Banking and Finance Law Daily Wrap Up, ENFORCEMENT ACTIONS—Bill would ban "backroom deal-making" in agency settlements over corporate wrongdoing, (Apr. 29, 2015)

Banking and Finance Law Daily Wrap Up

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By J. Preston Carter, J.D., LL.M.

A bipartisan measure introduced in the Senate would increase transparency around major settlements reached by federal enforcement agencies. Introduced by Sens. Elizabeth Warren (D-Mass) and James Lankford (R-Okla), the Truth in Settlements Act (S. 1109) would require more accessible and detailed disclosures about these settlement agreements to allow the public to hold regulators accountable for the true value of these deals. The bill was introduced in the last Congress by Sens. Warren and Tom Coburn (R-Okla), and it advanced through the Senate Homeland Security & Governmental Affairs Committee by voice vote.

Background. Federal agencies are charged with holding companies and individuals accountable when they break the law, and their investigations regularly end in settlement agreements rather than public trials. According to the senators, when federal agencies close investigations and settle cases, they often tout the dollar amount obtained from the offender, but in many cases that amount is misleading because of tax deductions and other "credits" built into the settlement that reduce the settlement's true value. In addition, because these agreements are deemed confidential, major details or even the fact of a settlement are sometimes not available to the public, Warren and Lankford maintained.

"When government agencies reach settlements with companies that break the law, they should disclose the terms of those deals to the public," said Warren. "Anytime an agency decides that an enforcement action is needed, but it is not willing to go to court, that agency should be willing to disclose the key terms and conditions of the agreement. Increased transparency will shut down backroom deal-making and ensure that Congress, citizens and watchdog groups can hold regulatory agencies accountable for strong and effective enforcement that benefits the public interest."

"The Truth in Settlements Act is needed to hold the federal government accountable for the investigations and settlements that it negotiates on behalf of American taxpayers," said Lankford. "An open and transparent government will lead to an accountable government. Federal agencies should not hide behind top-line settlement figures—the taxpayers deserve to access how settlement decisions are made, what the true post-tax settlement dollar amount is, and why confidentiality is justified in a case."

Truth in Settlements Act. The Truth in Settlements Act demands specificity and transparency in all federal agency settlements that include $1 million or more in payments. The measure is intended to ensure that relevant details and terms of non-confidential settlements are publicized truthfully, and that the process by which settlements are deemed confidential is assessed and monitored. The measure:

- requires federal agencies to explain, in written public statements that reference the settlement amount, whether any portion of that amount is potentially tax deductible or includes the cost of "credits" for routine conduct;
- requires federal agencies to post basic information about the settlements on their websites, and also provide copies of the settlements;
- requires companies that settle with enforcement agencies to state in their Securities and Exchange Commission filings whether they have deducted any settlement payments from their taxes;
- requires federal agencies to explain why they deemed a settlement confidential;
- requires federal agencies to report annual aggregate statistics on confidential settlements; and

- directs the Government Accountability Office to conduct a study to examine the confidentiality issue and make legislative and administrative recommendations for reform.

Fact Sheet. A Fact Sheet released by the senators outlines recent settlements that allowed tax deductions or included "credits," or were confidential. For instance, the Department of Justice and other entities recently settled a case with JPMorgan Chase for $13 billion; however, approximately $11 billion will be tax deductible.

Also, in 2013, the Federal Reserve Board and the Office of the Comptroller of the Currency claimed that they settled for $8.5 billion with 13 mortgage servicers accused of illegal foreclosure practices. Of that $8.5 billion figure, $5.2 billion—over 60 percent of the settlement value—was in the form of "credits" for what the agencies described as "loan modifications and forgiveness of deficiency judgments."

Finally, the Federal Housing Finance Agency recently reached a settlement with Wells Fargo & Co. for $335 million for allegedly fraudulent sales of mortgage-backed securities to Fannie Mae and Freddie Mac. That figure is a fraction of what other big banks paid to settle with FHFA for liability arising from their sale of mortgage-backed securities. However, because the agency deemed the settlement confidential, Congress and the public cannot scrutinize the deal.

U.S. PIRG applauds. "Taxpayers have a right to scrutinize deals made by federal regulatory agencies with corporations who commit wrong, especially since the public must foot a part of the bill in the form of tax credits and deductions," said Mario Salazar, Legislative Director for U.S. PIRG. "We support today's bipartisan effort to allow the public to hold agencies accountable for the real value of these settlements."

Companies: Fannie Mae; Freddie Mac; JPMorgan Chase; Wells Fargo & Co.

LegislativeActivity: EnforcementActions