

May 10, 2016

The Honorable Bob Goodlatte Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable John Conyers, Jr. Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Re: Oppose H.R.5063, The “Stop Settlement Slush Funds Act of 2015”

Dear Chairman Goodlatte and Ranking Member Conyers,

We write to strongly oppose H.R. 5063. This bill would prohibit settlement agreements to which the United States is a party from including terms providing for payment to third parties. As the Committee is aware, settlement agreements that result from a federal enforcement action sometimes require the defendant to make payments to third parties to advance programs that assist with recovery, benefits, or relief for communities harmed by the wrongdoing addressed in the enforcement action. H.R. 5063 would handcuff federal enforcement officials’ ability to negotiate appropriate relief for harm caused to the public by parties that are the subject of the federal prosecution by barring such payments.

This bill intends to handcuff federal agencies attempting to negotiate relief to address injuries to the public that may be difficult to monetize, for example the ecological impact or public health hazards caused by violations of environmental laws, 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. This bill would shield corporate lawbreakers from full accountability for injuries such as these that cannot be addressed by restitution or by direct relief paid to injured members of the public.

Real world examples help illustrate the importance of third-party payments to address the harmful effects to individuals resulting from illegal conduct. As highlighted in testimony before this committee, the Department of Justice secured funding for long-term healthcare monitoring in asbestos cases for individuals who were poisoned by toxic exposure to carcinogenic chemicals. These funds were operated by community-based organizations to address health problems that take decades to materialize. As another example, the department’s settlements with the architects of the subprime mortgage crisis included agreements by financial institutions to set aside funding for organizations that counsel veterans in avoiding foreclosure, provide solutions for abandoned properties that can inhibit neighborhood recovery, and help prospective homebuyers navigate the process of buying a home.

Contrary to the assertions of industry backers of this bill, third-party settlement payments do not undermine congressional appropriation power: Treasury funds are not implicated nor is any

federal agency enriched by settlement payments to non-federal actors. Nor is there any legitimate concern about prosecutors exceeding the scope of their authority: As the Congressional Research Service has found, settlement payments to non-federal actors are permissible remedies to the extent they bear a nexus to the prosecutorial objectives of the agency.¹ And while it makes sense to develop guidelines on appropriate scope, purpose and use of third-party payments, this exercise most appropriately lies with the executing agency, which has the benefit of expertise and experience.

It is also worth pointing out that in an apparent rush to address a problem that may not even exist, the legislation will have unintended effects. As drafted, it would apply not only to cases where the government is engaging in civil enforcement, but where it is a defendant. The government-as-defendant cases raise different issues than the civil enforcement context, and these do not appear to have been considered by the Committee. For example, the proposed legislation calls into question the use of the cy pres doctrine in federal civil settlements. Cy pres doctrine holds that when a class cannot be fully compensated, for example because certain class members cannot be located, then leftover funds should be directed to advance the interests of this class, commonly through an allocation to a nonprofit organization that serves the interest of the class. Cy pres distributions are a vital means to ensure that class action settlements benefit the affected class, including in cases where the government is a defendant.

Finally, the Committee's attack on so-called "activist groups" during the April 28 hearing on H.R. 5063 is shameful. Oftentimes, third party payments are remitted to the nonprofit sector, community organizations, or trusts or foundations established in furtherance of the public good. In a variety of circumstances, such institutions offer the best opportunity to provide important services, engage affected communities, or provide redress. The bill's focus on curtailing settlement "donations" shows a lack of understanding on the role of these service organizations in communities around the country. The Committee should applaud the good work done by these organizations to assist struggling communities and serve the public good.

This bill is a cynical effort to protect business interests by blocking federal law enforcement agencies from using the settlement process to craft appropriate remedies. We urge you to oppose this legislation.

Respectfully submitted,

Public Citizen

¹ CONGRESSIONAL RESEARCH SERVICE, MONETARY RELIEF TO THIRD PARTIES AS PART OF FEDERAL LEGAL SETTLEMENTS (Apr. 26, 2016).