchase dozens of laptop computers, but subsequently failed to follow the JMD General Counsel's direction that only expert witnesses could use the computers. Instead, the component loaned the computers to litigative consultants on several occasions in violation of the FEW Guiding Principles, which prohibit using FEW funds to support litigative consultant services.

Furthermore, we determined that JMD PSS inadequately monitored payments made by the Department on expert witness contracts, despite the FEW Guiding Principles assigning PSS a monitoring role. PSS staff told us that their office cannot realistically monitor component use of FEW funding due to the volume of expert witness contract actions each year. Instead, PSS expects component administrative staff members to monitor the use of these funds. However, PSS also acknowledged that these component administrative staff members are often reluctant to question attorney decision making. EOUSA officials likewise agreed that USAO staff members are reluctant to question the decisions made by Assistant United States' Attorneys. We believe this situation creates confusion about monitoring responsibilities and likely results in inconsistent monitoring of FEW funds.

We also identified two instances where, in coordination with JMD Budget Staff, FEW funds were repurposed to reduce budgetary pressure on two Department components. JMD Budget Staff informed us that it consulted with its Office of General Counsel before such repurposing. It is unclear whether this use of FEW funds for purposes not covered in the FEW Guiding Principles was inappropriate under any law or regulation. However, we believe such repurposing of funds should be done rarely, and only with scrupulous attention to both the explicit requirements that attach to the FEW funds and to the Congressional purpose of that appropriation. Moreover, the FEW Guiding Principles do not clearly outline a policy for the repurposing of FEW funds, yet as FEW carry forward balances continue to increase, we believe litigating components could increasingly

look to the FEW to relieve pressure on their budgets. If the Department finds this to be an acceptable practice under the FEW appropriation, we believe strict measures must be in place to prevent abuse. At the very least, the FEW Guiding Principles should be revised to identify a clear procedure for the repurposing of FEW funds that includes adequate documentation and approval requirements. In addition, the Department should consider whether congressional notification of such repurposing would be appropriate.

This report makes 12 recommendations to improve the Department's guidance on the use of FEW funds and its monitoring of payments made to expert witnesses using FEW funds.

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COSTS INCURRED THROUGH THE FEES AND EXPENSES OF
WITNESSES APPROPRIATION**

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AUDIT OF THE DEPARTMENT OF JUSTICE'S OVERSIGHT OF COSTS INCURRED THROUGH THE FEES AND EXPENSES OF WITNESSES APPROPRIATION

INTRODUCTION

The Fees and Expenses of Witnesses (FEW) appropriation is administered by the Department of Justice (Department) and provides funding for certain categories of expenses associated with the legal proceedings of the federal government. The FEW is a mandatory appropriation meaning that the funding does not require further authorization from Congress for the Department to utilize it each year. The Department's FEW funding levels have been constant at \$270 million annually since fiscal year (FY) 2011.

There are seven activities of Department expenses authorized to be funded by the FEW appropriation: Fees and Expenses for Witnesses, Protection of Witnesses, the Victim Compensation Fund, Private Counsel, Superior Court Informant Program, Alternative Dispute Resolution, and Foreign Counsel.¹ As noted in the chart below, in FY 2013 nearly 80 percent of the FEW appropriation was allocated for the fees and expenses for expert and fact witnesses.

¹ The entire appropriation is called the Fees and Expenses of Witnesses appropriation. Within the appropriation are seven funded activities including one also called the Fees and Expenses for Witnesses.

**FEW Appropriation Funds by Expense Category
FYs 2011 to 2014**

Department Expense Category	FEW Funded Amount Each FY	Percent of Total²
Fees and Expenses for Witnesses: Provides funding for the payment of costs incurred by expert and fact witnesses.	\$214,622,000	79
Protection of Witnesses: Provides funding for the Department's Witness Security Program, which ensures the security of certain government witnesses, or potential government witnesses, and their families.	\$43,661,000	16
Victim Compensation Fund: Provides resources to compensate individuals who are victimized by protected witnesses. ³	\$0	0
Private Counsel: Provides funding to allow the Department to retain outside private counsel to defend federal employees who are being sued while carrying out official duties.	\$7,000,000	3
Superior Court Informant Program: Provided funding for the protective services offered to the District of Columbia Superior Court Witnesses. ⁴	\$0	0
Alternative Dispute Resolution: This program encompasses a wide range of problem-solving and conflict management techniques including mediation, early neutral evaluation, and arbitration.	\$1,300,000	<1
Foreign Counsel: Provides funding to allow the Department to retain outside counsel to represent Government officers and employees who are sued in a foreign country while performing their official duties.	\$3,417,000	1
Total:	\$270,000,000	100

Source: 2014 Congressional Budget Request, Fees and Expenses of Witnesses.

FEW funds are considered no-year funds. This allows the Department to retain any balances unspent for any given year making funds available for an indefinite period of time without limitation. The following chart shows the annual appropriated and carry forward amounts from FY 2008 to the present.

² Due to rounding, the sum of the percentages in this table does not equal 100 percent.

³ There has been no funding or authorizations for this activity since FY 2011.

⁴ The funding for this activity has been eliminated and moved to the Protection of Witnesses decision unit. As a result, there has been no funding or expenditures for this activity since FY 2011.

**FEW Annual Appropriated and Carry Forward Amounts
FYs 2008-2014**

Fiscal Year	Appropriated Amount	Carry Forward Amount	Funds Available Including Carry Forward
2008	\$168,300,000	\$90,669,792	\$258,969,792
2009	\$168,300,000	\$64,994,621	\$233,294,621
2010	\$168,300,000	\$39,767,037	\$208,067,037
2011	\$270,000,000	\$18,551,903	\$288,551,903
2012	\$270,000,000	\$92,378,168	\$362,378,168
2013	\$270,000,000	\$177,556,162	\$447,556,162
2014	\$270,000,000	\$201,980,219	\$471,980,219

Source: JMD

FEW funds are appropriated to and managed by the Department's Justice Management Division (JMD), which in turn allots those funds to the litigating components within the Department. The following three offices within JMD have responsibilities related to the FEW:

- Budget Staff - serves as the central budget office for the Department. The Budget Staff is responsible for overseeing all aspects of planning and preparation of the budget for the entire Department, which totals over \$30 billion. Included within the Budget Staff is the Legal Activities Group which oversees the various litigation-related components, and is specifically responsible for the formulation, execution and performance review of the FEW appropriation.
- Procurement Services Staff (PSS) - provides acquisition support primarily to the Department's litigating components, as well as other DOJ components such as the U.S. Trustees and JMD staffs. PSS is organized into three groups: the Office of the Director, the Acquisition Programs Group (APG), and the Acquisition Management Group.

PSS developed the *Guiding Principles for Obtaining Witness Services Under the Fees and Expenses of Witnesses Appropriation* (FEW Guiding Principles). The FEW Guiding Principles were originally published in February 1999 and have been updated several times, most recently in April 2005.⁵ According to the FEW Guiding Principles,

PSS has responsibility for: (1) overseeing and monitoring the use of the FEW appropriation; (2) issuing policies and procedures and conducting training related to the approval and execution of witness agreements (contracts); (3) authorizing

⁵ On November 16, 2012, an interim addendum titled "Applicable use of Fees and Expenses of Witnesses Mandatory Appropriation" was issued. See Appendix IV.

and processing requests to obtain Government/Military and Foreign fact witnesses; and (4) obtaining advances for foreign fact witnesses.

The APG is the organization within PSS that is directly responsible for managing the expert and fact witness program.

- Finance Staff - develops and promulgates policies and standards pertaining to financial and accounting activities of the Department. The Finance Staff provides accounting policies and services in coordination with Department components authorized to use the FEW appropriation. The Finance Staff told us that their responsibilities with respect to the FEW are the same as with all appropriations they manage within the Department.

Utilization of the FEW Appropriation

FEW funds for the fees and expenses of witnesses are utilized primarily by 6 of the Department's litigating divisions and by EOUSA, which provides administrative support for the 93 United States Attorneys located throughout the United States, the District of Columbia, and U.S. territories.⁶ The following chart provides a brief description of these components and the amount of FEW funding each was allotted for the fees and expenses of witnesses in FY 2013.

⁶ There are 93 United States Attorneys responsible for 94 United States Attorney's Offices (USAO). The Department's National Security Division and the Office of General Counsel also make limited use of FEW funds. As explained in greater detail in Appendix I, these two components were not included in this audit.

FEW Funding Allotted to Components, FY 2013

Department Component	FEW Funding Received
Antitrust Division - promotes economic competition through enforcing and providing guidance on antitrust laws and principles.	\$14,100,603
Civil Division - represents the United States, its departments and agencies, Members of Congress, Cabinet Officers, and other federal employees in any civil or criminal matter within its scope of responsibility.	\$63,209,982
Civil Rights Division - enforces federal statutes prohibiting discrimination on the basis of race, color, sex, disability, religion, familial status and national origin.	\$6,807,365
Criminal Division - develops, enforces, and supervises the application of all federal criminal laws except those specifically assigned to other divisions.	\$5,616,074
Environment & Natural Resources Division (ENRD) - enforces the Nation's environmental laws; prosecutes criminal cases under federal pollution and wildlife laws; defends environmental and natural resources laws and federal agency programs and actions; litigates cases under statutes providing for the management of public lands and natural and cultural resources; litigates cases to protect the rights of Indians under treaties, acts of Congress, and Executive Orders, and defends the United States in claims brought by Indians.	\$52,022,292
Tax Division - handles or authorizes most civil and criminal litigation that concerns or relates to the internal revenue laws in federal district and appellate courts.	\$25,393,382
EOUSA – EOUSA receives annual FEW allotments from JMD and disburses the funds to each United States Attorneys' Office. EOUSA also provides FEW and FEW Guiding Principles training to U.S. Attorneys' administrative staffs, and monitors district FEW allotments and spending.	\$72,476,335

Source: DOJ, OIG

OIG Audit Approach

As noted above, the fees and expenses for expert and fact witnesses account for 79 percent of appropriated FEW funds each year. During our initial comprehensive survey of the fees and expenses for witnesses we found that the fact witness program accounts for only about 9 percent of this total.⁷ In addition, FEW fact witness payments are statutorily restricted to \$40 per day plus expenses. These factors led us to conclude that the fact witness program did not present a high risk to the FEW appropriation. As a result, we focused our audit on the expert witness program, with the objective of reviewing the Department's management and use of the Fees and Expenses of Witnesses appropriation for expert witnesses.

⁷ The second largest FEW expense category, Protection of Witnesses, accounts for 16 percent of the FEW appropriation, and the remaining activities comprise less than 5 percent of appropriated FEW funds.

To accomplish our objective, we interviewed representatives from several DOJ components responsible for the management of the FEW appropriation including JMD, EOUSA, selected United States Attorneys' Offices (USAO), and the six litigating divisions noted above.

In addition, as shown in the following chart, we reviewed expert witness contracts executed from FY 2008 to 2011 at 18 locations to assess the effectiveness of internal controls and compliance with the FEW Guiding Principles.⁸

**FEW Expert Witness
Testing Sample by Component
FYs 2008 to 2011**

Component	Contracts Sampled	Sample FEW Funds Paid
Antitrust Division	34	\$13,733,853
Civil Division	101	\$35,244,034
Civil Rights Division	25	\$2,414,123
Criminal Division	5	\$2,313,507
ENRD	93	\$79,976,101
Tax Division	81	\$31,075,991
12 US Attorneys' Offices	390	\$13,110,423
Total:	729	\$177,868,032

Source: OIG

The results of our review are detailed in Findings and Recommendations section of this report. Further information on the audit objectives, scope, and methodology is contained in Appendix I.

Prior Reports

Our research identified two prior reports prepared by the Department of Justice Office of the Inspector General and the General Accounting Office (now known as the Government Accountability Office) which dealt with the fees and expenses of witnesses. Although these reports are over 20 years old, they identified some of the same issues discussed in this report, including the failure to follow procedures, questionable payments, and the need for additional guidance. Additional details on these reports are included in Appendix II.

⁸ A complete list of the 18 locations we visited is listed in Appendix I.

FINDINGS AND RECOMMENDATIONS

I. OIG REVIEW OF EXPERT WITNESS CONTRACTS

We found that the Department did not always meet the requirements for retaining and paying expert witnesses with FEW funds. Overall, we reviewed 729 expert witness contract files funded by the FEW appropriation and found that 74 (10 percent) contracts amounting to \$15.2 million did not satisfy the criteria set forth in the FEW Guiding Principles because, for example, they involved work performed prior to the case being filed in federal court, cases outside the federal court system, or component administrative support. We also found an additional 39 contracts totaling over \$10 million for which we could not determine whether the intent of the FEW Guiding Principles had been met because the underlying contract was vaguely written, as with contracts for the evaluation of damages; or because the FEW Guiding Principles were ambiguous or silent about the circumstances presented in the particular case, as with contracts for translation of evidence. According to JMD staff, some sections of the FEW Guiding Principles are ambiguous or overly restrictive, and as a result would benefit from clarification to better meet the purposes of the Guiding Principles.

Expert Witness Contract Guidance

The FEW appropriation provides funding for the payment of costs incurred by the Department for its use of expert witnesses. Expert witnesses may appear on behalf of the federal government when a specific expertise is required in the prosecution or defense of a federal case. Expert witnesses provide technical or scientific testimony based on their qualifications and expertise, and are compensated based on negotiations with the federal government attorney that obtained the services of the witness.

The use of FEW funds to contract with expert witnesses is primarily governed by the FEW Guiding Principles, section 1.4, which states in part:

The cost of work performed by an expert witness for other than preparing and presenting his or her own testimony cannot be properly paid from the FEW appropriation. The financial responsibility for an expert witness whose primary function is to assist in the investigative phase of a case remains with the litigating organization or investigative agency (i.e., information or investigative work done for a prosecuting attorney for the purpose of determining whether a charge should be made in a particular case; services provided **PRIOR** to the case being docketed in a Federal court; services

which are not solely for examination/preparation and testimony in a legal proceeding in a Federal court). Any individual retained by DOJ to assist in the investigative phase of a case or who is not expected to provide expert testimony is considered to be a "Litigative Consultant." The FEW appropriation **CANNOT** be used to reimburse Litigative Consultants. Rather, funding comes from the litigating office's or client agency's appropriation.⁹

The FEW Guiding Principles provide the following definitions for "expert witness" and "litigative consultant":

Expert Witness: An individual who is an expert by knowledge, skill, experience, training or education, and may testify in the form of an opinion or otherwise. (See Federal Rules of Evidence, Rules 702 and 703). Expert witnesses are appropriate for use when scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence, the Government's case, or to determine a fact in issue. Payment for services of expert witnesses and those expenses necessary for the expert witness to prepare and present his or her testimony may be made from the FEW appropriation.

Litigative Consultant: An individual retained to assist in the investigative phase of a case matter who is not expected to testify in a formal trial proceeding. Consultants serve in a purely advisory capacity and express opinions or views on issues and subjects presented to them. Ordinarily, a consultant is an expert, but not necessarily a specialist, in the particular area in which advice is given. Payment of services of a litigative consultant CANNOT be made from the FEW appropriation.

JMD staff told us that prior to the development of the FEW Guiding Principles, the FEW appropriation was governed by a loose array of guidance that was developed and maintained on an ad-hoc basis.¹⁰ The FEW Guiding Principles were developed by JMD in 1999 and have been revised several times since then. The current version was produced in April 2005 by a working group that included JMD's PSS staff and Office of General Counsel, the six litigating divisions, and EOUSA. JMD staff told us that it began an effort to produce an updated version of the FEW Guiding Principles in 2009, and that the effort is ongoing. According to JMD staff, the updates were intended to address, among other things, language in the current FEW Guiding Principles that the JMD staff believes to be ambiguous or overly

⁹ Additional relevant portions of the FEW Guiding Principles are included in Appendix III.

¹⁰ JMD order OBD 2110.20B dated February 1, 2001, addresses the delegation of authority to acquire the services of fact and expert witnesses in judicial proceedings using the FEW appropriation.

restrictive.¹¹ As of January 2014, JMD staff told us they did not have an estimated target date for completing these updates.

Use of FEW Funds Inconsistent with the FEW Guiding Principles

We conducted reviews of expert contracts at the 6 litigating divisions and 12 USAOs in order to assess compliance with the FEW Guiding Principles at the component level. We reviewed a sample of 729 expert witness contracts in total, accounting for \$177,868,032 in FEW funds spent from FYs 2008-2011. Overall, we found that 74 contracts (10 percent of our sample) did not satisfy the requirements as set forth in the FEW Guiding Principles. These 74 contracts totaled \$15,199,676, or about 9 percent of associated FEW funds paid. Generally, these 74 contracts can be grouped into 4 categories that, in our opinion, were inconsistent with the FEW Guiding Principles. Each of these categories is explained in further detail below.

Expert Witness Services Provided Prior to Case Docketing in Federal Court

As noted above, according to our reading of the FEW Guiding Principles, FEW funds may not be used to pay for expert witness services provided prior to a case being docketed in a federal court.¹² The FEW Guiding Principles consider such services to be the financial responsibility of the component. According to JMD, a case is considered docketed on the date a case is filed in a court and assigned a court docket number.

In total we identified 43 contracts totaling \$10,194,222 that paid for expert services provided either in part or in full prior to the docket date, or for services in matters for which investigations were closed without a case being filed in a federal court. For those contracts in which some work was performed prior to the docket date, we considered only that portion as an inconsistent use of FEW funds. For work performed entirely prior to or absent a docket date, we considered the entire contract an inconsistent use of FEW funds.

¹¹ One such update was issued November 16, 2012, and expanded the use of FEW funds for contract administration costs. It also recognized that appropriate uses of the FEW Appropriation for the costs of expert witnesses are outlined in the FEW Guiding Principles. See Appendix IV.

¹² At the conclusion of this audit, one of the Department's litigating divisions disagreed with our interpretation of section 1.4 of the FEW Guiding Principles. This component stated that, in its view, the nature of the work to be performed, not the timing of the contractor's retention, determines whether a contractor is a litigative consultant or a "FEW-fundable" expert witness. This component described section 1.4 of the FEW Guiding Principles, upon which the OIG's analysis is based, as "poorly worded." The OIG recognizes that in some circumstances an expert witness may be retained to prepare for testimony in an action not yet docketed. However, the current language of section 1.4 of the FEW Guiding Principles seems to provide that when such activity is undertaken before the docket date, FEW funds should not be used to pay for the expert's services. As we state later in this report, if the OIG's interpretation of the FEW Guiding Principles is inconsistent with the intent of its drafters, we recommend that the working group considering modifications or clarifications to the FEW Guiding Principles include this issue in the scope of its review.

**Expert Services Provided Before or Without
a Docket Date By Component**

Component	Number of Contracts	FEW Funds Paid
Antitrust Division	26	\$8,411,477
Civil Rights Division	2	\$141,450
ENRD	4	\$312,881
Tax Division	1	\$46,150
USAO Eastern District of California	1	\$2,538
USAO District of Nevada	3	\$3,000
USAO District of New Jersey	1	\$38,280
USAO Southern District of New York	4	\$1,206,875
USAO Western District of Tennessee	1	\$31,571
Total:	43	\$10,194,222

Source: OIG

As noted in the chart above, most of the expert services provided prior to the court docketing date were expended by the Antitrust Division. When we discussed these cases with Antitrust Division staff, we were told that Antitrust Division's use of expert witnesses differs substantially from the other litigating components within the Department. Antitrust Division officials acknowledged that docket numbers may not yet be assigned to its cases when it places experts under contract. The reason for this, according to Antitrust Division, is that the Antitrust Division's civil merger and non-merger investigations are typically months, and sometimes years, in the making and routinely require the use of expert witnesses from the outset of the investigation. Antitrust Division officials stated that these investigations require intense data analysis in a wide variety of industries, and the expert witnesses it places under contract typically will not testify at trial unless they are involved with the research from the outset. According to Antitrust Division officials, when the division places an expert witness under contract, it is with the expectation that, if the case ultimately goes to trial, the expert witness will testify.

Antitrust Division officials also noted that, depending on the industry, the pool of available expert witnesses may be extremely limited. This means that the Antitrust Division and its opposing counsel could be pursuing the same expert witnesses. For this reason, Antitrust Division officials stated that it is vital that experts be placed under contract as early in the investigative process as possible.

We do not question Antitrust Division’s reasoning for placing its expert witnesses under contract as early as possible. However, as we note above, the current language of the FEW Guiding Principles appears to state that services provided prior to a case being docketed in a federal court are the financial responsibility of the component and cannot be paid with FEW funds. In our judgment, based upon the FEW Guiding Principles, the appropriate course of action for cases involving expert services prior to docketing would be to process and pay the contractor for such services using the component’s agency appropriation. We recommend that JMD ensure that FEW funds are not expended for expert witness services provided prior to a case being docketed in a federal court. If JMD believes that exceptions to this rule are necessary, or the rule as stated in the FEW Guiding Principles should be adjusted, the FEW Guiding Principles should be updated accordingly.

Expert Witness Services Retained But Not Performed

We found 21 cases where, although the contract was for expert witness services, either there was no indication in the file that expert testimony was anticipated or the file indicated that the anticipated testimony would be fact-based. In 14 of these cases, based on the contract files, it appeared that the contractor was expected to perform work that more closely resembled that of a litigative consultant. In seven of these cases, private investigators were hired for what appeared to be fact-finding purposes only. These 21 contracts totaled \$2,372,980 and are explained in further detail below.

Expert Services Not Performed After Docketing by Component

Component	Number of Contracts	FEW Funds Paid
Civil Rights Division	2	\$25,600
ENRD	2	\$567,608
USAO Central District of California	3	\$65,270
USAO Eastern District of California	1	\$210
USAO Northern District of California	1	\$4,267
USAO Middle District of Florida	6	\$43,026
USAO Southern District of Florida	1	\$3,375
USAO District of New Mexico	1	\$7,002
USAO Southern District of New York	3	\$1,639,712
USAO Western District of Tennessee	1	\$16,910
Total:	21	\$2,372,980

Source: OIG

No Indication of Anticipated Expert Testimony

According to the FEW Guiding Principles, litigative consultants serve in a purely advisory capacity and express opinions or views on issues and subjects presented to them; these individuals are retained to assist in the investigative phase of a case matter and are not expected to testify in a formal trial proceeding. We asked JMD if there were circumstances where a component might retain a

litigative consultant after a case is docketed in federal court. According to JMD, litigative consultants may be used in an advisory capacity after the docket date and during trial, but these costs should not be paid using FEW funds because the FEW Guiding Principles make clear that the cost of work performed by an expert for anything other than preparing and presenting his or her own testimony cannot be properly paid from FEW.

We identified 14 contracts, totaling \$2,318,304, and found that 13 of the 14 cases' statements of work contained no indication that testimony was possible or expected and that none of the related invoices described preparation or presentation of expert testimony.¹³ In some of these cases the contract files explicitly described the contractor as engaged to advise the Assistant U.S. Attorney handling the case. Below are two examples excerpted from contract files that we reviewed:

- We are requesting funds for [contractor] to review the case file, the taped interviews of the defendant by law enforcement, review the medical records of the defendant, interview relevant witnesses, and prepare the prosecution team for any court hearing involving the defendant's mental health.
- [Contractor], a medical consultant, is needed to assist in the defense of this medical malpractice claim. She will be reviewing, organizing and summarizing plaintiff's medical records, advising on medical records issues and any pertinent issues deemed necessary.

Although we understand that litigation can be unpredictable and that Department attorneys must prepare for the possibility that a case may go to trial, in our judgment, when expert services are requested and approved for payment with FEW funds, the contract files should contain some explanation of the nature of the expert testimony anticipated, or should at least document the fact that the expert is expected to testify at a trial. Such an explanation would help ensure that expenditures of FEW funds are consistent with the FEW Guiding Principles. It could also help to clarify what is expected of the expert under the contract. Although we recognize that some of these individuals could have gone on to testify as expert witnesses in these cases, none of the 14 files discussed above contained a statement of why the witness would fairly be expected to provide expert testimony and thus would be eligible under the FEW Guiding Principles for payment with FEW funds.

¹³ One Statement of Work read as follows: "Although the defendant has pled, the government requires [contractor's] services to assist the USAO as it prepares its position and recommendation in regards to sentencing (fines, restitution, etc.). [Contractor] will consult with government counsel, prepare charts and exhibits, review reports and findings, and prepare a report and/or recommendations. There is a slight possibility of testimony at the sentencing hearing as well." We reviewed the transcript of the sentencing hearing and found the contractor did not provide any testimony.

Private Investigators Paid with FEW Funds

Seven of the 21 contracts noted above involved cases in which components representing the U.S. government as a defendant in civil cases hired private investigators to gather information about plaintiffs. These seven contracts totaled \$54,676 in expenses paid. According to EOUSA guidance for contracting with private investigators in civil cases, private investigators should only be categorized as experts when it is appropriate to do so. This guidance states that an expert provides his or her expertise and gives his or her opinion on a matter; in contrast, the guidance states that investigators will usually be retained to develop evidence and not to offer an opinion, and if they are called to testify about their investigations, they are most likely to be considered fact witnesses, not experts.

EOUSA's guidance is consistent with the FEW Guiding Principles, which, as noted above, states that an expert witness is an individual who is an expert by knowledge, skill, experience, training or education, and may testify in the form of an opinion or otherwise. The FEW Guiding Principles further state that expert witnesses are appropriate for use when their specialized knowledge will assist the trier of fact to understand the evidence or the government's case, or to determine a fact in issue. In comparison, the FEW Guiding Principles define a fact witness as an individual whose testimony consists exclusively of the recitation of facts or a description of events.

Because the question of whether a private investigator should be considered an expert or a fact witness turns on the nature of the testimony they are contracted to provide, we reviewed these files to determine whether expert witness services were provided, or at least anticipated.

In one of the files we reviewed, we did not see any evidence in the Statements of Work that the component anticipated any type of testimony by the private investigator. As noted above, the FEW Guiding Principles state that payment for services of expert witnesses and those expenses necessary for the expert witness to prepare and present his or her testimony may be made from the FEW appropriation. Because this file did not contain any explanation of anticipated testimony, we do not believe FEW funds should have been used. In the remaining six contracts, the components anticipated that the private investigator would testify, but we did not see any indication in the files that the testimony would be expert in nature. Instead, it appeared that the testimony of these private investigators was to have been limited to the results of their fact finding, which is consistent with the FEW Guiding Principles' definition of a fact witness. In addition, according to the invoices none of the private investigators hired in these seven cases ultimately testified at a deposition or trial.

Because we found that these components retained contractors under expert witness contracts who were expected to perform, or actually performed, litigative consultant or fact witness work, we recommend that JMD take steps to ensure that litigative consultants or fact witnesses are not paid with FEW funding under expert witness contracts.

Services Provided Outside of a Federal Court

The FEW Guiding Principles allow FEW funds to be used for services of expert witnesses testifying in federal court or participating in judicially-sponsored Alternative Dispute Resolution proceedings. In total, we identified five Civil Division contracts totaling \$1,631,880 where expert services were retained for matters heard outside of a federal court or judicially-sponsored Alternative Dispute Resolution proceeding.

Four of these contracts, which totaled \$1,282,529, were for expert witness services involving the resolution of matters between the United States and Canada in the London Court of International Arbitration (LCIA). According to its web site, the LCIA is not linked to, or associated with, the government of any jurisdiction, but rather is a private, not-for-profit company that is entirely neutral and independent of any other organization. LCIA records we reviewed for these matters indicated that the parties involved brought the disputes directly to the LCIA, and we found no evidence that the proceedings were sponsored by or held at the direction of a federal court. Because the matters were not held in or sponsored by a federal court, we consider the use of FEW funds to pay for these four expert witness contracts to be inconsistent with the FEW Guiding Principles.

The remaining Civil Division contract, which totaled \$349,351, paid for expert witness services in proceedings held before the Civilian Board of Contract Appeals. The Federal Acquisition Regulation describes matters before the Civilian Board of Contract Appeals as administrative proceedings. The FEW Guiding Principles also state that the FEW appropriation is to be used only for judicial, and not administrative, proceedings. Therefore, we consider the funding of this contract with FEW funds to be inconsistent with the FEW Guiding Principles.

We recommend that JMD take steps to ensure that expert witness services paid for with FEW funds are only utilized in cases heard in a federal judicial proceeding or judicially-sponsored Alternative Dispute Resolution proceeding. If JMD intended for expert witness fees to be paid with FEW funds for judicial proceedings outside of those described in the FEW Guiding Principles, it should update the FEW Guiding Principles accordingly.

Administrative Expenses Paid with FEW Funds

We identified five contracts totaling \$1,000,594 in which FEW funds were used to pay administrative expenses incurred by ENRD's Expert Witness Unit. ENRD hired contractors with these FEW funds to process expert witness invoices and perform other administrative tasks related to ENRD's expert witness program.

Prior to November 2012, the FEW Guiding Principles did not contemplate or make any allowance for the use of FEW funds to pay for component administrative expenses, whether related to expert testimony or otherwise. When we asked JMD about this in March 2012, PSS staff agreed that administrative expenses should not

be paid with FEW funds. As a result, we considered all of the charges associated with these five contracts to be inconsistent with the FEW Guiding Principles. We also note that, based on discussions with ENRD staff and review of ENRD's FEW reports, it appears that ENRD spent a total of \$2,543,183 in FEW funds on administrative expenses from FYs 2007-2011.

In November 2012, JMD issued an interim addendum to the FEW Guiding Principles which stated "In light of current fiscal constraints... JMD has reconsidered current guidance that does not explicitly authorize the payment of contract administration costs associated with preparing and presenting expert testimony from the FEW appropriation. Because these costs are an integral part of expert witness functions, JMD is revising its guidance to allow such costs to be paid by the FEW."¹⁴ However, the administrative expenses that ENRD paid with FEW funds also included services that, based on the contract, were clearly associated with litigative consultant services, not preparing and presenting expert testimony. The use of FEW funds for such expenses appears to be inconsistent with the FEW Guiding Principles even taking into account the November 2012 interim addendum.

We recommend that JMD ensure that expert witness contracts paid with FEW funds are used to retain administrative services only when allowable under the FEW Guiding Principles and that, if JMD intends to expand the allowable uses of FEW funds, it formally incorporate all relevant guidance into the FEW Guiding Principles.

Other Reportable Matters

In addition to the inconsistent uses of the FEW funds noted above, we identified other instances where we believe FEW funds were not used in accordance with the FEW Guiding Principles. This included travel expenses paid with FEW funds that exceeded the allowances in the Federal Travel Regulation or were not properly supported. In addition, we found that one component purchased dozens of laptop computers with FEW funds that were used by litigative consultants as well as expert witnesses, contrary to the guidance provided by JMD's General Counsel.

Travel Reimbursements

The FEW Guiding Principles state that the expert witness' travel expenses may be reimbursed up to the allowances and subsistence levels stated in the Federal Travel Regulation. We identified the following FEW travel expenditures that were reimbursed above what was allowable at the time the travel occurred and the reimbursements did not have the required documentation to exceed normally allowed rates.

¹⁴ As of August 2014, this interim addendum had not been formally incorporated into the FEW Guiding Principles.

Lodging Rates

Allowable lodging rates are established by the General Services Administration (GSA).¹⁵ We identified the following hotel stays reimbursed by components in excess of allowable GSA rates:

Expert Witness Hotel Stays in Excess of Allowable GSA Rate by Component

Component	Hotel Nights	Total Amount in Excess of Allowable GSA Rate
Antitrust	2	\$197
Civil	120	\$8,390
Civil Rights	15	\$631
ENRD	304	\$11,124
Tax	17	\$1,384
USAO Eastern District of California	3	\$195
USAO District of Massachusetts	4	\$346
USAO Southern District of New York	8	\$1,146
USAO Western District of Tennessee	12	\$1,180
Total:	485	\$24,593

Source: OIG

First Class Air and Train Fares

The Federal Travel Regulation generally requires air and train travelers to use coach class accommodations. We found the following first class air and train trips reimbursed by the following components:

¹⁵ The Federal Travel Regulation has provisions for instances where these lodging and coach class rates are exceeded; however, the reason must be documented and approval provided.

Unallowable Expert Witness First Class Travel by Component¹⁶

Component	First Class Air Trips	First Class Train Trips
Antitrust	1	0
Civil	1	1
Civil Rights	2	2
ENRD	8	0
Tax	6	3
USAO Southern District of New York	0	2
Total:	18	8

Source: OIG

Other Unsupported Travel

Terms for expert witness contracts include a requirement that invoices must be accompanied by travel receipts to substantiate the invoice amount. We found travel unsupported by receipts totaling \$90,122 at the Civil Division and \$1,203 at the USAO for the Southern District of Florida.

Expert witness contract terms and the Federal Travel Regulation are clear that travel expenses must be supported. Department components must be conscious of these guidelines when reimbursing expert witness travel expenses.

Litigative Consultant Use of FEW-Funded Computer Equipment

In 2008, new encryption requirements were promulgated by the Department's Senior Procurement Executive for Personally Identifiable Information (PII). Some litigating components requested permission from JMD to buy PII-compliant laptops for those experts unable or unwilling to render their own equipment compliant. In response, the JMD General Counsel produced an opinion which found such purchases were allowable under the FEW Guiding Principles, with the following stipulation: "The litigating component will need to ensure that if the laptops are funded by the FEW, they are only used by expert witnesses and only for the purposes described."

In 2008, Civil Rights Division purchased 50 laptop computers with FEW funds totaling \$50,723, as well as external hard drives totaling \$9,583. The Civil Rights Division also purchased another 25 computers of the same make and model in 2011 for \$53,636. Civil Rights Division staff told us that these computers were used by both expert witnesses and litigative consultants. Under JMD direction, litigative consultants should not use laptops purchased with FEW funds.

¹⁶ Because some documentation we reviewed listed only fare totals inclusive of taxes and fees and did not list base fares, and due to the limitations of air and rail coach class fare histories, we were unable to calculate accurate amounts reimbursed in excess of allowable fares for these trips.

Civil Rights Division staff told us they maintain an electronic database in which FEW laptops are signed in and out, but do not maintain a history of usage. We obtained records identifying the FEW laptops that were signed out for use at the start of our audit in February 2012, and again toward the end of our fieldwork in August 2013. In February 2012, we found that there were 19 FEW laptops in use. The Civil Rights Division told us that 13 of the 19 laptops were signed out to expert witnesses, and the remaining six were signed out to litigative consultants. In August 2013, we found that six laptops were signed out: three to expert witnesses and three to litigative consultants. The use of these laptops by litigative consultants was contrary to the stipulation contained in the JMD General Counsel's opinion governing the use of laptops paid for by FEW funds.

In addition, we believe that the use of FEW laptops by litigative consultants serves as an example of why we believe the Department should monitor the use of FEW funds more closely. We discuss the issue of monitoring in greater detail in Finding II of this report.

Unclear Uses of FEW Funds

In addition to the 74 contracts where we determined the use of FEW funds was inconsistent with the FEW Guiding Principles, we also found 39 expert witness contracts for which it was unclear whether the use of FEW funds was allowable. For the cases described below, either the expert witness contracts prepared by the responsible attorneys were vague, or the FEW Guiding Principles were ambiguous or silent on the particular circumstances of the case. These 39 files totaled over \$10 million in fees and expenses paid with FEW funds.

Evaluation of Damages

We identified four contracts totaling \$863,916 where an expert was retained to evaluate the plaintiff's damage claims. Three of these four contract files made no explicit mention of testimony. The fourth file indicated that the contractor was available to provide testimony if necessary. We did not find any evidence of preparation for or presentation of testimony in the related invoices.

When we followed up with the components involved with the first three contracts, we were advised that they anticipated that the contractors would provide expert testimony. However, it was still unclear to us based on the contract files whether the evaluation of damages in these cases was intended to advise the government's attorney when assessing settlement options or whether it was intended for testimony in court. In these cases, we believe a more clearly written contract could have helped the reviewer determine whether these contracts were allowable uses of FEW funds. We recommend that JMD provide clear guidance to department attorneys and administrative staffs on the necessary elements of an expert witness contract to be paid with FEW funding.

Post-Settlement or Post-Judgment Expert Witness Contracts

We identified 12 Civil Rights Division expert witness contracts that involved post-settlement or post-judgment activities for which we were unable to conclude whether they represented an allowable use of FEW funds. These contracts totaled \$744,270.

Nine of these Civil Rights Division contracts, totaling \$110,774, involved assessment of compliance with settlement agreements. Generally, the settlement agreements in these matters allowed, but did not explicitly require, Civil Rights Division to assess compliance with settlement terms agreed to by the parties and approved by the court. In the event Civil Rights Division found non-compliance with the settlement terms, the court expected that Civil Rights Division would first attempt resolution with the opposing party. However, if that resolution was unsuccessful, Civil Rights Division could seek relief from the court. In such circumstances the retained expert who assessed compliance with the settlement would be expected to testify on behalf of the government. We did not find any evidence in the related invoices that any of these nine contractors actually testified.

We also identified three Civil Rights Division expert witness contracts, totaling \$633,496, involving its successful suit against the New York City Fire Department (FDNY). These contractors were hired after the verdict to participate in the development of new FDNY hiring practices. These contract files also did not explicitly state that expert testimony was anticipated but rather stated "if requested." When we inquired about these three contracts, Civil Rights Division staff told us that these contractors would be expected to testify in the event Civil Rights Division objected to the new hiring practices. In addition, Civil Rights Division told us that it anticipated that the court would request testimony from the each party's experts as it considered whether to approve the new hiring practices.

We found that the FEW Guiding Principles are silent as to whether the retention of an expert witness after an approved settlement or judgment order has been entered by court is a permissible use of FEW funds. While we understand that a court may retain jurisdiction over a case in order to supervise a settlement, in cases like the nine referenced above, the terms of the settlements indicate that the initial review by the expert is intended for the government attorney's internal use. Only if a dispute arises might the retained expert be called upon to testify. We recommend that JMD assess whether payments made to experts retained to assess compliance with settlement agreements or judgment orders are an allowable use of FEW funds and update the FEW Guiding Principles as appropriate.

Translation or Enhancement of Evidence

During our visits to the various USAOs, we identified 16 contracts where linguists were hired and paid with FEW funds to translate written or recorded evidence. In another case we found that an audio laboratory was hired to enhance audio and video evidence, for a total of 17 contracts. These contracts totaled \$137,799.

The only role explicitly described for linguists in the FEW Guiding Principles is found in Section 3.3, which allows for interpreters to be paid with FEW funds for pretrial conference, deposition, or courtroom interpretation of witness testimony.¹⁷ Although the term “translator” is included in the definitions section of the FEW Guiding Principles as an individual who converts written material from one language to another; the work of a “translator” is not addressed in the substantive sections of the FEW Guiding Principles. When we discussed the translation contracts with the litigating components, we were told that linguists are often called to the witness stand in order to attest to the accuracy of the translation they produced.

Because the FEW Guiding Principles do not explicitly address either the translation or enhancement of evidence, we recommend that JMD assess whether experts retained for translation and enhancement of evidence purposes can be paid with FEW funds and update the FEW Guiding Principles as appropriate.

Grand Jury Interpreters

We found three contracts, totaling \$3,824, where FEW funds were paid to interpreters who were hired as experts for grand jury witness testimony. As mentioned above, the FEW Guiding Principles, section 3.3, specifically allows for interpreters to be paid as expert witnesses in pretrial conferences, depositions, or court testimony. We also note that section 9.1 of the FEW Guiding Principles, which covers pre-trial conferences, defines a pre-trial conference as a meeting with a witnesses to discuss their testimony in a pending trial, hearing, or grand jury proceeding. The FEW Guiding Principles go on to state that these meetings take place after the investigative stage of a case is completed and the trial, hearing, or grand jury proceeding has been scheduled. However, the U.S. Attorney Grand Jury Manual describes a grand jury as an “investigative body,” which appears to imply that the investigative stage of the case includes the grand jury. In addition, JMD told us that they consider grand jury interpreter work to be a fact witness expense, allowable under FEW Guiding Principles section 7.7. This JMD interpretation would limit the payment to grand jury interpreters to the statutory fact witness rate. Because the U.S. Attorney Grand Jury Manual and the JMD interpretation provided to us appear to conflict with the information contained in the current version of the FEW Guiding Principles, we recommend that JMD definitively determine when

¹⁷ The FEW Guiding Principles defines an “interpreter” as “an individual who converts verbal communications in one language to another.”

expert witness fees in grand jury proceedings can be paid with FEW funds and update the FEW Guiding Principles accordingly.

Document Management

We found three contracts at ENRD, totaling \$8,442,764 in FEW funds, that involved primarily document management, scanning, and coding related to ENRD's Tribal Trust litigation. The Tribal Trust litigation involves the U.S. government's management of 56 million acres of land resources in trust for the benefit of individual Indians and tribes. The U.S. government has been sued in over 100 lawsuits which allege that the U.S. government should be ordered to prepare a "full and complete historical accounting of the Tribes' trust fund accounts and non-monetary trust resources." ENRD handles these cases on behalf of the U.S. government and is also the document manager for the records relating to all of the Tribal Trust cases.

ENRD's contract files stated that the documents were intended for expert witness use and, as such, were expenses necessary for the expert witness to prepare and present his or her testimony. However, the FEW Guiding Principles specifically state that only the cost of work performed by an expert witness to prepare and present his or her own testimony can properly be paid from the FEW appropriation. As a result, even if these documents were intended for an expert witness's use, they appear not to have been strictly allowable under the FEW Guiding Principles because the expenses were not used to compensate that expert witness for the preparation or presenting of his or her own testimony.¹⁸

As noted above, we recommend that JMD ensure that expert witness contracts paid with FEW funds are used to retain administrative services only when allowable under the FEW Guiding Principles and that, if JMD intends to expand the allowable uses of FEW funds, it formally incorporate all relevant guidance into the FEW Guiding Principles.

Conclusion

Overall, we found that in 74 of the 729 expert witness contracts we reviewed, the criteria set forth in the FEW Guiding Principles were not satisfied. These 74 contracts amounted to \$15.2 million in FEW funds expended on contracts inconsistent with the FEW Guiding Principles. We also found an additional 39 contracts, totaling more than \$10 million, where we could not determine whether the intent of the FEW Guiding Principles was followed because the underlying contract was not written with specificity or the FEW Guiding Principles were ambiguous or silent about the circumstances presented in the particular case. As a

¹⁸ The costs discussed in this section were all paid with FEW funds prior to JMD's issuance of the November 2012 interim addendum, discussed above, that addressed the use of FEW funds for payment of contract administration costs associated with preparing and presenting expert testimony.

result, we believe the Department should ensure that the FEW Guiding Principles are updated appropriately and that Department attorneys understand when contractors are eligible to be paid as expert witnesses with FEW funds.

Recommendations

We recommend that JMD:

1. Ensure that FEW funds are not expended for expert witness services provided prior to a case being docketed in a federal court. If JMD believes that exceptions to this rule are necessary, or the rule as stated in the FEW Guiding Principles should be adjusted, the FEW Guiding Principles should be updated accordingly.
2. Ensure that litigative consultants or fact witnesses are not paid under expert witness contracts with FEW funding.
3. Ensure that expert witness services paid for with FEW funds are only utilized in cases heard in a federal judicial proceeding or judicially-sponsored Alternative Dispute Resolution proceeding. If JMD intended for expert witness fees to be paid with FEW funds for judicial proceeding outside of those described in the FEW Guiding Principles, it should update the FEW Guiding Principles accordingly.
4. Ensure that expert witness contracts paid with FEW funds are used to retain administrative services only when allowable under the FEW Guiding Principles and that, if JMD intends to expand the allowable uses of FEW funds, it formally incorporate all relevant guidance into the FEW Guiding Principles.
5. Provide clear guidance to department attorneys and administrative staffs on the necessary elements of an expert witness contract to be paid with FEW funding.
6. Assess whether payments made to experts retained to assess compliance with settlement agreements or judgment orders are an allowable use of FEW funds and update the FEW Guiding Principles as appropriate.
7. Assess whether experts retained for translation and enhancement of evidence purposes can be paid with FEW funds and update the FEW Guiding Principles as appropriate.
8. Definitively determine when expert witness fees for grand jury proceedings can be paid with FEW funds and update the FEW Guiding Principles accordingly.

II. OVERSIGHT AND MONITORING OF FEW BUDGETING AND EXPERT WITNESS EXPENSES

We identified two instances where, in coordination with JMD Budget Staff, FEW funds were repurposed to relieve pressure on the budgets of two Department litigating components. JMD Budget Staff informed us that it consulted with its Office of General Counsel before such repurposing. While it is unclear whether the use of FEW funds for purposes not covered in the Guiding Principles was inappropriate under any law or regulation, we believe such repurposing should be done rarely, and only with scrupulous attention to both the explicit requirements which attach to the FEW funds and to the Congressional purpose of that appropriation. Moreover, the FEW Guiding Principles do not specifically outline a policy for such repurposing, yet as the FEW carry forward balances increase, we believe litigating components could increasingly look to the FEW to relieve budget pressure. Without clear guidance on the repurposing of FEW funds we believe the practice is susceptible to abuse.

In addition, according to the FEW Guiding Principles, JMD's Procurement Services Staff is responsible for overseeing and monitoring FEW funds. Nonetheless, PSS officials stated that it cannot realistically perform this key function due to the volume of expert witness contract actions performed by the Department each year. Instead, PSS stated that it relies on component administrative staff, in part through its Delegation of Procurement Authority program, to monitor FEW funds. However, the Delegation of Procurement Authority Program does not specifically delegate monitoring responsibility to components, and PSS officials, as well as some component officials, acknowledged that these administrative staff members are often reluctant to question the decision making of the attorneys they support. We believe this situation creates confusion and likely results in inconsistent monitoring of FEW funds.

FEW Budgeting for Expert Witnesses

According to the FEW Guiding Principles, the Assistant Attorney General for Administration is responsible for setting general policies and for the control of the FEW appropriation. JMD's Budget Staff provides funds control policy and oversight. With respect to expert witness funding, this includes allotting FEW funds to the litigating components, ensuring component FEW spending remains within quarterly

and annual allotment limits, and consulting with components on appropriate use of FEW funds.

According to the JMD Budget Staff, in recent years decisions regarding the allotment of funds to the litigating components have been based primarily on prior year spending. If a component requires additional FEW funds to meet expert witness needs, that component contacts the JMD Budget Staff directly. As noted above, the FEW appropriation is a “no-year” appropriation, which means that unexpended balances from the prior fiscal years are carried forward to the current fiscal year. Unexpended component allotments are returned to JMD at the end of each fiscal year and are carried forward to the next fiscal year.

2011 FEW Appropriation Increase

For FY 2011, JMD requested and received a 60 percent, \$101.7 million increase in the Department’s FEW appropriation, from \$168.3 million to \$270 million. Ninety-one percent of this increase was intended for expert witnesses. JMD requested the increase because FEW carry forward balances, which were at \$96.8 million in FY 2006, had been decreasing toward zero, while expert witness costs were projected to increase, particularly those related to national security and fraud prosecutions.

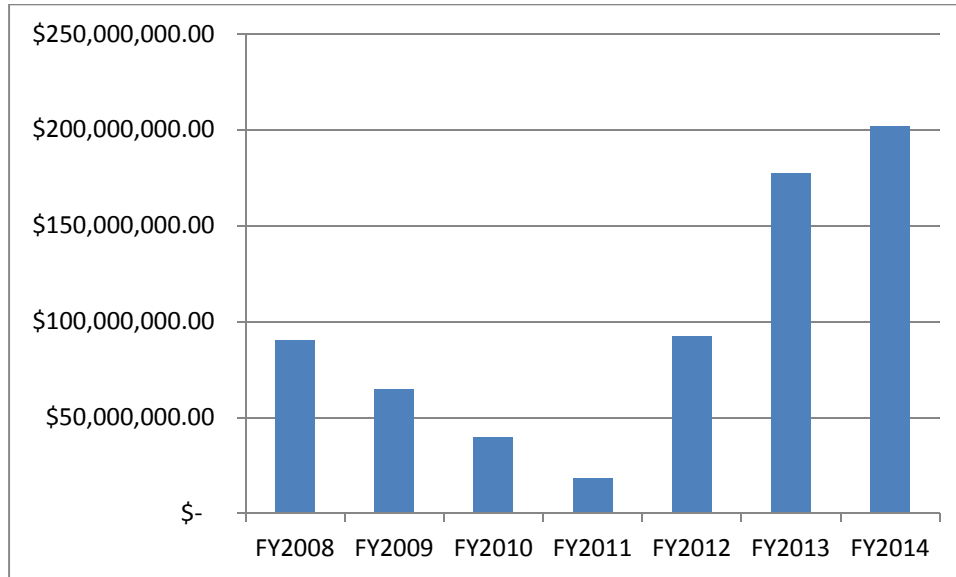
By the time of the FY 2014 budget request, the 2013 FEW carry forward amount had increased to \$177.6 million, nearly double the carry forward amount in 2006. The request included the following language explaining the increase:

The FEW appropriation had a carryover of \$177,556,000 in FY 2013. This amount is inclusive of an increased appropriation in FY 2011 to \$270 million while obligation rates have not materialized as anticipated to meet this increase.

JMD Budget Staff told us they had not determined why the anticipated increased FEW expenditures did not materialize. JMD initially thought that this was possibly a result of reduced or frozen hiring in recent years, but JMD staff later found that this was not supported by the case volume data. Another potential explanation put forward to us was that there was an increase in cases going to settlement rather than trial. However JMD had not arrived at any definitive explanation at the time of our audit.

The chart below illustrates both the annual decreases in carry forward funds leading up to the FY 2011 FEW appropriation increase and the subsequent annual increases.

FEW Annual Carry Forward Amounts, FY 2008 – 2014



Source: JMD

We asked whether JMD had any plans to revisit and possibly adjust the FEW appropriation total, given lower than expected expenditures. Despite the increasing carry forward amounts, the Budget Staff told us they did not have plans to adjust the appropriation total. There is no statutory cap or limit on FEW carry forward amounts.

Repurposing of FEW Funds

As noted in Finding I of this report, we identified instances where FEW funds were used to pay for litigative services that would not be authorized under the FEW Guiding Principles. During our review of expert witness contracts, we found further that two litigating divisions, in coordination with JMD Budget Staff, charged fees of litigative consultants to their FEW allotments so that they could redirect litigative consultant funds to cover shortfalls in their salaries and expenses budgets. Specifically, the Civil Rights Division used FEW funds to help cover a \$655,000 shortfall related to Americans with Disabilities Act rulemaking, and the Antitrust Division requested approximately \$1,000,000 from the FEW, in addition to funds from other sources, to help fund current services.¹⁹ Documentation provided to us by Antitrust Division indicated that only about \$130,000 in FEW funds was ultimately paid to litigative consultant contracts as part of this transaction.

¹⁹ Two of the Antitrust Division contracts and three of the Civil Rights Division contracts are also discussed in Finding I of this report as part of our expert contract sample. Both Antitrust Division contracts involved litigative consulting services performed before the docketing of the case. Two of the Civil Rights Division contracts were also cases where litigative consulting services were performed before the docketing of the case. The remaining Civil Rights Division case was for litigative consultant services performed subsequent to docketing.

JMD Budget Staff told us the decision to arrange these transactions resulted from the availability of surplus FEW funds as well as the components' budget necessities. JMD Budget Staff informed us that it consulted with its Office of General Counsel before such repurposing, and we found that the Assistant Attorney General for Administration approved these decisions. It is unclear whether this use of FEW funds for purposes not covered in the FEW Guiding Principles was inappropriate under any law or regulation. However, we also found that the FEW Guiding Principles do not clearly outline a policy for the repurposing of FEW funds, and that, as discussed in Finding I, they specifically prohibit the use of FEW funds to pay for litigative consulting services.

If FEW carry forward balances continue to increase, the opportunities for litigating components to look to the FEW to relieve pressure on their budgets will also increase. If the Department considers the repurposing of FEW funds in this manner to be an acceptable practice, we believe strict measures must be in place to prevent abuse. We therefore recommend that JMD revise the FEW Guiding Principles to identify a clear procedure for the repurposing of FEW funds that includes adequate documentation and approval requirements. In addition, the Department should consider whether congressional notification of such repurposing would be appropriate.

Monitoring of FEW Expert Witness Expenses

As described in the introduction section of this report, the FEW Guiding Principles state that the JMD Procurement Services Staff (PSS) is responsible for (1) issuing policies and procedures and conducting training related to the approval and execution of witness contracts, and (2) overseeing and monitoring the use of the FEW appropriation. However, in our initial meeting with PSS staff, we were told that PSS does not proactively monitor or review component FEW expenditures; instead, the component staff members are expected to monitor these funds. According to PSS staff, their office cannot realistically monitor component FEW funds due to the volume of expert witness contract actions that occur each year.

During subsequent follow-up discussions, PSS told us they intended to remove the language from the FEW Guiding Principles concerning PSS oversight and monitoring of the FEW, and that PSS's role in this regard should be considered as more of a compliance function than a monitoring function. We asked who specifically, if not PSS, is or should be responsible for monitoring and oversight of the FEW, and PSS staff told us they believe that the component budget or administrative staffs should be responsible for ensuring FEW funds are used properly.

However, PSS staff also acknowledged certain factors that we believe could compromise components' ability to monitor FEW funds adequately. Specifically, PSS staff told us that they believed it is an "unwritten rule" for component management to make use of FEW funds to the greatest extent possible, and that the incentive to spend FEW funds is strongest when doing so allows the component to avoid spending its own budgeted funds. PSS also acknowledged that some

component administrative personnel may be reluctant to disagree with attorney decisions with respect to charging contracts to the FEW.

We also discussed these issues with EOUSA staff, who confirmed that USAO administrative personnel may be reluctant to question attorney decisions.

We believe that PSS's inability to monitor the FEW, the strong incentives for components to use FEW funds to the greatest extent possible, and the apparent reluctance of some component administrative staffs to question attorney decision making combine to create a significant risk that FEW funds could be used improperly. We recommend that JMD clarify and issue updated guidance that clearly delineates the responsibility to conduct adequate oversight and monitoring of FEW funds used for expert witness contracts, and ensure that appropriate resources are budgeted for the oversight and monitoring.

Department Attorney Review of Expert Invoices

The FEW Guiding Principles section 6.4 states that the Department attorney conducting the case shall certify on each payment voucher that the services were performed. We found that this review and certification was generally performed on invoices at all components we visited with the exception of ENRD. At ENRD, we did not find evidence of the required attorney review or certification in 80 of the 88 expert contract files we reviewed.²⁰

When we discussed the expert witness process with ENRD, the staff told us that upon receipt, expert witness invoices are sent by email to the responsible attorney to review and approve the charges. ENRD staff told us that for invoices under \$75,000, if the attorney does not respond to the email and approve the invoice within 2 weeks, ENRD considers the invoice approved. This policy was established because ENRD's attorneys were not responding to the emails. We have significant concerns about this ENRD policy.

In our judgment, attorney review of expert witness charges is an important internal control to minimize risk of misuse of FEW funds. Simply assuming that invoiced amounts are valid in the absence of actual confirmation from the reviewing attorney presents a significant risk that FEW funds will be improperly paid to expert witness contractors. We recommend that JMD ensure all components are aware of the requirement for Department attorneys to certify the work performed by expert witnesses, and that those certifications are consistently performed.

²⁰ We reviewed a total of 93 ENRD contracts; however, as described on page 14 above, we found five of these contracts were for administrative support services and not requested by or subject to review by any particular ENRD attorney.

FEW Accounting Activities

In reviewing FEW expenditure reporting for each component, we identified certain irregularities in how FEW expert witness expenditures were recorded in the Department's Financial Management Information System (FMIS), which is developed and maintained by the JMD Finance Staff.

Expended funds are recorded in FMIS using sub-object classification codes. Sub-object classification codes are four digit codes which define the nature of services or articles obligated and provide the Department with a detail of expended funds. For example, the sub-object code for expert witness fees is "1157."

We found that the Civil Rights Division's FEW payments were applied not only to the 1157 expert witness sub-object code, but also to other sub-object codes, including those in the 2100 series, which are designated for recording travel and transportation expenses. We did not find the 2100 series codes used by any of the other litigating divisions or USAO we visited. Based on the files we reviewed, it appeared that each of these other components applied all of their expert witnesses' expenses to the 1157 code, including reimbursable expenses such as travel, supplies, equipment, and sub-contractors.

JMD Finance Staff told us that particular sub-object codes, including the 1157 code, are flagged in FMIS to generate annual 1099 tax forms. Amounts for travel-related sub-object codes in the 2100 series do not appear on 1099 forms. The annual 1099 form provides the expert witnesses and the Internal Revenue Service with a statement of the income earned under the 1157 code for the year. When we brought the Civil Rights Division's use of other sub-object codes to the attention of JMD Finance Staff, we were told that currently, the only code available to the components for expert witness fees is the 1157 code and the use of this code should include the expert's fees as well as reimbursed expenses, such as those for travel, supplies, equipment, and sub-contractors.

As a result, 1099 forms produced for Civil Rights Division experts report only the taxable expert witness fees, and do not include travel and other reimbursable expenses. 1099 forms produced for other Department components include both the taxable expert fee and the reimbursable expenses, and the expert is expected to provide documentation to reconcile the claimed tax obligation with the 1099.

We are concerned that not all 1099s generated by Department components are using the same criteria. Expert witnesses that may be engaged by more than one Department component could receive 1099 forms that were generated inconsistently. As a result, we recommend that JMD ensure that FEW expenses are coded consistently in FMIS so that all Department financial reporting in the form of 1099 tax forms are consistent across components.

Conclusion

Based on our review of expert witness contracts, we do not believe FEW funds expended on expert witness contracts are being appropriately monitored by the Department or its components. The FEW Guiding Principles currently state that JMD PSS is responsible for monitoring FEW funds. However, JMD PSS told us that it cannot realistically perform the task. In addition, both JMD and EOUSA raised concerns to us about the reluctance of administrative staff members to question attorney decision making on issues such as payments to expert witnesses. We believe this situation creates confusion about monitoring responsibilities and likely suggests inconsistent levels of monitoring among administrative staff members involved in the preparation and execution of expert witness contracts. We believe that the FEW Guiding Principles should be reassessed and revised to clearly delineate the responsibility to conduct oversight and monitoring of FEW funds used for expert witness contracts.

Further, we found that, in consultation with JMD, FEW funds were repurposed to help components cover shortfalls in budgets that were unrelated to the FEW appropriation. In our judgment, the repurposing of FEW funds should be done rarely and only with scrupulous attention to the explicit requirements of the FEW funds and the Congressional purpose of the FEW appropriation. If the Department finds this repurposing to be an acceptable practice, strict measures must be in place to prevent abuse, especially as FEW carry forward balances continue to increase. JMD should also ensure that all FEW expert witness related expenses are accurately and consistently recorded in FMIS.

Recommendations

We recommend that the JMD:

9. Revise the FEW Guiding Principles to identify a clear procedure for the repurposing of FEW funds that includes adequate documentation and approval requirements. In addition, the Department should consider whether congressional notification of such repurposing would be appropriate.
10. Clarify and issue updated guidance that clearly delineates the responsibility to conduct oversight and monitoring of FEW funds used for expert witness contracts and ensure that appropriate funds are budgeted for this oversight and monitoring.
11. Ensure all necessary components are aware of the requirement for Department attorneys to certify the work performed by expert witnesses, and that those certifications are consistently performed.
12. Ensure that FEW expenses are coded consistently in FMIS so that all Department financial reporting in the form of 1099 tax forms are consistent across components.

STATEMENT ON INTERNAL CONTROLS

As required by the Government Auditing Standards, we tested, as appropriate, internal controls significant within the context of our audit objectives. A deficiency in an internal control exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to timely prevent or detect: (1) impairments to the effectiveness and efficiency of operations, (2) misstatements in financial or performance information, or (3) violations of laws and regulations. Our evaluation of internal controls was not made for the purpose of providing assurance on the Department's internal control structure as a whole. The Department and the individual components discussed in this report are responsible for the establishment and maintenance of internal controls.

As noted in the Findings and Recommendations section of this report, we identified deficiencies in the Department's internal controls that are significant within the context of the audit objectives and that we believe, based upon the audit work performed, adversely affect its ability to provide adequate oversight and management of the FEW appropriation. While the Department through JMD has developed guidance to serve as internal controls for the FEW appropriation, we found that this guidance is vague and results in variances in its implementation. In addition, because no routine oversight of the use of the FEW funds is performed, we found numerous instances where the controls were not followed. As a result, until these deficiencies are remedied, the Department will be unable to provide adequate oversight and management of the FEW appropriation.

Because we are not expressing an opinion on the Department's internal control structure as a whole, this statement is intended solely for the information and use of the Department and the individual components discussed in this report. This restriction is not intended to limit the distribution of this report, which is a matter of public record.

STATEMENT ON COMPLIANCE WITH LAWS AND REGULATIONS

As required by the *Government Auditing Standards* we tested, as appropriate given our audit scope and objectives, selected statistics, procedures, and practices to obtain reasonable assurance that JMD complied with federal laws and regulations for which noncompliance, in our judgment, could have a material effect on the results of our audit. JMD is responsible for ensuring compliance with applicable federal laws and regulations. In planning our audit, we identified the following laws and regulations that were significant within the context of the audit objectives:

- 5 U.S.C. § 5537 (2014)
- Federal Acquisition Regulation § 6.302-3
- Federal Travel Regulation
- Federal Rules of Evidence 702, 703

Other than the specific instances noted in this report, nothing came to our attention that caused us to believe that the Department or the components discussed in this report were not in compliance with the aforementioned laws and regulations.

OBJECTIVE, SCOPE, AND METHODOLOGY

Objectives

The objective of our audit was to review the Department's management and use of the Fees and Expenses of Witnesses (FEW) appropriation for expert witnesses.

Scope and Methodology

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

To accomplish our audit objectives, we interviewed responsible staff members of the Justice Management Division's Procurement Services, Budget, and Finance Staffs; Executive Office for United States Attorneys; and the United States Marshals Service. We reviewed Financial Management Information System (FMIS) reports of FEW transactions for FYs 2008-2011. We conducted site visits, interviewed responsible administrative staff and reviewed 729 sampled expert witness contract files for compliance with JMD FEW Guiding Principles. Of the 729 contract files, 666 were statistically selected, as described in the sample selection methodology section below; 35 were selected judgmentally during our survey phase; and the remaining 28 were judgmentally selected from a set of payments where it appeared that vendor related information was incomplete.²¹ The contract file reviews were conducted at the following locations:

Litigating Divisions, Washington, D.C.:

Antitrust Division	Criminal Division
Civil Division	Environment & Natural Resources Division
Civil Rights Division	Tax Division

²¹ We identified a set of payments that could not be matched to a dataset that contained vendor identification information. We judgmentally selected 28 of these payments for further review and determined that the vendor information was not actually incomplete. For example, in instances where the expert witness was a federal employee from another federal agency the vendor identification information would not be included.

United States Attorneys' Offices (USAO):

Central District of California	District of New Jersey
Eastern District of California	District of New Mexico
Northern District of California	Southern District of New York
Middle District of Florida	Eastern District of Pennsylvania (survey)
Southern District of Florida	Western District of Tennessee
District of Massachusetts	Eastern District of Virginia (survey)
District of Nevada	Southern District of West Virginia

We determined that the six litigating divisions and the USAOs were the primary users of FEW expert witness funds based on our review of JMD's annual Authorization to Obligate Funds for the FEW. We found that the National Security Division and the Consolidated Executive Office & Office of General Counsel also made limited use of FEW expert witness funds, but because the amounts were small (less than 0.2 percent of FEW expert funds combined in FY 2013), we did not include these components in our audit.

The Fees and Expenses of Witnesses activity involves both expert and fact witness funds, and initially we intended our audit to encompass both. During our initial comprehensive survey of the activity at the start of our audit, we interviewed staff at the United States Marshals Service headquarters about fact witness processes, visited three United States Marshals' district offices to learn about their fact witness programs, and reviewed fact witness files. We found that the fact witness program accounts for only about 9 percent of the activity, and this, in addition to the statutory restriction of FEW fact witness payments to \$40 per day plus expenses, led us to conclude that the program did not present a high risk to the FEW appropriation. As a result, we narrowed our scope to focus our audit efforts on the expert witness program only.

Sample Selection Methodology

We compiled a universe of "sample units" based on the audit objectives using payments that were coded in FMIS with account classes of: (a) Expert Witness, (b) Psych Exams, and (c) all sub-object codes of Fees, Expert Witnesses.²² For the six litigating divisions, the universe for sample selection consisted of 4,326 sample units with a total payment amount of \$368 million. For the 94 USAOs, the universe consisted of 17,148 sample units with a total payment amount of \$118.4 million.

To provide effective coverage of vendors and litigating divisions, we used a multistage stratified sample design.²³ For this stratified sample design, the

²² We considered a payment made from the FEW fund by the six litigating divisions and the 94 USAOs from FY 2008 to FY 2011 to be a "sample unit."

²³ Stratification is a process of dividing population into homogeneous, mutually exclusive subgroups.

universe consisted of 4,297 sample units with a total payment amount of \$347.6 million, after excluding 29 sample units that were judgmentally selected and tested during our survey phase. Based on the stratification, a statistical sample size of 282 sample units with a payment amount of \$151.1 million was selected for the litigating divisions.²⁴

For our sample selection of FEW payments made in the USAOs, we scaled the universe to include only the USAOs located in the contiguous United States and the District of Columbia.²⁵ Our universe for the 48 contiguous states and the District of Columbia consisted of 16,499 sample units and a total payment amount of \$113.8 million in 88 USAOs.

Our review and analysis of the USAOs' payments led us to employ a two level sampling approach to select the USAOs and payments for testing. We chose this approach because the FEW payment amounts varied significantly across the 88 USAOs, as well as the variation in USAO size and activity.

The first level sampling approach consisted of selecting USAOs from the universe based on their total payments for FYs 2008-2011. In order to select USAOs with high-dollar amounts, those with more than \$100,000 in at least 3 out of the 4 fiscal years were considered for selection. In addition, USAOs with total payment amounts of more than \$500,000 during the 4 fiscal years were also considered for selection. Forty-one USAOs satisfied at least one of these criteria with a total payment amount of \$103 million (91 percent of the universe considered). To have sufficient coverage we selected 12 of these 41 USAOs.²⁶ The 12 selected USAOs contained 5,243 sample units with a total payment amount of \$54 million.

In the second level sampling approach, sample units for testing were selected by first identifying all payments of \$500,000 or more from the 12 USAOs for automatic inclusion in the sample as high-dollar items. There were a total of 10 high-dollar sample units in 3 USAOs with a total payment amount of \$9.7 million.

²⁴ The 282 sample units consisted of: (1) 35 sample units, with a total payment amount of \$86.6 million, of high-dollar amounts (\$1 million or higher in payment) that were automatically included; (2) 140 sample units, with a total payment amount of \$61 million, that were randomly selected from a stratum of payments between \$250,000 to less than \$1 million; and (3) 107 sample units, with a total payment amount of \$3.5 million, that were randomly selected from a stratum of payments less than \$250,000.

²⁵ We excluded the USAOs in Alaska, Hawaii, Guam, Puerto Rico, and the US Virgin Islands due to budget and time constraints.

²⁶ The Southern District of New York was automatically included as one of the 12 districts because it accounted for 18 percent of the total payments made by these 41 USAOs. The remaining 11 USAOs were selected by employing random sample selection using probability proportion to size. This resulted in our selection of the: Central District of California, Middle District of Florida, Eastern District of California, Northern District of California, District of New Jersey, Southern District of Florida, District of New Mexico, District of Massachusetts, District of Nevada, Western District of Tennessee, and Southern District of West Virginia.

In order to obtain a representative coverage of the 12 USAOs and 4 fiscal years, from the remaining 5,233 sample units we selected a statistical sample of 374 units. Therefore, in total, 384 (10 high-dollar and 374 randomly selected) sample units with \$12.5 million in FEW payments were selected from the 12 USAOs for testing.

PRIOR REPORTS

In July 1984, the General Accounting Office, now known as the Government Accountability Office (GAO), issued a report titled, *Justice Needs Better Controls Over Payment of Witness Fees*.²⁷ At the time of the report, each expert witness contract was approved and paid directly by the Justice Management Division. The report stated this policy was established to provide centralized control over payments to expert witnesses.

The report found that Department of Justice procedures for obtaining the services of expert witnesses were not being fully followed and that some payments to expert witnesses were questionable. GAO recommended that the Attorney General emphasize compliance with existing approval and payment policies and develop additional controls for compensating expert witnesses.

In September 1992, the Department of Justice, Office of the Inspector General issued a report titled, *Expert Witnesses*.²⁸ The report stated that in 1990, JMD decentralized the expert witness fund, delegating authority for the litigating components to obligate their own expert witness expenses. Prior to that, expert witness contracts were managed centrally by JMD. As a result, the litigating divisions began managing their own expert witness allotments.

The report found that additional guidelines from the Justice Management Division would increase effectiveness, including a definition of the difference between an expert witness and an expert, the amount of detail needed on invoices, and guidance for the procurement of expert witnesses for testimony before grand jury. The report raised questions about the distinction between an expert, now referred to as a litigative consultant, and an expert witness, that is an expert expected to testify.

²⁷ U.S. General Accounting Office, *Justice Needs Better Controls Over Payment of Witness Fees*, GAO/GGD-84-61 (July 12, 1984).

²⁸ U.S. Department of Justice, Office of the Inspector General, *Expert Witnesses*, Evaluation and Inspections Report I-92-21 (September 1992).

**SELECTED EXCERPTS FROM FEW GUIDING PRINCIPLES
PERTAINING TO EXPERT WITNESSES**

1.1 BACKGROUND

- 1.1.1 The Fees and Expenses of Witnesses (FEW) appropriation is the source of funding for witnesses appearing in court on behalf of the Department of Justice and for fact witnesses subpoenaed on behalf of indigent defendants proceeding under the Criminal Justice Act (28 C.F.R. § 1821, 28 C.F.R Part 21, and Rule 17(b) of the Federal Rules of Criminal Procedure).
- 1.1.2 The Assistant Attorney General for Administration (AAG/A) is responsible for setting general policies and for the control of the FEW appropriation. The Budget Staff, Justice Management Division (JMD), provides funds control policy and oversight. The Finance Staff, JMD, provides accounting policies and services in coordination with the U.S. Marshals Service and the Justice components authorized to use the FEW appropriation. The U.S. Marshals Service provides accounting services for the payment of fact witness allowances.

1.2 ROLE OF THE PROCUREMENT SERVICES STAFF

The Procurement Services Staff (PSS) is an organization within the Justice Management Division that reports to the AAG/A. Among other things, PSS has responsibility for:

- 1.2.1 Overseeing and monitoring the use of the FEW appropriation;
- 1.2.2 Issuing policies and procedures and conducting training related to the approval and execution of witness agreements (contracts);
- 1.2.3 Authorizing and processing requests to obtain Government/Military and Foreign fact witnesses; and
- 1.2.4 Obtaining advances for foreign fact witnesses.

1.3 ROLE OF THE ACQUISITION PROGRAMS GROUP.

The Acquisition Programs Group (APG) is the organization within PSS that is directly responsible for managing the Witness Program. The mailing address as well as telephone and facsimile numbers are as follows:

Department of Justice
Procurement Services Staff
Acquisition Programs Group
National Place Building, Suite 1040
1331 Pennsylvania Avenue, NW
Washington, DC 20530

1.4 USE OF THE FEW APPROPRIATION

1.4.1 Most witness expenses in judicial proceedings incurred by DOJ's litigating components of the Offices, Boards, and Divisions (OBDs) are payable from the FEW Appropriation (15X0311). They include:

1.4.1.1 services of expert witnesses testifying in federal judicial proceedings in a Federal court or participating in judicially-sponsored Alternative Dispute Resolution (ADR) proceedings,

1.4.1.2 medical and psychiatric examinations of plaintiffs or defendants, as discussed in greater detail in Chapters 4 and 5.

1.4.1.3 taking depositions of the opposing party's expert witnesses or fact witnesses, and

1.4.1.4 fees and allowances of fact witnesses.

1.4.2 The FEW appropriation is available to reimburse the fees and expenses of Neutrals in Alternative Dispute Resolution (ADR) proceedings, where the Department of Justice is a party....” See 28 U.S.C. 530C(b)(3)(B).

1.4.3 There are, however, some witness expenses that cannot be reimbursed from the FEW appropriation, regardless of what legal forum is utilized. These are considered “litigative expenses,” payable from the litigating component’s appropriation. For example:

1.4.3.1 The cost of work performed by an expert witness for other than preparing and presenting his or her own testimony cannot be properly paid from the FEW appropriation. The financial responsibility for an expert witness whose primary function is to assist in the investigative phase of a case remains with the litigating organization or investigative agency (i.e., information or investigative work done for a prosecuting attorney for the purpose of determining whether a charge should be made in a particular case; services provided **PRIOR** to the case being docketed in a Federal court; services which are not solely for examination/preparation and testimony in a legal proceeding in a Federal court). Any individual retained by DOJ to assist in the investigative phase of a case or who is not expected to provide expert testimony is considered to be a “Litigative Consultant.” The FEW appropriation **CANNOT** be used to reimburse Litigative Consultants. Rather, funding comes from the litigating office's or client agency’s appropriation. SAS Instruction 35 provides detailed guidance on obtaining the services of litigative consultants. A copy of this instruction is posted on the PSS website on the DOJNET.

1.4.3.2 The FEW appropriation is NOT to be used for payment of fees or expenses in administrative (as opposed to judicial) proceedings.

1.4.3.3 The FEW appropriation is **NOT** to be used to pay for subpoena service on behalf of either DOJ or Criminal Justice Act (CJA) attorneys. The U.S. Marshals Service and the investigative agencies, both DOJ and non-DOJ, receive Congressionally appropriated funds for this purpose.

1.4.3.4 The FEW appropriation may NOT be reimbursed from another agency's appropriation.

1.4.3.5 The FEW appropriation may NOT be used to pay expenses relative to depositions conducted by non-DOJ attorneys.

1.4.4 Only a warranted Contracting Officer (i.e., a person with a Delegation of Procurement Authority) is authorized to execute an expert witness contract on behalf of the government (See also section 1.6.3.2 below).

3.1 GENERAL

3.1.1 An "expert witness," as defined in Chapter 2 of these Guidelines, is eligible for expert witness payments when the testimony to be given covers more than a mere recitation of facts (e.g., opinions on hypothetical situations, diagnoses, analyses of facts, drawing conclusions, etc., which involve technical thought or effort independent of mere facts).

3.1.2 Testimony with respect to knowledge acquired on the job, although technical in nature, does not entitle one to expert witness fees if the testimony is purely factual. The nature of the testimony is the ultimate test.

3.1.3 Expert witnesses are generally paid by the party retaining them. However, DOJ may be ordered by the court to pay all or part of the fees and expenses of independent experts.

3.1.4 An "Expert Witness Quick-Look Table" is located immediately after Chapter 6 of these Guidelines to summarize the proper method of acquisition and reimbursement of various types of Expert Witnesses.

3.3 INTERPRETERS

The FEW appropriation may be used to pay for the services of interpreters retained by the Government for purposes of interpretation for witnesses attending pretrial conferences, providing depositions conducted by DOJ attorneys, or court testimony. Requests should be submitted on Form OBD-47 as expert witness expenses.

3.5 SELECTION AND REIMBURSEMENT OF EXPERT WITNESSES

- 3.5.1 Negotiation and Justification Required. As authorized by Section 6.302-3 of the Federal Acquisition Regulation (FAR), full and open competition need not be obtained for expert witnesses to be used in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Government in any trial, hearing, or proceeding before any court or administrative tribunal, whether or not the expert witness is expected to testify. A brief explanation should be placed in the contract file explaining the basis for selection of the particular expert and whether other experts were considered.
- 3.5.2 Selection. The expertise and potential contributions to the case should be determining factors in the selection process. The selecting attorney should also ensure that the expert does not have anything in his or her history that could be used to impugn the credibility of testimony as a witness for the Government.
- 3.5.3 Negotiating Expert Witness Rates. Litigating components should negotiate IN ADVANCE with EACH expert witness to ensure that the services are obtained at a reasonable rate. It should be remembered that experts may charge differing rates for differing activities such as deposition, testimony, trial preparation, and court appearance, etc. The rates a witness receives for these various activities shall be identified in the appropriate section of the Form OBD-47. A listing of various expert witness labor categories may be found in FMIS Module, Report No. 17. The rates obligated for each expert witness labor category may be found in FMIS Expert Witness Module Report No. 10. Rates within expert specialties vary depending on the location, number of experts available in a particular field, technical expertise, prior experience, and other factors. Components are encouraged to refer to the rates contained in FMIS Expert Witness Module, Report No. 10 in order to verify the reasonableness of their proposed expert's rate.
- 3.5.4 Rates in Excess of the Listed Rates. Expert witness rates in excess of the rates found in FMIS Expert Witness Module, Report No. 10 should be justified. The justification shall cite such things as the difficulty of the case, or the lack of other suitable, reasonably priced expert witnesses. This situation often occurs when only a limited number of

expert witnesses exist or when only local expert witnesses can be used and all the local expert witnesses demand excessive rates.

3.5.5 Rates for Expert Witnesses in Categories Not Listed in FMIS. For expert witnesses in other than the categories listed in FMIS Module, Report No. 17, litigating components should use the prevailing rates in their local area as guidelines for negotiations.

3.5.6 Reimbursement of Travel Expenses. In addition to the expert witness' fee, the witness' travel expenses will be reimbursed up to the allowances and subsistence levels in the Federal Travel Regulations. Expert witness travel expenses, including those paid via the Government Transportation Account (GTA) shall be included on the Form OBD-47.

Generally, expert witnesses should NOT be paid a witness fee for travel time. However, witnesses may be paid for their time in transit if it is their customary practice to do so, although payment for travel time is disfavored.

3.5.7 Government Transportation Account (GTA). Authorized expert witness travel may be arranged via a GTA under DOJ's charge card contract for official government travel. Components may arrange for expert witness GTAs through the Contract Programs Coordinator, Financial Operations Service, Finance Staff, Justice Management Division. GTAs for component employees, or those used for fact witnesses, are NOT to be used for expert witness travel. A separate GTA must be established for expert witnesses.

3.5.8 Obtaining Government Rates. Under the General Services Administration's transportation contracts, contract fares are available for expert witnesses traveling on behalf of the Federal government, provided that the arrangements are made by the government pursuant to a court order, a properly executed expert witness contract, or other authorizing document. Transportation costs must be paid directly by DOJ and not by the witness. There is no entitlement to Federal government fares when expert witnesses purchase their own tickets.

3.6 REIMBURSEMENT OF THE SAME WITNESS USED IN MULTIPLE CASES

3.6.1 When the same expert witness is used in multiple cases (often in land condemnation cases or cases where multiple defendants are indicted separately), the expert witness is allowed to invoice only for the number of hours he or she actually expended on each of the cases. The witness is not permitted to "double bill." As an example, if a witness works 8 hours one day preparing for testimony in three separate, but virtually identical cases, the witness may not charge 8

hours for each case. Instead, the 8 hours of preparation must be allotted among the three cases.

- 3.6.2 If the witness is billing on a daily rate, the witness should be permitted to bill a maximum of one day's rate for each day's work, regardless of the number of cases worked on. It is recommended that this procedure be explained in advance to the witness to avoid subsequent billing disputes.

3.7 REIMBURSEMENT OF MISCELLANEOUS EXPENSES

Miscellaneous expenses, such as the preparation of court exhibits, photocopying costs, laboratory costs, etc., should be included in the witness contract and on the expert's invoice if the payment will be made directly to the expert witness. If the payment for the miscellaneous expense will be made to a third party, a separate expert witness request must be processed for the third party. A copy of the approved expert witness request (OBD-47) must be attached to the request for payment to a third party.

3.8 REIMBURSEMENT OF FEDERAL GOVERNMENT EMPLOYEES AS EXPERT WITNESSES.

Whenever a DOJ attorney expects to use expert testimony of any kind, the attorney should consider using a Federal government employee in a specialized field from an agency or bureau of the government as an expert witness. Significant cost savings are often realized by utilizing government employees. Reimbursement of government employees used as expert witnesses should be made as follows:

- 3.8.1 Fees. 5 U.S.C. § 5537 prohibits Federal government employees from receiving witness fees for service as witnesses on behalf of the United States.
- 3.8.2 Cases Involving Employing Agency. Federal government employees appear in their official capacity when they testify in cases involving the rules and regulations of their own ("employing") agencies. In such instances, the expenses of the appearance are to be paid by the employing agency. The witness does NOT receive witness fees.
- 3.8.3 Cases Not Involving Employing Agency. When Federal government employees testify as a witness on behalf of another agency, they are considered on loan or detail to the other agency. They are reimbursed as follows:
 - 3.8.3.1 Travel Expenses. Travel expenses are normally paid by the employing agency and are then reimbursed by DOJ (see Chapter 12, "Federal Government Employees as Fact Witnesses" if only travel expenses are being requested).

3.8.3.2 Former Federal Government Employees. Former Federal government employees are considered non-government employees. Requests should be processed in the same manner as "regular" expert witnesses on the Form OBD-47. They are entitled to expert witness fees and expenses even if the expert testifies about official matters he or she worked on while federally employed.

3.8.3.3 U.S. Postal Service Employees. For expert witness purposes, U.S. Postal Service employees are considered Federal employees.

3.9 REIMBURSEMENT OF COSTS OF DISCOVERY OF EXPERT WITNESSES

Rule 26(b)(4) of the Federal Rules of Civil Procedure addresses situations in which one party wishes to obtain information from the other party's expert witness. While it is preferable for parties to pay for their own witnesses, Rule 26(b)(4) provides that under certain circumstances the party seeking discovery must pay a fair portion of the fees and expenses of the other party's expert. Fees should be allocated as follows:

- 3.9.1 Department's Expert Witness Deposed by Opposing Counsel. Fees for the attendance of the Department's expert witness to be deposed by the other party are payable by the party requesting the deposition.
- 3.9.2 Opposing Counsel's Expert Witness. In those cases when DOJ must pay for discovery of the other party's expert, fees for the other party's witness are payable from the FEW appropriation. Such services are not considered to be "procurements" by DOJ, but rather, "payments." Thus, a contract document should not be issued; signatures of the expert(s) are not required; and these "payments" are not subject to ratification procedures (see Section 1.8).
- 3.9.3 Attendance of Department Expert Witness at Depositions in Aid of Witnesses' Own Preparation. Fees for the attendance by the Department's expert witness at a discovery deposition of the other party's witness are payable from the FEW appropriation when the purpose is to assist the Department's expert witness in preparing his or her own testimony.
- 3.9.4 Attendance of Department Expert Witness for General Litigative Assistance. Fees for the attendance by the Department's expert witness at a discovery deposition of the other party's witness are **NOT** payable from the FEW appropriation when the purpose is for the Department's expert to assist the DOJ attorney on more general aspects or strategies of the litigation, not directly related to the contents of the DOJ witness' own testimony. This type of service

should be paid as a litigative expense from the component's appropriation account.

FEW GUIDING PRINCIPLES INTERIM ADDENDUM



U.S. Department of Justice

Washington, D.C. 20530

NOV 16 2012

TO: Fees and Expenses of Witnesses (FEW) User Components
(See Distribution List)

FROM: Jolene LauriaSullens
Deputy Assistant Attorney General, Controller

Michael Allen
Deputy Assistant Attorney General for Policy, Management and Planning

SUBJECT: Applicable use of the Fees and Expenses of Witnesses Mandatory Appropriation

The Fees and Expenses of Witnesses Mandatory Appropriation (FEW) is available to pay costs for Fact Witnesses and Expert Witnesses. Appropriate uses of the FEW appropriation for these purposes are outlined in the Fees and Expenses of Witnesses Guiding Principles (2005).

The Justice Management Division (JMD), Procurement Services Staff (PSS) developed the original guiding principles for the FEW appropriation, and the Department published them in February 1999. The Department published the current set of Guiding Principles in March 2005.

In light of current fiscal constraints, JMD is reviewing the FEW appropriation to determine what, if any, items or activities that currently fall outside the funding authority of the Guiding Principles may be considered appropriate for payment from the FEW appropriation in this, and subsequent, fiscal years. As its first priority, JMD has reconsidered current guidance that does not explicitly authorize the payment of contract administration costs associated with preparing and presenting expert testimony from the FEW appropriation. Because these costs are an integral part of expert witness functions, JMD is revising its guidance to allow such costs to be paid by the FEW. **To that end, effective immediately, the current Guiding Principles are hereby revised to allow payment of contract administration costs associated with preparing and presenting expert testimony from the FEW appropriation.** This memorandum shall serve as an interim addendum to the 2005 FEW Guiding Principles.

JMD continues to review and assess the 2005 FEW Guiding Principles and notes the possibility of additional changes in the coming months. Please direct any questions regarding this memorandum to Michelle Wall (JMD PSS) or Chris Hook (JMD Budget Staff).

JUSTICE MANAGEMENT DIVISION RESPONSE TO THE DRAFT AUDIT REPORT



U.S. Department of Justice

Washington, D.C. 20530

SEP 11 2014

MEMORANDUM FOR RAYMOND J. BEAUDET
ASSISTANT INSPECTOR GENERAL FOR AUDIT

FROM: *for* Lee J. Lofthus *Michael H. Allen*
Assistant Attorney General
For Administration

SUBJECT: Justice Management Division Response to Office of the Inspector General Draft Report: *Audit of the Department of Justice's Oversight of Costs Incurred Through the Fees and Expenses of Witnesses Appropriation*

This responds to the Office of the Inspector General (OIG) draft report, *Audit of the Department of Justice's Oversight of Costs Incurred Through the Fees and Expenses of Witnesses Appropriation*. We appreciate OIG's review of the Department's administration of the expert witness program funded by the Fees and Expenses of Witness appropriation (FEW). We concur overall with the recommendations; however, the Justice Management Division (JMD) does not agree with all the Report's factual findings and does not plan to reinvestigate the expert witness procurement actions discussed.

Before responding to the recommendations, we wish to clarify how the expert witness program fits into the Department's overall management of appropriated funds. The Department has broad statutory authority to expend FEW funds for multiple purposes. The Department must manage those funds to meet competing authorized uses. As an internal management matter, some statutorily-authorized uses are not permitted as a matter of course. The JMD Procurement Services Staff's *Guiding Principles for Obtaining Witness Services Under the Fees and Expenses of Witnesses Appropriation* ("Guiding Principles"), discusses such constraints. When there is a *bona fide* need for expert witness services consistent with statute, JMD has discretion to allow exceptions to the Guiding Principles.

The 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107-273 (2002), currently authorizes the Department's use of the FEW as follows:

- (3) Fees and expenses of witnesses.—Funds available to the Attorney General for fees and expenses of witnesses may be used for—
 - (A) expenses, mileage, compensation, protection, and per diem in lieu of subsistence, of witnesses (including advances of public money) and as authorized by [28 U.S.C.] section 1821 or other law, except that no witness may be paid more than 1 attendance fee for any 1 calendar day;

(B) fees and expenses of neutrals in alternative dispute resolution proceedings, where the Department of Justice is a party; and

(C) construction of protected witness safesites.

28 U.S.C. § 530C(b)(3).¹ Further, the Department's annual appropriation specifies appropriate uses of the FEW:

FEES AND EXPENSES OF WITNESSES

For fees and expenses of witnesses, for expenses of contracts for the procurement and supervision of expert witnesses, for private counsel expenses, including advances, and for expenses of foreign counsel, \$270,000,000, to remain available until expended, of which not to exceed \$16,000,000 is for construction of buildings for protected witness safesites; not to exceed \$3,000,000 is for the purchase and maintenance of armored and other vehicles for witness security caravans; and not to exceed \$11,000,000 is for the purchase, installation, maintenance, and upgrade of secure telecommunications equipment and a secure automated information network to store and retrieve the identities and locations of protected witnesses.

Department of Justice Appropriations Act, 2014, Pub. L. 113-76, Div. B, Tit. II, 128 Stat. 5, 54.

As Chief Financial Officer of the Department, the Assistant Attorney General for Administration (AAG/A) administers the FEW, like other Department appropriations, with the assistance of the Deputy Assistant Attorney General/Controller and the JMD Budget Staff. By delegation, the AAG/A assigned the Director, JMD Budget Staff, with responsibility for "funds control policy and oversight" for the FEW. OBD 2110.20B, *Delegation of Authority to Commit Funds and to Acquire Witness Services Using the Fees and Expenses of Witnesses (FEW) Account*, ¶ 5(b) (2001) (Delegation). The AAG/A also assigned to the Director, JMD Procurement Services Staff (PSS), responsibility for "acquisition policy and services for the expert and fact witness programs." *Id.* The AAG/A further assigned the PSS Director responsibility for promulgating additional guidelines "on acquiring witness services" and for "monitoring and overseeing the effective use of delegations of authority" issued pursuant to that directive. *Id.*, ¶ 8.

The Department's mission requirement for expert witness services is mandatory, on-going, and dependent on factors not entirely within its control. The Department must manage FEW funding

¹ Two other statutes generally authorize the Department's use of appropriated funds to make payments to witnesses: 28 U.S.C. § 524(a)(1) ("Appropriations . . . are available to the Attorney General for payment of . . . expenses of witnesses") and 28 U.S.C. § 1821 (witnesses are entitled to fees and allowances for attendance at federal judicial proceedings).

to meet variable, irregular needs. The Guiding Principles articulate prudential internal constraints on what may be otherwise statutorily-authorized uses of the FEW. By the same token, JMD also has flexibility to manage funding resources to allow statutorily-authorized uses of the FEW which may not be always explicitly cited in the Guiding Principles.

We agree that the Guiding Principles, as well as the Delegation, need updating. However, we also want to point out that, as the name suggests, the Guiding Principles were never intended to address all the scenarios associated with the expert witness program operated in multiple components. The Guiding Principles were last revised in 2005. The Report's recommendations, and JMD's experience, surface a number of areas that require reassessment, clarification, or explication. In part, that effort has been in abeyance pending issuance of OIG's recommendations. A successor document will need to be issued within strictures of the Department's Directives Management program. See DOJ Order 0401, *Directives Management* (2012). Thus, when updated, the material comprising the Guiding Principles will be issued in a different format. JMD will undertake those revisions in FY '15.

We believe that PSS is properly executing its role regarding the expert witness program. The Guiding Principles state that PSS generally has responsibility for "[o]verseeing and monitoring the use of the FEW appropriation." Guiding Principles, § 1.2.1. The Guiding Principles must be read in conjunction with the Delegation, however. PSS' delegated authority is to set acquisition policy and to monitor and oversee procurement delegations. To date, PSS has fulfilled this role by issuing the Guiding Principles, providing technical assistance in interpreting and applying them, and operating the Delegation of Procurement Authority (DPA) program. Through this program, PSS has delegated procurement authority to approximately 300 individuals in the Offices, Board, and Divisions, including those with a need to procure expert witness services. Each component with DPA holders must demonstrate that it has proper procedures and internal controls to handle the anticipated volume, dollar value, and type of procurement actions, including expert witness services. Prior to being issued a Contracting Officer's warrant under the DPA program, each individual must successfully complete certain training requirements. PSS retains general oversight responsibility and performs regular compliance reviews of the overall procurement programs operating under a DPA. It is through the DPA program that PSS monitors and oversees procurement delegations that implicate expert witness services.

PSS is not responsible for day-to-day oversight and monitoring of individual expert witness transactions outside of JMD, however. Under general direction of the AAG/A, Component Heads are responsible for committing, obligating, and expending funds within the limitation and purpose of an appropriation as warranted and allotted. DOJ 2030.4G, *Control of Funds Under Apportionment*. ¶ 5(b)(1) (2010). Likewise, Component Heads are responsible for developing and maintaining internal controls, and preparing component assurance statements. *Id.*, ¶ 5(b)(3), (5). JMD will review its existing policies and procedures and, as necessary, update them to improve internal controls. Components will also be reminded of their responsibilities under

DOJ Order 2030.4G to establish and maintain internal controls to help ensure that FEW funds are expended for authorized uses only.

Response to Specific Recommendations

Below are JMD's responses to the Report's 12 recommendations. JMD will develop successor guidance to the Guiding Principles in FY '15. JMD will remind components of their responsibilities regarding expert witness program in the first quarter of FY '15.

Recommendation 1: Ensure that FEW funds are not expended for expert witness services provided prior to a case being docketed in a federal court. If JMD believes that exceptions to this rule are necessary, or the rule as stated in the FEW Guiding Principles should be adjusted, the FEW Guiding Principles should be updated accordingly.

Response: We concur that successor guidance should address whether and when it is permissible to activate FEW funding for expert witness services rendered prior to a case docketing, or whether a waiver should be granted in a particular situation. JMD will review existing policies and procedures and, as necessary, update them to improve internal controls. Components will also be reminded of their responsibilities under DOJ Order 2030.4G to establish and maintain internal controls to help ensure that FEW funds are expended for authorized uses only.

Recommendation 2: Ensure that litigative consultants or fact witnesses are not paid under expert witness contracts with FEW funding.

Response: We concur. JMD will review existing policies and procedures and, as necessary, update them to improve internal controls. Components will also be reminded of their responsibilities under DOJ Order 2030.4G to establish and maintain internal controls to help ensure that FEW funds are expended for authorized uses only.

Recommendation 3: Ensure that expert witness services paid for with FEW funds are only utilized in cases heard in a federal judicial proceeding or judicially sponsored Alternative Dispute Resolution proceeding. If JMD intended for expert witness fees to be paid with FEW funds for judicial proceeding outside of those described in the FEW Guiding Principles, it should update the FEW Guiding Principles accordingly.

Response: There is no limitation in 28 U.S.C. § 530C(b)(3) or the FEW appropriation that requires expert witness services paid with FEW funds be limited to federal judicial proceedings or judicially-sponsored Alternative Dispute Resolution. These limitations in the Guiding Principles are prudent to conserve FEW resources. We concur that successor guidance should articulate a process to seek a waiver of this prudent restriction as appropriate when FEW

resources are available. JMD will review existing policies and procedures and, as necessary, update them to improve internal controls. Components will also be reminded of their responsibilities under DOJ Order 2030.4G to establish and maintain internal controls to help ensure that FEW funds are expended for authorized uses only.

Recommendation 4: Ensure that expert witness contracts paid with FEW funds are used to retain administrative services only when allowable under the FEW Guiding Principles and that, if JMD intends to expand the allowable uses of FEW funds, it formally incorporate all relevant guidance into the FEW Guiding Principles.

Response: We concur that successor guidance should include the November 16, 2012 authorization to use FEW funds for contract administration costs associated with preparing and presenting expert testimony, and any other appropriate guidance. JMD will review existing policies and procedures and, as necessary, update them to improve internal controls. Components will also be reminded of their responsibilities under DOJ Order 2030.4G to establish and maintain internal controls to help ensure that FEW funds are expended for authorized uses only.

Recommendation 5: Provide clear guidance to department attorneys and administrative staffs on the necessary elements of an expert witness contract to be paid with FEW funding.

Response: We concur that successor guidance should provide a clear description of the necessary elements of an expert witness contract.

Recommendation 6: Assess whether payments made to experts retained to assess compliance with settlement agreements or judgment orders are an allowable use of FEW funds and update the FEW Guiding Principles as appropriate.

Response: We concur that JMD should assess these scenarios identified in the Report against statutorily-authorized uses of the FEW, Department needs, and available resources. Once JMD has done so, it will update successor guidance accordingly.

Recommendation 7: Assess whether experts retained for translation and enhancement of evidence purposes can be paid with FEW funds and update the FEW Guiding Principles as appropriate.

Response: We concur that JMD should assess whether the FEW is or should be available for experts retained for translation and enhancement of evidence purposes. Once JMD has done so, it will update successor guidance accordingly.

Memorandum for the Assistant Inspector General for Audit
Subject: Justice Management Division Response to Office of the Inspector General
Draft Report: *Audit of the Department of Justice's Oversight of Costs Incurred
Through the Fees and Expenses of Witnesses Appropriation*

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Recommendation 8: Definitively determine when expert witness fees for grand jury proceedings can be paid with FEW funds and update the FEW Guiding Principles accordingly.

Response: It is consistent with 28 U.S.C. § 530C(b)(3) and the FEW appropriation to use the FEW to pay experts who testify before federal grand juries. The Guiding Principles' treatment of the subject is less clear. We concur that the eligibility of expert witness services for payment by the FEW should be clarified in successor guidance.

Recommendation 9: Revise the FEW Guiding Principles to identify a clear procedure for the repurposing of FEW funds that includes adequate documentation and approval requirements. In addition, the Department should consider whether congressional notification of such repurposing would be appropriate.

Response: JMD and Department senior leadership always retain the discretion to use appropriated funds consistent with legal limitations on those funds and applicable transfer or reprogramming authorities. JMD also retains the discretion to permit uses of the FEW authorized by statute but not the Guiding Principles. As the Report notes, this discretion has been used in special circumstances. We concur that when successor guidance is issued, it should identify a clear procedure for seeking a waiver of internal limitations that are more restrictive than 28 U.S.C. § 530C(b)(3) and the FEW appropriation. Nothing in the Report suggests a change is necessary regarding control of appropriated funds in general.

Recommendation 10: Clarify and issue updated guidance that clearly delineates the responsibility to conduct oversight and monitoring of FEW funds used for expert witness contracts and ensure that appropriate funds are budgeted for this oversight and monitoring.

Response: JMD will review existing policies and procedures and, as necessary, update them to improve internal controls. Components will also be reminded of their responsibilities under DOJ Order 2030.4G to establish and maintain internal controls to help ensure that FEW funds are expended for authorized uses only. We concur that when successor guidance is issued, it should restate this internal control structure.

Recommendation 11: Ensure all necessary components are aware of the requirement for Department attorneys to certify the work performed by expert witnesses, and that those certifications are consistently performed.

Response: We concur that components would benefit from a reminder of this requirement and JMD will issue such a reminder. Components will also be reminded of their responsibilities under DOJ Order 2030.4G to establish and maintain internal controls to help ensure that FEW funds are expended for authorized uses only.

Memorandum for the Assistant Inspector General for Audit
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Recommendation 12: Ensure that FEW expenses are coded consistently in FMIS so that all Department financial reporting in the form of 1099 tax forms are consistent across components.

Response: We concur that FEW expenses should be coded consistently in FMIS. JMD Finance Staff will reinforce to Executive and Administrative Officers in the Offices, Boards, and Divisions (OBDs) the importance of accurate reporting for FEW expenses and the requirement to use Sub-object (SOC) 1157, expert witness fees, for all FEW expert witness activity. This message will be communicated in the JMD Finance Staff annual Opening Bulletin, which is sent out each October to reiterate key financial management controls throughout the OBDs.

If you have any questions, please contact me on (202) 514-3101, or have your staff call Robin Funston, Director, JMD Budget Staff, on (202) 616-3793; Mark Selweski, Deputy Director, JMD Procurement Services Staff, on (202) 307-1968; or Melinda Morgan, Director, JMD Finance Staff at (202) 616-5809.

ANTITRUST DIVISION RESPONSE TO THE DRAFT AUDIT REPORT



U.S. Department of Justice

Antitrust Division

Liberty Square Building

*450 5th Street, N.W.
Washington, DC 20001*

September 9, 2014

Raymond J. Beaudet
Assistant Inspector General for Audit
Office of the Inspector General
Department of Justice
1425 New York Avenue NW, Suite 5000
Washington DC 20005

Re: Draft Audit Report - Department of Justice's Fees and Expenses of Witnesses
Appropriation

Dear Mr. Beaudet:

The Antitrust Division is in receipt of the OIG's draft audit report on use of the Fees and Expenses of Witnesses Account (FEW) within the Department of Justice. One of the areas referenced in this report is the application of the Department's FEW "Guiding Principles" document on expert witness expenditures by the Antitrust Division, U.S. Department of Justice. I believe it important to reiterate the Division's legitimate use of FEW funding on matters prior to issuance of a court docket number, a practice that has been fully coordinated with and approved by Department of Justice officials.

For reasons stated clearly in the draft report, Antitrust Division matters are unique in that services of expert witnesses are required early in investigations and well before a court docket number is issued. Indeed, as acknowledged in Footnote 12 in the audit report, "The OIG recognizes that in some circumstances an expert witness may be retained to prepare for testimony in an action not yet docketed." This is indeed the need in Antitrust Division matters where experts necessarily must be contracted at matter initiation with full expectation they will testify at trial.

To ensure it is the nature of the work performed and not the timing of contract expert retention that determines whether a contractor is a litigative consultant or an expert witness, the Antitrust Division will work closely with the Department to update its 2005 "Guiding Principles" document and revise Section 1.4 to ensure that necessary and previously authorized FEW-funded investigation and litigation expert witness retention practices are adequately reflected in the Guidelines document.

Sincerely,

Thomas D. King
Executive Officer
Antitrust Division
Department of Justice

TAX DIVISION RESPONSE TO THE DRAFT AUDIT REPORT



U.S. Department of Justice

Tax Division

September 11, 2014

Raymond J. Beaudet
Assistant Inspector General for Audit
Office of the Inspector General
Department of Justice
1425 New York Avenue, NW, Suite 5000
Washington, D.C. 20005

Re: Draft Audit Report – Department of Justice’s Fees and Expenses of Witnesses
Appropriation

Dear Mr. Beaudet:

The Tax Division is in receipt of the OIG’s draft audit report on use of the Fees and Expenses of Witnesses Account (FEW) within the Department of Justice. Throughout the audit report, the FEW “Guiding Principles” are referenced, and the audit notes a number of discrepancies between the practices of the legal divisions and the Principles. Several of the Recommendations suggest that these practices be changed to conform with the Principles, or the reverse – that the Principles be revised to address current practices. We fully agree with this alternative recommendation -- that the FEW “Guiding Principles” be revised to specifically address the areas of practice identified by the audit team.

Although the audit report mentions several instances of improper billing for travel expenses, none of the Recommendations specifically address this problem. Nonetheless, the Tax Division has asked for copies of the working papers which identify these improper travel costs, and we are reviewing our internal control processes regarding first class travel expenses. We expect to issue revised guidance to strengthen the review of Expert Witness contracts and travel expense invoices regarding travel expenses.

The Tax Division will work closely with our sister litigating components and the Justice Management Division to update the 2005 “Guiding Principles” document. We appreciate the work of the audit team in identifying these areas for improvement.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert L. Bruffy".

Robert L. Bruffy
Executive Officer
Tax Division

11849982.3

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
RESPONSE TO THE DRAFT AUDIT REPORT



U.S. Department of Justice

Executive Office for United States Attorneys

Office of the Director


Room 2261, RFK Main Justice Building
950 Pennsylvania Avenue, NW
Washington, DC 20530

(202) 252-1000

SEP 16 2014

MEMORANDUM

TO: Thomas O. Puerzer
Regional Audit Manager
Office of the Inspector General

FROM: 
Monty Wilkinson
Director

SUBJECT: Response to Office of the Inspector General's Draft Audit Report
on the Department of Justice's Oversight of Costs Incurred through
the Fees and Expenses of Witnesses (FEW) Appropriation

Thank you for the opportunity to review the Office of the Inspector General's (OIG's) draft report entitled "Audit of the Department of Justice's Oversight of Costs Incurred through the Fees and Expenses of Witnesses Appropriation." Although all of the OIG's recommendations were addressed to and are actionable by the Justice Management Division, the Executive Office for United States Attorneys (EOUSA) would like to address and clarify the following references to comments made by EOUSA personnel during the audit:

- (p. ii) EOUSA officials likewise agreed that USAO staff members are reluctant to question the decisions made by Assistant United States Attorneys.
- (p.27) We also discussed these issues with EOUSA staff, who confirmed that USAO administrative personnel may be reluctant to question attorney decisions.
- (p.29) In addition, both JMD and EOUSA raised concerns to us about the reluctance of administrative staff members to question attorney decision making on issues such as payments to expert witnesses.

Administrative staff members in EOUSA and the United States Attorneys' Offices (USAOs) regularly monitor and review the use of the FEW appropriation in the USAOs. While administrative staff members are responsible for ensuring that the USAOs follow the relevant policies and procedures on the proper use of the FEW appropriation, they cannot make legal judgments about litigation strategy or the litigative need for an expert witness in a case. Accordingly, once responsible administrative staff members are satisfied that the requesting

AUSA handling a particular case has properly explained and justified the need for the expert witness, the administrative staff will defer to the requesting AUSA on the legal decision to retain the expert witness.

We ask that you consider this clarification when finalizing the audit report.

Thank you again for the opportunity to review the draft report. Please do not hesitate to contact me if you have additional questions.

OFFICE OF THE INSPECTOR GENERAL ANALYSIS AND SUMMARY OF ACTIONS NECESSARY TO CLOSE THE REPORT

The Office of the Inspector General (OIG) provided a draft of this audit report to the Justice Management Division (JMD), Antitrust Division, Civil Division, Civil Rights Division, Criminal Division, Environment and Natural Resources Division, Tax Division, and the Executive Office for United States Attorneys (EOUSA). Responsible officials from each of these Department components was represented at the close-out meeting for this audit and was provided with the opportunity to provide comments and formal, written responses to the draft report. All comments received by the OIG were considered and incorporated into this final report as appropriate. JMD's formal response is incorporated as Appendix V of this final report, and the formal responses from the Antitrust and Tax Divisions and EOUSA are included as Appendices VI, VII, and VIII. The Criminal Division, Civil Division, and Civil Rights Division did not provide formal, written responses.

Analysis of JMD Response

All of the recommendations in this report are directed to JMD. In its response, JMD concurred with each of our recommendations and discussed the actions it will implement in response to our findings. However, JMD also indicated that it did not agree with all of the report's factual findings, and that it does not plan to reinvestigate the expert witness procurement actions discussed in the report. While JMD did not point to any specific factual findings with which it disagrees in its response, we did not ask it to reinvestigate the expert witness procurement actions discussed in the report. The intent of the recommendations contained in our report is to ensure that FEW funding is appropriately controlled and monitored going forward, and we believe the Department's corrective actions to address our recommendations should help it to achieve this result.

JMD's response also discusses the Department's broad statutory authority to expend appropriated Fees and Expenses of Witnesses (FEW) funds, and the fact that the Department's mission requirement for expert witness services is mandatory, ongoing, and dependent on factors not entirely within its control. Congress has also recognized this by allowing the FEW appropriation to be no-year funds, which allows for the carryover of remaining balances year to year. However, because of the significant dollar amounts involved and the Department's ability to carry over yearly remaining balances, we believe that it is particularly important that the Department establish clear and concise guidance governing the use of FEW funds and ensure that strong internal controls are in place. JMD agrees with our assessment that the Department's *Guiding Principles for Obtaining Witness Services Under the Fees and Expenses of Witnesses Appropriation* (FEW Guiding Principles) need to be updated to help achieve this.

JMD's response also included a discussion of its responsibilities with respect to its oversight of the FEW appropriation. JMD indicates that its Procurement Services Staff (PSS) is properly executing its role regarding the expert witness program by issuing the FEW Guiding Principles, providing technical assistance in

interpreting and applying the FEW Guiding Principles, and operating the Delegation of Procurement Authority Program. JMD further indicates that the component heads are responsible for committing, obligating, and expending FEW funds as well as developing and maintaining internal controls. We believe the FEW Guiding Principles should expressly make this delegation of authority clear so that those who use FEW funds understand that they are primarily responsible for internal controls over the funds.

Analysis of Antitrust Division, Tax Division, and EOUSA Responses

In addition to JMD's response, we received formal responses from the Antitrust and Tax Divisions, as well as EOUSA.

In its response, the Antitrust Division reiterates what we noted in footnote 12, on page 9 of this report. According to the Antitrust Division's response, it will work closely with the Department to update the FEW Guiding Principles to "ensure it is the nature of the work performed and not the timing of contract expert retention that determines whether a contractor is a litigative consultant or an expert witness...". As we suggest in our first recommendation, if JMD believes that exceptions to its rule regarding the docketing date are necessary, the FEW Guiding Principles should be updated accordingly. We are encouraged by the Antitrust Division's willingness to work with JMD on this issue.

In its response, the Tax Division recognized the discrepancies between the actual practices of the Department's litigating divisions and the FEW Guiding Principles. In its response, the Tax Division stated that it favors the revision of the FEW Guiding Principles to address the practices of the litigating divisions and expressed a willingness to work with the other litigating divisions and JMD on updating current guidance. In addition, the Tax Division stated that it plans to review its internal control processes regarding first class travel expenses and plans to issue revised guidance to strengthen the review of expert witness contracts and invoices with respect to travel expenses. We are encouraged by the Tax Division's willingness to work with JMD and the other litigating divisions on this issue.

In its response, EOUSA addressed comments made during our review regarding the willingness of USAO staff members to question the decision-making by attorneys during the expert witness retention process. EOUSA stated that these administrative staff regularly monitor and review the use of FEW appropriations in their offices, but noted that these same staff cannot make legal judgments about litigation strategy or the need for an expert witness in a case. To clarify, the OIG is not suggesting that these staff members should make legal judgments; rather, the report highlights the reluctance of these staff members to question administrative requirements, such as the proper account from which to pay for the services of a retained contractor.

Summary of Actions Necessary to Close the Report

- 1. Ensure that FEW funds are not expended for expert witness services provided prior to a case being docketed in a federal court. If JMD believes that exceptions to this rule are necessary, or the rule as stated in the FEW Guiding Principles should be adjusted, the FEW Guiding Principles should be updated accordingly.**

Resolved. JMD concurred with this recommendation. In its response, JMD stated that successor guidance should address whether and when it is permissible to activate FEW funding for expert witness services rendered prior to a case docketing, or whether a waiver should be granted in a particular situation. JMD also stated that it will review existing policies and procedures and, as necessary provide updates to improve internal controls. In addition, components will also be reminded of their responsibilities under DOJ Order 2030.4G to establish and maintain internal controls to help ensure that FEW funds are expended for authorized uses only.

This recommendation can be closed when we receive evidence of the review of existing policies and procedures, and that the revisions determined to be necessary regarding the expenditure of FEW funds prior to a case being docketed in federal court have been developed and implemented. JMD should also provide evidence that all Department components were reminded of their responsibilities under DOJ Order 2030.4G.

- 2. Ensure that litigative consultants or fact witnesses are not paid under expert witness contracts with FEW funding.**

Resolved. JMD concurred with this recommendation. In its response, JMD stated it will review existing policies and procedures and, as necessary, update them to improve internal controls. Again, JMD stated it will remind the components of their responsibilities under DOJ Order 2030.4G to establish and maintain internal controls to help ensure that FEW funds are expended for authorized uses only.

This recommendation can be closed when we receive evidence of the review of existing policies and procedures, and that the revisions determined to be necessary regarding litigative consultants or fact witnesses have been developed and implemented.

- 3. Ensure that expert witness services paid for with FEW funds are only utilized in cases heard in a federal judicial proceeding or judicially-sponsored Alternative Dispute Resolution proceeding. If JMD intended for expert witness fees to be paid with FEW funds for judicial proceeding outside of those described in the FEW Guiding Principles, it should update the FEW Guiding Principles accordingly.**

Resolved. JMD concurred with this recommendation. In its response, JMD stated that there is no limitation in 28 U.S.C. § 530C(b)(3) or the FEW appropriation that requires expert witness services paid with FEW funds to be limited to federal judicial proceedings or judicially-sponsored Alternative Dispute Resolution. However, JMD noted, that the limitations placed in the Guiding Principles are prudential to conserve FEW resources. JMD concurred, therefore, that the successor guidance should articulate a process to seek a waiver of this restriction when FEW resources are available. In addition, JMD stated it will review existing policies and procedures and, as necessary, update them to improve internal controls. Again, JMD will remind the components of their responsibilities under DOJ Order 2030.4G to establish and maintain internal controls to help ensure that FEW funds are expended for authorized uses only.

This recommendation can be closed when we receive evidence of the review of existing policies and procedures, and that the revisions determined to be necessary regarding non-federal judicial proceedings or Alternative Dispute Resolution proceedings have been developed and implemented.

- 4. Ensure that expert witness contracts paid with FEW funds are used to retain administrative services only when allowable under the FEW Guiding Principles and that, if JMD intends to expand the allowable uses of FEW funds, it formally incorporate all relevant guidance into the FEW Guiding Principles.**

Resolved. JMD concurred with this recommendation. In its response JMD stated that successor guidance should include the November 16, 2012 authorization to use FEW funds for contract administration costs associated with preparing and presenting expert testimony, and any other appropriate guidance. In addition, JMD stated it will review existing policies and procedures and, as necessary, update them to improve internal controls. Again, JMD will remind the components of their responsibilities under DOJ Order 2030.4G to establish and maintain internal controls to help ensure that FEW funds are expended for authorized uses only.

This recommendation can be closed when we receive evidence of the review of the existing policies and procedures and the revisions determined to be necessary regarding the retention of administrative services have been developed and implemented.

- 5. Provide clear guidance to department attorneys and administrative staffs on the necessary elements of an expert witness contract to be paid with FEW funding.**

Resolved. JMD concurred with this recommendation. In its response, JMD stated that successor guidance should provide a clear description of the necessary elements of an expert witness contract.

This recommendation can be closed when we receive evidence that successor guidance that contains a clear description of the necessary elements of an expert witness contract has been developed and implemented.

6. Assess whether payments made to experts retained to assess compliance with settlement agreements or judgment orders are an allowable use of FEW funds and update the FEW Guiding Principles as appropriate.

Resolved. JMD concurred with this recommendation. In its response, JMD stated that it will assess the scenarios identified in the report against statutory uses of the FEW, Department needs, and available resources. Once this is completed, JMD will update its successor guidance accordingly.

This recommendation can be closed when we receive evidence of the review of the existing policies and procedures and the revisions determined to be necessary regarding settlement agreements or judgment orders have been developed and implemented.

7. Assess whether experts retained for translation and enhancement of evidence purposes can be paid with FEW funds and update the FEW Guiding Principles as appropriate.

Resolved. JMD concurred with this recommendation. In its response, JMD stated that it should assess whether the FEW is or should be available for experts retained for translation and enhancement of evidence purposes. Once JMD has done so, it will update successor guidance accordingly.

This recommendation can be closed when we receive evidence of the review of the existing policies and procedures and the revisions determined to be necessary regarding translation or enhancement of evidence purposes have been developed and implemented.

8. Definitively determine when expert witness fees for grand jury proceedings can be paid with FEW funds and update the FEW Guiding Principles accordingly.

Resolved. JMD concurred with this recommendation. In its response, JMD stated that it is consistent with 28 U.S.C. § 530C(b)(3) and the FEW appropriation to use the FEW to pay experts who testify before federal grand juries, but recognized that the Guiding Principles' treatment of the subject is less clear.

This recommendation can be closed when we receive evidence that the use of FEW funds for the fees of expert witnesses in grand jury proceedings is clarified in JMD's existing policies and procedures and its successor guidance.

- 9. Revise the FEW Guiding Principles to identify a clear procedure for the repurposing of FEW funds that includes adequate documentation and approval requirements. In addition, the Department should consider whether congressional notification of such repurposing would be appropriate.**

Resolved. JMD concurred with this recommendation. In its response JMD stated that when successor guidance is issued, it should identify a clear procedure for seeking a waiver of internal limitations that are more restrictive than 28 U.S.C § 530C(b)(3) and the FEW appropriation. JMD also stated that JMD and Department senior leadership always retain the discretion to use the appropriated funds consistent with legal limitations on those funds, as well as applicable transfer or reprogramming authority. In addition, JMD stated that it retains the discretion to permit uses of the FEW authorized by statute but not the Guiding Principles.

This recommendation can be closed when we receive evidence of the review of the existing policies and procedures and the revisions determined to be necessary regarding the repurposing of FEW funds have been developed and implemented.

- 10. Clarify and issue updated guidance that clearly delineates the responsibility to conduct oversight and monitoring of FEW funds used for expert witness contracts and ensure that appropriate funds are budgeted for this oversight and monitoring.**

Resolved. JMD concurred with this recommendation. In its response, JMD stated that it will review existing policies and procedures and, as necessary, update them to improve internal controls. Again, JMD will remind the components of their responsibilities under DOJ Order 2030.4G to establish and maintain internal controls to help ensure that FEW funds are expended for authorized uses only. JMD also stated that when successor guidance is issued, it should restate this internal control structure.

This recommendation can be closed when we receive evidence of the review of the existing policies and procedures and the revisions determined to be necessary regarding responsibility and oversight of FEW funds have been developed and implemented.

- 11. Ensure all necessary components are aware of the requirement for Department attorneys to certify the work performed by expert witnesses, and that those certifications are consistently performed.**

Resolved. JMD concurred with this recommendation. In its response, JMD stated that Department components would benefit from a reminder of this requirement and that it would issue such a reminder. Again, JMD will also remind the components of their responsibilities under DOJ Order 2030.4G to

establish and maintain internal controls to help ensure that FEW funds are expended for authorized uses only.

This recommendation can be closed when we receive evidence that all appropriate Department components are aware of the certification requirements, and the certifications are performed as required.

12. Ensure that FEW expenses are coded consistently in FMIS so that all Department financial reporting in the form of 1099 tax forms are consistent across components.

Resolved. JMD concurred with this recommendation. In its response, JMD stated that FEW expenses should be coded consistently in FMIS and that its staff will reinforce the importance of accurate reporting and the requirement to use the expert witness fee code for all FEW expert witness activity.

This recommendation can be closed when we receive evidence that all appropriate components are made aware of the FMIS coding requirements for expert witness activity and these requirements are included in the revised policies and procedures.