Settling for a Lack of Accountability?

Which Federal Agencies Allow Companies to Write Off Out-of-Court Settlements as Tax Deductions, and Which Are Transparent about It

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Which Federal Agencies Allow Companies to Write Off Out-of-Court Settlements as Tax Deductions, and Which Are Transparent about It

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U.S. Public Interest Research Group Education Fund

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Executive Summary

When large companies harm the public through fraud, financial scams, chemical spills, dangerous products or other misdeeds, they almost never just pay a fine or penalty, as ordinary people would. Instead, these companies negotiate out-of-court settlements that resolve the charges in return for stipulated payments or promised remedies. These agreements, made on behalf of the American people, are not subject to any transparency standards and companies often write them off as tax deductions claimed as necessary and ordinary costs of doing business.

Tax deductibility is a rarely discussed feature of many out-of-court settlements. According to the United States tax code, corporations are allowed to deduct from their taxable income all ordinary and necessary business expenses, though they are not allowed to deduct penalties or fines paid to a government. Corporate outlays to satisfy legal settlements with the government exist in a gray area of the tax code. These payments are often not specifically a penalty or fine, but are meant to address some liability in connection to alleged wrongdoing. When the tax status of these required payments is not addressed by the government agency that is signing a settlement, then the corporation typically can claim the vast majority of those payments made to address allegations of wrongdoing as an "ordinary and necessary cost of doing business," and thus as a tax deduction.

When corporations deduct settlements for wrongdoing, the public is doubly harmed. First, the deterrent value of those settlement payments is undermined. Instead of the message being that the payments are atoning for wrongdoing, the message is that the activity is acceptable business as usual. In cases like those involving fraud or financial scams or negligent chemical spills, that message is a dangerous one. Moreover, when corporations write off their settlement payments, the taxpaying public ultimately must shoulder the burden of the lost revenue in the form of higher taxes for other ordinary taxpayers, cuts to public programs, or more national debt.

Because neither corporations nor government agencies have to abide by any standards of transparency with regards to out of court settlements, the public remains largely unaware of the tax deductibility of settlement agreements. Agencies like the Department of Justice can advertise the top-line numbers rather than the net value of the settlements they sign. Ultimately, the American people don't know the real public value of the deals signed on their behalf.

This report follows up on a 2005 study by the nonpartisan federal Government Accountability Office, which found that settlement agreements between corporations and government agencies rarely address tax deductibility, and this practice overwhelmingly led corporations to claim the bulk of their settlement payments as tax deductions. Furthermore, the study found that neither the agencies nor the IRS took responsibility for designating the appropriate tax status for particular settlements. This lack of communication resulted in even some payments that were designated as "penalties" being construed by corporate tax attorneys as non-punitive and therefore tax deductible.

The present study examines all out-of-court settlements between 2012 and 2014 for which press releases were posted by the same agencies – the Department of Justice, Environmental Protection Agency, Securities and Exchange Commission, and Department of Health and Human Services – plus the Consumer Financial Protection Bureau, a new agency that negotiates some large settlements. For each agency we examine whether the announcements of settlements include a posting of the actual settlement language or whether people must rely purely on the agency's characterization of the deal they negotiated on the public's behalf. For those settlements where it is possible to view the actual settlement language, we examine which portion of the settlement is designated as a penalty and whether any protections are included to ensure that the settlement won't be written off as an ordinary tax deduction.

Key Findings:

- Of the five agencies examined, none have publicly announced a policy for how to address the tax status of the settlements they sign.

- For the ten largest settlements announced by these major agencies during the three year period, companies were required to pay nearly $80 billion to resolve federal charges of wrongdoing, but companies can readily write off at least $48 billion of this amount as a tax deduction.

- Some agencies consistently act to limit tax deductibility for settlements they negotiate, while others rarely address the issue. Some agencies have stronger practices than others in preventing settlements from being treated as tax deductions. The EPA and CFPB in particular are most consistent in ensuring that at least portions of the settlements they sign are specifically non-deductible.

- The DOJ signs most of the largest settlement agreements of all federal agencies. Based on the cases with available settlement text, between 2012 and 2014, only 18.4 percent of settlement dollars were explicitly non-deductible. Only 15 percent of settlement dol-

lars negotiated by the SEC included language to ensure against settlement deductions, at least for those with publicly available settlement language.

- The CFPB and the EPA had the strongest transparency practices, making the vast majority of settlements they sign publicly available online. These agencies have continued to improve their practices. The SEC and the DOJ are less consistent about disclosing the text of their announced settlements. At the SEC the number of announced settlements where text was disclosed increased from 55 percent in 2012 to 87 percent in 2014. At the DOJ, disclosure decreased from 35 percent to 25 percent of announced settlements during the period.

Some common sense measures would make the use of out-of-court settlements as tax deductions less common and more transparent.

1. The federal tax code should explicitly deny tax deductions for all payments made in connection with alleged corporate wrongdoing, unless otherwise specified in a settlement agreement. By requiring that agencies and corporations negotiate in tax deductibility, even for payments that qualify as compensation or restitution and are not necessarily going to the federal government, rather than including it as a matter of course, millions of dollars of unintended corporate tax write offs would be prevented.

2. In lieu of changing the federal tax code, agencies can make it standard practice to make settlements non-deductible across the board. Agencies will have greater leverage in negotiating if they start with the default position of non-deductibility.

3. Agencies should include language in all settlements specifying whether or not a settlement can be deducted as a business expense.

4. Tax deductible settlements should only be allowed by an agency if also accompanied with an explanation of why the conduct should be regarded as an ordinary and necessary business expense.

5. In cases where agencies do grant tax-deductibility, then agencies should make clear in their public descriptions about the settlement what the net value of the settlement would likely be once it has been applied against taxable income as an ordinary business expense.

6. Agencies should similarly be mandated to publicly post all settlement agreements online, including their full text.

7. When settlements require confidentiality, agencies and signing corporations should be required to explain why a deal has been deemed confidential.

The Problem: Tens of Billions of Dollars in Largely Undisclosed Tax Write Offs for Payments Linked to Corporate Misconduct

In November 2013, JPMorgan Chase and Co. resolved charges of illegally packaging, marketing, selling and issuing residential mortgage backed securities by signing a $13 billion settlement with a number of federal and state enforcement agencies.[1] The settlement attracted public attention both as the largest in Justice Department history at the time and because reports emerged that it allowed the bank to classify $11 billion of the costs as a legitimate business expense and thus be treated as a tax deduction.[2]

Similarly, in October 2015 the Department of Justice announced its proposed consent decree with the oil giant BP to determine damages for violations of the Clean Water Act, for actions a judge had already determined constituted "gross negligence" leading to the spill of millions of gallons of oil into the sensitive Gulf of Mexico in 2010. The Justice Department announced that it had negotiated a $20.8 billion payment from BP. $15.3 billion of the total payment can be classified as a tax deductible business expense. As of publication, the settlement with BP has not been finalized.

JPMorgan's tax write off translates into an almost $4 billion benefit for the bank and BP's tax deductions, if not prevented, will shift at least $5.35 billion in costs from the oil giant back onto taxpayers.[3] The general public ultimately bears the costs of this foregone revenue because the amount must be offset by some combination of cuts to federal program, higher future tax rates and greater federal debt.

Federal law is supposed to forbid companies from deducting fines or penalties on their taxes.[4] Section 162(a) of the tax code allows deductions of "all the ordinary and necessary expenses paid or incurred during

the taxable year in carrying on any trade or business," but, since 1969, Section 162(f) has stated that "no deduction shall be allowed… for any fine or similar penalty paid to a government for the violation of any law."[5] Unlike most other expenses a company incurs throughout the course of its business, such fines or penalties to address a company's wrongdoing can't be treated as ordinary and necessary business expenses.[6]

However, the issue becomes more ambiguous when, instead of simply paying a fine or penalty or waiting for a judge to decide the penalty amount, companies instead negotiate an out-of-court settlement.[7] Unlike small companies and individuals, large corporations typically negotiate these settlements, especially in the face of large penalties. Sizeable settlement payments are often more complex than ordinary, court-ordered fines or penalties like parking tickets. Unless agencies specifically forbid it, companies later can often claim that their payments should not be considered akin to a fine, but rather are business compensation or restitution, and an "ordinary and necessary" cost of doing business. When an agency does not specify the tax status of a settlement payment in the consent decree it negotiates with a company, and a payment isn't explicitly a "fine or penalty", then companies will deduct the cost of the settlement. Thus, compensation, restitution, damages, or other non-penalty and non-fine classifications of payment tied to allegations of corporate misconduct become fully deductible regardless of the circumstances of the case.

Each settlement dollar deducted reduces a company's future federal tax liabilities by 35 cents, as per the federal corporate income tax. These tax windfalls can even be carried forward to future years if the company doesn't have taxable profits that year. State revenues additionally suffer when settlements are allowed to become federal tax deductions because corporate income taxes to states are generally based on federally declared income.

Meanwhile, federal agencies often issue press releases to announce the sizeable settlements they've negotiated with corporations. Those stories often get widely covered in the media. Rarely does the public hear how the *net* payments to the Treasury are substantially lower after these tax givebacks.

The practice is commonplace. ExxonMobil Corporation reportedly managed to claim a tax deduction for almost all of the $1.1 billion settlement it negotiated with enforcement agencies for the disastrous 1989 Exxon Valdez oil spill in Prince William Sound.[8] BP wrote off $37.2 billion in cleanup costs from Deepwater Horizon for an almost $10 billion tax credit.[9] In a banner case in 2013, Fresenius Medical Care Holdings went to court to overcome an IRS decision and ultimately deducted most of a $385 million civil portion of its settlement for Medicare fraud, securing a $50 million tax refund, plus interest, from the government.[10]

The IRS noted in a 2013 Industry Director Directive (IDD) that unless enforcement agencies explicitly forbid a corporation from doing so in a settlement agreement, "almost every defendant/taxpayer deducts the entire amount" of the settlement as a business expense.[11]

The public loses multiple times over when companies write off their settlements as tax deductions. First, the misconduct itself harms the public, such as through environmental damage, misleading marketing, mortgage fraud, dangerous products or other misdeeds. Second, taxpayers must make up for the foregone tax

revenue by paying higher tax rates, cutting public programs, or adding to the national debt. Third, future deterrence of corporate wrongdoing is weakened. And fourth, the absence of a trial eliminates opportunities for a public airing of evidence about corporate misdeeds and the lax regulations that can lead to them.

The problem is illustrated later in Table 1 examining the ten largest known settlements listed in press releases between 2012 and 2014 at the five federal agencies that issue the most settlements.[12] These are the largest listed penalties or fines, representing some of the biggest instances of wrongdoing settled by these agencies.[13] The total settlement amount for these ten instances was over $79 billion. As Table 1 below shows, almost $48 billion of the total was entirely tax deductible.[14] As a result of the tax deductibility of these ten settlements, the public will likely forego almost $17 billion in revenues to the companies accused of wrongdoing.

These sums are far too large to ignore, especially since taxpayers must pick up the tab for each dollar. The amount of foregone revenue from just these ten settlements is equal to the entire amount the IRS collects in estate taxes each year.[15] It exceeds the entire annual state budget in thirty five states.[16] Given the huge public sums that can be involved in settlements, and that deals are negotiated in the name of the American people behind closed doors, it is particularly important that information about settlement deals is transparent and open to public scrutiny.

Federal agencies are not required by law, however, to post any information about their settlements. The only way the public or the media may hear about settlements is when agencies decide to issue press releases. These press releases are not legally required and not subject to any minimum transparency standard. They only include the information that agencies choose to disclose. Only sometimes do the settlements that agencies list online link to the text of the settlement agreement. Agencies may also declare a settlement to be confidential without explanation. At other times they may officially designate an agreement as solely an Agreement in Principle and can therefore publish a final consent decree at an undesignated later date with less fanfare.

Sometimes, it may be appropriate to consider restitution or compensation required in a settlement agreement as genuinely an ordinary cost of doing business. In some cases, even with proper precaution and attention to regulation, a harm may have been unavoidable or purely accidental. For example, a company that cleans public buildings with utmost care, may still eventually break something valuable. So long as the company was acting responsibly, it may be appropriate to treat the costs of compensation as an ordinary business expense for tax purposes.

However, large settlement agreements often serve as an expeditious way for a corporation with strong legal muscle to negotiate its way out of a potentially larger fine or penalty without admitting any wrongdoing. In such cases, even though it may be clear that a compensation or restitution payment serves as an alternative way to punish a wrongdoing, the payments will still be entirely tax deductible unless the agency specifies otherwise. Compensation and restitution are valuable tools in the arsenal of justice, but the automatic tax deductibility of payments that serve these functions should not be a given. Government agencies have the power to deny deductions even for payments that are ultimately used to make whole the injured parties.

The public is concerned about the lack of transparency and about the fact that settlements for wrongdoing are routinely written off as business expenses. An April 2014 poll conducted by Lake Research found that the public is seriously concerned about both the lack of transparency and the tax deductibility of settlement agreements. Americans express major concern with the fact that federal agencies are not required to disclose settlements to the public (71 percent holds concerns, including 33 percent expressing serious concerns). Similar majorities express concern that corporations are often allowed to write off these financial settlements as tax-deductible business expenses: 75 percent concerned, with 43 percent seriously concerned).[17] These views are widely held across all regions and are largely consistent regardless of party affiliation.

What Previous Studies Found

Ten years ago the Government Accountability Office (GAO) sought to understand problems with the lack of clarity about tax-deductible settlements. Particularly troubled by a tax-deductible settlement with Boeing to resolve allegations of illegally recruiting a Pentagon official and obtaining proprietary documents, Senators Chuck Grassley and Max Baucus requested the Government Accountability Office (GAO) to report on how federal agencies address tax issues for civil settlements and how companies have treated their civil settlement payments for federal tax purposes.

The Government Accountability Office report, titled "Systematic Information Sharing Would Help IRS Determine the Deductibility of Civil Settlement Payments," examined four federal enforcement agencies "that negotiated some of the largest dollar civil settlements."[18] It documented how the Department of Justice (DOJ), the Environmental Protection Agency (EPA), Securities and Exchange Commission (SEC), and the Department of Health and Human Services (HHS) approach the issue of tax deductibility in the settlements each agency negotiates.

After examining past settlements and interviewing officials at the four agencies, the GAO concluded that "the settlement agreements [they] reviewed generally did not specify the deductibility of settlement amounts, which was consistent with what the agency officials told [them]." Furthermore, "**even when a term used to describe a payment may seem to indicate that a payment is not deductible, in fact, the opposite may be the case.** For example, a payment labeled as a civil penalty that seems non-deductible may be deductible if it is imposed as a remedial measure to compensate the government or other party." As a result, the GAO recommended that agencies provide the IRS with the information necessary to ensure "the correct tax treatment of the settlement amounts."

The GAO found that a lack of communication between government agencies and the IRS creates confusion over the appropriate tax treatment for settlement payments. Settlement agreements often failed to include language addressing tax deductibility, and were unclear about whether payments were punitive or compensating for normal business circumstances. Agencies did not take responsibility for the tax treatment of settlements, and left the IRS with very little information to guide its decisions.

The picture painted by the GAO makes clear that the issue of settlement

deductibility exists in a kind of regulatory "nowhere land." On the one hand, agencies often act as if tax-related issues are not their concern, and leave the issue to the Internal Revenue Service. The IRS, in the meantime, lacks clear information to challenge the interpretation of corporations that seek to deduct their settlements. Ultimately, the buck gets passed to the corporate tax lawyers who are likely to claim the largest deductions they possibly can.

Even if the IRS felt legally empowered and had access to the proper information, the agency lacks the capacity to research settlements or explore how they should be interpreted in lieu of clear directives. The IRS' budget has been cut 17 percent since 2010 in inflation-adjusted terms, and the number of employees devoted to enforcing tax laws has fallen by 20 percent since that time.[19] In addition, recent legal decisions have shown more starkly the need for tax implications to be specified by agencies. [See text box below].

Court Decisions Add Urgency to the Need for Clearer Policies

The ability for companies paying settlements to interpret them as tax deductible has been emboldened by a recent court case, Fresenius Medical Care Holdings, Inc. v. the United States, a very rare instance where differing legal interpretations went to trial and were decided by a judge.[20] In False Claims Act cases, the respondent can be charged to pay "double damages" for defrauding the government—that is, the corporation must pay the amount by which they had defrauded the government two times over. This case, in which Fresenius was charged with defrauding Medicare, allowed the company to subsequently claim half of its total settlement payment as a tax deduction. The company claimed that because it was compensating the government for its litigation costs and whistleblower payments, the portion of the settlement was "compensatory" and therefore deductible. While the settlement did not specify deductibility, the government claimed that the intent of double damages is clearly punitive in nature and should not be deducted. The judge, however, allowed Fresenius to claim the deduction, with the court noting that the lack of comment on tax status could be interpreted as permitting the payment to be used as a tax deduction

While some technicalities of this situation may be specific to False Claims Act charges, this case may have greater implications and broadly illustrates how remaining silent as to the tax treatment of a settlement limits the government's future ability to later claim that payments were supposed to be non-deductible.

In affirming the decision upon appeal by the IRS the judge framed the question of deductibility as determined by whether a settlement could be viewed from the perspective of the public recipient as compensating some cost rather than whether it's an expense that the business would have ordinarily incurred as part of its ordinary activity. Depending on how broadly this precedent is interpreted, the decision potentially creates new opportunities to claim tax deductibility when no prohibition has been specified.

As the First Circuit Court noted in their decision allowing the Fresenius deduction, "While these legal principles are uncontroversial, plotting the sometimes hazy line that separates the compensatory from the punitive can be tricky business." This tricky business translates into billions of dollars in lost revenue that taxpayers must shoulder and a lack of accountability for corporations that commit misconduct and federal agencies responsible for upholding the law.

What This Report Examines

Our study takes up where the GAO study left off a decade ago. We demonstrate that federal agencies are negotiating tens of billions of dollars in corporate settlements each year to resolve charges of alleged wrongdoing. We find that some agencies consistently limit tax deductibility for their settlements, while others rarely address the issue. Overall, agencies have made inconsistent progress in limiting tax deductions for settlements.

Our findings are not directly comparable to the GAO's data from a decade ago because we lack the same access to the confidential settlements and company tax information that was available to GAO researchers.[21] We instead focus on those cases where agencies have published press releases publicly and we limit analysis to settlements that have the legal text of those settlements available online. Arguably, the publicized and posted settlement cases represent a kind of "best case" scenario. After all, the settlements that agencies choose to publicize tend to be the largest and most prominent settlements, and the ones where agencies may be seeking credit in the court of public opinion. These likely provide the most important subset of settlements to examine the practices of these agencies. These settlements are in some sense those that the agencies believe casts them in the best light.

This report differs from the GAO study in some other ways. In addition to the four agencies examined by the GAO in 2005, this report also examines the Consumer Financial Protection Bureau, which was created in 2011 and signed its first settlement in 2012. The CFPB is a valuable additional agency to study because it negotiates some large settlements and its practices offer some important lessons for other agencies. Moreover, while the GAO study focused on communication between the agencies and the IRS, recent legal decisions, most notably the Fresenius case, make clear that the actual stipulations of the settlement are paramount. Even if the agency and the IRS understand that a settlement was not supposed to be tax deductible, if that is not stipulated then the company could potentially nonetheless write it off as a deduction. This study

therefore focuses on the content of the written settlement and what information is disclosed to the public.

In addition to the quantitative analysis on settlements between 2012 and 2014, we also examine how agencies differ considerably in how strongly they limit tax deductibility when they do stipulate restrictions. The typical legal language used ranges from fairly weak and unspecific at the Justice Department to language that clearly denies deductions for penalties at the Environmental Protection Agency and at the Consumer Financial Protection Bureau. The importance of these differences in language is explained along a spectrum of stronger to weaker protections against tax deductibility in the sidebar on page 12. These differences are not typically apparent in agencies' press releases. In press releases, the Department of Justice often fails to even specify whether payments are classified as punitive or compensatory, so a citizen would be unable to even speculate as to the after-tax value of the deal.

A Spectrum of Weaker and Stronger Protections Against Settlement Deductions

Section 162(f) of the US Tax Code states that "fines or similar penalties" paid to the government for the violation of a law are explicitly not tax deductible, as many other business expenses are. However, when a corporation settles with a government agency to address alleged crimes or rule breaking, they may claim that "fines or similar penalties" represent only a fraction of the total payment or are not incorporated in the deal at all. The more clearly agencies specify the tax status, the less room there is for such interpretations. In the case of payments that are clearly classified as penalties or fines, tax deductibility would seem highly unlikely, but best practice is to explicitly deny deductions for such payments nonetheless.

The spectrum of stronger and weaker language for barring settlement deductibility is presented below: from the strongest language denying tax deductions to the weakest language, fully permitting such deductions for corporate misdeeds.

Furthermore, this report studies the progress, or lack thereof, that agencies have made with regards to being more transparent about the settlements they sign. To track this progress, we looked at which of the settlements that were publicized online in press releases also posted the full legal text of the settlements online. We examine two areas where the GAO identified problems and recommended greater transparency and agency accountability.

1. Do the agencies systematically make settlements accessible online?

2. Is there a publicly-stated policy on how the agency addresses tax implications of settlements?

Strongest:

- Payment classified as a penalty or fine, and settlement includes clause stating "respondent will not claim tax deduction" or that the payment is a "penalty for tax purposes." Such languages best assures that non-deductibility is difficult to contest in any way.

Middling:

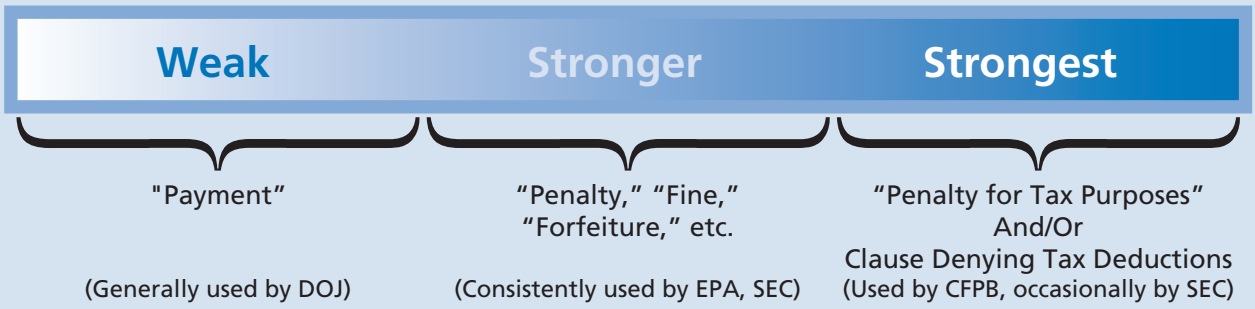
- Payment is classified as a penalty or fine, with no mention of tax status. Such a payment will likely be non-deductible, but the company may be able to argue that it is a compensatory penalty rather than a punitive one, allowing deduction, at least in part.

Weak:

- Payment is classified as disgorgement or damages, with no mention of tax status. These payments will likely be deductible

Weakest:

- Payment is unclassified, instead just a 'payment to resolve allegations' or a 'resolution amount', with no explicit purpose. Such payments almost certainly will be tax deductible.
- Payment is classified explicitly as compensation or restitution. It will almost certainly be tax deductible.
- Settlement explicitly allows deductions



Ideally, the policies governing these practices should be clearly available on the agency's website. In the absence of such policy statements, we asked the public relations officers at each of these agencies and followed up with Freedom of Information (FOIA) requests if the information was not supplied.

This report examines settlements signed by the Department of Justice, Health and Human Services, the Environmental Protection Agency, the Securities and Exchange Commission, and the Consumer Financial Protection Bureau. It looks both at information on the aggregate settlement amounts signed by these agencies and also at all the settlements individually listed in press releases by these agencies between 2012 and 2014. With regards to the Department of Health and Human Services, too few cases were available online to allow this report to accurately analyze their contents. This report, rather than analyze the few cases available online, instead analyzes a few available False Claims Act cases, in order to more closely follow methods of the GAO report.

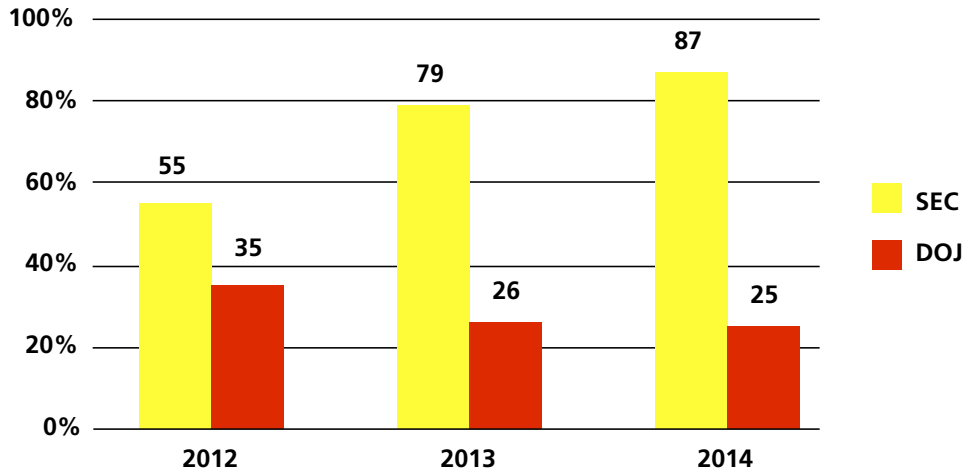
This is the only dataset of its kind, focusing on settlements announced in agency press releases and on the issue of tax deductibility.[22] It includes 642 settlements in total, which are just a partial view of the larger universe of federal settlements, but include the most high-profile and thus, presumably most of the largest settlements. Together these settlements in press releases represent just over $90 billion dollars.

Summary Findings of the Five Agencies

The largest settlements in our findings were almost always negotiated by the Department of Justice (DOJ), sometimes in conjunction with other agencies. In the past three years, the DOJ has litigated numerous large and high-profile settlements to address the actions of banks in connection with the financial crisis. Unfortunately, the Department of Justice is also the agency that is *least transparent* about its settlements and *least likely to limit tax deductions* in its settlements.

Progress has been slowly made as many agencies move toward more online disclosures. All agencies examined in this report except the Department of Justice have become more comprehensive about disclosing online the legal text of settlements they announce in press releases. In fact, the

Figure 1: Percent of the Settlements Announced in Press Releases that Provide Legal Text, DOJ and SEC 2012-2014



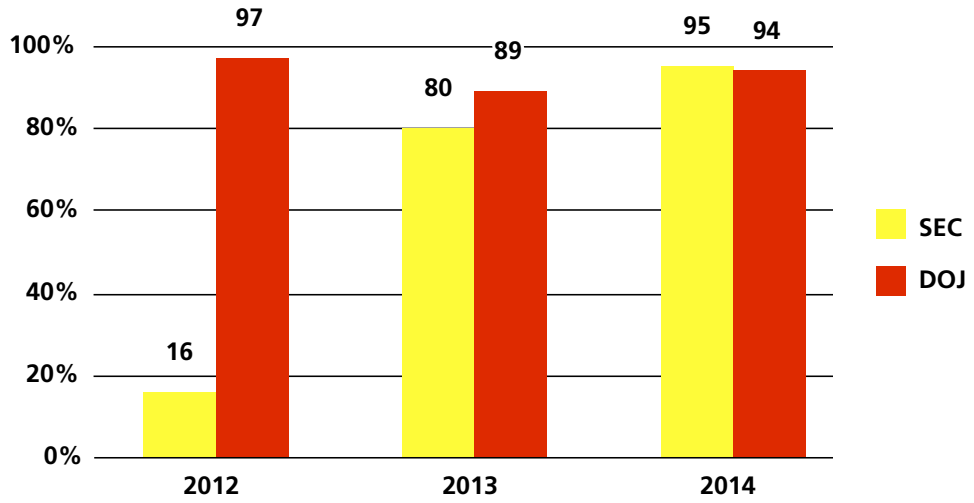
EPA, CFPB and HHS appear to always disclose online the text of their settlements – at least those settlements for which they issue press releases. The SEC improved their disclosure of the text of settlements from 55 percent of announced settlements in 2012 to 87 percent in 2014. The DOJ moved in the opposite direction: slightly reducing the percent of announced consent decrees which they disclose online from 35 percent in 2012 to 25 percent in 2014.

The picture looks somewhat brighter if we examine the transparency of total settlement *dollars* rather than measuring the number of settlements. The SEC and the DOJ are both more likely to disclose legal text for the large settlements they issue press releases for than for smaller announced settlements. As can be seen in Figure 2, the percent of settlement dollars that were announced in press releases where the legal text of the settlement was disclosed has increased for the SEC over the years. The DOJ performs better in this context than in Figure 1 because their largest settlements—the billion dollar mortgage settlements, for instance—were consistently disclosed online, but the percent of DOJ settlement dollars with disclosed text nonetheless declined slightly over the whole period.

No agencies consistently state in their press releases whether companies paying settlements are allowed to deduct them from their taxes as ordinary business expenses. Sometimes this information can be determined by closely reading the settlement text, when it is provided. But even with disclosure of the settlement text, it is often not possible to determine whether the value of settlements will be greatly diminished by being treated as a tax deduction.

An important issue where many agencies fail to protect against unwarranted settlement deductions occurs when agencies fail to specify when required payments are penalties. For instance, a company may be required to excuse certain mortgage costs to homeowners injured by a bank's irresponsible mortgage practices, or an oil company may be required to pay states or federal agencies for their cleanup efforts after a spill. While there may be

Figure 2: Percent of Settlement Dollars Announced in Press Releases that Provide Legal Text, DOJ and SEC 2012-2014



legitimate reasons to negotiate for these kinds of actions in lieu of a fine or penalty, the payments are certainly not "business as usual," and treating them as such for tax purposes will substantially reduce the net value of these settlements for the public.

The large role played by non-penalty payments and the lack of specification about their tax status can be seen in Table 1, showing the ten largest settlements signed by all agencies between 2012 and 2014. Six of these settlements include some language regarding the tax status of *penalty* payments. However, the majority of the money paid in these ten settlements is non-penalty and thus fully deductible. None mention why those non-penalty payments should qualify as a "cost of doing business".

The present study demonstrates that, despite some signs of progress, the basic problems remain and become more serious as more dollars are allocated through federal settlements. Two-thirds (434 agreements or 67 percent) of all settlements across the five agencies reported in press releases were fully disclosed by the agency with the full text of the agreements themselves, allowing us to examine whether the text specified tax deductibility. Agencies were more likely to publicly disclose the full text of their larger settlements, meaning that fully $88 billion in settlement deals included their text for public scrutiny. Upon examination, however, only $17.8 billion of these settlements was explicitly designated as non-deductible, leaving $55 billion as almost certain to be deducted and an additional $15.5 billion that was specified as a "penalty" or "fine" and therefore likely non-deductible, but not protected by explicit instruction regarding tax status.

Table 1: Ten Largest Settlements Ranked by Penalty or Fine 2012-2014

Settling Corporation	Agency	Year	Specifies Tax Status for Penalties	Payments not specified as fine or penalty (billion $)	Penalty or Fine (billion $)	Total Settlement (billion $)
BNP Paribas S.A.	DOJ	2014	yes	0	9.0	9.0
Bank of America Corporation	DOJ, SEC, HUD,	2014	no	11.65	5.0	16.65
Citigroup Inc.	DOJ, SEC	2014	no	3.0	4.0	7.0
National Mortgage Settlement[23]	DOJ	2012	no	20	5.0	25.0
Credit Suisse	DOJ	2014	yes	0	2.6	2.6
JPMorgan	DOJ, SEC	2013	yes	11.0	2.0	13.0
Toyota	DOJ	2014	yes	0	1.2	1.2
TransOcean	EPA, DOJ	2013	yes	0	1.004	1.004
GlaxoSmithKline LLC (GSK)	DOJ	2012	no	2.0	1.0	3.0
Alstom	DOJ	2014	yes	0	0.77229	0.77229
Total			**4 no, 6 yes**	**47.65**	**31.576**	**79.226**

Comparing the Agencies: How Much Does Each Agency Limit Settlement Tax Deductions and How Transparent Are They About It?

The following section examines each of the five agencies' approach to the issue of tax deductibility of corporate settlement agreements. Our analysis is supplemented with additional information from the agencies about their deductibility practices where they supplied information in response to our requests.

While none of the agencies we surveyed posts a clear or concise protocol online to detail how the agency addresses the tax implications of settlement payments, some agencies are moving forward toward deliberately and clearly limiting tax deductibility of settlements. Signs of progress are unfortunately difficult to discern at the Department of Justice, which is the most important agency in terms of the volume of settlement dollars signed. Though the agency does occasionally take the extra step of guaranteeing that no penalties can be interpreted as deductible, the Justice Department all too often leaves the settlement payments it negotiates ambiguous with regards to tax status.

Environmental Protection Agency (EPA)

Of the original four agencies studied by the GAO in 2005, the EPA has come the farthest in meeting the recommendations of the 2005 Government Accountability Office report. Not only does the agency consistently use standard language to clarify the tax implications of settlement pen-

Table 2: Overview of Settlement Tax Deductibility and Transparency by Agency

	Environmental Protection Agency (EPA)	Securities and Exchange Commission (SEC)	Department of Health and Human Services (HHS)	Department of Justice (DOJ)	Consumer Financial Protection Bureau (CFPB)
Do announced settlements publicly disclose settlement text?	Always	Sometimes[24]	Almost never for False Claims cases, more for civil rights or HIPAA[25]	Sometimes[26]	Always
Is there a policy on how the agency addresses tax implications of settlements?	Yes, but not publicly stated	Yes, but not publicly stated	None	None	Yes, but not publicly posted
Is standard language used in agreements that specifically addresses tax treatment of settlement penalties?	Almost always[27]	Standard language, irregularly applied.[28]	No[29]	No	Yes, since 2013. Many settlements pay directly to consumers, therefore deductible.

alties and post all of its settlement agreements online, but these strong practices carry over when the DOJ's Environment and Natural Resources Division (ENRD) litigates on behalf of EPA.[30] The EPA also sometimes takes the extra step of denying deductions for many Supplementary Environmental Projects (SEPs), such as agreements for spending on environmental remediation as part of an enforcement settlement. Without specific stipulations against deducting these payments, companies would likely deduct them as ordinary compensatory or restitutive business payments. This practice is an example of how agencies can limit deductibility even within the confines of a tax code that only denies deductions for "fines or similar penalties."

The EPA's settlements are systematically published online in a searchable database of case dockets, though not always linked to a press release. For all three years we studied, the EPA had provided every announced settlement text posted accessibly online.

Between 2012 and 2014, the Environmental Protection Agency completed $2.69 billion settlements that were announced in agency press releases.[31] The agency ensured that nearly half of these settlement dollars were explicitly non-deductible for federal tax purposes. By specifying that virtually all penalties the agency requires settling companies to pay were clearly non-deductible, the agency ensured there could be no contestation regarding tax status. One reason the portion was not higher was that a large percentage of the EPA's settlement amounts are payments to other entities like states or agreements for companies to spend on supplementary environmental projects, which are considered tax deductible remediation.

Almost every settlement includes standard boilerplate language that stipulates

the tax treatment of the penalties by spelling out that "any stipulated penalty incurred… is a penalty within the meaning of Section 162(f) of the Internal Revenue Code 26 U.S.C 162(f) and therefore will not treat such penalty payment as tax deductible for purposes of federal, state, regional, or local law."

One typical EPA case is the Roquette America Inc. settlement, which addressed alleged violations of the Clean Water Act and violations of the company's National Pollutant Discharge Elimination System (NPDES) permit at one of its Iowa plants. This case, publicly available online[32] though not linked from the original press release[33], includes both a penalty portion and a portion of other required actions valued at $17 million. This penalty portion of the settlement, at $4.1 million, and all stipulated penalties associated with non-compliance, are explicitly non-deductible, with the agreement saying "Defendant shall not deduct any penalties paid under this Decree pursuant to this Section or Section VIII (Stipulated Penalties) in calculating its federal income tax." Along with paying this penalty, Roquette is required to complete several other requirements which are valued at $17 million total. These required actions include things like "the completion of a sewer survey to identify possible discharge locations, the implementation of sewer modifications, the construction of upgrades to the wastewater treatment plant, and the performance of enhanced effluent monitoring." The $17 million Roquette spends to meet these requirements will be considered an ordinary tax deductible business cost, which would entail a $5.95 million tax windfall.

EPA cases where the DOJ litigates on their behalf also use strong language to ensure that penalties are explicitly non-deductible, as is best practice. All civil judicial actions litigated by the DOJ Environment and Natural Resources Division (ENRD) are published on the EPA's website and include clauses in the settlement agreements that address the tax implications of the settlement payments. The TransOcean settlement in 2013 related to the Deepwater Horizon oil spill is an excellent example. Negotiated by the Department of Justice, the consent decree is available on the EPA's website and specifically bans tax deductions.[34] This could imply that as a matter of course EPA standards are retained even when the DOJ litigates on behalf of the environmental agency, but we are aware of no standard policy.

Since the GAO report in 2005, the EPA strengthened its policies by articulating the tax treatment for the cost of Supplemental Environmental Projects (SEPs), which require a company to take some action in addition to making a payment. According to materials released in response to our Freedom of Information Act (FOIA) request, the EPA introduced a formal policy in 2007 about the intended tax treatment of SEPs, after facing some coordination problems with the IRS. The IRS issued a guideline stating "that a taxpayer may not deduct the portion of the costs incurred for the performance of a SEP that is an amount analogous to a non-deductible penalty or include such amount in the basis of assets or property it depreciates." Under this new Directive, the EPA would be required to assist the IRS in determining the amounts of each SEP that could be analogous to a non-deductible penalty and which parts should be considered deductible as remediation or compensation. In order to avoid complicated communications with the IRS regarding cases that might be subject to their audit under this new Directive, the EPA released a memoranda on how best to handle SEPs worth more than $1 million. According to this memoranda,

Table 3: Ten Largest EPA Settlements by Penalty Amount, 2012-2014

Case	Date	Tax status specified for penalties?	Penalties, fines, and non-deductible SEPS (millions $)	Payments not specified as fine or penalty (millions $)	Total (millions $)
TransOcean	1/3/2013	Yes	1004	0	1004
Hyundai	11/3/2014	Yes	100	250	350
MOEX Offshore 2007 LLC	2/17/2012	Yes	90	0	90
Titanium Metals Corporation	5/14/2014	Yes	13.75	0.25	14
Total Petrochemical USA, Inc	9/20/2013	Yes	8.75	0	8.75
BP North America Inc	5/23/2012	Yes	8	400	408
Scotts Miracle-Gro Company	9/7/2012	Yes	6	0.5	6.5
Roquette America Inc.	11/13/2012	Yes	4	170	21.2
MotorScience Inc., and MotorScience Enterprise Inc	8/29/2013	Yes	4	0	4
Tyson Foods, Inc	4/5/2013	Yes	3.95	0.3	4.25

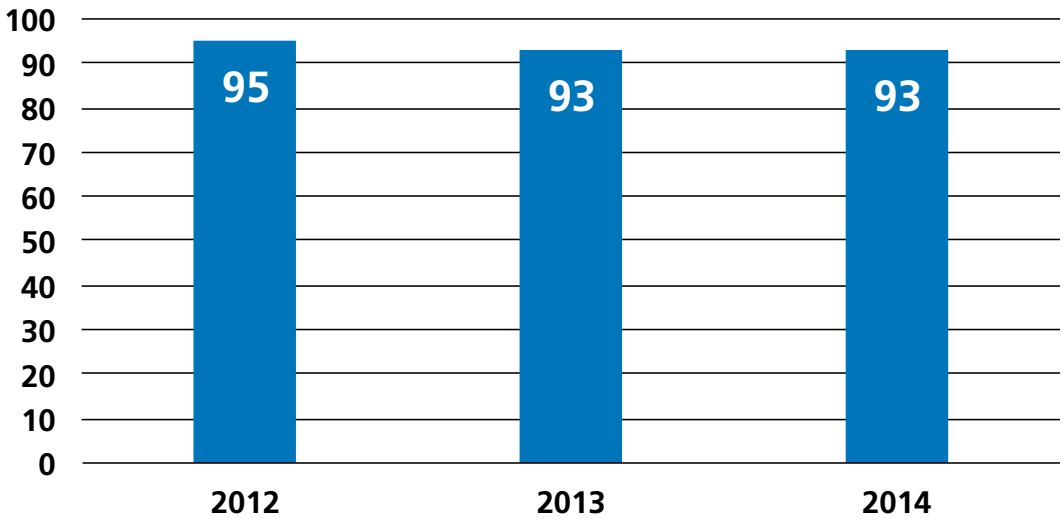
all settlements that include SEPs signed after December 1, 2007, should aim to include the following language: "For federal income tax purposes, (Defendant/Respondent) agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP." This memoranda is not binding, and in certain cases, the above stated language can be left out of a final agreement. Our survey of several settlements found that often, even SEP projects worth considerably less than $1 million incorporate the language denying tax deductions, though the EPA is not consistent about this.[35]

This EPA memoranda is significant because as a matter of policy it explicitly denies deductions for a settlement payment which is neither strictly a fine nor a penalty. Even if only part of each SEP might be analogous to a fine or penalty, the remaining portion is still declared non-deductible regardless of the fact that that portion is not strictly a penalty. It shows that, despite the limitations of the tax code, federal government agencies are empowered to deny deductions on additional kinds of non-penalty payments.

A look above at the ten largest settlements the EPA has signed between 2012 and 2014 shows that *all* of these major deals specified protections against unintended tax deductions for penalties. In some of these cases, the SEP portion was non-deductible, along with the entirety of the penalty. These ten cases are broadly representative of the EPA's practices regarding the tax status of settlements.

Our analysis also looked at a total of 258 official press releases about settlements and consent agreements over a million dollars that were posted by the EPA. For each and every one of these announced settlements, the full text was available for analysis, and 245 included language specifying tax status.

Figure 3: Percent of EPA Settlements Specifying Tax Deductibility Status, 2012 - 2014



Nearly all settlements the EPA negotiated and signed include a specific clause clearly denying the corporation the right to deduct any penalty, with only four or five exceptions each year. The few cases where the EPA failed to include such language were outliers. We could not determine why those settlements did not include the standard language. Similarly, some SEPs were not specified as non-deductible.

Department of Justice (DOJ)

The DOJ lags the furthest behind other agencies we examined in its settlement transparency and in consistently specifying the tax status of its settlements. Although the Department's largest and most newsworthy settlements are typically made available online and tend to provide some direction about how penalties should be treated by the IRS, the overall performance is worse when also considering the Department's smaller announced settlements. The agency lacks a clear, publicly available policy on its best practices in negotiating on behalf of the public, and does not provide any details about the tax status of non-penalty payments in press releases or in the body of their settlements.

The Department of Justice is responsible for most of the largest corporate settlements that the federal government negotiates. The DOJ also often negotiates on behalf of other federal enforcement agencies, such as the EPA and HHS. The Justice Department could make the biggest difference in changing federal settlement practices of any agency if it committed to specifying the tax deductibility of its settlements. Unfortunately, from 2012 to 2014, the Department only ensured that 18.4 percent of total settlement dollars were explicitly non-deductible.

Meanwhile, the amount of very large settlements at the DOJ has increased in recent years, especially with the advance of cases against Wall Street firms in the wake of the 2008 financial crisis. The four largest DOJ settlements of 2012 –

with Abbot Labs, Barclays, Glaxo-Smith-Kline, and Johnson & Johnson – totaled over $7 billion. This figure was dwarfed in 2013 by the $13 billion JPMorgan settlement, and again in 2014 by the $16 billion Bank of America settlement. Altogether, we identified $86 billion in settlements announced by the DOJ. The largest ten settlements are presented below.

While these largest, most public deals often specify the tax status of some portion of the payments or indicate that some portion is a "penalty" the larger portion of those settlement deals often remain unspecified. Looking at press releases for the Department of Justice, we see that the ten largest settlements the DOJ has negotiated and signed between 2012 and 2014 indicates that none of the deals specified how compensation and restitution, which makes up the bulk of these settlements, should be treated for tax purposes. Only half of all the ten largest deals specifically denied deductions for the penalty portion of the settlement. Best practices by agencies like the EPA include language to ensure non-deductibility is airtight, including for penalties that might be difficult to deduct anyway.

August 2014's Bank of America settlement is an example of the kind of high-profile settlement the Department of Justice has been negotiating in the aftermath of the financial crisis that also illustrates the ambiguities of these settlement deals. The deal, which totaled $16.65 billion, included a $5 billion penalty, which was not specified as non-deductible, and the rest of the payment was entirely deductible as compensation. This deductible remainder of $11.65 billion will presumably allow the bank to reduce its future tax bills by over

Table 4: Department of Justice Largest Settlements by Penalty Amount, 2012-2014

Case name	Date	Tax Status specified for penalties?	Payments not specified as fine or penalty (millions $)	Penalty or Fine ($ Millions)	Total Settlement ($ Millions)
BNP Paribas S.A.	6/30/2014	yes	0	9000	9000
Bank of America Corporation	8/21/2014	no	11650	5000	16650
Citigroup Inc.	7/14/2014	no	3000	4000	7000
National Mortgage Settlement[36]	3/12/2012	no	21500	3500	25000
Credit Suisse	5/21/2014	yes	0	2600	2600
JPMorgan	11/19/2013	yes	11000	2000	13000
Toyota	3/19/2014	yes	0	1200	1200
GlaxoSmithKline LLC (GSK)	7/2/2012	no	2000	5000	3000
Alstom	12/22/2014	yes	0	772.29	772.29
Abbott Laboratories Inc.	5/7/2012	no	800	698	1498

$4 billion, an amount that will eventually be shouldered by the broader taxpaying public. The deductible portion includes so-called "soft dollar relief," based on the value of writing down soured mortgages that the bank would have had to write down regardless of the settlement deal. On the one hand, if removing failed mortgages from the bank's books is normal and appropriate business practice that would have occurred anyway, then it arguably should be a legitimate business cost for tax purposes. On the other hand, if these are ordinary practices, then it is misleading to count their value as part of the bank's payment to resolve charges of wrongdoing.

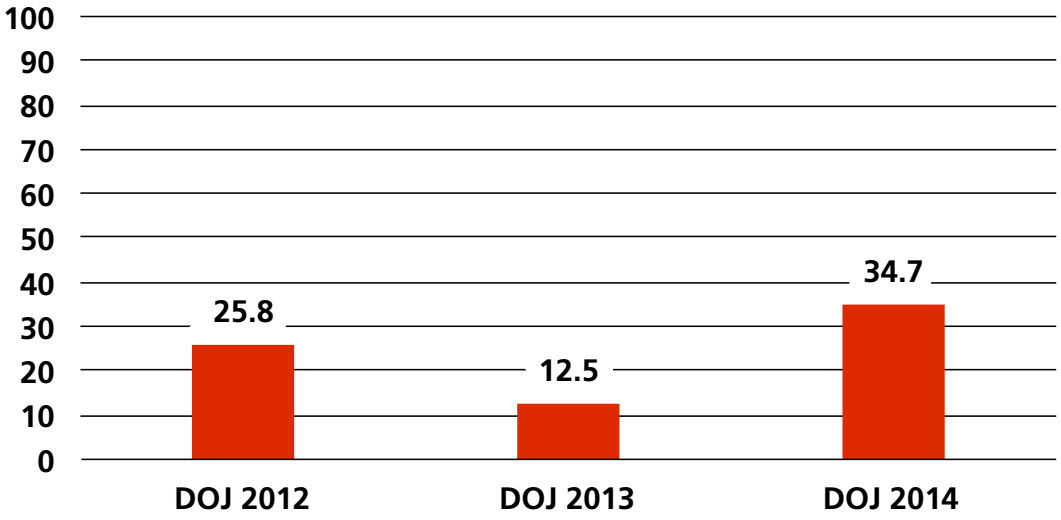
While all of the Department's largest and most newsworthy agreements are available publicly online and often specifically deny tax deductions for punitive portions of the payments, the DOJ is actually providing access to the text of *fewer* settlement agreements from 2012 to 2014. As seen in Figure 1 previously, the percent of publicly announced settlements with text posted on line declined from 35 percent in 2012 to 25 percent in 2014. Because the Department of Justice consistently posts its largest settlement agreements online, fully 94 percent of total announced settlement dollars in 2014 included the text of the agreements. The DOJ often does not post the settlement language of its smaller deals, and rarely posts links to the legal texts for False Claims Act cases that it negotiates on behalf of the Department of Health and Human Services. Though these cases are smaller compared to the blockbuster deals like the ones the DOJ has signed in connection with the financial crisis, transparency is still vital.

The lesser transparency of smaller settlement deals is clear from examining all announced DOJ settlements over $1 million. We were able to identify only 78 out of 268 total announced settlements that included a link to the full settlement language in the press release. This represents only 29 percent of all announced settlements at the agency, but it clearly indicates the lack of consistent specification of tax status for settlements. In 2012, there were 31 such disclosed settlements and only eight included provisions about tax status (25.8 percent). In 2013, there were only 24 such cases with full settlement language provided and three included language specifying tax status (12.5 percent). In 2014, there were 23 instances where press releases linked to full settlement language, and eight of them provided language about tax status (34.7 percent).

Our analysis found no instances in which the DOJ commented on the tax status of payments other than noting that a portion was an explicit penalty or (rarely) that a penalty was non-deductible. Criminal penalties are never tax deductible, and in these cases the Department is consistent in specifying that status. The US tax code is more ambiguous when it comes to civil penalties; and the Justice Department is less consistent in its specific language for these payments. The greatest benefit would come from adding specific language regarding the tax status for such payments.

Other amounts that are not labeled as penalties can be assumed to be entirely tax deductible. In 2012, DOJ's announced settlements included a total of $24 billion in deductible compensatory or restitutive payments. In 2013, the total for such automatically deductible payments was $11 billion and in 2014 it rose to $14 billion. Over the course of these years, that has added up to $17 billion in foregone revenue for the United States. Though some of these payments may be justifiably deductible, they should not be considered

Figure 4: Percent of Disclosed DOJ Settlements that Mention Tax Status, 2012 - 2014



Note on data source: Press releases posted by the Department of Justice for 2012 to 2014 included 268 settlements, 78 of which included publicly available consent decrees. This chart is based on the cases with available language: 31 in 2012, 22 in 2013, and 23 in 2014.

so automatically without weighing the details of the case. By failing to specify tax status, the DOJ allows these deductions without judging whether or not these payments should ultimately be punitive and non-deductible.

Some DOJ settlements, like the 2014 case with U.S. Bank,[37] go so far as to expressly abstain from comment on the tax status of payments made in connection with the agreement – actively working against the best practices suggested by the GAO.[38] U.S. Bank, settling allegations of Federal Housing Administration mortgage lending violations, paid $200 million, none of which was labeled anything other than a "payment." The settlement text explicitly stated that no portion of the agreement constitutes an agreement about the payment's characterization for purposes of I.R.S. laws. In the absence of a specified tax status, this payment is thus almost guaranteed to be written off as a tax deduction by the bank. It is not clear why the DOJ would take the step of actively abdicating responsibility to provide guidance about the intended tax-deductibility of its settlement.

Despite the huge monetary value of some of the settlements the DOJ negotiates on the public's behalf, there remains relatively little public information available about the standard practices the agency uses in negotiating civil settlements. The DOJ Civil Division, which alone secured several large settlements and judgments from civil cases involving fraud against the government, posts no information online about its best practices in addressing the tax implications of settlement payments.

There is nothing inherent about the Justice Department which should prevent the

agency from specifying tax deductibility more consistently in its out-of-court settlements and being more transparent about them. In fact, the DOJ's own Environment and Natural Resource Division (ENRD), which works alongside the more-transparent EPA in negotiating civil settlements, posts all of its settlement agreements online, provides links to those agreements in their corresponding press releases, and includes language clarifying the tax implications of settlement payments. Likewise, the Fraud Section of the Justice Department in its Criminal Division, which often signs settlements regarding violations of the Foreign Corrupt Practices Act, appears to publicly post full settlement language for all announced settlements,[39] and these settlements include language specifically denying any tax deductions for penalties. If this practice were the norm throughout the Department, federal settlement deductibility practices would be far more transparent and far less likely to lead to any unintended tax deductions.

Unfortunately, the agency did not provide useful information in response to our attempts to determine its internal policies about settlement tax-deductibility practices through the Freedom of Information process. Our 2014 request for details on the agency's policies around determining tax status of settlements was forwarded on to the Tax Division but not answered. This follows a similar Freedom of Information Act (FOIA) request we filed in 2013 for a number of settlement agreements the agency negotiated over that year in an effort to ascertain how the DOJ Civil Division determines tax deductibility. That request, filed in September 2013, also went unanswered. Save a few emails assuring us that it was being handled by DOJ attorneys, we have not received any documents from the agency.

The Department of Health and Human Services (HHS)

The Department of Health and Human Services (HHS), specifically its Office of Inspector General, works to fight waste, fraud and abuse in Medicare, Medicaid and more than 300 other HHS programs. The department is at the forefront of combating health care fraud and abuse, and thus is responsible for collaborating with the Department of Justice in litigating such cases. Like other agencies, HHS and its Office of Inspector General do not have prosecutorial power. Because of this, the Justice Department litigates criminal charges on behalf of HHS.[40]

In regards to transparency, HHS' record is inconsistent. The Department does not consistently publish False Claims Act settlement agreements or link to them from their corresponding press releases through the DOJ. Conversely, settlement agreements for HIPAA cases, which are handled in-house by the HHS, can be found online, although there is no way to ascertain how comprehensive these listings are because there is no way to check whether there are other HIPAA cases that are not disclosed.[41]

The HIPAA cases, when they involve some payment to the HHS to resolve allegations, designate the payment only as a "resolution amount" and expressly state that the payment is not a monetary penalty. This suggests that all of these payments will likely be deductible. Our analysis in this report does not list the largest HHS cases where full text of the cases are available because the only available settlements are a few HIPAA cases, which are generally small. We were able to analyze only 14 settlements over three years, but they do not appear representative. The FCA settlements are consistent with the general practices exhibited by DOJ in its own, self-initiated settle-

ments. As with the DOJ's own cases, a lack of transparency makes it difficult to draw any conclusions about the standard protocol employed by the HHS in addressing the tax deductibility of FCA settlements. We can only draw limited conclusions from the few settlements that are available.

Our analysis thus follows the practice of the 2005 GAO report by restricting our analysis of HHS settlements to settlements negotiated over alleged False Claims Act (FCA) violations. According to the 2005 GAO report, FCA settlements are the largest of the agency's civil settlements. To take an example that is rare for having been publicly disclosed, Amgen Inc., a California-based biotechnology company, settled a False Claims Act case in 2013 for $24.9 million. The entirety of this amount was classified merely as a "settlement payment" and the legal text of the agreement went so far as to clarify that no portion of the deal characterized the payment in any way for Internal Revenue Service's purposes.[42] The entirety of this $24.9 million was thus likely claimed as a tax deduction.

As the DOJ negotiates FCA cases, any analysis on the tax clarity and transparency of HHS settlements reflects on DOJ as well. According to the GAO report the Department of Health and Human Services employs a standard language in False Claims Act cases, but that language does not address tax deductibility.

Because of the DOJ's practice of often not publishing settlements online, this report is limited in its ability to analyze the language in FCA cases. Most of them are not publicly available. A few of the largest settlements, like the Amgen False Claims Act settlement or the $16.5 million settlement with the Pacific Health Corporation, are online and did not include language to deny tax deductions.

Standard Language in False Claims Act Cases

In all of the False Claims Act cases we examined, HHS uses standard language. However, rather than expressly allowing or denying deductibility, HHS uses language to "reserve any tax liability claim," by which the agency secures its right to dictate the tax status of any payments made at a later date. For instance, the Abbott and Amgen settlements, highlighted by HHS in its Semi-annual Report, both employ the language below:

> *Notwithstanding the releases given in Paragraphs 111.2 through 111.8 of this Agreement, or any other term of this Agreement, the following claims of the United States are specifically reserved and are not released:*
>
> *(a) Any liability arising under Title 26, United States Code (Internal Revenue Code)*

Securities and Exchange Commission (SEC)

The stated mission of the Securities and Exchange Commission is to "protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation."[43] The 2005 GAO report observes that, as part of this mission, the SEC is "responsible for administering and enforcing federal securities laws and regulations and fostering fair and efficient markets for the trading of securities." According to the agency's 2014 Annual Report, "An integral part of the [Enforcement] program's function is to seek penalties and the disgorgement of ill-gotten gains in order to return funds to harmed investors."[44] The Securities and Exchange Commission (SEC), has language it sometimes employs to deny deductions for penalties, but is inconsistent about doing so and has only ensured that 15 percent of the total settlement dollars from 2012 to 2014 are non-deductible.

According to the SEC's Annual Financial Reports, the total amount of SEC settlements has increased in recent years. The most recent report states that, "The SEC ended FY 2014 with 755 enforcement actions and obtained orders for $4.16 billion in penalties and disgorgement." In FY2013, total penalties and disgorgement ordered had also increased, up to $3.4 billion, from $3.1 billion in the prior fiscal year.[45]

While the Securities and Exchange Commission appears to have a standard language regarding the tax status of settlements, it is not employed consistently, and there is no publicly stated policy to clarify the conditions of its apparent inconsistency. Settlement agreements, when available, are frequently difficult to track down and not posted by the SEC, but third parties. However, the SEC has improved significantly in this regard, just from 2012 to 2014, from having only just over half of settlements available online to having nearly 90 percent available online.

Publicly available settlement agreements have demonstrated that the SEC varies widely in how it negotiates the tax implications of settlement payments. In some cases, such as in its September 2013 settlement with JPMorgan Chase, the SEC approached the tax deductibility issue from multiple angles: JPMorgan agreed to admit wrongdoing, the agreement dubbed payments "penalties," and a specific clause clarified that the payments were "penalties paid to the government for all purposes, including all tax purposes."[46] These three elements- admission of wrongdoing, classification as a penalty, and clarification of tax treatment- are all important in helping the IRS clearly determine the tax deductibility of settlement payments.

In other SEC settlements, the only indication that payments are not deductible is that the payments levied by the agreement are termed "penalties." In many of these cases, payments are ordered to be made pursuant to Section 21C of the Exchange Act, which essentially binds those payments to a Cease and Desist order that may or may not acknowledge any specific crime.[47] In yet other settlement agreements, the SEC makes it clear that the penalties are pursuant to Section 21B of the Exchange Act, effectively dubbing those payments civil penalties charged due to a violation of the law.[48] However, as *Forbes*' Robert Wood points out, labeling a payment as a penalty does not always guarantee against tax deductibility.[49]

According to information provided through our FOIA request, the SEC stated that, "the Commission's policy is to require, in settlements involving the payment of a civil money penalty, that settling defendants or respondents agree not to seek a tax deduction or tax credit for the penalty. This policy applies to all defendants and respondents, whether corporations, other entities, or individuals."[50]

According to information provided by the SEC, the following language is used in consents (for federal court action) and offers of settlement (for administrative and cease-and-desist proceedings) to settle actions involving payment of penalties:

> "[Defendant/Respondent] further agrees that [it, he, she] shall not claim, assert, or apply for a tax deduction or tax credit with regard to any federal, state or local tax for any penalty amounts that [Defendant/Respondent] shall pay pursuant to this [Final Judgment/Order], regardless of whether such penalty amounts or any part thereof are added to a distribution fund or otherwise used for the benefit of investors."

However, our survey of settlements with publicly available consent decrees between 2012 and 2014 found that this language has often been left out of agreements. Notably, cases where the above or similar language was used to deny tax deductibility were often cases where the penalties paid by the settling corporation were used to establish a "Fair Fund," a fund that distributes penalty money to investors hurt by alleged corporate actions. This use of penalty money could be construed as compensatory rather than punitive, which would leave space for a corporation to argue that the money should be deductible. In those instances where the SEC specifies otherwise, the SEC protects taxpayers from shouldering the burden of these payments. This use of penalty money shows that federal agencies have the power to simultaneously deny deductibility by classifying payments as penalties and still use that money to compensate injured parties.

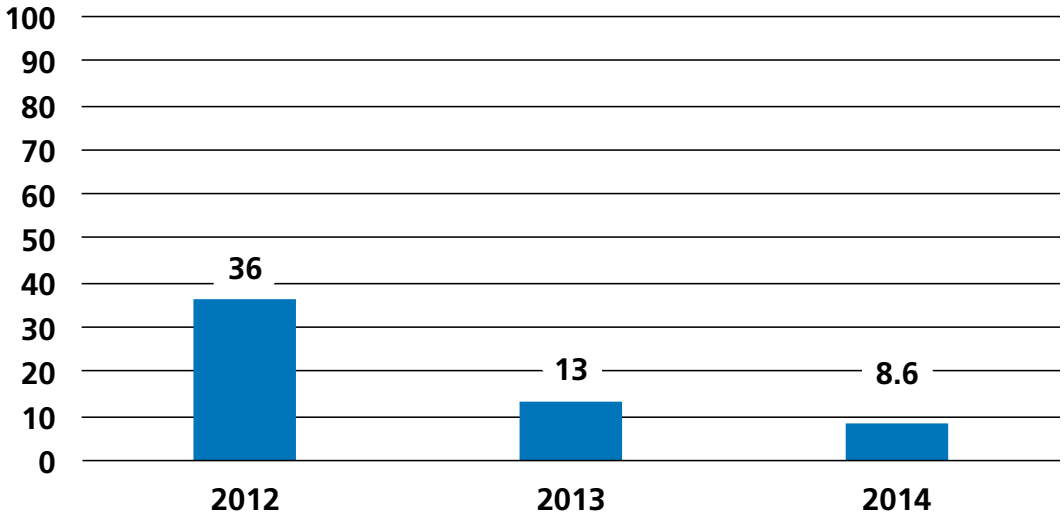
It is likely that other cases, which do not establish such a "Fair Fund" for any penalty payments, fail to specify tax status because the SEC counts on the "civil penalty" classification to speak for itself; but we know from the GAO's 2005 analysis that any ambiguity may become the basis for a company to claim a deduction regardless. A closer examination of settlements disclosed by the SEC illustrates the agency's inconsistency in specifying tax status.

We examined the 72 settlements described in agency press releases between 2012 and 2014, representing a total of $2.1 billion. We found the SEC is inconsistent in specifying the tax status of its settlements. Like the Department of Justice, only half of the largest deals in the past three years specifically deny deductions for penalty portions. The SEC has the added complication of often including "disgorgement" in its settlement agree-

Table 5: Top Ten SEC Settlements by Designated "Penalty" (Millions $)

Case name	Date	Tax Status specified for penalties?	Penalty or Fine (Millions $)	Payments not specified as fine or penalty (Millions $)	Total (Millions $)
CR Intrinsic	3/15/2013	no	275	326.774	601.774
JP Morgan	9/19/2013	yes	200	0	200
Bank of America	7/21/2014	yes	109.220	115.820	225.04
Morgan Stanley	7/27/2014	yes	96	178.623	274.623
Merrill Lynch	12/12/2013	no	56.286	75.514	131.800
Credit Suisse	2/21/2014	no	50	146.511	196.511
OppenheimerFunds Inc.	6/6/2012	yes	24	11.366	35.366
Goldman Sachs	4/12/2012	no	22		22
ConvergEx	12/18/2013	yes	20	87.424	107.424
Latour Trading LLC	9/17/2014	no	16	0	16

Figure 5: Percent of SEC Settlements that Mention Tax Status, 2012 - 2014



ments. Disgorgement is in a gray area of tax law, and it is unclear whether or not a defendant can deduct that cost entirely.

In fact, by some indications, the SEC increasingly does not specify tax deductibility in its settlements. In 2012, four out of twelve settlements included a specific clause denying tax deductions for the penalty portions of the payments. In 2013, three out of twenty three had such provisions, and the proportion dropped further in 2014, when the SEC specified the tax status of just two out of twenty publicly available settlements.

Consumer Financial Protection Bureau

The Consumer Financial Protection Bureau was created in 2011 to "make markets for consumer financial products and services work for Americans."[51] In practice, the CFPB is responsible for enforcing federal consumer financial protection regulations. As the government's newest federal enforcement agency, it provides an excellent case study of how an agency, given a blank slate, approaches the tax deductibility of settlement payments with the benefit of the recommendations of the GAO's 2005 findings and without an entrenched history that inhibits change.

In regards to agency transparency, the CFPB has since 2013 made all of its settlement agreements publicly available and provides direct links in the press releases that announce the settlements.[52] The agency's policies evolved over time, as evident in Figure 7. After its initial inception, the first five cases the agency handled did not address tax deductibility, and only prohibited the corporations "from seeking or accepting indemnification for any such payment from any third party." This language was only applied to civil penalties; indemnification for restitution payments was not addressed. Midway through fiscal year 2013, the CFPB's specifications about penalties became stricter. In addition to the clause on indemnification, settlement agreements began to prohibit that respondents "claim, assert, or apply for a tax deduction or tax credit with regard to any fed-

eral, state, or local tax for any civil money penalty." This language is used without exception for all subsequent civil penalties assessed by the CFPB.

Documents obtained through our FOIA request show that the CFPB operates under a set of principles which guide how the agency handles tax treatment of the settlements it negotiates. The CFPB was the only agency to provide us with principles that included specifications about tax status and transparency.

Principle 8 states:

> 8) To the extent practicable, settlements should have sufficient impact that defendants do not treat them as "a cost of doing business." Settlements should therefore take into account the true impact on the settling party. Among the factors to consider is whether a defendant will seek reimbursement from insurance or other sources to pay for the costs imposed by the settlement, or whether the defendant will obtain a tax benefit as a result of the settlement structure.

The first of the agency's principles, which the agency claims guides all of its negotiations and litigations, states that "Settlements of Enforcement matters shall be public, and we should not agree to refrain from publicizing resolutions of matters." By building considerations about tax benefits directly into its principles, the CFPB has come to follow a standard procedure of always disclosing settlements and including an explicitly non-deductible penalty in all of its deals.

Like the other agencies we examined, other types of settlement payments such as restitution and disgorgement do not receive this standardized treatment, and most consent orders are entirely mum as to their tax status. Of the 15 cases in 2012 and 2013 that assess redress, restitution, or disgorgement payments, only three prevent indemnification (other third parties like insurers' obligation to compensate the company for its settlement loss) and assert that corporations "shall treat such payments in the ordinary course for tax purposes and may claim lawful deductions but shall not seek any extraordinary tax credit or other treatment."[53]

In short, the CFPB has a standardized approach for the tax deductibility of civil penalties which follows best practices, but not for other kinds of settlement payments. Since the CFPB is addressing consumer abuses, often settlements are meant to compensate consumers hurt by a corporation's alleged misdeeds. The vast majority of the CFPB's settlements seek to provide restitution and compensation to consumers, and are therefore tax-deductible. Federal tax law stipulates only that payments to the government not be tax-deductible when they are fines or penalties, so there is no ordinary basis for private compensation to be disallowed. Over the course of 2012 to 2014, the CFPB collected and redistributed nearly $2 billion in compensatory payments to consumers. This amount, entirely deductible under the tax code, could ultimately result in $700 million in foregone revenue. The agency regards this tax treatment as necessary to negotiate the best deal to make injured parties whole. The transparent nature of these settlements allows critics to challenge whether the agency has struck the proper balance between fairly compensating injured consumers, punishing corporations for misconduct, and ensuring that taxpayers are not footing the bill. In order to follow best practices and maintain this transparency, the agency could be more explicit about the after-tax value of the private compensation.

Table 6 below is a list of top ten largest settlements signed by the CFPB. It shows that while the agency is consistent now in always specifying the non-deductibility of penalties, after originally failing to do so in its first few settlements in 2012. The table also illustrates the relatively modest size of penalties issued by the CFPB, compared to the (tax deductible) compensation required by their settlement deals.

Figure 6: Percent of CFPB Settlements that Mention Tax Deductibility, 2012 - 2014

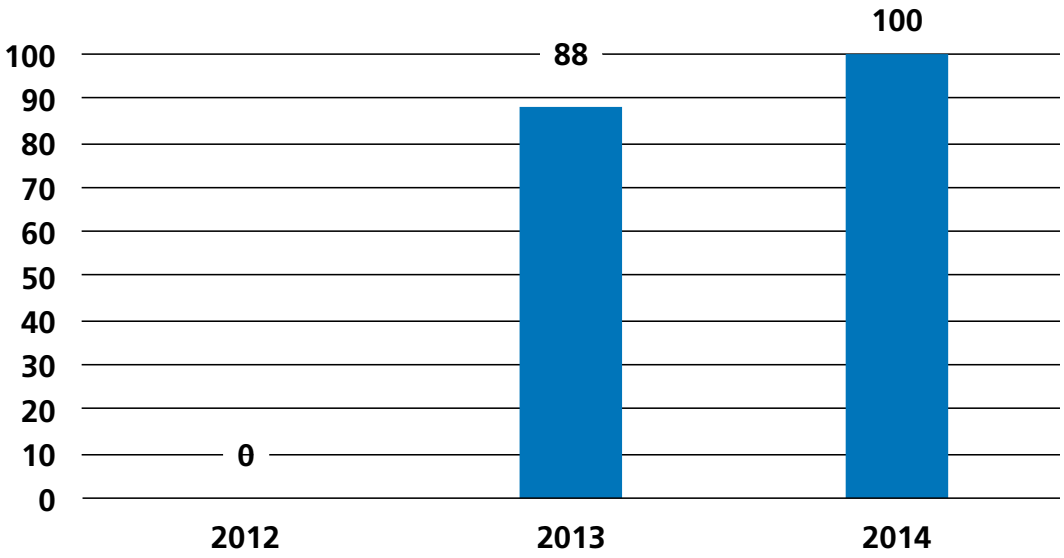


Table 6: Ten Largest CFPB Settlements by Penalty Size

Title	Date	Tax Status specified for penalties?	Penalty or Fine (Millions $)	Payments not specified as fine or penalty (Millions $)	Total (Millions $)
Capitol One	7/18/2012	no	25	140	165
JPMorgan Chase	9/19/2013	yes	20	309	329
Bank of America	4/9/2014	yes	20	727	747
Ally Financial Inc	12/20/2013	yes	18	80	98
Discover	9/24/2012	no	14	200	214
Flagstar Bank	9/29/2014	yes	10	37.5	47.5
American Express	12/23/2013	yes	9.6	59.5	69.1
U.S. Bank	9/25/2014	yes	9	48	57
American Express	10/1/2012	no	7.8	85	92.8
Amerisave	8/12/2014	yes	5.5	14.8	20.3

Recommendations

The following seven recommendations would improve the transparency of out-of-court settlements at federal agencies and clarify their true value by disclosing their tax-deductibility. Each action described below could be accomplished within a federal executive order by the administration. At a state level, these policies could also be accomplished by a state Attorney General for settlements that their office negotiates. These policies would ensure that tens of billions of annual dollars in tax benefits are allocated deliberately rather than being an inadvertent write off for wrongdoing or a shadowy side deal in federal negotiations.

1. **The federal tax code should explicitly deny tax deductions for all payments made in connection with corporate wrongdoing**, unless otherwise specified in a settlement agreement. By requiring that agencies and corporations negotiate in tax deductibility, even for payments that qualify as compensation or restitution and are not necessarily going to the federal government, rather than treating it as a matter of course, unintended corporate tax write offs would be prevented.

2. Barring a change in the federal tax code, **agencies should make it standard practice to make settlements non-deductible across the board**. This includes payments that could be construed as compensation or restitution to governmental entities. Agencies will have greater leverage in negotiating if they start with the default position of non-deductibility. Agencies may sometimes end up settling for somewhat smaller headline amounts as a result, but ultimately the net values of settlements will remain similar if not higher. By denying deductions, tax payers will not be forced to bear the burden of these settlements by having to make up for foregone revenue through higher income taxes, program cuts, or more national debt. Better informed debate about the adequacy of settlement sums can ensue if the real value of settlements is not significantly less than their announced amount. Moreover, the overall deterrence value

of settlements will be increased if payments are not permitted to be deductible. This could help lead to fewer cases of corporate misconduct, as well as less public harm caused by misconduct, and less need for settlements overall.

3. **Agencies should include language in all settlements specifying whether a settlement can be deducted as a business expense**. If a settlement payment is not in lieu of a fine or penalty and not intended as punitive, the agency should include specifics about which portions are fully deductible and which are not. Following this policy will clarify matters for the IRS, which does not otherwise have the perspective or the capacity to determine whether settlements should be regarded as punitive or not.

4. **Tax deductible settlements should only be allowed by agencies with an explanation of why the conduct should be regarded as an ordinary and necessary business expense.**

5. In cases where agencies do grant tax-deductibility, then **agencies should make clear in public descriptions about the settlement what the net value of the settlement would likely be** once it has been applied against taxable income as an ordinary business expense. Agencies should report this lesser amount, for instance, when they announce settlements and list them in annual reports and other documents.

6. **Agencies should similarly be mandated to publicly post all settlement agreements online**, and linked to official press releases, so the deals can be read and analyzed in full.

7. When settlements require confidentiality, **agencies and signing corporations should be required to explain why a deal has been deemed confidential** and will not be released publicly. As a standard practice, confidentiality should only be temporary, and at some specified date, should be made fully public.

Appendix I: CFPB Settlement Principles

Settlement Principles
(REVISED August 7, 2012)

The Office of Enforcement can benefit from creating and consistently following settlement principles in the resolution of matters. These principles are guidelines, and any individual principle may or may not apply to a particular matter.

Basic Settlement Principles

I) Settlements of Enforcement matters shall be public, and we should not agree to refrain from publicizing resolutions of matters.

2) Defendants shall not dictate any terms regarding the timing of filing or the Bureau's publicity of matters. We will not negotiate the language in a complaint or any press release regarding the tiling of a complaint or settlement.

3) Similar conduct with similar consumer impact shall be treated consistently, regardless of whether the actor is a DI or non-DI.

4) Settlements shall seek to increase specific deterrence, general deterrence, and consumer education to varying degrees depending on the circumstances of the individual matter.

5) Settlements shall be consistent with core Bureau principles of transparency, accountability (of the Bureau and our regulated entities) and fairness.

(b)(5) (b)(7)(E)

7) To the extent practicable a settlement should contain real consequences to a settling party for future non-compliance or recidivism.

8) To the extent practicable settlements should have sufficient impact that defendants do not treat them as "a cost of doing business." Settlements should therefore take into account the true impact on the settling party. Among the factors to consider is whether a defendant will seek reimbursement from insurance or other sources to pay for the costs imposed by the settlement, or whether the defendant will obtain a tax benefit as a result of the settlement structure.

9) Absent specific circumstances, to the extent practicable Enforcement should seek to avoid "hollow" settlements, such as huge judgments from bankrupt actors that we have no intention or ability to collect.

(b)(5) (b)(7)(E)

II) In cases with significant settlements we should consider pairing consumer and industry education with the settlement to amplify the message of the case, educate the public, and enhance visibility of the Bureau.

Notes

1 United States Department of Justice, *JP Settlement Agreement*, November 2013. Found at http://www.justice.gov/iso/opa/resources/6952013111919191246941958.pdf.

2 Aruna Viswanatha and David Henry, "JP Morgan settlement could cost bank closer to $9 billion," Thompson Reuters, 22 October 2013. Found at http://sustainability.thomsonreuters.com/2013/10/23/exclusive-jpmorgan-settlement-cost-bank-closer-9-billion/.

3 This assumes the federal statutory corporate income tax rate of 35 percent. The company typically pays a lower effective rate on any given year, but still pays the statutory rate on taxable profits it does declare. Even if JPMorgan did not report profits the next year, the settlement payment would likely be used to reduce future reported profits because losses can be carried forward to future years. A company with total profits under $1 million would face somewhat lower profits and thus a somewhat smaller tax benefit. JPMorgan's total tax benefit would likely be even larger considering that lower profits would be reportable for state taxes. It is not possible to calculate the size of JPMorgan's state tax benefit without knowing how they report their profits as apportioned among the states, and this information is not public.

4 26 USC §162f

5 Ibid.

6 Other types of outlays that can't be treated as a business expense for tax purposes include lobbying, campaign contributions, gambling losses, bribes and kickbacks, expenses related to the sale of illegal drugs, taxes paid to countries designated as supporting international terrorism, excessive "golden parachute" severance payments made to executives, and non-performance-based executive compensation over $1 million. See David I. Walker, "Suitable for Framing: Business Deductions in a Net Income Tax System," *William & Mary Law Review*, 52, 1247 (2010-2011).

7 This includes either a civil settlement, plea bargain, or non-prosecution/deferred prosecution agreement.

8 "Tax Deductions Will Help Exxon Slip Away From Much of Its Oil Spill Liability, Says CRS," Highlights & Documents (Mar.21, 1991), p. 2853, as quoted in Robert W. Wood, "BP, Oil, and Deducting Punitive Damages," *Tax Notes*, August 9, 2010. Exxon effectively paid less than half of the value of the settlement, but much of this reduction was because the settlement was allowed to be paid over many years when the value of each dollar had been reduced by inflation.

9 British Petroleum (BP p.l.c.), *Group results: Second quarter and half year 2010.* Found at http://www.bp.com/content/dam/bp/pdf/investors/bp_second_quarter_2010_results.pdf.

10 U.S. Department of Justice, *Fresenius Medical Care Holdings, Inc. Settlement Agreement*, 9 May 2013. Found at www.gpo.gov/fdsys/pkg/USCOURTS-mad-1_08-cv-12118/pdf/USCOURTS-mad-1_08-cv-12118-3.pdf.

11 Internal Revenue Service, *Attachment I to Industry Director Directive On Government Settlements Directive #1*, 17 January 2013. Downloaded from http://www.irs.gov/Businesses, 17 October 2013. This quotation is from an attachment to an IRS memorandum dealing specifically with False Claims Act settlements (of which Fresenius is an example). False Claims Act settlements are particularly common and are typically settled by the Department of Justice (DOJ), though the original IRS memorandum's discussion emphasized DOJ and EPA settlements in particular, it "can apply to any settlement between a government entity and a defendant under any law in which a penalty can be assessed," per John Risacher, Internal Revenue Service, Tier I Issue: Government Settlements Directive #1, 30 May 2007.

12 The largest settling agencies as determined in 2005 by the Government Accountability Office (GAO), plus consideration of the newer Consumer Financial Protection Bureau.

13 It does not include the $1.498 billion settlement by the DOJ in 2012 against Abbott Laboratories, of which $800 million was designated "compensation" and thus fully deductible.

14 Of the remaining $30 billion which is specified as a penalty or fine, only $10 billion specifically forbids tax deductibility. As the subsequent sections explain, it might be the case that some portion of the remaining $20 billion in penalties were nonetheless written off as tax deductions (see subsequent sections for an explanation).

15 http://www.irs.gov/uac/SOI-Tax-Stats-Gross-Collections,-by-Type-of-Tax-and-State,-Fiscal-Year-IRS-Data-Book-Table-5

16 "Fiscal Year 2015 State General Fund Appropriations," in National Association of State Budget Officers (NASBO), *Fiscal Survey of the States*, 2015, Table 5.

17 "Poll: Public Wants Federal Agencies to Disclose and Restrict Corporate Tax Wrote Offs of Out-of-Court Settlements," April 21, 2014, available at USPIRG.org .

18 United States Government Accountability Office. (2005). Systematic Information Sharing Would Help IRS Determine the Deductibility of Civil Settlement Payments. (GAO Publication No. 05-747)

19 Center on Budget and Policy Priorities (2015) http://www.cbpp.org/cms/index.cfm?fa=view&id=4156 and http://www.washingtonpost.com/opinions/irs-budget-cuts-will-compound-taxpayer-frustration/2015/01/19/d58ad862-9dcc-11e4-bcfb-059ec7a93ddc_story.html

20 Fresenius Med. Care Holdings, Inc. v. United States, 563 F.3d 64 (2014).

21 The GAO had access to unpublished settlements and was able to examine a sample of the largest settlements for each agency. Lacking this information, our study identified reports noting the combined amounts of all 2013 settlements for each of these agencies.

22 The most complete database of federal settlements of corporations, analyzed for other issues is discussed in Brandon L. Garrett's book. *Too Big To Jail: How Prosecutors Compromise with Corporations* (Harvard University Press, 2014).

23 Settlement between the U.S. government and Bank of America Corporation, J.P. Morgan Chase & Co., Wells Fargo & Company, Citigroup Inc. and Ally Financial Inc.,

24 Cases can sometimes be found online, but they are generally published through third parties, such as the 211 Ventures settlement from March 2013, available at http://ia601701.us.archive.org/0/items/gov.uscourts.mad.139102/gov.uscourts.mad.139102.28.0.pdf.

25 This report focuses on False Claims Act (FCA) cases. Other HHS cases, such as HIPAA and Civil Rights cases can be found on the HHS website. FCA cases are not generally available. Exceptions include the Amgen agreement, litigated by the DOJ on behalf of the HHS OIG and published by the DOJ at http://www.justice.gov/iso/opa/resources/98020134161975979868 7.pdf.

26 Exceptions include the JP Morgan Chase settlement, found at http://www.justice.gov/iso/opa/resources/6952013111919124694 1958.pdf.

27 Very few cases do not forbid deductions. See for example http://www2.epa.gov/sites/production/files/documents/xto-cd.pdf and http://www2.epa.gov/enforcement/consent-decree-san-antonio-water-system-saws. The DOJ litigated both cases.

28 The SEC's settlement with JP Morgan Chase contains an example of standard language (available at http://www.sec.gov/litigation/admin/2013/34-70458.pdf); any such language is absent from the Medifast settlement, available at http://www.sec.gov/litigation/admin/2013/34-70448.pdf.

29 The HHS uses a standard language, but only to ensure "any liability arising under the Internal Revenue Title 26, United States Code (Internal Revenue Code)" is "specifically reserved and not released." See for example http://www.justice.gov/iso/opa/resources/98020134161975979868 7.pdf.

30 The Environmental Protection Agency's mission is to "protect human health and the environment." To this end, the EPA pursues two different types of civil enforcement actions to resolve violations of environmental laws: civil administrative actions and civil judicial actions. Civil administrative actions direct a company or other public or non-profit entity to come into compliance with the law. Civil judicial actions, in contrast, are formal lawsuits brought and settled by the Department of Justice or state Attorney General on behalf of the EPA. Many times, these cases are handled by the DOJ's Environment and Natural Resources Division (ENRD). Environmental Protection Energy, "Enforcement Basic Information." Found at http://www2.epa.gov/enforcement/enforcement-basic-information.

31 For another accounting, not limited to settlements identified in online press releases, according to published materials by the agency, in 2013 the EPA obtained $1.1 billion in civil and administrative penalties, $1.5 billion in criminal fines and restitution, and $3 billion in court ordered environmental projects. A disproportionate amount of these settlement payments were due to Transocean's Deepwater Horizon settlement. Excluding Deepwater Horizon, the EPA handled approximately $287 million through settlement agreements in 2013. Office of Enforcement and Compliance Assurance, EPA, *Fiscal Year 2013 Enforcement and Compliance Annual Results*, 6 February 2014. Found at http://www2.epa.gov/sites/production/files/2014-02/documents/fy-2013-enforcement-annual-results-charts-2-6-14_0.pdf.

32 http://www2.epa.gov/sites/production/files/2014-12/documents/roquette-cd.pdf

33 http://yosemite.epa.gov/opa/admpress.nsf/79c090e81f0578738525781f0043619b/645d50e068ff777185257ab50083932a!OpenDocument

34 Department of Justice, Transocean Settlement Agreement, January 1, 2013. Found at http://www2.epa.gov/sites/production/files/documents/transocean-cd_0.pdf.

35 Information obtained through a FOIA request in 2014.

36 Settlement between the U.S. government and Bank of America Corporation, J.P. Morgan Chase & Co., Wells Fargo & Company, Citigroup Inc. and Ally Financial Inc.,

37 http://www.justice.gov/opa/pr/us-bank-pay-200-million-resolve-alleged-fha-mortgage-lending-violations

38 United States Government Accountability Office. (2005). Systematic Information Sharing Would Help IRS Determine the Deductibility of Civil Settlement Payments. (GAO Publication No. 05-747)

39 Any settlement that was a FCPA case and had a press release includes the settlement posted online in the Criminal division's database. We could not confirm whether there are settlements that did not have a press release. http://www.justice.gov/criminal/fraud/fcpa/cases/2014.html

40 http://www.taf.org/DOJ-FCA-Statistics-2014.pdf When we asked officials at HHS if their agency had any input as to how DOJ addresses the tax deductibility of the settlements it litigates on behalf of HHS more generally, they also responded that DOJ handles most of the details in those cases.

41 http://www.hhs.gov/ocr/privacy/hipaa/enforcement/examples/index.html

42 http://www.justice.gov/iso/opa/resources/980201341619759798687.pdf

43 U.S. Securities and Exchanges Commission, "About the SEC." Found at http://www.sec.gov/about/whatwedo.shtml#.U30R-K1dUnA.

44 U.S. Securities and Exchange Commission, Annual Financial Report 2014, Table 2.1.

45 SEC Annual Financial Report 2014. Found at http://www.sec.gov/about/secafr2014.shtml

46 Security and Exchange Commission, *In the Matter of JP Morgan Chase and Co.*, *Respondent*. September 19, 2013. Found at http://www.sec.gov/litigation/admin/2013/34-70458.pdf.

47 E.g., Security and Exchange Commission, *In the Matter of Medifast Inc.*, *Respondent*. September 18, 2013. Found at http://www.sec.gov/litigation/admin/2013/34-70448.pdf.

48 E.g., Security and Exchange Commission, *In the Matter of G-2 Trading LLC.*, *Respondent*. September 16, 2013. Found at http://www.sec.gov/litigation/admin/2013/34-70414.pdf.

49 Robert W. Wood, "BP, Oil, and Deducting Punitive Damages," *Woodcraft Tax Notes*. August 9, 2010. Found at: http://www.woodllp.com/Publications/Articles/pdf/BP_Oil_and_Deducting_Punitive_Damages.pdf.

50 Information obtained through FOIA in 2014.

51 Consumer Financial Protection Bureau, "About Us." Found at http://www.consumerfinance.gov/the-bureau/.

52 Independent analysis by U.S. PIRG of consent orders found at http://www.consumerfinance.gov/administrativeadjudication/.

53 E.g., Consumer Financial Protection Bureau, *In the Matter of: Bank of America, N.A.; and FIA Card Services, N.A.*, April 9, 2014. Found at http://files.consumerfinance.gov/f/201404_cfpb_bankofamerica_consent-order.pdf.