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118TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
118–339

STOP SETTLEMENT SLUSH FUNDS ACT OF 2023

JANUARY 9, 2024.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. JORDAN, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 788]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 788) to limit donations made pursuant to settlement agreements to which the United States is a party, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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49–006

The amendment is as follows:

Strike all that follows after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Stop Settlement Slush Funds Act of 2023".

SEC. 2. LIMITATION ON DONATIONS MADE PURSUANT TO SETTLEMENT AGREEMENTS TO WHICH THE UNITED STATES IS A PARTY.

(a) LIMITATION ON REQUIRED DONATIONS.—An official or agent of the Government may not enter into or enforce any settlement agreement on behalf of the United States directing or providing for a payment to any person or entity other than the United States, other than a payment that provides restitution for or otherwise directly remedies actual harm (including to the environment) directly and proximately caused by the party making the payment, or constitutes payment for services rendered in connection with the case.

(b) PENALTY.—Any official or agent of the Government who violates subsection (a) shall be subject to the same penalties that would apply in the case of a violation of section 3302 of title 31, United States Code.

(c) EFFECTIVE DATE.—Subsections (a) and (b) apply only in the case of a settlement agreement entered on or after the date of enactment of this Act.

(d) DEFINITION.—The term "settlement agreement" means a settlement agreement resolving a civil action or potential civil action.

(e) REPORTS ON SETTLEMENT AGREEMENTS.—

(1) IN GENERAL.—Not later than at the end of the first fiscal year that begins after the date of enactment of this Act, and annually thereafter, the head of each Federal agency shall submit electronically to the Congressional Budget Office a report on each settlement agreement entered into by that agency during that fiscal year that directs or provides for a payment to a person or entity other than the United States that is providing restitution for or otherwise directly remedies actual harm (including to the environment) directly and proximately caused by the party making the payment, or that constitutes payment for services rendered in connection with the case, which shall include the parties to each settlement agreement, the source of the settlement funds, and where and how such funds were and will be distributed.

(2) PROHIBITION ON ADDITIONAL FUNDING.—No additional funds are authorized to be appropriated to carry out this subsection.

(3) SUNSET.—This subsection shall cease to be effective on the date that is 7 years after the date of enactment of this Act.

(f) ANNUAL AUDIT REQUIREMENT.—

(1) IN GENERAL.—Not later than at the end of the first fiscal year that begins after the date of enactment of this Act, and annually thereafter, the Inspector General of each Federal agency shall submit a report on any settlement agreement entered into in violation of this section by that agency to—

(A) the Committee on the Judiciary, the Committee on the Budget, and the Committee on Appropriations of the Senate; and

(B) the Committee on the Judiciary, the Committee on the Budget, and the Committee on Appropriations of the House of Representatives.

(2) PROHIBITION ON ADDITIONAL FUNDING.—No additional funds are authorized to be appropriated to carry out this subsection.

Purpose and Summary

H.R. 788, the Stop Settlement Slush Funds Act of 2023, introduced by Rep. Lance Gooden (R–TX), eliminates the practice of slush fund settlements by prohibiting the federal government from entering into any settlement agreement that provides a payment to a person or entity other than the United States, with an exception for payments that are restitution, directly remedy actual harm, or constitute a payment for services rendered. The bill also improves transparency by requiring agencies to file annual reports with the Congressional Budget Office that describe how settlement funds are handled, and by requiring inspectors general to report to Congress on violations of the Act.

Background and Need for the Legislation

Popularized during the Obama-Biden Administration, the use of settlement slush funds divert funds that otherwise should be directed to injured parties or deposited in the U.S. Treasury to politically-favored third-party entities or programs, while avoiding Congressional oversight.[1] In these cases, as part of a settlement, defendants are required to make payments to favored or politically-friendly third parties.[2] Because these payments are from a defendant to a third party, and the money does not flow through the Treasury, it can be challenging to track these settlements and the funds involved.[3] Many of these settlements also involve non-disclosure requirements, and therefore, other than public statements that may inform the defendant's shareholders of the settlement amount, there is little transparency into which entities receive the funds under the settlement.[4] Such settlements effectively put some of Congress's power over the purse into the hands of agencies because the executive branch, not Congress, is determining the terms of these settlements.

One example of how settlement slush funds work relates to President Obama's unsuccessful request in 2011 that Congress fund electric vehicle innovation.[5] After Congress did not act upon his request, the Environmental Protection Agency (EPA) reached a partial settlement with Volkswagen in a lawsuit related to pollution claims.[6] The settlement required Volkswagen to invest $2.7 billion in "projects across the country" to reduce emissions, with billions of dollars directed toward "improving infrastructure, access and education to support and advance zero emissions vehicles."[7] This settlement circumvented Congressional spending and policy-making authority, and was an unconstitutional governmental overreach.[8] The Obama-Biden Administration also used settlements to direct funds to political allies such as the National Fish and Wildlife Foundation, the National Community Reinvestment Coalition, the National Urban League, and the National Council of La Raza in order to advance an agenda without Congressional oversight.[9]

Unlike with federal outlays to third parties, where Congress has authorized an agency to exercise discretion in directing funds, there are few requirements as to how settlement funds must be spent and accounted for.[10] For example, government contracting laws require clear disclosure and accounting of how third parties

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[1] *See* Letter from Michael Buschbacher to Hon. Merrick B. Garland, Att'y Gen., U.S. Dep't of Just. (Jul. 12, 2022), at 17–18; *see also, e.g.,* John Allison, et al., *Improper Third-Party Payments in U.S. Government Litigation Settlements*, REGULATORY TRANSPARENCY PROJECT OF THE FEDERALIST SOCIETY 1 (February 22, 2021) [hereinafter *Improper Third-Party Payments*].

[2] *See, e.g., Improper Third-Party Payments* at 1.

[3] *Id.* At 6–7.

[4] *Id.*

[5] Glenn Kessler, *Obama's 2011 State of the Union Address: An Accounting,* WASH. POST (Jan. 23, 2012).

[6] Press Release, U.S. Dep't of Just., Volkswagen to Spend Up to $14.7 Billion to Settle Allegations of Cheating Admissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles (June 28, 2016).

[7] *Id.*

[8] William Yeatman, *Justice Department Revives Slush Fund Settlements*, CATO AT LIBERTY (May 6, 2022).

[9] *See, e.g.*, Ian Tuttle, *Good Riddance to the Obama DOJ's Scandalous Settlement 'Slush Fund' Policy*, NAT'L. REV. (Sept 12, 2017).

[10] *Id.*

spend funds allocated through normal government channels.[11] In contrast, settlement slush funds are not subject to such laws, and thus these settlements can be used by the executive branch to apply pressure on defendants and direct funds without the same Congressional oversight that would apply in other contexts.[12] Accordingly, the details of where third-party payments go are often unknown. For example, one study found that only 1.4% of all settlement slush fund payments could be tracked—the remaining 98.6% of the relevant $668 million was directed in ways that were undisclosed.[13]

The Trump Administration ended the practice of using settlement slush funds.[14] In 2017, then-Attorney General Jeff Sessions issued a memorandum prohibiting Department of Justice (DOJ) staff from entering into these types of agreements except in limited circumstances.[15] The Trump Administration further limited the practice in 2020.[16] Specifically, the Trump DOJ expressly prohibited its attorneys from negotiating settlements in environmental cases that directed funding to third parties, and instead directed settlement funds to be placed in the U.S. Treasury.[17]

However, in 2022, Attorney General Merrick Garland rescinded the Trump Administration policies that banned third-party settlement slush fund payments.[18] In support of the rescission, Attorney General Garland noted that third-party payments have certain remedial purposes and should be permissible if they have a "strong connection to the underlying violation or violations of federal law at issue in the enforcement action."[19] However, as one commentator suggested, the concept of a "remedial" third-party payment is misguided: the courts already provide a legitimate and unbiased avenue for remedial damages.[20] Left unabated and subject to administrative discretion, this practice can lead to corruption in government.[21]

On June 6, 2023, Mr. John Shu, an attorney and legal commentator, testified on the issue of settlement slush funds at a hearing before the Subcommittee on the Constitution and Limited Government. Mr. Shu testified that this tactic has been used by the executive branch across party lines, and he argued that reform should therefore receive bipartisan support.[22]

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[11] *See, e.g.*, 2 C.F.R. Part 200, *et seq.*

[12] *Improper Third-Party Payments, supra.* Note 1, at 9–10.

[13] *Id.* At 15.

[14] *See* Memorandum from the Hon. Jeffrey Sessions on the Prohibition on Settlement Payments to Third Parties, U.S. Dep't of Just. (June 5, 2017) [hereinafter Sessions Memo]; *see also* Memorandum from Jeffrey Clark, Assistant Attorney General, on Supplemental Environmental Projects ("SEPs") in Settlements with Private Defendants, U.S. Dep't of Just. (March 12, 2020) [hereinafter Clark Memo].

[15] Sessions Memo, *supra.* Note 14.

[16] *See generally* Clark Memo, *supra.* Note 14.

[17] *See id.*

[18] Memorandum from the Hon. Merrick Garland on Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties, U.S. Dep't of Just. (May 5, 2022).

[19] *Id.* At 2.

[20] *See generally* Letter from Michael Buschbacher, *supra* note 1, at 3–4.

[21] *See id.* at 17–18.

[22] *See Government Litigation and the Need for Reform: Hearing Before the Subcomm. On the Const. and Limited Gov't of the H. Comm. On the Judiciary,* 118th Cong. (2023) (Testimony of John Shu).

Hearings

For the purposes of clause 3(c)(6)(A) of House rule XIII, the following hearing was used to develop H.R. 788: "Government Litigation and the Need for Reform" a hearing held on June 6, 2023, before the Subcommittee on the Constitution and Limited Government of the Committee on the Judiciary. The Subcommittee heard testimony from the following witnesses:

- Ms. Kirby West, Attorney, Institute for Justice
- Mr. Andrew Grossman, Partner, Baker Hostetler
- Mr. John Shu, Attorney and Legal Commentator
- Mr. Todd Phillips, Principal, Phillips Policy Consulting, LLC

The hearing addressed how different aspects of government litigation, including settlement slush funds, require reform.

Committee Consideration

On June 14, 2023, the Committee met in open session and ordered the bill, H.R. 788, favorably reported with an amendment in the nature of a substitute, by a roll call vote of 15 to 10, a quorum being present.

Committee Votes

In compliance with clause 3(b) of House rule XIII, the following roll call votes occurred during the Committee's consideration of H.R. 788:

1. Vote on Amendment #1 to H.R. 788 ANS offered by Mr. Nadler—failed 8 ayes to 11 nays.

2. Vote on favorably reporting H.R. 788, as amended—passed 15 ayes to 10 nays.

COMMITTEE ON THE JUDICIARY

Date: 6/14/23

118th CONGRESS

25-19

ROLL CALL

Vote on: Nadler Amdt #1 to HR 788 ANS

Roll Call #: 1

REPUBLICANS	AYE	NO	PRESENT	DEMOCRATS	AYE	NO	PRESENT
MR. JORDAN (OH) *Chairman*		✓		MR. NADLER (NY) *Ranking Member*	✓		
MR. ISSA (CA)				MS. LOFGREN (CA)			
MR. BUCK (CO)				MS. JACKSON LEE (TX)			
MR. GAETZ (FL)				MR. COHEN (TN)			
MR. JOHNSON (LA)		✓		MR. JOHNSON (GA)	✓		
MR. BIGGS (AZ)		✓		MR. SCHIFF (CA)	✓		
MR. McCLINTOCK (CA)		✓		MR. SWALWELL (CA)			
MR. TIFFANY (WI)				MR. LIEU (CA)			
MR. MASSIE (KY)		✓		MS. JAYAPAL (WA)			
MR. ROY (TX)				MR. CORREA (CA)			
MR. BISHOP (NC)				MS. SCANLON (PA)	✓		
MS. SPARTZ (IN)		✓		MR. NEGUSE (CO)	✓		
MR. FITZGERALD (WI)				MS. McBATH (GA)			
MR. BENTZ (OR)		✓		MS. DEAN (PA)			
MR. CLINE (VA)				MS. ESCOBAR (TX)	✓		
MR. GOODEN (TX)		✓		MS. ROSS (NC)			
MR. VAN DREW (NJ)				MS. BUSH (MO)	✓		
MR. NEHLS (TX)				MR. IVEY (MD)			
MR. MOORE (AL)		✓		MS. BALINT (VT)	✓		
MR. KILEY (CA)		✓					
MS. HAGEMAN (WY)							
MR. MORAN (TX)							
MS. LEE (FL)		✓					
MR. HUNT (TX)							
MR. FRY (SC)							

Roll Call Totals: Ayes: 8 Nays: 11 Present:

Passed: _____ Failed: X

COMMITTEE ON THE JUDICIARY Date: 6/14/23

118th CONGRESS

25-19

ROLL CALL

Vote on: Final passage of HR 788, as amended Roll Call #: 2

REPUBLICANS	AYE	NO	PRESENT	DEMOCRATS	AYE	NO	PRESENT
MR. JORDAN (OH) *Chairman*	✓			MR. NADLER (NY) *Ranking Member*		✓	
MR. ISSA (CA)	✓			MS. LOFGREN (CA)			
MR. BUCK (CO)				MS. JACKSON LEE (TX)			
MR. GAETZ (FL)	✓			MR. COHEN (TN)			
MR. JOHNSON (LA)	✓			MR. JOHNSON (GA)		✓	
MR. BIGGS (AZ)	✓			MR. SCHIFF (CA)		✓	
MR. McCLINTOCK (CA)	✓			MR. SWALWELL (CA)			
MR. TIFFANY (WI)				MR. LIEU (CA)			
MR. MASSIE (KY)	✓			MS. JAYAPAL (WA)			
MR. ROY (TX)				MR. CORREA (CA)			
MR. BISHOP (NC)				MS. SCANLON (PA)		✓	
MS. SPARTZ (IN)	✓			MR. NEGUSE (CO)		✓	
MR. FITZGERALD (WI)	✓			MS. McBATH (GA)		✓	
MR. BENTZ (OR)	✓			MS. DEAN (PA)			
MR. CLINE (VA)				MS. ESCOBAR (TX)		✓	
MR. GOODEN (TX)	✓			MS. ROSS (NC)		✓	
MR. VAN DREW (NJ)	✓			MS. BUSH (MO)		✓	
MR. NEHLS (TX)				MR. IVEY (MD)			
MR. MOORE (AL)	✓			MS. BALINT (VT)		✓	
MR. KILEY (CA)	✓						
MS. HAGEMAN (WY)							
MR. MORAN (TX)							
MS. LEE (FL)	✓						
MR. HUNT (TX)							
MR. FRY (SC)							

Roll Call Totals: Ayes: 15 Nays: 10 Present:

Passed: X Failed:

Committee Oversight Findings

In compliance with clause 3(c)(1) of House rule XIII, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives does not apply where a cost estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the *Congressional Budget Act of 1974* has been timely submitted prior to filing of the report and is included in the report. Such a cost estimate is included in this report.

Congressional Budget Office Cost Estimate

With respect to the requirement 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 enclosed cost estimate for H.R. 788 from the Director of the Congressional Budget Office:

H.R. 788, Stop Settlement Slush Funds Act of 2023
As ordered reported by the House Committee on the Judiciary on June 14, 2023

By Fiscal Year, Millions of Dollars	2023	2023-2028	2023-2033
Direct Spending (Outlays)	0	a	a
Revenues	0	a	a
Increase or Decrease (-) in the Deficit	0	a	a
Spending Subject to Appropriation (Outlays)	0	*	not estimated

Increases *net direct spending* in any of the four consecutive 10-year periods beginning in 2034?	Cannot Determine	Statutory pay-as-you-go procedures apply?	Yes
		Mandate Effects	
Increases *on-budget deficits* in any of the four consecutive 10-year periods beginning in 2034?	Cannot Determine	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No

a. CBO has no basis to estimate the direction or magnitude of the changes in revenues and direct spending or the effect on the deficit stemming from enactment of H.R. 788.
* = between zero and $500,000.

H.R. 788 would prohibit government agencies from entering or enforcing any civil settlement agreement that requires the other party to the settlement (such as a corporation) to make a donation to a third party. That prohibition would not include payments to provide restitution or other remedies associated with the harm caused by the responsible party. In recent settlements with federal agencies, large corporations have sometimes been required to donate funds to nonprofit institutions as a part of their restitution in lieu of paying those amounts to the government in the form of a penalty. The prohibition in H.R. 788 would sunset seven years after enactment.

Based on conversations with officials from the Department of Justice, CBO expects that, by precluding any such donations in civil settlements, enactment of H.R. 788 would likely reduce the number of civil settlements reached in the future and result in more litigation by federal agencies. Such settlements are typically recorded as revenues to the government. While most revenues are deposited in the General Fund of the Treasury, some are deposited in specific funds, such as the Assets Forfeiture Fund, from which they can be spent without appropriations action.

Accordingly, CBO expects that enacting H.R. 788 would affect both revenues and direct spending. However, CBO has no basis to estimate the direction or magnitude of those effects because we cannot predict the number or content of future settlements that would be precluded by the legislation, decisions made by federal agencies (including about whether and how to prosecute individual cases), or the outcome of future litigation. CBO expects that, under the bill, more cases would go to trial instead of being settled out of court, but we cannot determine whether the penalties awarded from a trial would be larger or smaller, on average, than the amounts that would be agreed to under the type of settlements the bill would preclude.

The bill also would require federal agencies to submit an annual report to the Congress, as well as to the Congressional Budget Office, if certain settlement agreements were entered into during that year by the agency in violation of the prohibitions in H.R. 788. Based on the cost of similar activities, CBO estimates that preparing those reports would cost less than $500,000 annually; such spending would be subject to the availability of appropriated funds.

In addition, enacting the bill could affect direct spending by some agencies that are allowed to use fees, receipts from the sale of goods, and other collections to cover operating costs. CBO estimates that any net changes in direct spending by those agencies would be negligible because most of them can adjust amounts collected to reflect changes in operating costs.

The CBO staff contact for this estimate is Jon Sperl. The estimate was reviewed by H. Samuel Papenfuss, Deputy Director of Budget Analysis.

PHILLIP L. SWAGEL,
Director, Congressional Budget Office.

Committee Estimate of Budgetary Effects

With respect to the requirements of clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the *Congressional Budget Act of 1974*.

Duplication of Federal Programs

Pursuant to clause 3(c)(5) of House rule XIII, no provision of H.R. 788 establishes or reauthorizes a program of the federal government known to be duplicative of another federal program.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of House rule XIII, H.R. 788 would eliminate the practice of slush fund settlements by prohibiting the federal government from entering into any settlement agreement that provides a payment to a person or entity other than the United States, with certain exceptions.

Advisory on Earmarks

In accordance with clause 9 of House rule XXI, H.R. 788 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clauses 9(d), 9(e), or 9(f) of House rule XXI.

Federal Mandates Statement

Pursuant to section 423 of the *Unfunded Mandates Reform Act*, the Committee has determined that the bill does not contain federal mandates on the private sector. The Committee has determined that the bill does not impose a federal intergovernmental mandate on state, local, or tribal governments.

Advisory Committee Statement

No advisory committees within the meaning of section 5(b) of the *Federal Advisory Committee Act* were created by this legislation.

Applicability to Legislative Branch

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the *Congressional Accountability Act* (Pub. L. 104–1).

Section-by-Section Analysis

Section 1. Short title

This section sets forth the short title of the bill as the "Stop Settlement Slush Funds Act of 2023."

Section 2. Limitation on donations made pursuant to settlement agreements to which the United States is a party

This section includes the following reforms:

Subsection (a), Limitation on required donations

- Prohibits officials or agents of the United States from entering into or enforcing settlement agreements that direct payment to any person or entity other than the United States, except for payments that directly remedy actual harm, or constitute payment for services rendered in the case.

Subsection (b), Penalty

- Applies the same penalties for violations of this Act that apply to a violation 31 U.S.C. § 3302.

Subsection (c), Effective date

• Specifies that (a) and (b) apply only to settlement agreements entered on or after the date of enactment.

Subsection (d), Definition

• The term "settlement agreement" means a settlement agreement resolving a civil action or potential civil action.

Subsection (e), Reports on settlement agreements

• Requires the head of each Federal agency to submit an annual report to the Congressional Budget Office detailing certain settlement agreements entered into by the agency; provides that no additional funds are authorized to carry out the subsection; and sunsets the subsection seven years after the date of enactment.

Subsection (f), Annual audit requirement

• Requires the Inspector General of each Federal agency to submit an annual report to the House and Senate Judiciary, Budget, and Appropriations committees detailing any settlement agreement that violates this section; provides that no additional funds are authorized to carry out the subsection.

Dissenting Views

H.R. 788, the "Stop Settlement Slush Funds Act of 2023" is a deeply flawed proposal that would undermine the ability of civil enforcement agencies to hold corporate wrongdoers accountable for unlawful conduct. Based on unsubstantiated allegations that ignore law and agency practice, the legislation prohibits settlement agreements that authorize payments to parties not "directly and proximately" harmed by the unlawful conduct of the settling defendant. This would undermine the ability of federal agencies to provide civil relief to victims of systemic misconduct and would prevent such agencies from tailoring remedies to address generalized societal injuries related to public health and safety, the environment, and financial fraud, among areas.

For these reasons and others discussed below, I strongly oppose H.R. 788 and respectfully dissent from the Committee's views on this legislation.[1]

DESCRIPTION AND BACKGROUND

H.R. 788, the "Stop Settlement Slush Funds Act of 2023," prohibits an "officer or agent of the Government" from entering or enforcing a settlement agreement on behalf of the United States that requires a donation to a third party who is not "directly and proximately" harmed by the unlawful conduct of the settling defendant. A violation of this legislation would constitute a violation of the Miscellaneous Receipts Act, which prohibits the augmentation of agency appropriations through enforcement policy.[1] The bill's proponents claim that it is necessary to stop the practice of the De-

[1] I incorporate by reference into my views the extensive dissenting views to the Committee report for H.R. 5063 from the 114th Congress, a bill that is substantially identical to H.R. 788. See H.R. Rep. No. 114–694 at 19–43 (2016) (dissenting views of Democratic Members of the House Committee on the Judiciary to the Committee report for H.R. 5063 from the 114th Congress).

partment of Justice (DOJ) and other civil enforcement agencies of entering settlement agreements that direct funds to non government organizations, which, these proponents claim, circumvents Congress's appropriations power under article I, section 9, clause 7 of the U.S. Constitution.[3]

Although proponents of this legislation argue that settlement payments to third parties are effectively "slush funds" paid to "activist groups,"[2] there is no evidence to substantiate such concerns. For example, for several years beginning in 2014, Republicans conducted an extensive investigation into settlement agreements that the DOJ entered with major banks, including Bank of America and Citigroup, concerning their mortgage lending practices. The Bank of America and Citigroup settlements required donations to third-party charitable organizations, including legal aid organizations, community development financial institutions, and housing counseling groups.[3] The Republicans' investigation of these settlements ultimately failed to establish any credible facts showing that these settlements included so-called "slush funds" otherwise subject to appropriations, despite voluminous document production by these federal agencies and private parties. The bill's proponents also ignore well-established law and agency practice governing the propriety of settlement payments to third parties, as recognized by the non-partisan and independent Government Accountability Office (GAO) and Congressional Research Service (CRS),[4] and which the Republicans themselves admit is lawful.[5]

Not surprisingly, the DOJ, in its strenuous opposition to a substantively identical version of the legislation considered in the 114th Congress, stated that the bill would "unwisely constrain the government's settlement authority and preclude many permissible settlements that would advance the public interest," while interfering with the Department's ability to address, remedy, and deter systemic harm caused by unlawful conduct.[6] Several leading environmental and banking law experts similarly opposed that legislation because it would undermine the restitution of generalized harm in various cases.[7] In the context of a veto threat of that bill,

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[2] Memorandum from U.S. Rep. Bob Goodlatte (R–VA) for Markup of H.R. 5063, the "Stop Settlement Slush Funds Act of 2016," to Members of the H. Comm. on the Judiciary 9 (May 9, 2016); *Consumers Short Changed? Oversight of the Justice Department's Mortgage Lending Settlements: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 8 (2015) (statement of U.S. Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary) [hereinafter "Judiciary Oversight Hearing"].

[3] H.R. Rep. No. 114–694, at 23–24 (2016).

[4] *See, e.g.*, DAVID CARPENTER, CONG. RESEARCH SERV., LEGAL PRINCIPLES ASSOCIATED WITH MONETARY RELIEF PROVIDED AS PART OF FINANCIAL-RELATED LEGAL SETTLEMENTS & ENFORCEMENT ACTIONS 1 (2015); DAVID CARPENTER & EDWARD LIEU, CONG. RESEARCH SERV., MONETARY RELIEF TO THIRD PARTIES AS PART OF FEDERAL LEGAL SETTLEMENTS 3 (2016); U.S. GOV'T ACCOUNTABILITY OFFICE, B–210210, MATTER OF: COMMODITY FUTURES TRADING COMM'N—DONATIONS UNDER SETTLEMENT AGREEMENTS (1983) (donations must be reasonably related to prosecutorial authority under statutory goals); U.S. GOV'T ACCOUNTABILITY OFFICE, B–238419, MATTER OF: NUCLEAR REGULATORY COMMISSION'S AUTH. TO MITIGATE CIVIL PENALTIES (1990) (settlements may not impose punishments unrelated to prosecutorial objectives).

[5] Memorandum from U.S. Rep. Bob Goodlatte (R–VA) for Markup of H.R. 5063, the "Stop Settlement Slush Funds Act of 2016," to Members of the H. Comm. on the Judiciary 1 (May 9, 2016) ("Since the government never receives the money the MRA is not triggered. This idea is echoed in a 2006 DOJ Office of Legal Counsel memo.").

[6] Comments from the Dep't of Justice on H.R. 5063, the "Stop Settlement Slush Funds Act of 2016," to Members of the H. Comm. on the Judiciary 1, 3 (May 17, 2016).

[7] *Stop Settlement Slush Funds Act of 2016: Hearing on H.R. 5063 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 3 (2016) [hereinafter "H.R. 5063 Hearing"] (written statement of Joel Mintz, Professor, Nova Southeastern University College of Law) (on file with Democratic staff of the H. Comm. on the Judiciary); *Id.* (statement of David Uhlmann, Director, Environmental Law and Policy

the Obama Administration stated that the "legislation seeks to address a problem that does not exist" and "would interfere with the just and fair settlement of cases." [8]

Despite the complete lack of evidence for the settlement practices alleged by Republicans, in 2017, during the Trump Administration, then-Attorney General Jeff Sessions issued a memorandum prohibiting settlement payments to third parties, with three exceptions like those proposed in H.R. 788, and ordering the Justice Manual to be revised accordingly.[9] Notably the memo makes no assertion that the settlements that included such payments violated federal law or the U.S. Constitution.[10]

On May 5, 2022, Attorney General Merrick Garland issued a memo revising the current Justice Manual provisions, observing that "it has been the consistent view of the Office of Legal Counsel, including in 2020 when the Justice Department's current regulation was promulgated [at the direction of the 2017 Sessions Memo], that settlements involving payments to non-governmental third parties, if properly structured, do not violate the Miscellaneous Receipts Act." [11] Nonetheless, Attorney General Garland's memorandum instructed that some limitations on settlement agreements should remain, stating that the "current policy is more restrictive and less tailored than necessary to address concerns that these agreements could be used to inappropriately fund projects unrelated to the harm involved in the matter." [12] The limitations and guidelines outlined in the 2022 Garland Memo include:

- Any such settlement agreement shall define with particularity the nature and scope of the specific project or projects that the defendant has agreed to fund.
- All such projects must have a strong connection to the underlying violation or violations of federal law at issue in the enforcement action.
- The Justice Department and its client agencies shall not propose the selection of any particular third party to receive payments to implement any project carried out under any such settlement nor propose a specific entity to be the beneficiary of any projects carried out (but may specify the type of entity and reject any implementer or beneficiary proposed by the defendant so long as disapproval is based upon objective criteria for assessing qualifications and fitness outlined in the settlement agreement).
- Prohibiting such settlements to require payments to non-governmental third parties solely for general public education

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Program, University of Michigan School of Law, and former Chief of the Environmental Crimes Section of the Justice Department), https://judiciary.house.gov/wp-content/uploads/2016/04/Uhlmann-Testimony.pdf; *Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriations Powers?: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services,* 114th Cong. (2016) [hereinafter "Financial Services Oversight Hearing"] (statement of David K. Min, Assistant Professor of Law, University of California Irvine School of Law), http://financialservices.house.gov/uploadedfiles/hhrg-114-ba09-wstate-dmin-20160519.pdf.

[8] EXEC. OFFICE OF THE PRESIDENT, OFFICE OF MGM'T & BUDGET, STATEMENT OF ADMINISTRATION POLICY: H.R. 5063, STOP SETTLEMENT SLUSH FUNDS ACT OF 2016 (2016).

[9] *See* Memorandum from Jeff Sessions, U.S. Att'y General, Dep't of Justice, Prohibition on Settlement Payments to Third Parties (Jun. 5, 2017).

[10] *Id.*

[11] *See* Memorandum from Merrick Garland, U.S. Att'y General, Dep't of Justice, Guidelines and Limitations For Settlement Agreements Involving Payments to Non-Governmental Third Parties (May 5, 2022).

[12] *Id.*

or awareness projects; solely in the form of contributions to generalized research; or in the form of unrestricted cash donations.

The Subcommittee on the Constitution and Limited Government held a hearing on June 6, 2023, entitled "Government Litigation and the Need for Reform." At the hearing, Democratic witness Todd Phillips testified that H.R. 788 "would place arbitrary limits on how the federal agencies may enter into settlement agreements that arise from enforcement actions brought against companies that have violated federal laws" and that "[i]ts cumulative effect would be to deter agencies from the efficient resolution of civil complaints through settlement agreements." [13]

A coalition of public interest organizations—including the National Urban League, Public Citizen, and Americans for Financial Reform, and The Leadership Conference on Civil and Human Rights—have opposed this legislation in the past.[14]

CONCERNS WITH H.R. 788

I. H.R. 788 Is a Dangerous Solution to a Non-Existent Problem

H.R. 788 is yet another Republican solution in search of a problem that is rife with unintended consequences. Longstanding appropriations law and agency policy—as the GAO and CRS recognized—prevent civil enforcement agencies from directing funds to politically- favored groups or circumventing Congress's appropriations role. The DOJ has broad enforcement discretion when settling litigation, including substantial flexibility in crafting settlement agreements within its statutory enforcement authority.[15] Donations under settlement agreements are a lawful exercise of the DOJ's enforcement discretion. GAO has issued several opinions clarifying that settlement donations are not "for the Government" within the meaning of the MRA, which prohibits augmentation of agency appropriations through enforcement policy.[16] Rather, according to GAO, an agency's enforcement discretion includes the use of settlement donations as long as the remedies have a nexus to the correction of an underlying violation and the agency's prosecutorial objectives. There is absolutely no evidence that any settlement included so-called slush funds, despite voluminous document production by these federal agencies and private parties.

The cumulative effect of H.R. 788's provisions would be to deter agencies from the efficient resolution of civil complaints through settlement agreements. By forcing agencies into needless litigation, the bill would waste agency time and resources as well as taxpayer dollars and delay the timely enforcement of the law and the provision of full relief for victims. In the context of a veto threat, the Obama Administration stated that a substantively identical version of the bill considered in the 114th Congress was "unnecessary and would harm the public interest."

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[13] *Government Litigation and the Need for Reform: Hearing before the Subcomm. on the Constitution and Limited Government of the H. Comm. on the Judiciary*, 118th Cong. 4 (2023) (statement of Todd Phillips, Principal, Phillips Policy Consulting).

[14] Letter from Public Citizen to H. Comm. on the Judiciary (Feb. 1, 2017); Letter from Marc H. Morial, President, the National Urban League, to Chairman Goodlatte & Ranking Member Conyers, H. Comm. of the Judiciary (Feb. 1, 2017); Letter from Americans for Financial Reform, et al. (Sept. 7, 2016)

[15] H.R. Rep. 114–694, at 27–28 (2016).

[16] *Id.* at 28.

As with other anti-regulatory bills, a broad coalition of public-interest organizations, including Alliance for Justice, Americans for Financial Reform, EarthJustice, Sierra Club, and Public Citizen.[17] In their letter opposing substantially the same bill as H.R. 788 the House passed on largely partisan lines during the 115th Congress, the coalition wrote:

> This bill would be a gift to lawbreakers at the expense of families and communities suffering from injuries that cannot be addressed by direct restitution because the bill would prevent federal law enforcement agencies from negotiating forms of relief that would address injuries to the public that may be either non-quantifiable or indeterminate. These forms of relief are crucial when harm is difficult to monetize, such as damage to the environment, the collateral consequences to communities resulting from predatory lending by financial institutions, or unknown health outcomes to individuals resulting from chemical exposures in the workplace.
>
> Under current law, the legitimacy and utility of federal enforcement settlements that include payments to third parties is clear, as long as such payments bear a nexus to the prosecutorial objectives of the agency. This bill would supplant the wisdom of federal law enforcement official to craft appropriate remedies.
>
> [This legislation] is unnecessary because the practice of providing relief to the public through payments to nonprofits and other community organizations was discontinued by the current Department of Justice. Thus, the bill is just another example of Congressional overreach into executive branch decision-making. Not only does it disregard the needs of future Administrations, but the bill is sloppily crafted, failing to provide even a basic definition of the "donations" or payments in question.[18]

As these organizations noted, this legislation is completely unnecessary. Worse yet, if enacted, it threatens to inflict harm on society by hamstringing agencies' ability to enforce public health and safety protections.

II. H.R. 788 Eliminates Critical Public Interest Protections

H.R. 788 applies to *all* civil enforcement settlements, thereby potentially affecting the enforcement of a broad range of civil rights, environmental, consumer protection, and servicemember relief laws. In 2016, DOJ stated in its strenuous opposition to a substantively identical version of the bill that it would "unwisely constrain the government's settlement authority and preclude many permissible settlements that would advance the public interest," while interfering with the Department's ability to address, remedy, and deter systemic harm caused by unlawful conduct. Civil enforcement functions as a means of providing general compensation to society, particularly where a party's unlawful conduct involves diffuse

[17] Letter from Alliance for Justice et al., to Members of the United States House of Representatives (Oct. 23, 2017).
[18] *Id.*

or systemic harms, or injures an unidentifiable victim, the public health, or the environment.

Because H.R. 788 undermines the government's ability to engage in this critical enforcement function, I offered an amendment that would exempt from the legislation settlements related to the enforcement of the Clean Air Act and the regulation of hazardous air pollutants, which include greenhouse gases. The Committee, however, rejected the amendment by a party-line vote of 8 to 11.

III. Ambiguous Drafting Will Create Needless Litigation and Impose Draconian Penalties on Any Federal Official, Including Federal Judges

As ordered reported by the Committee, H.R. 788 is inherently ambiguous and will invite legal challenges to proposed settlements, deter agencies from pursuing settlements, and ultimately force courts to define key areas of the bill's provisions. For example, the bill does not define what constitutes a "payment." As Professor David Uhlmann of the University of Michigan Law School explained in testimony before the Subcommittee on Regulatory Reform, Commercial, and Antitrust Law, "courts interpreting the legislation could conclude that it precludes third-party payments as part of civil settlement agreements, other than restitution, even in cases of generalized harm to the environment or consumers."[19] Moreover, the legislation fails to define "official or agent of the Government," meaning that even a Federal judge could hesitate to enforce clearly valid settlements in actions involving the government to avoid the bill's prohibition. As a result of the bill's wide-ranging punitive provisions, the bill would have a chilling effect on the efficient resolution of civil cases through settlement agreements.

CONCLUSION

Similar to the multitude of anti-regulatory bills that our Committee has considered during this and prior Republican-controlled Congresses, H.R. 788 is a solution in search of a problem that will result in unintended consequences detrimental to the public welfare. It has been well over a decade since this legislation was first introduced, yet Republicans have still produced no credible evidence substantiating the underlying premise of this bill, namely, that settlement payments are an unconstitutional subversion of congressional spending authority or that agencies have included unlawful terms in settlement agreements.

Contrary to this tired argument, longstanding appropriations law and agency policy clearly contemplate these concerns and prevent civil enforcement agencies from directing funds to politically favored groups or circumventing Congress to augment their own appropriations. Nevertheless, Republicans continue to advance this legislation, which would establish sweeping changes to the enforcement of Federal statutes and severely undermine the ability of agencies to respond to unlawful conduct through the provision of general compensation for indirect harm. Further, H.R. 788's ambiguously drafted provisions and draconian penalties will generate

[19] H.R. 5063 Hearing (statement of David Uhlmann, Professor, University of Michigan Law School, at 4).

needless litigation and dissuade the timely resolution of civil complaints through settlement.

Accordingly, I strongly oppose H.R. 788 and urge my colleagues to join me in opposition.

JERROLD NADLER,
Ranking Member.

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