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REPORT
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TRUTH IN SETTLEMENTS ACT OF 2015

JUNE 9, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CHAFFETZ, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

[To accompany S. 1109]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom 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, report favorably thereon without amendment and recommend that the bill do pass.

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COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

S. 1109, the Truth in Settlements Act of 2015, requires federal agencies to make public non-confidential information about settle-

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ment agreements to ensure transparency in settlement agreements entered into by the federal government. The bill also restricts agencies from communicating misleading information about settlement agreements regarding violations of federal law by nongovernment entities.

BACKGROUND AND NEED FOR LEGISLATION

Settlement agreements are a common tool used to manage alleged violations of law. The federal government uses settlements for allegations against both federal agencies and nonfederal entities. In either case, the lack of transparency in the process and terms of the agreement can prevent public understanding and oversight of these binding legal agreements.

Executive agencies have publicly announced settlements, often touting large aggregate payments, without providing much detail as to how the amount is distributed.[1] In many instances, federal agencies inflate prosecutorial success by claiming large settlement numbers, which suggests to the public that the federal government is receiving the full amount.[2] S. 1109 requires greater transparency into federal settlements and ensures that the federal government will provide an honest assessment about agreements actually reached.

One factor in determining the amount paid to the federal government through federal settlements between agencies and private businesses is payments to third parties. Some settlements include payments made by the nonfederal settling party to parties not involved in the settlement.[3] Payments to third parties through federal settlements subvert the Congressional budget and appropriations processes, giving broad discretion to executive agencies to distribute federal funds.[4] With the prospect of payouts, organizations advocate for the inclusion of third party payments in settlements, creating conflicts of interest in the settlement process.[5]

Another complicating factor that might inflate the dollar amounts aggregated by agencies is the determination of the tax status of those settlement payments. If the payment is a penalty or fine for wrongdoing, the business is prohibited from claiming the settlement as a business expense.[6] However, if the payment is simply a business decision to make a payment in exchange for avoiding litigation, the settlement could be considered a business expense, thus making it tax deductible. Tax deductible settlements mean that the net amount received by the federal government is much less than the headlines suggest.[7]

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[1] *See e.g.* U.S. Dep't. 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) available at: *https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading.*

[2] U.S. PIRG, *Subsidizing Bad Behavior* (Jan. 2013), available at: *http://www.uspirg.org/sites/pirg/files/reports/Subsidizing%20Bad%20Behavior%20USPIRG%20EF.pdf.*

[3] Letter from Bob Goodlatte, Chairman, Comm. on Judiciary, Jeb Hensarling, Chairman, Comm. on Financial Services, Tom Marino, Chairman, Comm. on Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law, and Sean Duffy, Chairman, Comm. on Financial Services Subcomm. on Oversight and Investigations to Loretta E. Lynch, Attorney General, U.S. Dep't. of Justice (May 14, 2015), available at: *https://judiciary.house.gov/wp-content/uploads/2016/02/051415-BG-JH-TM-SD-Letter-to-AG-Lynch.pdf.*

[4] *Id.*

[5] *Id.*

[6] U.S. PIRG

[7] *Id.*

One final factor which may inflate the total dollar amount of settlements is the inclusion of credits for conduct. An agency may agree to provide credits for engaging in mitigating or remedial behavior going forward. However, the settling corporation may have engaged in that conduct for business purposes even absent the settlement agreement (e.g., an agency may provide a dollar credit for each dollar of a mortgage a lender forgives, but if a borrower is unable to pay the lender may otherwise have forgiven and written down that mortgage dollar). S. 1109 requires agencies to include a detailed description of any actions a settling party may take in lieu of payments.

S. 1109 enhances transparency into the actual amount received by the federal government by requiring non-confidential settlements to be published online and by requiring federal agencies to issue a written public explanation when they deem all or part of a covered settlement agreement confidential. S. 1109 also requires agencies to report publicly how much of the total amount, if any, is expressly not tax deductible. The bill prevents agencies from issuing written public statements that provide an aggregate amount to be paid under a settlement without specifying how those payments are classified (e.g., as a penalty, fine, compensatory damages, restitution, etc.).

In addition to concerns about inflated settlement amounts for allegations against nonfederal entities, S. 1109 addresses concerns about the use of settlements to subvert the regulatory process. The ordinary process for adopting or substantially modifying regulations is designed to allow the public to examine a rule, offer comments, and understand the regulating agency's rationale for the change. However, in recent years, a detour around the ordinary process has emerged: settlement agreements with special interest groups, or "Sue and Settle."[8] Sue and Settle agreements are a means to enacting a stricter regulation in a nontransparent and uninformed manner.[9]

In a typical Sue and Settle case, a special interest group sues a federal agency for allegedly failing to follow a legal requirement to issue regulations.[10] Agencies decline to vigorously defend the lawsuit, instead entering into negotiations with the special interest group.[11] From those negotiations, the agency enters into a settlement agreement that may set deadlines to issue regulations, or otherwise impose requirements about the issuance of a regulation, without the benefit of the regulatory notice and comment process. In some cases, those settlement agreements can even contain payments for attorney fees or expenses, funding the special interest group's activities.

One study found that between 2009 and 2012, the Environmental Protection Agency (EPA) settled over 60 Sue and Settle cases on terms favorable to the plaintiffs. Those settlements required the EPA to issue 100 new regulations.[12] According to the U.S. Chamber of Commerce, the ten most expensive of those rules

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[8] U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors*, (May 2013), available at *https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

will collectively cost the economy more than $100 billion annually.[13] A Government Accountability Office (GAO) study on such EPA cases found that these suits "affect the timing and order in which rules are issued but not which rules are issued."[14]

Given the importance of Sue and Settle cases and the effect of such cases on the regulatory process, the public must, at a minimum, know some basic facts about the settlement agreements. S. 1109 would require each federal agency to release a list on its website containing, for each settlement agreement above a reasonable monetary threshold, the names of the parties, a description of their claims, and details about money to be paid pursuant to the settlement.

LEGISLATIVE HISTORY

S. 1109, the Truth in Settlements Act of 2015, was introduced on April 28, 2015 by Senator Elizabeth Warren (D–MA). Senators James Lankford (R–OK) and Tammy Baldwin (D–WI) are cosponsors. The bill was referred to the Senate Committee on Homeland Security and Governmental Affairs (HSGAC), which favorably reported the bill on July 7, 2015. On September 21, 2015, S. 1109 passed the Senate by unanimous consent with an amendment offered by Senator David Vitter (R–LA). The House received the bill on September 22, 2015 and the bill was referred to the House Committee on Oversight and Government Reform. The Committee reported S. 1109 by unanimous consent on March 1, 2016.

On June 4, 2015, Congressman Matt Cartwright (D–PA) introduced identical legislation in the House, H.R. 2648, which was referred to both the Committee on Oversight and Government Reform and in addition to the Committee on Financial Services.

In the 113th Congress, Senator Warren and Senator Tom Coburn (R–OK), and Congressman Cartwright and Congressman Tom Cole (R–OK) introduced the Truth in Settlements Act of 2014 in the Senate and House, S. 1898 and H.R. 4324 respectively. S. 1898 was referred to HSGAC and favorably reported to the full Senate for consideration. No further action was taken on S. 1898. H.R. 4324 was referred to the Committees on Oversight and Government Reform and Financial Services. No further action was taken in the House.

SECTION-BY-SECTION

Section 1. Short title

Designates 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

Adds section 307 to title 5, United States Code. Section 307 does the following:

Defines covered settlement agreement as either (1) a settlement related to an alleged violation of federal civil or criminal law that requires a non-federal person to pay $1 million or more, or (2) a

[13] *Id.*

[14] U.S. Government Accountability Office, *Environmental Litigation: Impact of Deadline Suits on EPA's Rulemaking is Limited*, (Dec. 2014) (GAO–15–34).

settlement related to rulemaking or an alleged failure to engage in rulemaking and requires a payment of attorney fees and costs of $200,000 or more.

Requires a list of each covered settlement agreement to be posted on the agency's website with the following information about each settlement, as long as the information is not confidential: the date, the names of the parties, a description of the claims, the amount parties are obligated to pay including both what is expressly a penalty or fine and what is expressly not tax deductible, and a description of where payments will be deposited, and a copy of each settlement agreement.

Requires the information about settlement agreements to be posted on the website for at least five years and a copy of each settlement agreement to be available for at least a year, or five years if the required payment is $50 million or more.

Requires agencies that enter into settlement agreements that include confidentiality agreements to issue a public statement explaining why such action is required.

Establishes requirements for public statements issued by an agency about a settlement agreement.

Limits disclosure requirements to information and settlements that are not subject to a confidentiality agreement.

Requires each agency to submit an annual report to Congress with information about settlements entered into in the prior fiscal year and to make such report publicly available in a searchable format on agency's website.

Requires the GAO to report to Congress information regarding how agencies determine whether a settlement agreement will be treated as confidential and offer any recommendations to increase transparency while continuing to protect legitimate interests that confidentiality provisions serve.

COMMITTEE CONSIDERATION

On March 1, 2016, the Committee met in open session and ordered reported favorably the bill, S. 1109, by unanimous consent.

ROLL CALL VOTES

No roll call votes were requested or conducted during Full Committee consideration of S. 1109.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill requires disclosure by federal agencies of the executive branch. As such this bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goal and objective of the bill is to require adequate information regarding the tax treatment of payments under settlement agreements entered into by Federal agencies.

DUPLICATION OF FEDERAL PROGRAMS

No provision of this bill establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting this bill does not direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, P.L. 104–4) requires a statement as to whether the provisions of the reported include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

EARMARK IDENTIFICATION

This bill does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that Rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of Congressional Budget Office:

MARCH 24, 2016.

Hon. JASON CHAFFETZ,
Chairman, Committee on Oversight and Government Reform,
House of Representatives, 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 nonconfidential 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. 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 penalty, a 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 less than $500,000. Because enacting S. 1109 could affect direct spending by agencies not funded through annual appropriations, pay-as-you-go procedures apply. CBO estimates that any net changes in spending by those agencies would be negligible. Enacting the legislation would not affect revenues.

CBO estimates that enacting S. 1109 would not increase direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

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

On May 20, 2015, CBO transmitted an estimate for S. 1109, as ordered reported by the Senate Committee on Homeland Security and Governmental Affairs on May 6, 2015. The two versions of the legislation are similar, and CBO's estimates of the budgetary effects are the same. The previous version of the legislation also contained a private-sector mandate that is not included in this version of the act.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

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PART I—THE AGENCIES GENERALLY

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CHAPTER 3—POWERS

Sec.
301. Departmental regulations.

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307. Information regarding settlement agreements.

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§ 307. Information regarding settlement agreements

(a) DEFINITIONS.—In this section—

(1) the term "covered settlement agreement" means a settlement agreement (including a consent decree)—

(A) that is entered into by an Executive agency; and

(B)(i) that—

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

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

(ii) that—

(I) relates to the rule making process of the Executive agency or an alleged failure by the Executive agency to engage in a rule making process; and

(II) requires the payment of a total of not less than $200,000 in attorney fees, costs, or expenses by the Executive agency or entity within the Federal Government to a non-Federal person;

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

(3) the term "non-Federal person" means a person that is not an entity within the Federal Government; and

(4) the term "rule making" has the meaning given that term under section 551(5).

(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;

(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

(VII) a description of where amounts collected under the covered settlement agreement will be deposited, including, if applicable, the deposit of such amounts in an account available for use for 1 or more programs of the Federal Government; 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) 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, beginning 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 or that entered into a settlement agreement that involves regulatory action or regulatory changes 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;

(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;

(D) the total amount of attorney fees, costs, and expenses paid to non-Federal persons under settlement agreements (including consent decrees) of the Executive agency during that fiscal year; and

(E) the number of settlement agreements (including consent decrees) between the Executive agency and non-Federal persons that involve regulatory action or regulatory changes, including the promulgation of new rules, during that fiscal year.

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

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