

Calendar No. 140

114TH CONGRESS }
1st Session }

SENATE

{ REPORT
114-76

TRUTH IN SETTLEMENTS ACT OF 2015

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 1109

TO REQUIRE ADEQUATE INFORMATION REGARDING THE TAX
TREATMENT OF PAYMENTS UNDER SETTLEMENT AGREEMENTS
ENTERED INTO BY FEDERAL AGENCIES, AND FOR OTHER
PURPOSES



JULY 7, 2015.—Ordered to be printed

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JULY 7, 2015.—Ordered to be printed

Mr. JOHNSON, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 1109]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 1109), to require adequate information regarding the tax treatment of payments under settlement agreements entered into by Federal agencies, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

I. PURPOSE AND SUMMARY

The Truth in Settlements Act seeks to provide more transparency and public access to the terms and conditions under which federal agencies settle enforcement actions or other cases brought against non-government entities and involving payments of at least one million dollars.

II. BACKGROUND AND THE NEED FOR LEGISLATION

Executive agencies are entrusted with the responsibility of enforcing federal laws and holding non-government entities accountable when they violate these laws. Federal enforcement actions can be resolved through settlement agreements under which the party under federal investigation agrees to make a payment to the government. In recent years, Executive agencies have entered into settlement agreements in which the settling party or parties agree to make millions to billions of dollars in payments to the government, such as the government's settlement agreements with Bank of

America,¹ JPMorgan Chase,² Standard & Poor's,³ and Anadarko Petroleum Corp.⁴ However, under existing law, there is no requirement for Executive agencies to publicly disclose how many settlement agreements the government enters into and the terms of these agreements, making it difficult for the public to easily access this information.

Additionally, when Executive agencies do publicly disclose information about a settlement agreement, there are no uniform standards for what type of information must be disclosed. This lack of public disclosure requirements allows Executive agencies to omit key information about the terms of settlement agreements in written public statements. For example, the tax code prohibits the deduction of "any fine or similar penalty paid to a government for the violation of any law."⁵ The Government Accountability Office has reported "[i]n general, payments that are intended to punish (punitive payments) a violator are not deductible and payments made to compensate (compensatory payments) those who were harmed by a violation are deductible under federal law. Nevertheless, it may not always be clear which payments are deductible, in part because the Internal Revenue Code (IRC) does not address the deductibility of all types of payments that may be made pursuant to a civil settlement and that statutes imposing the payments may be unclear regarding whether they are punitive, compensatory, or both."⁶ Additionally, a settling party may earn "credits" toward the settlement amount for certain conduct.⁷ Therefore, without a uniform standard for public disclosure of settlement agreements, Executive agencies may not be communicating to the public the actual amount that will be paid by the settling party.

Finally, there is no requirement for Executive agencies to disclose when a settlement agreement (or a portion thereof) is determined to be confidential and the justification for confidentiality. Therefore, Executive agencies can enter into confidential settle-

¹U.S. Department of Justice, Press Release: Bank of America to Pay \$16.65 Billion in Historic Settlement for Financial Fraud Leading up to and During the Financial Crisis, Aug. 21, 2014, <http://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading>.

²U.S. Department of Justice, Press Release: Justice Department, Federal and state Partners Secure Record \$13 Billion Global Settlement with JP Morgan for Misleading Investors About securities Containing Toxic Mortgages, Nov. 19, 2013, <http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement>. See also U.S. Department of Justice, Press Release: JPMorgan Chase to Pay \$614 Million for Submitting False Claims for FHA-insured and VA-guaranteed Mortgage Loans, Feb. 7, 2014, <http://www.justice.gov/opa/pr/jpmorgan-chase-pay-614-million-submitting-false-claims-fha-insured-and-va-guaranteed-mortgage>.

³U.S. Department of Justice, Press Release: Justice Department and State Partners Secure \$1.375 Billion Settlement with S&P for Defrauding Investors in the Lead Up to the Financial Crisis, Feb. 3, 2015, <http://www.justice.gov/opa/pr/justice-department-and-state-partners-secure-1375-billion-settlement-sp-defrauding-investors>.

⁴U.S. Department of Justice, Press Release: Historic \$5.15 Billion Environmental and Tort Settlement with Anadarko Petroleum Corp. Goes into Effect, Jan. 23, 2015, <http://www.justice.gov/opa/pr/historic-515-billion-environmental-and-tort-settlement-anadarko-petroleum-corp-goes-effect-0>.

⁵26 U.S.C. § 162(f).

⁶U.S. Government Accountability Office, Tax Administration: Systematic Information Sharing Would Help IRS Determine the Deductibility of Civil Settlement Payments, GAO-05-757, 1, Sept. 2005, available at <http://www.gao.gov/products/GAO-05-747>.

⁷Schmit, Julie, "Foreclosure settlement to distribute \$3.6 billion," USA Today, Feb. 28, 2013, <http://www.usatoday.com/story/money/business/2013/02/28/foreclosure-settlement-banks/1954871/>. See also Dewan, Shalia and Silver-Greenburg, Jessica, "Foreclosure deal credits banks for routine efforts," New York Times, Mar. 27, 2012, <http://www.nytimes.com/2012/03/28/business/foreclosure-deal-gives-banks-credit-for-routine-activities.html>.

ment agreements on behalf of the public without explaining to the public why the agreement needs to be confidential.⁸

The Truth in Settlements Act addresses current gaps in public transparency in settlement agreements entered into by Executive agencies and non-governmental entities for violations of federal law. The bill does so by establishing new, uniform, government-wide standards for information disclosed to the American public about settlement agreements entered into to redress a violation of federal law. The bill requires agencies to post copies of settlement agreements involving payments of at least one million dollars by non-government entities and to disclose basic information about those agreements online in a publicly accessible and searchable format. The bill further requires agencies to disclose certain information in written public statements that describe the amount to be paid under a settlement agreement. If an agency determines that some or all of the settlement agreement must be kept confidential, the bill requires the agency to issue a public statement explaining the interests protected by confidentiality and why those interests outweigh the public's right to full transparency of government actions and expenditures.

III. LEGISLATIVE HISTORY

On April 28, 2015, Senators Warren and Lankford introduced the Truth in Settlements Act of 2015 (S. 1109). S. 1109 was referred to the Senate Committee on Homeland Security and Governmental Affairs. Senator Baldwin is also a cosponsor of the bill.

The Committee considered S. 1109 at a business meeting on May 6, 2015. The Committee ordered S. 1109 reported favorably by voice vote, en bloc. Senators present for the vote were Senators Johnson, McCain, Portman, Lankford, Ernst, Sasse, Carper, McCaskill, Baldwin, Heitkamp, and Peters.

IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Short title

This section establishes the short title of the bill as the "Truth in Settlements Act of 2015."

Section 2. Information regarding settlement agreements entered into by Federal agencies

Section 2(a) would create a new statutory provision, 5 U.S.C. § 307.

New section 307(a) defines key terms under the bill. The term "covered settlement agreement" means a settlement agreement (including a consent decree) that is entered into by an Executive agency, relates to an alleged violation of Federal civil or criminal law, and requires the payment of a total of not less than \$1,000,000 by one or more non-Federal persons. The term "entity within the Federal Government" includes an officer or employee of the Federal Government acting in an official capacity. The term "non-Federal person" means a person that is "not an entity within the Federal Government."

⁸Campbell, Dakin, "Wells Fargo Said to Settle FHFA Claims for Less Than \$1 Billion," Bloomberg Business, Oct. 31, 2013, <http://www.bloomberg.com/news/articles/2013-10-31/wells-fargo-said-to-settle-fhfa-claims-for-less-than-1-billion>.

New section 307(b) would require Executive agencies that enter into covered settlement agreements to post copies of those agreements on their agency website in a searchable format and to post certain information about the agreements. This information includes the date the agreement was entered into, the names of the settling parties, a description of the claims each party settled, the amount each settling party is obligated to pay, and the total amount the settling parties are obligated to pay. This information must also include, for each settling party, the amount that is expressly specified as a civil or criminal penalty or fine, and the amount that is expressly specified as not tax deductible. Agencies are not prohibited from entering into confidential settlement agreements and are not required to post information about agreements, or portions thereof, that are subject to confidentiality provisions. Agencies must post this information online for at least five years and post copies of the agreement online for at least one year (or at least five years if the settlement amount totals \$50 million or more).

New section 307(c) would require an agency to issue a public statement if an agency determines that a covered settlement agreement should be subject to a confidentiality provision in order to protect the public interest. This public statement must explain what interests confidentiality protects and why the interests protected by confidentiality outweigh the public's interest in knowing about the conduct of the Federal Government and the expenditure of government resources.

New section 307(d) would require Executive agencies to include certain information in any written public statement that refers to the amount to be paid under a covered settlement agreement by a non-Federal person. This information includes specifying which portion, if any, of the amount is expressly specified under the agreement as a civil or criminal penalty or fine to be paid for a violation of Federal law or is expressly specified under the agreement as not tax deductible. If no portion of the amount to be paid under the agreement is expressly specified as a civil or criminal penalty or fine, the Executive agency must include a statement attesting to such. Furthermore, the Executive agency must describe what actions, if any, the settling party or parties must take under the agreement in lieu of payment and any payments or compensation the settling party or parties must make to other non-Federal persons under the agreement.

New section 307(e) provides that the disclosure requirements of subsection 307(d) apply to the extent to the information to be disclosed (or portion thereof) is not subject to a confidentiality provision that prohibits such disclosure.

New section 307(f) would require agencies to annually report to Congress on the number of covered settlement agreements they entered into, and the number of these agreements that were either partially or fully confidential.

Section 2(b) would require settling parties who file reports for transactions on a national securities exchange with the Securities and Exchange Commission to disclose in those reports if they have filed a claim for a tax deduction during the reporting period for any payments made under a covered settlement agreement.

Section 2(c) would direct the Government Accountability Office to examine, no later than 6 months after enactment of the bill, how Executive agencies determine settlements or settlement terms to be confidential and to offer recommendations, if any, for increasing the transparency of Executive agency settlements.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments. The Committee agrees with the Congressional Budget Office's statement that the bill would impose a low-cost private-sector mandate on issuers of securities that are required to submit reports to the Securities and Exchange Commission.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 20, 2015.

Hon. RON JOHNSON,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1109, the Truth in Settlements Act of 2015.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

KEITH HALL.

Enclosure.

S. 1109—Truth in Settlements Act of 2015

S. 1109 would establish new requirements for the public disclosure of settlement agreements entered into by federal agencies. Specifically, the legislation would require that non-confidential settlements be posted online if they involve payments from nonfederal entities that are greater than \$1 million and are related to a violation of civil or criminal laws. Under the bill, each settlement posted online would have to include the names of the parties involved, a description of the claims settled, the amount to be paid, and whether the settlement is a criminal or civil penalty or a fine. In addition, S. 1109 would require the Government Accountability Office (GAO) to complete a report on the confidentiality of settlement agreements.

CBO estimates that enacting S. 1109 would have no significant effect on the federal budget because most of the information required is already collected during the settlement process and the cost of making it available online would not be significant. CBO also estimates that the cost for GAO to prepare the required study

would be small. Enacting S. 1109 could affect direct spending by some agencies (such as the Tennessee Valley Authority) because they are authorized to use receipts from the sale of goods, fees, and other collections to cover their operating costs; therefore, pay-as-you-go procedures apply. Because most of those agencies can make adjustments to the amounts collected, CBO estimates that any net changes in direct spending by those agencies would not be significant. Enacting the bill would not affect revenues.

S. 1109 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

S. 1109 would impose a private-sector mandate, as defined in UMRA, on issuers of securities that are required to submit reports to the Securities and Exchange Commission. The bill would require such issuers to describe in those reports any tax deduction claimed that relates to payments required under a covered settlement agreement with a federal agency. The cost of providing such information would be only slightly more than the cost of meeting current reporting requirements. CBO estimates, therefore, that the direct cost of complying with the mandate would be small and would fall well below the annual threshold established in UMRA for private-sector mandates (\$154 million in 2015, adjusted annually for inflation).

The CBO staff contacts for this estimate are Matthew Pickford (for federal costs) and Paige Piper/Bach (for the private-sector impact). The estimate was approved by Theresa Gullo, Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 1109 as reported are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

TITLE 5—UNITED STATES CODE

* * * * *

PART 1—THE AGENCIES GENERALLY

* * * * *

CHAPTER 3—POWERS

* * * * *

SEC. 307. INFORMATION REGARDING SETTLEMENT AGREEMENTS.

(a) *DEFINITIONS.*—*In this section—*

(1) *the term ‘covered settlement agreement’ means a settlement agreement (including a consent decree) that—*

(A) is entered into by an Executive agency;

(B) relates to an alleged violation of Federal civil or criminal law; and

(C) requires the payment of a total of not less than \$1,000,000 by 1 or more non-Federal persons;

(2) the term ‘entity within the Federal Government’ includes an officer or employee of the Federal Government acting in an official capacity; and

(3) the term ‘non-Federal person’ means a person that is not an entity within the Federal Government.

(b) INFORMATION TO BE POSTED ONLINE.—

(1) REQUIREMENT.—

(A) IN GENERAL.—Subject to subparagraph (B), the head of each Executive agency shall make publicly available in a searchable format in a prominent location on the Web site of the Executive agency—

(i) a list of each covered settlement agreement entered into by the Executive agency, which shall include, for each covered settlement agreement—

(I) the date on which the parties entered into the covered settlement agreement;

(II) the names of the parties that settled claims under the covered settlement agreement;

(III) a description of the claims each party settled under the covered settlement agreement;

(IV) the amount each party settling a claim under the covered settlement agreement is obligated to pay under the settlement agreement;

(V) the total amount the settling parties are obligated to pay under the settlement agreement; and

(VI) for each settling party—

(aa) the amount, if any, the settling party is obligated to pay that is expressly specified under the covered settlement agreement as a civil or criminal penalty or fine; and

(bb) the amount, if any, that is expressly specified under the covered settlement agreement as not deductible for purposes of the Internal Revenue Code of 1986; and

(ii) a copy of each covered settlement agreement entered into the by the Executive agency.

(B) CONFIDENTIALITY PROVISIONS.—The requirement to disclose information or a copy of a covered settlement agreement under subparagraph (A) shall apply to the extent that the information or copy (or portion thereof) is not subject to a confidentiality provision that prohibits disclosure of the information or copy (or portion thereof).

(2) PERIOD.—The head of each Executive agency shall ensure that—

(A) information regarding a covered settlement agreement is publicly available on the list described in paragraph (1)(A)(i) for a period of not less than 5 years, beginning on the date of the covered settlement agreement; and

(B) a copy of a covered settlement agreement made available under paragraph (1)(A)(ii) is publicly available—

(i) for a period of not less than 1 year, beginning on the date of the covered settlement agreement; or

(ii) for a covered settlement agreement under which a non-Federal person is required to pay not less than \$50,000,000, for a period of not less than 5 years, be-

ginning on the date of the covered settlement agreement.

(c) *PUBLIC STATEMENT.*—If the head of an Executive agency determines that a confidentiality provision in a covered settlement agreement, or the sealing of a covered settlement agreement, is required to protect the public interest of the United States, the head of the Executive agency shall issue a public statement stating why such action is required to protect the public interest of the United States, which shall explain—

(1) what interests confidentiality protects; and

(2) why the interests protected by confidentiality outweigh the public's interest in knowing about the conduct of the Federal Government and the expenditure of Federal resources.

(d) *REQUIREMENTS FOR WRITTEN PUBLIC STATEMENTS.*—Any written public statement issued by an Executive agency that refers to an amount to be paid by a non-Federal person under a covered settlement agreement shall—

(1) specify which portion, if any, of the amount to be paid under the covered settlement agreement by a non-Federal person—

(A) is expressly specified under the covered settlement agreement as a civil or criminal penalty or fine to be paid for a violation of Federal law; or

(B) is expressly specified under the covered settlement agreement as not deductible for purposes of the Internal Revenue Code of 1986;

(2) if no portion of the amount to be paid under the covered settlement agreement by a non-Federal person is expressly specified under the covered settlement agreement as a civil or criminal penalty or fine, include a statement specifying that is the case; and

(3) describe in detail—

(A) any actions the non-Federal person shall take under the covered settlement agreement in lieu of payment to the Federal Government or a State or local government; and

(B) any payments or compensation the non-Federal person shall make to other non-Federal persons under the covered settlement agreement.

(e) *CONFIDENTIALITY.*—The requirement to disclose information under subsection (d) shall apply to the extent that the information to be disclosed (or portion thereof) is not subject to a confidentiality provision that prohibits disclosure of the information (or portion thereof).

(f) *REPORTING.*—

(1) *IN GENERAL.*—Not later than January 15 of each year, the head of an Executive agency that entered into a covered settlement agreement during the previous fiscal year shall submit to each committee of Congress with jurisdiction over the activities of the Executive agency a report indicating—

(A) how many covered settlement agreements the Executive agency entered into during that fiscal year;

(B) how many covered settlement agreements the Executive agency entered into during that fiscal year that had any terms or conditions that are required to be kept confidential; and

(C) how many covered settlement agreements the Executive agency entered into during that fiscal year for which all terms and conditions are required to be kept confidential.

(2) AVAILABILITY OF REPORTS.—The head of an Executive agency that is required to submit a report under paragraph (1) shall make the report publically available in a searchable format in a prominent location on the Web site of the Executive agency.