

ConsumersUnion®

POLICY & ACTION FROM CONSUMER REPORTS

October 24, 2017

Dear Representative:

Consumers Union, the policy and mobilization division of Consumer Reports, asks that you vote against H.R. 732, termed the “Stop Settlement Slush Funds Act of 2017.” We are concerned that enacting this bill would unnecessarily weaken the federal government’s ability to ensure that its enforcement efforts can achieve appropriately full relief, in accordance with the objectives of the laws it is charged with enforcing. This should continue to include, where it can be effective, using payments to non-profit and community-based third parties to assist with broader remedial efforts, where there is sufficient nexus between the required payment and the wrongful or harmful conduct that is the subject of the enforcement action.

There are numerous instances in which violations of the law cannot be effectively remedied solely through direct restitution payments to identifiable individual victims. Among recent prominent examples are:

- The mortgage foreclosure crisis of 2008, caused in significant part by reckless, even fraudulent, marketing and selling of unsustainable predatory mortgage loans, which were then bundled into risky mortgage-backed securities – resulting in millions of American families being displaced from their homes, and in widespread damage to the economy, and threatening the safety and soundness of the broader financial system.
- The Deepwater Horizon explosion and massive oil leak from the floor of the Gulf of Mexico in 2010, which poured 5 million gallons of crude oil into the Gulf, causing long-lasting devastation to broad swaths of the waters and coastal communities of the Gulf ecosystem.
- Volkswagen’s use of deceptive “clean diesel” technology, exposed in 2015, that deliberately falsified emissions readings, not only cheating more than half a million American consumers who purchased the vehicles, and millions worldwide, but also causing ongoing environmental damage, and threatening public trust in industry's commitment to developing cleaner cars.

It is important that, in these and other similar kinds of situations, federal enforcers are able to use the most effective – and the most cost-effective – means to address not only readily quantifiable harms to individuals and businesses, but also broader harms to communities and the economy. This would be imperiled by H.R. 732.

As the Justice Department noted in its letter to the Judiciary Committee of May 17, 2016, opposing similar legislation, the bill:

may inhibit or restrict settlements from requiring remediation to impacted victims that addresses more intangible harms, or from requiring monetary payments to victims in estimated amounts where it is impractical or resource-prohibitive to quantify the actual harm. ... In certain cases, as part of negotiated settlement terms, a defendant ... might undertake to correct the harms, both direct and indirect, that its conduct may have caused; to carry out activities making the public less vulnerable to conduct of that type; or to modify the conditions and circumstances that might otherwise contribute to similar conduct by others. The government legitimately considers such undertakings when it assesses the just resolution of its claims or potential claims.

In our view, there are already sufficient safeguards against possible inappropriate use of this settlement authority, through judicial oversight – beginning with the requirement that the agreed-to expenditure have sufficient nexus to the wrongful or harmful conduct that is the subject of the enforcement action.

We are also concerned that, if this avenue of redress is precluded, the result will be more expensive, more time-consuming, and ultimately less effective litigation to seek the same remediation.

A payment into the general revenues of the Treasury, as some have suggested as an alternative, is not an effective substitute for the more-specifically-directed payments to a third party. A payment to Treasury risks becoming a windfall to the general revenues, used for some purpose that has **no** nexus to remediating the specific harm involved in the enforcement action. Nor does Congress have the ability to impose the obligation on the specific actors in the case; instead, it would fall on the industry, or on taxpayers, generally, thus defeating the equitable, compensatory, and deterrent benefits of imposing the payment as part of the settlement. Relying on Congress to follow through with an appropriation directed to the same purpose would also unavoidably bring in the full range of political considerations that are inherent in the appropriations process. In these respects, H.R. 732 is inconsistent with accepted separation-of-powers principles, and would interfere with effective enforcement.

Beyond these concerns, H.R. 732 is not clearly drafted, and could have additional, unintended adverse effects, on state government enforcement actions and private lawsuits.

For the foregoing reasons, we respectfully urge you to vote against H.R. 732.

Sincerely,

A handwritten signature in blue ink that reads "George P. Slover". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

George P. Slover
Senior Policy Counsel
Consumers Union