

Calendar No. 273

116TH CONGRESS }
1st Session }

SENATE

{ REPORT
116-152

STOP IMPROPER FEDERAL BONUSES ACT

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 2119

TO AMEND TITLE 5, UNITED STATES CODE, TO APPROPRIATELY
LIMIT THE AUTHORITY TO AWARD BONUSES TO FEDERAL
EMPLOYEES



OCTOBER 24, 2019.—Ordered to be printed

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OCTOBER 24, 2019.—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. 2119]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 2119) to amend title 5, United States Code, to appropriately limit the authority to award bonuses to Federal employees, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

CONTENTS

	Page
I. Purpose and Summary	1
II. Background and Need for the Legislation	2
III. Legislative History	5
IV. Section-by-Section Analysis	5
V. Evaluation of Regulatory Impact	6
VI. Congressional Budget Office Cost Estimate	6
VII. Changes in Existing Law Made by the Bill, as Reported	7

I. PURPOSE AND SUMMARY

The purpose of S. 2119, the Stop Improper Federal Bonuses Act, is to prevent agencies from giving bonuses to employees that engage in serious misconduct. Specifically, this bill would prevent a Federal agency from awarding bonuses to an employee for five years after an adverse finding is made. An adverse finding is a finding that the employee violated a policy for which the employee could be terminated or suspended for at least 14 days or violated a law for which the employee could be imprisoned for more than one year. An adverse finding may be based on information known by the employee's supervisor or human resources department, a

Government Accountability Office (GAO) or Office of Inspector General (OIG) report, or any other source of information made available to the employee's chain of command. If a bonus had previously been awarded in the same year as an adverse finding is made, agency managers must attempt to recover that bonus, subject to a notice and opportunity for a hearing. The Merit Systems Protection Board (MSPB) can hear appeals about whether the misconduct fits the definition of "adverse finding."¹

II. BACKGROUND AND THE NEED FOR LEGISLATION

Federal law governs employee awards and incentives, and grants agencies authorities to help them manage their workforce. While performance awards can be a valuable tool for Federal managers to incentivize and reward good performance, they are inappropriate in cases where employees have engaged in serious misconduct or criminal behavior. The total amount of awards distributed to Federal employees has fluctuated in recent years—awards reached \$1.2 billion in fiscal year 2016.² The Committee is concerned that, in some cases, bonuses are awarded to Federal employees during periods in which those employees engaged in misconduct.

One Internal Revenue Service (IRS) OIG report found that, between 2008 and 2013, the IRS gave nearly \$145,000 in bonuses to employees within one year of being disciplined for willful tax non-compliance.³ Another IRS OIG report revealed that, between 2010 and 2012, \$2.8 million was awarded in bonuses to 2,800 employees with conduct violations—1,449 of which the OIG found were "substantiated serious conduct issues."⁴ The problem is ongoing—a 2018 report found that between fiscal years 2016 and 2017, 159 IRS employees identified in a prior audit as inappropriately receiving bonuses after committing misconduct *again* received bonuses, totaling \$239,000, after being subject to *additional* disciplinary actions for re-committing the same misconduct.⁵

Several cases of improper bonuses have been documented at the Department of Veterans Affairs (VA). The former Deputy Chief Business Officer for Purchased Care at the VA, Patricia Gheen, retired in May 2012 after a VA OIG investigation found that she attempted to steer more than \$2 million in contracts to a firm that employed her former boss.⁶ Gheen received nearly \$35,000 in bonuses while employed at the VA.⁷ Sheila Cullen, director of the VA's Sierra Pacific Network, received a \$21,000 bonus the year the

¹On May 17, 2017, the Committee approved S. 696, the Stop Improper Federal Bonuses Act of 2017. That bill is identical to S. 2119. Accordingly, this committee report is in large part a reproduction of Chairman Johnson's committee report for S. 696, S. Rep. No. 115-127 (2017).

²Information provided by the Office of Personnel Management to Committee staff (June 26, 2017).

³Treasury Inspector Gen. for Tax Admin: Review of the Internal Revenue Service's Process to Address Violations of Tax Law by Its Own Employees, Ref. No. 2015-10-002 (Apr. 14, 2015), available at <https://www.treasury.gov/tigta/auditreports/2015reports/201510002fr.pdf>.

⁴Treasury Inspector Gen. for Tax Admin.: The Awards Program Complied with Fed. Regulations but Some Emp. with Tax and Conduct Issues Received Awards, Ref. No. 2014-10-007 (Mar. 21, 2014), available at <http://www.treasury.gov/tigta/auditreports/2014reports/201410007fr.pdf>.

⁵Treasury Inspector Gen. for Tax Admin: The Internal Revenue Service Has Implemented Some Screening Procedures, but Employees with Recent Tax and Conduct Issues Continue to Receive Awards, Ref. No. 2018-10-005 (Feb. 13, 2018), available at <https://www.treasury.gov/tigta/auditreports/2018reports/201810005fr.pdf>.

⁶Dept of Veterans Affairs Office of Inspector Gen.: Review of Alleged Misuse of VA Funds to Develop the Health Care Claims Processing Sys., No. 14-00730-126 (Mar. 2, 2015), available at <http://www.va.gov/oig/pubs/VAOIG-14-00730-126.pdf>.

⁷*Id.*

OIG found that she got the job by falsely claiming that she had a master's degree in medicine,⁸ and she received a \$23,000 bonus the next year.⁹

Cases of bonuses awarded by the VA in fiscal years 2014 and 2015, with the agency plagued by scandals of systematic fraud and misconduct, indicate that the agency continued to pay bonuses to some employees who committed these violations. The VA distributed over \$142 million in bonuses to 156,000 VA employees in fiscal year 2014. One recipient was Dr. David Houlihan, the chief of staff of the Tomah VA Medical Center (Tomah VAMC) in Wisconsin. Despite a March 12, 2014 VA OIG report that found Dr. Houlihan's opioid prescription practices "raised potentially serious concerns",¹⁰ he received a \$4,000 bonus in December 2014.¹¹ The Committee investigated the allegations of over-prescription of opiates and issued a 359-page majority staff report on the systematic failures of the VA and VA OIG to identify and stop the over-prescription, veterans' deaths, abuse of authority, and whistleblower retaliation at the Tomah VAMC.¹² During this 16-month long investigation, the Committee found that veterans nicknamed Dr. Houlihan the "Candy Man", because of his reputation for dispensing narcotics like candy.¹³ The Committee discovered this nickname for Dr. Houlihan was known to law enforcement agencies and executive branch agencies since at least 2009.¹⁴ Dr. Houlihan surrendered his medical license in January 2017 pursuant to an agreement with Wisconsin state regulators to stop investigating his activities at the Tomah VAMC.¹⁵

Kimberly Graves, a VA benefits office director, also received a bonus for 2014, the year in which she improperly used her authority for personal and financial benefit, according to a VA OIG report.¹⁶ The VA OIG found that Graves "participated personally and substantially in creating [a position] vacancy and then volunteering for the vacancy."¹⁷ The VA provided Graves over \$129,000 in relocation expenses for taking this position that she created for herself.¹⁸ Yet, Graves also collected an \$8,697 bonus for her performance during this time.¹⁹

⁸Jim McElhatton, *Resume-padding VA Employee Got Big Bonuses*, Washington Times (June 16, 2014), available at <http://www.washingtontimes.com/news/2014/jun/16/resume-padding-va-employee-got-big-bonuses/>.

⁹*Id.*

¹⁰Dep't of Veterans Affairs Office of Inspector Gen.: Tomah VA Medical Center Administrative Closure, MCI #2011-04212-HI-0267 (Mar. 12, 2014), available at <https://www.va.gov/oig/pubs/admin-reports/VAOIG-11-04212-127.pdf>.

¹¹Donovan Slack and Bill Theobald, *Veterans Affairs Pays \$142 Million in Bonuses Amid Scandals*, USA Today (Nov. 11, 2015), available at <https://www.usatoday.com/story/news/politics/2015/11/11/veterans-affairs-pays-142-million-bonuses-amid-scandals/75537586/>.

¹²The Systematic Failures and Preventable Tragedies at the Tomah VA Medical Center, Majority Staff Report of the Comm. on Homeland Security & Governmental Affairs, United States Senate (May 31, 2016), available at https://www.hsgac.senate.gov/library?PageNum_rs=2&c=114&type=reports.

¹³*Id.* at 1.

¹⁴*Id.* at vi.

¹⁵Bill Glauber and Daniel Bice, *Fired Tomah VA Chief to Surrender Medical License*, USA Today (Jan. 18, 2017), available at <http://www.jsonline.com/story/news/politics/2017/01/18/fired-tomah-va-chief-of-staff-surrender-medical-license/96724274/>.

¹⁶*Id.* See also Dep't of Veterans Affairs Office of Inspector Gen.: Administrative Investigation: Inappropriate Use of Position and Misuse of Relocation Program and Incentives in the Veterans Benefits Administration (Sept. 28, 2015), available at <https://www.va.gov/oig/pubs/VAOIG-15-02997-526.pdf>.

¹⁷*Id.*

¹⁸*Id.*

¹⁹Donovan Slack and Bill Theobald, *supra* note 11.

In fiscal year 2015, the VA awarded more than \$177 million in bonuses to more than half of the agency's employees.²⁰ VA employees receiving these bonuses included Dr. Darren Deering, the former chief of staff at the Phoenix VA Health Care System, received a \$5,000 bonus just four months before being fired for "negligent performance of duties and failure to provide effective oversight."²¹ Another bonus recipient, Jack Hetrick, a VA official at the Cincinnati VA Medical Center, retired within weeks of collecting a \$12,075 bonus after receiving a notice of pending removal.²² The VA proposed firing Hetrick after a review found that Barbara Temeck, the acting chief of staff at the Cincinnati VA Medical Center, was prescribing medications and providing other medical care to Hetrick's family without a proper license.²³ Temeck also received a bonus of \$5,000 in January 2016.²⁴ Temeck was later suspended from employment and indicted on three felony charges of writing drug prescriptions outside the scope of her government licensing.²⁵

The VA is not the only agency to fail to take into account serious allegations or investigations against employees before paying them bonuses. In February 2017, the Bureau of Prisons agreed to a \$20 million settlement in a class-action Equal Employment Opportunity complaint filed by more than 500 female employees of a Federal prison in Florida.²⁶ This complaint alleged that "the [BOP] created a hostile work environment when it failed to correct known egregious sexual harassment perpetrated by inmates at Federal Correctional Complex (FCC) Coleman since February 6, 2011."²⁷ Despite this complaint by hundreds of FCC Coleman employees that was filed in 2011,²⁸ four senior executives at FCC Coleman during the course of these allegations received some of the largest bonuses paid by the BOP in 2015.²⁹ Among them, the then-warden of FCC Coleman received \$34,500 in bonuses during the previous two years.³⁰

Further illustrating the disconnect between bonuses and actual performance is an OIG report finding that large numbers of Patent and Trademark Office employees did not do any work at all for weeks at a time and still received bonuses.³¹

²⁰ Bill Theobald, *More bonuses for VA employees despite ongoing problems at the agency*, USA Today (Oct. 28, 2016), available at <https://www.usatoday.com/story/news/politics/2016/10/28/more-bonuses-va-employees-despite-ongoing-problems-agency/92837218/>.

²¹ *Id.*

²² *Id.*

²³ *Id.* See also Dep't of Veterans Affairs, *VA Takes Action on Allegations of Wrongdoing in Cincinnati* (Feb. 25, 2016), available at <https://www.va.gov/opa/pressrel/includes/viewPDF.cfm?id=2750>.

²⁴ *Id.*

²⁵ Ann Saker, *Suspended Cincinnati VA Leader Indicted on Federal Drug Charges*, Cincinnati Enquirer (May 4, 2017), available at <http://www.cincinnati.com/story/news/2017/05/04/suspended-cincinnati-va-leader-indicted-federal-drug-charges/101289568/>.

²⁶ Jeff Deal, *\$20 Million to be Paid to Women Claiming Sexual Harassment, Cover-up at Florida Prison*, WFTV9 (Feb. 13, 2017), available at <http://www.wftv.com/news/local/20-million-to-be-paid-to-women-claiming-sexual-harassment-coverup-at-florida-prison/493884499>.

²⁷ Taronica White, et al., v. U.S. Dep't of Justice, EEOC Case No. 510-2012-00077X (2013), available at <http://www.mcclatchydc.com/latest-news/article24192091.ece/BINARY/Class%20Certification%20Decision%20on%20Sexual%20Harassment>.

²⁸ *Id.*

²⁹ Kevin Johnson, *Execs at Troubled Federal Prisons Received Bonuses Totaling in the Millions*, USA TODAY (Apr. 9, 2017), available at <https://www.usatoday.com/story/news/politics/2017/04/09/federal-prison-execs-got-thousands-bonuses-despite-ongoing-problems/100072938/>.

³⁰ *Id.*

³¹ See generally *Abuse of USPTO's Telework Program: Ensuring Oversight, Accountability and Quality: Hearing Before the H. Comm. on Oversight & Gov't Reform & H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of the Honorable Todd J. Zinzer), available at <https://www.oig.doc.gov/OIGPublications/OIG-15-009-T.pdf>.

Some agencies have internal policies related to bonuses for employees involved in serious misconduct. The Drug Enforcement Agency (DEA), for example, prohibits employees from receiving promotions or performance awards for three years after being disciplined for misconduct or while an investigation is pending.³² However, the DEA did not follow this policy when it awarded bonuses and time-off awards to employees who were disciplined for patronizing prostitutes, visiting a brothel overseas, sexually harassing a Foreign Service National, and attending sex parties.³³

These cases illustrate that some Federal managers awarded bonuses to employees who engaged in serious misconduct. A performance award or bonus should be reserved for employees who excel at their work for the American people.

S. 2119 would help address the most extreme of these systemic problems by barring employees who commit serious misconduct from receiving bonuses and would provide a mechanism to recover previously awarded bonuses when the agency learns of misconduct after the bonus has already been awarded. The bill allows employees to utilize a repayment plan for returning improper bonus awards to agencies. The provisions of this bill are triggered if the head of an agency makes an “adverse finding” that the employee either violated an agency policy that would warrant removal or suspension of not less than 14 days, or violated a law for which the employee could be imprisoned for more than one year. An adverse finding may be based on, among other things, information, investigations, or findings of an OIG, the Comptroller General of the United States, or another senior ethics official of an agency.

III. LEGISLATIVE HISTORY

S. 2119, the Stop Improper Federal Bonuses Act, was introduced on July 15, 2019, by Senator Deb Fischer. The bill was referred to the Committee on Homeland Security and Governmental Affairs. The Committee considered S. 2119 at a business meeting on July 24, 2019, and ordered the bill reported favorably by voice vote *en bloc* with Senators Johnson, Portman, Paul, Lankford, Romney, Scott, Enzi, Hawley, Peters, Carper, Hassan, Sinema and Rosen present.

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 “Stop Improper Federal Bonuses Act.”

Section 2. Bonuses

This section provides definitions for “adverse finding”, “agency”, “bonus”, and “employee”.

Under this section, the head of an agency shall not award a bonus to an employee of the agency for a period of five years after the head of an agency makes a qualifying adverse finding against that employee. An adverse finding is a finding that the employee

³²Dep’t of Justice Office of Inspector Gen.: Bonuses and Other Favorable Personnel Actions for Drug Enforcement Administration Employees Involved in Alleged Sexual Misconduct Incidents (Mar. 2015), available at <https://oig.justice.gov/reports/2015/e1601.pdf#page=1>.

³³*Id.*

violated a policy of the agency for which the employee may be removed or suspended for at least fourteen days, or that the employee violated a law for which the employee could be imprisoned for longer than one year.

This section also lists some sources of information that may be the basis for such a finding, including reports prepared by the GAO, OIG, and senior ethics officials. This is not intended to be an exhaustive list.

This section further requires the head of an agency to recover bonuses already paid to an employee in a fiscal year in which an adverse finding is made, after notice and opportunity for a hearing, in addition to appeal rights before the MSPB. An agency will also be required to allow a bonus to be repaid under a repayment plan.

Finally, this section requires that as a condition of receiving a bonus awarded after the date of enactment, a Federal employee must sign a certification stating that the employee will repay the bonus if so compelled under this section.

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 or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 9, 2019.

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. 2119, the Stop Improper Federal Bonuses Act.

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

Sincerely,

PHILLIP L. SWAGEL.

Enclosure.

S. 2119, Stop Improper Federal Bonuses Act			
As ordered reported by the Senate Committee on Homeland Security and Governmental Affairs on July 24, 2019			
By Fiscal Year, Millions of Dollars	2019	2019-2024	2019-2029
Direct Spending (Outlays)	0	0	0
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	0	0
Spending Subject to Appropriation (Outlays)	0	*	*
Statutory pay-as-you-go procedures apply?	Yes	Mandate Effects	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2030?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No
* = between -\$500,000 and \$500,000.			

S. 2119 would prohibit federal agencies from awarding a bonus to an employee for five years following an adverse finding against that employee. The bill defines an adverse finding as a determination that an employee either has violated agency policy for which the employee could be removed or suspended from employment for 14 or more days, or has broken the law and could be imprisoned for more than one year. Under S. 2119, any employee who received a bonus in the same year as an adverse finding would need to repay the bonus to the agency.

Under current law, there are no restrictions on awarding bonuses to federal employees. Information from the Department of Veterans Affairs and the Internal Revenue Service indicates that some employees with conduct and performance issues have received bonuses. However, recent memorandums issued by the Office of Personnel Management direct agencies to reward the highest performing employees using rigorous standards. While CBO expects that the bill would make it more difficult to award bonuses to employees with performance issues it would not change the total amount of bonuses that could be awarded nor add any significant administrative costs to agencies. Therefore, CBO estimates that implementing S. 2119 would not have a significant budgetary effect.

Enacting S. 2119 could affect direct spending by some agencies that are allowed to use fees, receipts from the sale of goods, and other collections to cover operating costs. CBO estimates that any net changes in direct spending by those agencies would be negligible because most of them can adjust amounts collected to reflect changes in operating costs.

The CBO staff contacts for this estimate are Matthew Pickford and Dan Ready. The estimate was reviewed by H. Samuel Papenfuss, Deputy 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 the bill, 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):

UNITED STATES CODE

* * * * *

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

* * * * *

PART III—EMPLOYEES

* * * * *

Subpart C—Employee Performance

* * * * *

Chapter 45—Incentive Awards

* * * * *

Table of sections.

SUBCHAPTER I—AWARDS FOR SUPERIOR ACCOMPLISHMENTS

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SUBCHAPTER IV—LIMITATIONS ON BONUS AUTHORITY

4531. Certain forms of misconduct.

* * * * *

Subchapter IV—Limitations on Bonus Authority

* * * * *

SEC. 4531. CERTAIN FORMS OF MISCONDUCT.

(a) **DEFINITIONS.**—*In this section:*

(1) **ADVERSE FINDING.**—

(A) **IN GENERAL.**—*The term “adverse finding” means a determination by the head of the agency employing an employee that the conduct of the employee—*

(i) violated a policy of the agency for which the employee may be removed or suspended for a period of not less than 14 days; or

(ii) violated a law for which the employee may be imprisoned for more than 1 year.

(B) **BASIS.**—*A determination described in subparagraph (A) may be based on an investigation by, determination of, or information provided by the Inspector General or another senior ethics official of an agency or the Comptroller General of the United States, as part of carrying out an activity, authority, or function of the Inspector General, senior ethics official, or Comptroller General, respectively, under a provision of law other than this section.*

(2) **AGENCY.**—*The term “agency” has the meaning given that term under section 551.*

(3) **BONUS.**—*The term “bonus” means any performance award or cash award under—*

- (A) section 4505a;
- (B) section 5384; or
- (C) section 5754.

(b) *PROHIBITION.*—The head of an agency shall not award a bonus to an employee of the agency until 5 years after the end of the fiscal year during which the head of an agency makes an adverse finding relating to the employee.

(c) *AFTER BONUS AWARDED.*—

(1) *IN GENERAL.*—For a bonus awarded to an employee after the date of enactment of this section, if the head of the agency employing the employee makes an adverse finding relating to the employee during the fiscal year during which the bonus is awarded, the head of the agency, after notice and an opportunity for a hearing, shall issue an order directing the employee to repay the amount of the bonus.

(2) *REPAYMENT PLAN.*—An agency shall allow an employee who is required to repay a bonus under paragraph (1) to repay that bonus using a repayment plan.

(3) *HEARINGS.*—A hearing under this paragraph shall be conducted in accordance with regulations relating to hearings promulgated by the head of the agency under chapter 75.

(d) *CONDITION OF RECEIPT.*—As a condition of receiving a bonus awarded after the enactment of this section, an employee shall sign a certification stating that the employee shall repay the bonus in accordance with a final order issued under subsection (c).

(e) *APPEAL.*—An employee determined to be ineligible for a bonus under subsection (b) or against whom an order is issued under subsection (c) may submit an appeal to the Merit Systems Protection Board under section 7701.

* * * * *