



## Robert W. Wood

THE TAX LAWYER

TAXES | 9/18/2013

# JP Morgan's Whale-Sized Tax Deduction In \$800M London Whale Settlement

[JPMorgan Chase](#) is moving to pay \$800 million to the SEC and other agencies to put its “London whale” trading mess to rest. Reports suggest the deal includes a key admission of wrongdoing. Given that the losses totaled over \$6 billion, and lead to this [Indictment](#), perhaps a major admission of guilt?



(Image credit: AFP/Getty Images via @daylife)

It seems more likely that the mea culpa will be over vanilla topics such as internal controls. But **any** acknowledgement of wrongdoing may make the SEC giddy. After all, the SEC recently announced its brave new world, a break from the past to require select defendants to admit guilt.

The SEC’s longstanding practice was to settle civil litigation **without** requiring defendants to admit wrongdoing. Now, defendants will worry more about their public image. Plus, admissions of guilt may foment shareholder litigation.

And then there are all those tax deductions. While punitive damages are tax deductible, some fines and penalties paid to the government are not. Paying

nondeductible fines and penalties is painful. See [Cleaning Up: Tax Deductions for Restitution, Fines, and Penalties](#).

Yet some fines and penalties are viewed as remedial (and thus deductible) rather than penal in nature. See [Who's Paying For Citigroup's \\$968M Fannie Mae Settlement? You Are](#). For that reason, defendants hope the settlement agreement confirms that a payment is not a penalty and is remedial in nature. But the government often won't agree, as occurred in [Fresenius Medical Care Holdings Inc. v. United States](#).

Fresenius (a medical device company) resolved claims for criminal and civil health care fraud. It paid a criminal fine of \$101 million and a civil settlement of \$385 million. The company deducted the payments, but the IRS claimed they were non-deductible penalties. The IRS said the **only** way Fresenius could deduct the payments would be if the settlement agreement **expressly** allowed it. Yet the government had refused to address taxes in the underlying agreement.

Tax language in settlement agreements doesn't bind the IRS, but it goes a long way toward avoiding tax disputes. And the U.S. Public Interest Research Group thinks precluding JPMorgan Chase from claiming tax deductions should be explicit to safeguard taxpayers. USPIRG claims that Americans are ["Subsidizing Bad Behavior: How Corporate Legal Settlements for Harming the Public Become Lucrative Tax Write-Offs."](#)

The group claims that unless JPMorgan Chase is explicitly **forbidden**, it will write off the \$800 million settlement. That would make taxpayers bear 35% of the cost of the settlement. Can JPMorgan Chase find a way to deduct the \$800M in the absence of an express prohibition?

It depends, but the nature and scope of any admissions of fault may be pivotal. At the same time, some tepid admissions about inadequate controls or not reacting more quickly to the trading debacle may **still** allow some whale-sized tax deductions.

*You can reach me at [Wood@WoodLLP.com](mailto:Wood@WoodLLP.com). This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.*