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SENATE

{ REPORT
115-127

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. 696

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



JULY 11, 2017.—Ordered to be printed

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STOP IMPROPER FEDERAL BONUSES ACT

JULY 11, 2017.—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. 696]

[Including cost estimates of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 696) 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 with amendments and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

The purpose of S. 696, 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 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 depart-

ment, 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 System 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 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) OIG report revealed that \$2.8 million was awarded in bonuses to 2,800 employees with conduct violations between 2010 and 2012.² Another 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

While the amount of awards distributed to Federal employees has fluctuated or declined in recent years—awards reached \$1.2 billion in fiscal year 2016⁴—the scope of potentially improper award allocations is still broad.

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 OIG investigation found that she attempted to steer more than \$2 million in contracts to a firm that employed her former boss.⁵ Gheen received nearly \$35,000 in bonuses while employed at the VA.⁶ Sheila Cullen, director of the VA's Sierra Pacific Network, received a \$21,000 bonus the year the OIG found that she got the job by using a fabricated resume,⁷ and a \$23,000 bonus the next year.⁸

Bonuses awarded by the VA in fiscal years 2014 and 2015, with the agency plagued by scandals of systematic fraud and mis-

¹ On March 14, 2016, the Committee approved S. 742, the Stop Wasteful Federal Bonuses Act of 2015. That bill is almost identical to S. 696. Accordingly, this committee report is in large part a reproduction of Chairman Johnson's committee report for S. 742, S. Rep. No. 114-226 (2016).

² Treasury 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>.

³ Treasury 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>.

⁴ Information provided by the Office of Personnel Management to Committee staff (June 26, 2017).

⁵ Dep't 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>.

⁶ *Id.*

⁷ Jim 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/>.

⁸ *Id.*

conduct, indicate that the agency continues to pay bonuses to employees committing 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",⁹ he received a \$4,000 bonus in December 2014.¹⁰ 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.¹¹ 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.¹² The Committee discovered this nickname for Dr. Houlihan was known to law enforcement agencies and executive branch agencies since at least 2009.¹³ 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.¹⁴

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.¹⁵ The VA OIG found that Graves "participated personally and substantially in creating [a position] vacancy and then volunteering for the vacancy."¹⁶ The VA provided Graves over \$129,000 in relocation expenses for taking this position that she created for herself.¹⁷ Yet, Graves also collected an \$8,697 bonus for her performance during this time.¹⁸

In fiscal year 2015, the VA awarded more than \$177 million in bonuses to more than half of the agency's employees.¹⁹ VA employees receiving these bonuses included Dr. Darren Deering, the former chief of staff at the Phoenix VA Health Care System, who received a \$5,000 bonus just four months before being fired for "negligent performance of duties and failure to provide effective

⁹Dep'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>.

¹⁰Donovan 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/>.

¹¹The 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.

¹²*Id.* at 1.

¹³*Id.* at vi.

¹⁴Bill 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/>.

¹⁵*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>.

¹⁶*Id.*

¹⁷*Id.*

¹⁸Donovan Slack and Bill Theobald, *supra* note 11.

¹⁹Bill 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/>.

oversight.”²⁰ 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.²¹ 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.²² Temeck also received a bonus of \$5,000 in January 2016.²³ Temeck was later suspended from employment and indicted on three felony charges of writing drug prescriptions outside the scope of her government licensing.²⁴

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.²⁵ 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.”²⁶ Despite this complaint by hundreds of FCC Coleman employees that was filed in 2011,²⁷ four senior executives at FCC Coleman during the course of these allegations received some of the largest bonuses paid by the BOP in 2015.²⁸ Among them, the then-warden of FCC Coleman received \$34,500 in bonuses during the past two years.²⁹

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.³⁰

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.³¹ However, the DEA did not follow this policy when it awarded bo-

²⁰ *Id.*

²¹ *Id.*

²² *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>.

²³ *Id.*

²⁴ 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/>.

²⁵ 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>.

²⁶ 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>.

²⁷ *Id.*

²⁸ 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/>.

²⁹ *Id.*

³⁰ 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>.

³¹ Dep’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>.

nuses 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.³²

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. 696 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. An amendment allows employees to utilize a repayment plan for returning improper bonuses 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 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 OIG, the Comptroller General of the United States, or another senior ethics official of an agency.

III. LEGISLATIVE HISTORY

S. 696, the Stop Improper Federal Bonuses Act, was introduced on March 22, 2017, by Senator Deb Fischer, Ranking Member Claire McCaskill, and Senator Dean Heller. The bill was referred to the Committee on Homeland Security and Governmental Affairs. The Committee considered S. 696 at a business meeting on May 17, 2017.

During the business meeting, Senator Tom Carper offered an amendment requiring agencies to allow an employee to repay a bonus under a repayment plan. The Committee adopted the amendment by voice vote and ordered the bill, as amended, reported favorably by voice vote en bloc with Senators Johnson, McCain, Portman, Paul, Lankford, Enzi, Hoeven, Daines, McCaskill, Tester, Heitkamp, Peters, Hassan, and Harris present. Consistent with Committee Rule 11, the Committee reports the bill with a technical amendment by mutual agreement of the Chairman and Ranking Member.

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

³²*Id.*

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, 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

JUNE 21, 2017.

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. 696, 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 Dan Ready.

Sincerely,

KEITH HALL.

Enclosure.

S. 696—Stop Improper Federal Bonuses Act

S. 696 would prohibit federal agencies 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 the employee violated the law and could be imprisoned for more than 1 year. Additionally, any bonuses given to an employee

in the same year as an adverse finding would be returned to the agency.

Under current law, there are no restrictions on awarding bonuses to federal employees. Information from the Office of Personnel Management 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. 696 would not have a significant effect on the federal budget.

Enacting S. 696 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 CBO does not expect a significant number of returned bonuses, any net changes in direct spending by those agencies would likely not be significant. Enacting the bill would not affect revenues.

Enacting S. 696 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year period beginning in 2028.

S. 696 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Dan Ready. 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 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

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CHAPTER 45—INCENTIVE AWARDS

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Table of sections.

Subchapter I—Awards for Superior Accomplishments

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Subchapter IV—Limitations on Bonus Authority

4531. *Certain forms of misconduct.*

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Subchapter IV—Limitations on Bonus Authority

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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.

* * * * *

