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113TH CONGRESS }
2d Session }

SENATE

{ REPORT
113-259 }

TRUTH IN SETTLEMENTS ACT OF 2014

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 1898

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



SEPTEMBER 18, 2014.—Ordered to be printed

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

R E P O R T

[To accompany S. 1898]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 1898) to require adequate information regarding the tax treatment of payments under settlements agreements entered into by Federal agencies, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

The Truth in Settlements Act seeks to bring more transparency to the process whereby federal agencies settle enforcement actions or other cases brought against private parties. It requires Executive agencies to post copies of agreements involving payments of \$1 million or more by non-government parties and to provide basic information about those agreements online in a publicly accessible and searchable format. It requires agencies to disclose certain information in written public statements that reference the amount to be paid under such an agreement. And if an agency determines that some or all of such an agreement must be held confidential, the Act requires that agency to issue a brief public statement ex-

plaining what interests confidentiality protects and why those interests outweigh the public's right to a full accounting of government actions and expenditures.

II. BACKGROUND AND NEED FOR LEGISLATION

Executive agencies are responsible for holding companies and individuals accountable when they break the law. Both civil and criminal investigations can end in settlement agreements under which the party under investigation agrees to make a payment to the government. Although agencies enter these agreements on behalf of the American public, there are no uniform standards governing the public disclosure of the details of these agreements. As a result, it is often difficult—or impossible—for the public to obtain basic information about such agreements and thereby know whether our nation's laws are being adequately and fairly enforced.

The Truth in Settlements Act addresses three critical aspects of this lack of transparency. First, it is nearly impossible to determine what settlement agreements the government is entering into, let alone access aggregate information about agreements, or even the number entered into annually. Executive agencies are not currently required to post basic information about recent settlement agreements on their websites, so finding out about them can require significant effort. To review a sampling of recent Department of Justice (DOJ) settlement agreements, for example, the public must either look through the DOJ's list of recent press releases for links to the relevant documents,¹ or comb through all of DOJ's recent postings in the Federal Register to find the ones relating to settlement agreements.² Both approaches fail to provide a comprehensive list of recent agreements or a method for quickly reviewing information about those agreements. That basic lack of transparency is found across Executive agencies.

Second, if an Executive agency chooses to issue a written public statement referencing the amount it recovered under a settlement agreement, it is free to omit important contextual information, such as how those settlement payments are categorized, and how the settling party may earn "credits" toward the settlement amount for certain conduct. Without this information, an agency's public statement may be misleading.

The categorization of settlement payments is critical because the tax code prohibits the deduction of "any fine or similar penalty paid to a government for the violation of any law."³ Meanwhile, the tax code generally permits the deduction of payments that are considered compensatory or restitution. The potential tax deductibility of settlement payments can have a significant impact on the amount of money the government eventually recovers in a settlement and, potentially, the deterrent effect of that settlement. Likewise, the method for calculating monetary "credits" for conduct in a settlement can also have a significant impact on the settlement's ultimate value.

Finally, agencies are not subject to a uniform standard for disclosing when they have decided to hold a settlement agreement (or

¹ See <http://www.justice.gov/opa/pr/2014/September/> (listing recent press releases).

² See https://www.federalregister.gov/agencies/justice-department#recent_articles.

³ 26 U.S.C. § 162(f).

a portion thereof) confidential, and why confidentiality was warranted. Consequently, agencies can hold settlements confidential without any explanation provided to taxpayers or lawmakers of the need for confidentiality.

Taken together, these three challenges make it very difficult for the public and legislators to evaluate the actions the government is taking on behalf of the American people.

To address these problems, the Truth in Settlements Act mandates new government-wide standards for agencies to provide transparency to the American public on settlements. It requires Executive agencies to post copies of agreements involving payments of \$1 million or more by non-government parties and to provide basic information about those agreements online in a publicly accessible and searchable format. It requires agencies to disclose certain information in written public statements that reference the amount to be paid under such an agreement. And if an agency determines that some or all of such an agreement must be held confidential, the Act requires that agency to issue a brief public statement explaining what interests confidentiality protects and why those interests outweigh the public's right to a full accounting of government actions and expenditures.

III. LEGISLATIVE HISTORY

On January 8, 2014, Senators Warren and Coburn introduced the Truth in Settlements Act of 2014 (S. 1898). S. 1898 was referred to the Senate Committee on Homeland Security and Governmental Affairs. Senators Levin and Begich are also cosponsors of the bill.

The Committee considered S. 1898 at a business meeting on July 30, 2014. Senator Coburn offered a substitute amendment, which made technical changes to the description of information that agencies would be required to disclose. The Committee adopted the substitute amendment by unanimous consent and ordered S. 1898 reported favorably as amended by the Coburn substitute amendment. Senators present for the vote were Senators Carper, Levin, Pryor, Landrieu, McCaskill, Begich, Baldwin, Coburn, Johnson, and Ayotte.

IV. SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This section establishes the short title of the bill as the “Truth in Settlements Act of 2014.”

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) provides definitions of key terms. 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 million 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.

New section 307(b) would require Executive agencies that enter into covered settlement agreements to post copies of those agreements and basic information about those agreements online in a searchable format. That basic information includes a description of the claims each party settled, and the amount each settling party is obligated to pay, including information about the amount, if any, that is expressly specified as a civil or criminal penalty or fine, and the amount, if any, that is expressly specified as tax deductible. Agencies are not required to post information about agreements, or portions thereof, that are subject to confidentiality provisions. Agencies must post copies of the agreement online for at least one year following the settlement (or at least five years if the settlement includes \$50 million or more in payments), and must post the basic information about the agreement online for at least five years following the settlement.

New section 307(c) would require that if an agency determines a covered settlement agreement should be subject to a confidentiality provision, that agency is required to issue a public statement explaining what interests confidentiality protects and why those interests outweigh the public’s interest in knowing about the conduct of the government and the expenditure of government resources.

New section 307(d) would require agencies to specify in any written public statement referencing the amount to be paid under a covered settlement agreement the following information:

- which portion of the payment, if any, is expressly specified as a civil or criminal penalty or fine;
- that no portion of the payment is designated as a civil or criminal penalty or fine, if that is the case;
- which portion of the payment, if any, is expressly designated as not tax deductible;
- what actions, if any, the settling party or parties must take under the agreement in lieu of payment; and
- what payments, if any, the settling party or parties must make to non-Federal government entities.

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

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

Section 2(b) would require settling parties that file reports 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) directs the Government Accountability Office to examine how, and to what extent, agencies deem settlements confidential, and offer recommendations 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 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, September 9, 2014.

Hon. TOM CARPER,
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. 1898, the Truth in Settlements Act of 2014.

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

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

S. 1898—Truth in Settlements Act of 2014

CBO estimates that enacting S. 1898 would have no significant effect on the federal budget. The legislation could affect direct spending by agencies not funded through annual appropriations; therefore, pay-as-you-go procedures apply. CBO estimates, however, that any net increase in spending by those agencies would not be significant. Enacting the bill would not affect revenues.

S. 1898 would establish new requirements for publicly disclosing settlement agreements entered into by a federal agency. Specifically, the legislation would require that non-confidential settlements involving payments from nonfederal entities greater than \$1 million and related to a violation of civil or criminal law be posted online. Under the bill, each settlement posted online would have to include the names of the parties involved, a description of the claims, the amount to be paid, and whether the settlement is a criminal or civil penalty or a fine. Because that information is already collected during the settlement process, CBO expects that making it available online would have a negligible cost.

S. 1898 contains no intergovernmental mandate as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments. S. 1898 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 (\$152 million in 2014, 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, Deputy Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING STATUTE 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. 1898, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black 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

* * * * *

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 one 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, the amount the settling party is obligated to pay that has been designated as a civil penalty or fine, or otherwise specified as not tax deductible under the covered settlement agreement; and

(ii) a copy of each covered settlement agreement entered into 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) until at least the date that is 5 years after 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 until—

(i) at least the date that is 1 year after 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, at least the date that is 5 years after 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 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; and

(2) describe in detail any actions the non-Federal person shall take under the covered settlement agreement—

(A) in lieu of payment to the Federal Government or a State or local government; or

(B) in addition to such a payment.

(e) 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 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.