

115TH CONGRESS
2D SESSION

S. 3398

To require repayment of wasteful agency spending, and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 28, 2018

Mr. CARPER (for himself, Ms. HIRONO, Ms. WARREN, and Mr. PETERS) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

To require repayment of wasteful agency spending, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Executive Branch
5 Waste and Fraud Recovery Act”.

6 **SEC. 2. DEFINITIONS.**

7 In this Act:

8 (1) AGENCY.—The term “agency” has the
9 meaning given the term in section 551 of title 5,
10 United States Code.

1 (2) **AUTHORITY HEAD.**—The term “authority
2 head” means, with respect to an agency—

3 (A) the head of the agency; or

4 (B) if the political appointee being inves-
5 tigated under this Act is the head of the agen-
6 cy—

7 (i) the second most senior individual
8 in the agency; or

9 (ii) if applicable, the individual serv-
10 ing as the acting officer under section
11 3345 of title 5, United States Code.

12 (3) **POLITICAL APPOINTEE.**—The term “polit-
13 ical appointee” has the meaning given the term in
14 section 714(h) of title 38, United States Code.

15 (4) **PRESIDING OFFICER.**—The term “presiding
16 officer” has the meaning given the term in section
17 3801 of title 31, United States Code.

18 (5) **REVIEWING OFFICIAL.**—The term “review-
19 ing official” means any officer or employee of an
20 agency who is designated by the authority head of
21 the agency to make the determination required
22 under section 4(b)(1).

23 **SEC. 3. REPAYMENT OF WASTEFUL AGENCY SPENDING.**

24 (a) **IN GENERAL.**—If the Inspector General of an
25 agency determines that a current or former political ap-

1 pointee of the agency directed the agency, or agency com-
 2 ponent over which the political appointee had authority,
 3 to spend Federal funds available to the agency or compo-
 4 nent in a manner that is unlawful or inconsistent with ap-
 5 plicable regulations or agency policies or procedures, the
 6 authority head of the agency shall investigate the spend-
 7 ing, assess appropriate penalties, and require the political
 8 appointee to repay those funds to the United States Gov-
 9 ernment.

10 (b) TREATMENT AS CLAIM.—Any funds required to
 11 be repaid under subsection (a) shall be treated as a claim
 12 of the United States Government subject to subchapter
 13 II of chapter 37 of title 31, United States Code.

14 (c) LIMITATION.—An agency may not require a cur-
 15 rent or former political appointee to repay a claim for
 16 more than \$300,000 under this Act.

17 **SEC. 4. DUE PROCESS AND SUBMISSION TO ATTORNEY**
 18 **GENERAL.**

19 (a) REVIEWING OFFICIAL.—The authority head of an
 20 agency shall appoint a reviewing official to review the de-
 21 termination of an Inspector General of an agency under
 22 section 3(a).

23 (b) TRANSMISSION TO ATTORNEY GENERAL.—

24 (1) IN GENERAL.—If the reviewing official of
 25 an agency determines, based on information pro-

1 vided by the Inspector General of the agency under
2 section 3(a), that there is adequate evidence to be-
3 lieve that a current or former political appointee is
4 required to repay funds under section 3, the review-
5 ing official shall transmit to the Attorney General a
6 written notice of the intention of the reviewing offi-
7 cial to refer the allegations of liability to a presiding
8 officer of the agency, which shall include—

9 (A) a statement of the reasons of the re-
10 viewing official for the referral of the allega-
11 tions;

12 (B) a statement specifying the evidence
13 that supports the allegations;

14 (C) a description of the claims or state-
15 ments for which liability under section 3 is al-
16 leged;

17 (D) an estimate of the amount of money
18 that the political appointee shall be required to
19 repay under section 3; and

20 (E) a statement of any exculpatory or miti-
21 gating circumstances that may relate to the
22 claims or statements described in subparagraph
23 (C).

24 (2) APPROVAL OR DISAPPROVAL OF REFER-
25 RAL.—

1 (A) IN GENERAL.—Not later than 90 days
2 after the date on which the Attorney General
3 receives a notice from a reviewing official under
4 paragraph (1), the Attorney General or an As-
5 sistant Attorney General designated by the At-
6 torney General shall transmit a written state-
7 ment to the reviewing official that specifies—

8 (i) that the Attorney General or the
9 Assistant Attorney General approves or
10 disapproves the referral to a presiding offi-
11 cer of the allegations of liability stated in
12 the notice;

13 (ii) in any case in which the referral
14 of allegations is approved, that the initi-
15 ation of a proceeding with respect to the
16 allegations is appropriate; and

17 (iii) in any case in which the referral
18 of allegations is disapproved, the reasons
19 for the disapproval.

20 (B) LIMITATION.—A reviewing official may
21 refer allegations of liability to a presiding offi-
22 cer of the agency only if the Attorney General
23 or an Assistant Attorney General designated by
24 the Attorney General approves the referral of

1 the allegations in a written statement described
2 in subparagraph (A).

3 (C) DELAY OF HEARING.—If the Attorney
4 General or an Assistant Attorney General des-
5 ignated by the Attorney General transmits to
6 the authority head of an agency a written find-
7 ing that the continuation of any hearing with
8 respect to a claim or statement may adversely
9 affect any pending or potential criminal or civil
10 action related to the claim or statement, the
11 hearing shall be immediately stayed and may be
12 resumed only upon written authorization of the
13 Attorney General.

14 (c) NOTICE AND HEARING.—

15 (1) NOTICE.—

16 (A) IN GENERAL.—On or after the date on
17 which a reviewing official is permitted to refer
18 allegations of liability under subsection (b)(2),
19 the reviewing official shall mail, by registered or
20 certified mail, or shall deliver, a notice to the
21 current or former political appointee alleged to
22 be liable to repay funds under section 3, which
23 shall specify the allegations of liability against
24 the individual and shall state the right of the

1 individual to request a hearing with respect to
2 those allegations.

3 (B) REQUEST FOR HEARING.—If, within
4 30 days after receiving a notice subparagraph
5 (A), the individual receiving the notice requests
6 a hearing with respect to the allegations con-
7 tained in the notice—

8 (i) the reviewing official shall refer the
9 allegations to a presiding officer for the
10 commencement of the hearing; and

11 (ii) the presiding officer shall com-
12 mence the hearing by mailing by registered
13 or certified mail, or by delivery of, a notice
14 that complies with clauses (ii)(I) and
15 (iii)(I) of paragraph (3)(B) to that indi-
16 vidual.

17 (2) RELEVANT DOCUMENTS.—

18 (A) IN GENERAL.—Except as provided in
19 subparagraph (B), at any time after receiving a
20 notice under paragraph (1)(A), the individual
21 receiving the notice shall be entitled to review,
22 and upon payment of a reasonable fee for dupli-
23 cation, shall be entitled to obtain a copy of, all
24 relevant and material documents, transcripts,
25 records, and other materials, which relate to the

1 allegations and upon which the findings and
2 conclusions of the reviewing official are based.

3 (B) PRIVILEGED INFORMATION.—An indi-
4 vidual is not entitled under subparagraph (A)
5 to review and obtain a copy of any document,
6 transcript, record, or material that is privileged
7 under Federal law.

8 (C) EXCULPATORY INFORMATION.—At any
9 time after receiving a notice under paragraph
10 (1)(A), the individual receiving the notice shall
11 be entitled to obtain all exculpatory information
12 in the possession of the reviewing official relat-
13 ing to the allegations contained in the notice.
14 Subparagraph (B) shall not apply to any docu-
15 ment, transcript, record, or other material, or
16 any portion thereof, in which such exculpatory
17 information is contained.

18 (3) HEARINGS.—

19 (A) IN GENERAL.—Any hearing com-
20 menced under paragraph (1)(B)(ii) shall be
21 conducted by the presiding officer on the record
22 in order to determine, based on the preponder-
23 ance of the evidence—

24 (i) the liability of an individual under
25 section 3; and

1 (ii) if an individual is determined to
2 be liable to repay funds under such section,
3 the amount of any civil penalty or assess-
4 ment to be imposed on the individual.

5 (B) PROCEDURES.—

6 (i) IN GENERAL.—Each hearing under
7 this subsection shall be conducted—

8 (I) in the case of an agency to
9 which the provisions of subchapter II
10 of chapter 5 of title 5, United States
11 apply, in accordance with—

12 (aa) the provisions of such
13 subchapter to the extent that
14 such provisions are not incon-
15 sistent with the provisions of this
16 Act; and

17 (bb) procedures promulgated
18 by the authority head of the
19 agency under clause (iii); or

20 (II) in the case of an agency to
21 which the provisions of such sub-
22 chapter do not apply, in accordance
23 with procedures promulgated by the
24 authority head of the agency.

1 (ii) AGENCIES TO WHICH SUB-
2 CHAPTER II OF CHAPTER 5 DOES NOT
3 APPLY.—The authority head of an agency
4 shall by regulation promulgate procedures
5 for the conduct of hearings under this sub-
6 section, which shall include the following:

7 (I) The provision of written no-
8 tice of the hearing to any individual
9 alleged to be liable to repay funds
10 under section 3, including written no-
11 tice of—

12 (aa) the time, place, and na-
13 ture of the hearing;

14 (bb) the legal authority and
15 jurisdiction under which the
16 hearing is to be held; and

17 (cc) the matters of facts and
18 law to be asserted.

19 (II) The provision to any indi-
20 vidual alleged to be liable to repay
21 funds under section 3 of opportunities
22 for the submission of facts, argu-
23 ments, offers of settlement, or pro-
24 posals of adjustment.

1 (III) Procedures to ensure that
2 the presiding officer shall not, except
3 to the extent required for the disposi-
4 tion of ex parte matters as authorized
5 by law—

6 (aa) consult a person or
7 party on a fact in issue, unless
8 on notice and opportunity for all
9 parties to the hearing to partici-
10 pate; or

11 (bb) be responsible to or
12 subject to the supervision or di-
13 rection of the reviewing official.

14 (IV) Procedures to ensure that
15 the reviewing official does not partici-
16 pate or advise in the decision required
17 under subparagraph (D).

18 (V) The provision to any indi-
19 vidual alleged to be liable to repay
20 funds under section 3 of opportunities
21 to present the individual's case
22 through oral or documentary evidence,
23 to submit rebuttal evidence, and to
24 conduct such cross-examination as

1 may be required for a full and true
2 disclosure of the facts.

3 (VI) Procedures to permit any
4 individual alleged to be liable to repay
5 funds under section 3 to be accom-
6 panied, represented, and advised by
7 counsel or such other qualified rep-
8 resentative as authority head of the
9 agency may specify by regulation.

10 (VII) Procedures to ensure that
11 the hearing is conducted in an impar-
12 tial manner, including procedures
13 to—

14 (aa) permit the presiding of-
15 ficer to at any time disqualify
16 himself or herself; and

17 (bb) permit the filing, in
18 good faith, of a timely and suffi-
19 cient affidavit alleging personal
20 bias or another reason for dis-
21 qualification of a presiding officer
22 or a reviewing official.

23 (iii) ALL AGENCIES.—The authority
24 head of an agency shall promulgate by reg-
25 ulation the following procedures for the

1 conduct of hearings under this subsection,
2 which shall be in addition to any proce-
3 dures described in clauses (i) and (ii):

4 (I) Procedures for the inclusion,
5 in any written notice of a hearing
6 under this section to any individual al-
7 leged to be liable to repay funds under
8 section 3, of a description of the pro-
9 cedures for the conduct of the hear-
10 ing.

11 (II) Procedures to permit dis-
12 covery by any individual alleged to be
13 liable to repay funds under section 3,
14 only to the extent that the presiding
15 officer determines that the discovery
16 is necessary for the expeditious, fair,
17 and reasonable consideration of the
18 issues, except that the procedures
19 shall not apply to documents, tran-
20 scripts, records, or other material
21 which an individual is entitled to re-
22 view under paragraph (2)(A) or to in-
23 formation to which an individual is
24 entitled under paragraph (2)(C). Pro-
25 cedures promulgated under this sub-

1 clause shall prohibit the discovery of
2 the notice required under paragraph
3 (1).

4 (C) VENUE.—Each hearing under this
5 subsection shall be held—

6 (i) in the judicial district of the
7 United States in which the individual al-
8 leged to be liable to repay funds under sec-
9 tion 3 resides or transacts business;

10 (ii) in the judicial district of the
11 United States in which the claim or state-
12 ment upon which the allegation of liability
13 under such section was made, presented,
14 or submitted; or

15 (iii) in such other place as may be
16 agreed upon by the individual and the pre-
17 siding officer who will conduct the hearing.

18 (D) WRITTEN DECISION.—

19 (i) IN GENERAL.—The presiding offi-
20 cer shall issue a written decision after the
21 conclusion of a hearing under this sub-
22 section, which shall include the findings of
23 fact and conclusions of law which the pre-
24 siding officer relied upon in determining

1 whether an individual is liable to repay
2 funds under section 3.

3 (ii) APPEAL.—The presiding officer
4 shall promptly send to each party to the
5 hearing a copy of the written decision and
6 a statement describing the right of any in-
7 dividual determined to be liable to repay
8 funds under section 3 to appeal the deci-
9 sion of the presiding officer in accordance
10 with section 5.

11 **SEC. 5. JUDICIAL REVIEW.**

12 (a) IN GENERAL.—

13 (1) DETERMINATION BY REVIEWING OFFI-
14 CIAL.—A determination by a reviewing official under
15 section 4(b)(1) shall be final and shall not be subject
16 to judicial review.

17 (2) DETERMINATION OF LIABILITY.—Unless a
18 petition is filed under this section, a determination
19 by a presiding officer under section 4(c)(3)(D) that
20 an individual is required to repay funds shall be
21 final and shall not be subject to judicial review.

22 (b) PETITION.—

23 (1) IN GENERAL.—An individual who has been
24 determined under section 4 to be liable to repay
25 funds may obtain review of the determination in—

1 (A) the United States district court for the
 2 district in which the individual resides or trans-
 3 acts business;

4 (B) the United States district court for the
 5 district in which the claim or statement upon
 6 which the determination of liability is based was
 7 made, presented, or submitted; or

8 (C) the United States District Court for
 9 the District of Columbia.

10 (2) DEADLINE.—A review under paragraph (1)
 11 may be obtained by filing in any court described in
 12 such paragraph a written petition that the deter-
 13 mination be modified or set aside. The petition shall
 14 be filed—

15 (A) only after the individual has exhausted
 16 all administrative remedies under this Act; and

17 (B) within 60 days after the date on which
 18 the presiding officer sends the individual a copy
 19 of the written decision under section 4(c)(3)(D).

20 (3) TRANSMISSION TO ATTORNEY GENERAL.—

21 The clerk of the court shall transmit a copy of a pe-
 22 tition filed under this subsection to the agency and
 23 to the Attorney General. Upon receipt of the copy of
 24 the petition, the authority head of the agency shall
 25 transmit to the Attorney General the record in the

1 proceeding resulting in the determination of liability
2 under this Act. Except as otherwise provided in this
3 section, the district courts of the United States shall
4 have jurisdiction to review the decision, findings, and
5 determinations in issue and to affirm, modify, re-
6 mand for further consideration, or set aside, in
7 whole or in part, the decision, findings, and deter-
8 minations of the agency and to enforce such deci-
9 sion, findings, and determinations to the extent that
10 the decision, findings, and determinations are af-
11 firmed or modified.

12 (c) QUESTIONS OF FACT.—The decisions, findings,
13 and determinations of an agency with respect to questions
14 of fact shall be final and conclusive, and shall not be set
15 aside unless the decisions, findings, and determinations
16 are found by the court to be unsupported by substantial
17 evidence. In concluding whether the decisions, findings,
18 and determinations of the agency are unsupported by sub-
19 stantial evidence, the court shall review the whole record
20 or those parts of it cited by a party, and due account shall
21 be taken of the rule of prejudicial error.

22 (d) HEARING PROCEEDINGS.—Any district court re-
23 viewing under this section the decision, findings, and de-
24 terminations of an agency shall not consider any objection
25 that was not raised in the hearing conducted under section

1 4 unless a demonstration is made of extraordinary cir-
2 cumstances causing the failure to raise the objection. If
3 any party demonstrates to the satisfaction of the court
4 that additional evidence not presented at the hearing is
5 material and that there were reasonable grounds for the
6 failure to present such evidence at the hearing, the court
7 shall remand the matter to the authority for consideration
8 of such additional evidence.

9 (e) FINAL JUDGMENT.—Upon a final determination
10 by the district court that an individual is liable to repay
11 funds under this Act, the court shall enter a final judg-
12 ment for the appropriate amount in favor of the United
13 States.

14 **SEC. 6. COLLECTION OF PENALTIES.**

15 (a) IN GENERAL.—The Attorney General shall be re-
16 sponsible for judicial enforcement of any civil penalty or
17 assessment with respect to the repayment of funds im-
18 posed pursuant to the provisions of this Act.

19 (b) CIVIL ACTION.—Any penalty or assessment im-
20 posed in a determination which has become final pursuant
21 to this Act may be recovered in a civil action brought by
22 the Attorney General. In any such action, no matter that
23 was raised or that could have been raised in a hearing
24 conducted under section 4 or pursuant to judicial review
25 under section 5 may be raised as a defense, and the deter-

mination of liability and the determination of amounts of penalties and assessments shall not be subject to review.

(c) JURISDICTION.—The district courts of the United States shall have jurisdiction of any action commenced by the United States under subsection (b).

(d) CONSOLIDATION.—Any action under subsection (b) may, without regard to venue requirements, be joined and consolidated with or asserted as a counterclaim, cross-claim, or setoff by the United States in any other civil action which includes as parties the United States and the individual against whom such action may be brought.

(e) COURT OF FEDERAL CLAIMS.—The United States Court of Federal Claims shall have jurisdiction of any action under subsection (b) of this section to recover any penalty or assessment if the cause of action is asserted by the United States as a counterclaim in a matter pending in such court.

(f) COMPROMISE OR SETTLEMENT.—The Attorney General shall have exclusive authority to compromise or settle any penalty or assessment the determination of which is the subject of a pending petition pursuant to section 5 or a pending action to recover such penalty or assessment pursuant to this section.

(g) DEPOSITS.—

1 (1) IN GENERAL.—Except as provided in para-
2 graph (2), any amount of penalty or assessment col-
3 lected under this Act shall be deposited as miscella-
4 neous receipts in the Treasury of the United States.

5 (2) EXCEPTIONS.—

6 (A) Any amount of a penalty or assess-
7 ment imposed by the United States Postal Serv-
8 ice under this Act shall be deposited in the
9 Postal Service Fund established by section
10 2003 of title 39, United States Code.

11 (B) Any amount of a penalty or assess-
12 ment imposed by the Secretary of Health and
13 Human Services under this Act with respect to
14 a claim or statement made in connection with
15 old age and survivors benefits under title II of
16 the Social Security Act shall be deposited in the
17 Federal Old-Age and Survivors Insurance Trust
18 Fund.

19 (C) Any amount of a penalty or assess-
20 ment imposed by the Secretary of Health and
21 Human Services under this Act with respect to
22 a claim or statement made in connection with
23 disability benefits under title II of the Social
24 Security Act shall be deposited in the Federal
25 Disability Insurance Trust Fund.

1 (D) Any amount of a penalty or assess-
2 ment imposed by the Secretary of Health and
3 Human Services under this Act with respect to
4 a claim or statement made in connection with
5 benefits under part A of title XVIII of the So-
6 cial Security Act shall be deposited in the Fed-
7 eral Hospital Insurance Trust Fund.

8 (E) Any amount of a penalty or assess-
9 ment imposed by the Secretary of Health and
10 Human Services under this Act with respect to
11 a claim or statement made in connection with
12 benefits under part B of title XVIII of the So-
13 cial Security Act shall be deposited in the Fed-
14 eral Supplementary Medical Insurance Trust
15 Fund.

16 **SEC. 7. ADMINISTRATIVE OFFSET.**

17 (a) IN GENERAL.—The amount of any penalty or as-
18 sessment which has become final under section 4, or for
19 which a judgment has been entered under section 5 or 6,
20 or any amount agreed upon in a settlement or compromise
21 under section 6(f), may be collected by administrative off-
22 set under section 3716 of title 31, United States Code,
23 except that an administrative offset may not be made
24 under this subsection against a refund of an overpayment

1 of Federal taxes, then or later owing by the United States
2 to the individual liable for the penalty or assessment.

3 (b) DEPOSIT.—All amounts collected pursuant to this
4 section shall be remitted to the Secretary of the Treasury
5 for deposit in accordance with section 6(g).

○