

Calendar No. 386

114TH CONGRESS }
2d Session }

SENATE

{ REPORT
{ 114-226

STOP WASTEFUL FEDERAL BONUSES
ACT OF 2015

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 742

TO APPROPRIATELY LIMIT THE AUTHORITY TO AWARD BONUSES
TO EMPLOYEES



MARCH 14, 2016.—Ordered to be printed

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

R E P O R T

[To accompany S. 742]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 742) to appropriately limit the authority to award bonuses to employees, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

The purpose of S. 742, the Stop Wasteful Federal Bonuses Act of 2015, is to ensure agencies are not 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 relating to that employee and require repayment of any bonus awarded in the year in which 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 fourteen 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 inspector general (IG) 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 System Protection Board (MSPB) can hear appeals about whether misconduct fits the definition of "adverse finding."

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 employees, they are inappropriate in cases where employees have engaged in serious misconduct or criminal behavior.

The Committee is concerned that bonuses are being awarded to Federal employees even during periods in which those employees were engaging in misconduct. For example, an Internal Revenue Service (IRS) IG report revealed that \$2.8 million was awarded in bonuses to 2,800 employees with conduct violations between 2010 and 2012.¹ The IG found that, too often, the IRS does not consider misconduct when determining bonuses.²

While the amount of awards distributed to Federal employees has fluctuated or declined in recent years—awards peaked in 2011 at \$439 million³—the scope of potentially improper award allocations is still broad. The agencies awarding the most total bonus compensation each year are the Patent and Trademark Office (\$33.8 million), the Veterans Health Administration (\$27.3 million), and Customs and Border Protection (\$22.1 million).⁴

Further illustrating the disconnect between bonuses and actual performance is an IG 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.⁵

Even after being fired for her misconduct, Phoenix Veterans Affairs Health Care System director Sharon Helman's bonus was reinstated after a judge ruled that the agency lacked sufficient authorities to revoke performance awards previously paid to her.⁶

The former Deputy Chief Business Officer for Purchased Care at the Department of Veterans Affairs (VA), Patricia Gheen, retired in May 2012 after a VA IG investigation found that she attempted to steer more than \$2 million in contracts to a firm that employed her

¹TREASURY 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>.

²*Id.*

³See generally Asbury Park Press Data Universe, available at <http://php.app.com/agent/federalemployees/search>.

⁴*Id.*

⁵See 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>.

⁶See *Sharon M. Helman v. U.S. Dep't of Veterans Affairs*, P.S. Docket No. VA 14-397 (Feb. 25, 2015), available at https://www.govexec.com/media/gbc/docs/pdfs_edit/031315k12.pdf.

former boss.⁷ Gheen received nearly \$35,000 in bonuses while employed at the VA.⁸ Sheila Cullen, director of the VA's Sierra Pacific Network, received a \$21,000 bonus the year the IG found that she got the job by using a fabricated resumé,⁹ and a \$23,000 bonus the next year.¹⁰

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.¹¹ 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.¹²

This example in particular illustrates that some Federal managers award bonuses to employees whom they know to have engaged in serious misconduct. A performance award or bonus should be reserved for employees who excel at their work for the American people.

S. 742 would help address the most extreme of these systemic problems by barring employees who commit serious misconduct from receiving bonuses and providing a mechanism to recover previously awarded bonuses when the agency learns of misconduct after the bonus has already been awarded. 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 fourteen 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 IG, the Comptroller General of the United States, or another senior ethics official of an agency.

III. LEGISLATIVE HISTORY

Senator Kelly Ayotte (R-N.H.) introduced S. 742 on March 16, 2015 with Senators Claire McCaskill (D-Mo.) and Deb Fischer (R-Neb.).¹³ The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 742 at a business meeting on June 24, 2015. During the business meeting, Senator Ayotte offered a modified substitute amendment that strengthened due process procedures and restricted "adverse findings" to be those that can carry a penalty of suspension for two weeks or more. The modified substitute amendment was adopted by unanimous consent. The Com-

⁷DEPT 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>.

⁸*Id.*

⁹Jim 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/?page=all>.

¹⁰*Id.*

¹¹OFFICE 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>.

¹²*Id.*

¹³This bill was previously introduced in the 113th Congress by Senator Ayotte as S. 2263.

mittee ordered the bill, as amended by the Ayotte Substitute Amendment as modified, reported favorably by voice vote. Members present for the vote were Senators Johnson, McCain, Lankford, Ayotte, Ernst, Sasse, Carper, Tester, Baldwin, Heitkamp, and Peters. Senator Tester was recorded for the record as voting “No”.

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

Section 1. Short title

This section provides the bill’s short title, the “Stop Wasteful Federal Bonuses Act of 2015.”

Section 2. Bonuses

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

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 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, IG, 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 year in which an adverse finding is made, after notice and opportunity for a hearing, in addition to appeal rights before the MSPB.

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

JULY 13, 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. 742, the Stop Wasteful Federal Bonuses 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. 742—Stop Wasteful Federal Bonuses Act of 2015

S. 742 would amend federal law to prohibit a federal agency from awarding a bonus to an employee for five years after an adverse finding against the employee. The bill defines an adverse finding as a determination that an employee violated agency policy for which the employee could be removed or suspended from employment for 14 or more days or that an employee violated the law and could be imprisoned for more than 1 year. Under the bill all bonuses given to employees in the same year as an adverse finding would be returned to the agency.

Under current law, there is no prohibition 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, while the legislation would slightly diminish the pool of people eligible for bonuses, CBO expects it would not change the total amount of bonus money that could be awarded. Therefore, CBO estimates that implementing S. 742 would not have a significant effect on the federal budget.

Enacting S. 742 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 and because we do not expect a significant number of returned bonuses, CBO estimates that any net changes in direct spending by those agencies would not be significant. Enacting the bill would not affect revenues.

S. 742 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform 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.

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. 742 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

* * * * *

CHAPTER 45—INCENTIVE AWARDS

* * * * *

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 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) *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 date of enactment of this section, an employee of an agency shall sign a certification stating that the employee shall repay the bonus in accordance with a final order issued in accordance with 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 appeal to the Merit Systems Protection Board under section 7701.

