

STOP SETTLEMENT SLUSH FUNDS ACT OF 2016

—————
JULY 18, 2016.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed
—————

Mr. GOODLATTE, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 5063]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5063) to limit donations made pursuant to settlement agreements to which the United States is a party, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The Amendment

The amendment is as follows:

Strike all that follows after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Stop Settlement Slush Funds Act of 2016”.

SEC. 2. LIMITATION ON DONATIONS MADE PURSUANT TO SETTLEMENT AGREEMENTS TO WHICH THE UNITED STATES IS A PARTY.

(a) LIMITATION ON REQUIRED DONATIONS.—An official or agent of the Government may not enter into or enforce any settlement agreement on behalf of the United States, directing or providing for a payment to any person or entity other than the United States, other than a payment that provides restitution for or otherwise directly remedies actual harm (including to the environment) directly and proximately caused by the party making the payment, or constitutes payment for services rendered in connection with the case.

(b) PENALTY.—Any official or agent of the Government who violates subsection (a), shall be subject to the same penalties that would apply in the case of a violation of section 3302 of title 31, United States Code.

(c) EFFECTIVE DATE.—Subsections (a) and (b) apply only in the case of a settlement agreement concluded on or after the date of enactment of this Act.

(d) DEFINITION.—The term “settlement agreement” means a settlement agreement resolving a civil action or potential civil action.

Purpose and Summary

H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” prohibits terms in Department of Justice (DOJ) settlements that direct or provide for payments to non-victim third-parties.

Background and Need for the Legislation

A year-long Committee investigation has revealed that the DOJ is pushing and even requiring settling defendants to donate money to non-victim third-parties.

Donations can earn up to double credit against defendants’ overall payment obligations, while credit for direct relief to consumers is merely dollar-for-dollar. What is more, documents show that groups that stood to gain from these mandatory donations lobbied DOJ to include them in settlements. DOJ has funneled third-party groups as much as \$880 million dollars in just the last 2 years. These payments occur entirely outside of the Congressional appropriations and grant oversight process. What is worse, in some cases, DOJ-mandated donations restore funding that Congress specifically cut.

It is critical that Congress act. DOJ is ignoring Congress’ concerns—increasing the use of third-party payments, even as Congress objects. Just last month, DOJ included such terms in its settlement with Goldman Sachs.

The purpose of DOJ enforcement actions should be punishment and redress to actual victims. Carrying that concept to communities at large or community groups, *however worthy*, is a matter for the Legislative branch and is not to be conducted at the unilateral discretion of the Executive.

This is fundamentally a bipartisan, institutional issue. That is one reason that an amendment banning mandatory donations in last year’s Commerce, Justice, Science and Related Agencies Appropriations Act passed the House by voice vote.

I. THE IMPORTANCE OF CONGRESS' SPENDING POWER

Congress' spending power is its most effective tool for oversight and reining in Executive overreach.

In Federalist No. 58, James Madison described the power of the purse as “that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people . . . finally reducing . . . all the overgrown prerogatives of the other branches of government.”¹ Accordingly, Article I section 9, clause 7 provides that, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” Alexander Hamilton noted that this provision gave Congress the power to control not only the amount of an expenditure, but its purpose. “[N]o money can be expended, but for an object, to an extent, and out of a fund, which the laws have prescribed.”

Legal experts note that the Framers “vested Congress with this authority precisely because it was the most representative branch; the immediate accountability of Congress . . . insures equitable distribution of government funds.”²

II. EFFORTS BY AGENCIES TO CIRCUMVENT CONGRESS' SPENDING POWER

Precisely because the spending power so effectively reins in agency overreach, the Executive Branch has long sought ways around it.

A. *The Antideficiency Act*

As early as 1809, a Congressional resolution called for methods to “prevent the improper expenditure of Federal funds.” Executive departments would enter into vendor contracts without authorization, knowing that Congress could not in good conscience deny payment once the goods were provided. These “coercive deficiencies” prompted the 1820 Antideficiency Act (ADA) which provided that “no contract shall hereafter be made . . . except under law authorizing the same, or under appropriation adequate to its fulfillment.” The statute applied only to the Departments of War, State and Treasury. In 1870, Congress expanded it to cover all Federal agencies. In 1905, seeing that compliance problems persisted, Congress added criminal penalties. Even though no criminal prosecutions have been brought under the Antideficiency Act, “the *in terrorem* effect of the criminal sanctions has been enough to get the executive branch to take the provisions of the Act seriously.”³

B. *The Miscellaneous Receipts Act*

The Executive Branch soon found ways around the ADA. The Constitution requires an appropriation to withdraw money from the Treasury, it does not, agencies argued, require that money be placed there to begin with. Thus, agencies began to “divert funds received by an agency to that agency’s uses before it is placed in the [T]reasury.” Congress closed this loophole with the 1849 Miscellaneous Receipts Act (MRA). It provides that officials “receiving

¹The Federalist No. 58 (James Madison).

²Todd Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Dep’t of Justice*, 2009 BYU L. Rev. 327, 335 (2009).

³Peterson, *supra* note 2, at 339.

money for the Government from any source shall deposit the money in the Treasury.”⁴ The law reflects the Separation of Powers principle. The Executive Branch negotiates settlements, but Congress gets to decide how to allocate the money recovered.⁵ As the Government Accountability Office (GAO) explains, the MRA is “another element in the statutory pattern by which Congress retains control of the public purse under the Separation of Powers doctrine.”⁶

Unfortunately, DOJ has devised a way around the MRA too. The loophole is lamented in an article by Todd Peterson, former deputy Assistant Attorney General for the Office of Legal Counsel (OLC) in the Clinton administration: “Because the Department of Justice has such broad settlement authority, it has the ability to use settlements to circumvent the appropriations authority of Congress.” In particular, DOJ has the power “to short circuit the Miscellaneous Receipts Act by agreeing to settlement terms that require the violator of a Federal statute to undertake certain responsibilities or actions that might inure to the benefit of the executive branch.” Thus, the Department could effectively “augment the appropriations of the Executive Branch without running afoul of the technical requirements of the Miscellaneous Receipts Act—although creating an unconstitutional interference with Congress’ appropriations power.”⁷

That is precisely what has happened.

Beginning in the 1980’s, various Federal enforcement agencies, including the Commodity Futures Trading Commission, Nuclear Regulatory Commission and the Environmental Protection Agency (EPA), wanted to use settlement money to fund community service projects.⁸

In 1991, Representative John Dingell, then Chair of the Energy and Commerce Committee’s Oversight Subcommittee sought a GAO opinion on the practice. He asked particularly about the permissibility of EPA including Supplementary Environmental Projects (SEPs) in settlements with polluters. A SEP is a “beneficial project that a violator voluntarily agrees to perform in addition to actions required to correct the violation . . . as part of a settlement.”⁹

When GAO concluded that SEPs violated the MRA, EPA protested. GAO reexamined its opinion, but reaffirmed the conclusion:

An interpretation of an agency’s prosecutorial authority to allow an enforcement scheme involving supplemental projects that go beyond remedying the violation in order to carry out other statutory goals of the agency would permit the agency to improperly augment its appropriations for those other purposes in circumvention of the congressional appropriations process.¹⁰

⁴ 31 U.S.C. § 3302.

⁵ Andy Spalding, *The Much Misunderstood Miscellaneous Receipts Act (Part 1)*, The FCPA Blog (Sept. 29, 2014, 7:18 AM), <http://www.fcpablog.com/blog/2014/9/29/the-much-misunderstood-miscellaneous-receipts-act-part-1.html>.

⁶ Peterson, *supra* note 2, at 341.

⁷ Peterson, *supra* note 2, at 348.

⁸ Andrew B. Spalding, *Restorative Justice for Multinational Corporations*, University of Richmond Scholarship Repository, 35 (2015).

⁹ Peterson, *supra* note 2, at 352.

¹⁰ Peterson, *supra* note 2, at 354.

In subsequent face-to-face meetings between Rep. Dingell's staff, DOJ, and EPA, it was agreed that this analysis did not apply to all SEPs and that EPA would issue guidelines to avoid violations of the MRA and the related augmentation problem. SEPs continued in the meantime. The guidelines were finally released in 1998.¹¹

One key tactic the Executive Branch uses is to structure the transaction as an "adjustment of penalty." The government simply reduces the amount owed to it by the amount that the defendant agrees to pay directly to the community service project. Since the government never *receives* the money the MRA is not triggered. This idea is echoed in a 2006 DOJ Office of Legal Counsel memo. It advises that "[t]o avoid the Government's constructively 'receiving money for the Government,'" settlements that include payments to third-parties should "be executed before an admission or finding of liability in favor of the United States; and . . . the United States [should] not retain post-settlement control over the disposition or management of the funds."¹²

C. The U.S. Attorney's Manual's Limits on Defendant Funded Community Service Projects

A May 14, 2008 memo from Deputy Attorney General Mark Filip announced the following amendment to the U.S. Attorney's Manual (USAM) pertaining to defendant-funded community service projects:

Plea agreements . . . should not include terms requiring the defendant to pay funds to a charitable . . . community, or other organization . . . that is not a victim of the criminal activity or is not providing services to redress the harm caused by the defendant's criminal conduct. . . . **[T]his practice is restricted because it can create actual or perceived conflicts of interest and/or other ethical issues.**¹³ (Emphasis added.)

The history of this provision is instructive. According to a 2012 U.S. Attorney's Bulletin, the amendment was recommended "*due to instances of perceived abuse of extraordinary restitution by some offices.*" The original plan was to end all forms of such "extraordinary community restitution," except as statutorily authorized for certain drug crimes.

After intense discussion, the Criminal Chief's Working Group decided to make an exception for environmental crimes. This concession "*was due in large part to guidance that was issued by the Environment and Natural Resources Division (ENRD).*"¹⁴ Thus, the USAM makes exception for community service provisions in plea agreements . . . resolving environmental matters." Importantly, when contemplating such provisions, the prosecutor must confer with the Environment and Natural Resources Division, "which has issued guidance to ensure that the community service requirements

¹¹ *Id.*

¹² *Application of the Gov't Corp. Control Act and The Miscellaneous Receipts Act to the Canadian Softwood Lumber Settlement Agreement*, Op. O.L.C. (2006), <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/05/29/op-olc-v030-p0111.pdf>.

¹³ U.S. Attorney's Manual 9-16.325, Plea Agreements, Deferred Prosecution Agreements, Non-Prosecution Agreements and Extraordinary Restitution, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/16mcrm.htm#9-16.325 (emphasis added).

¹⁴ Kris Dighe, *Organizational Community Serv. in Envtl. Crimes Cases*, 60 U.S. Attorneys' Bulletin 101 (July 2012) (emphasis added).

are narrowly tailored to the facts of the case.”¹⁵ Exception is also made for certain drug offenses where there is an “absence of identifiable victims, as well as a nexus between the payment and the offense.”¹⁶

There are several reasons why the USAM language has not proven a barrier to DOJ’s expanding mandatory donation provisions in civil matters such as the recent banking settlements. First, strictly speaking, the USAM provision covers only criminal matters. In addition, the USAM’s language leaves loopholes. It permits payments “to redress the harm caused.” This phraseology fails to impose a tight nexus between the harm and the payment. Without demanding a direct causal link between the two, connections may be easy to manipulate.

III. DOJ’S UNPRECEDENTED MANDATORY-DONATION BANK SETTLEMENT TERMS

A. *The Emergence of Troubling Terms in DOJ Mortgage Banking Settlements*

In November 2014, the House Judiciary and Financial Services Committees opened a pattern-or-practice investigation into the Justice Department’s mortgage lending settlements with major banks, including JP Morgan, Citi and Bank of America (BoA). The concern was that DOJ was systematically subverting Congress’ spending power by using settlements to funnel money to third-party groups.

The initial evidence supporting the committees’ concern was a progression of troubling terms in DOJ’s major mortgage banking settlements. This began with the 2013 JP Morgan settlement that offered the bank credit against its settlement obligations for donations to community redevelopment groups.¹⁷ Next came Citi and Bank of America settlements in 2014 which *required* \$150 million in donations to housing non-profits.¹⁸ These donations earned double credit against the banks’ overall obligations. Meanwhile, credit for direct forms of consumer relief remained dollar-for-dollar.

Bank of America’s settlement went further. It not only required direct donations to housing non-profits, but required the bank to set aside \$490 million to pay potential consumer tax liability arising from loan modifications. Logic dictates that if there is no consumer tax liability to cover, that money should revert to the bank. Instead, under the terms of the settlement, since Congress extended the non-taxable treatment of loan modifications in December 2015, the money is split between NeighborWorks America and Interest on Lawyer’s Trust Account entities (IOLTAs) that fund legal aid.¹⁹

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Settlement Agreement between DOJ and JP Morgan, *Annex2—Consumer Relief*, Nov. 19, 2013, Menu Item 4D *available at* <https://www.justice.gov/iso/opa/resources/64420131119164759163425.pdf>.

¹⁸ Settlement Agreement between DOJ and Citi, *Annex2—Consumer Relief*, July 14, 2014, Menu Items 4D, 4E, 4F, *available at* <http://www.justice.gov/iso/opa/resources/649201471413721380969.pdf>; Settlement Agreement between DOJ and Bank of America, *Annex2—Consumer Relief*, Menu Items 3E, 3F, 3G, Aug. 21, 2014, *available at* <http://www.justice.gov/iso/opa/resources/8492014829141239967961.pdf>.

¹⁹ Settlement Agreement between DOJ and Bank of America, *Annex3—Tax Fund*, Aug. 21, 2014, *available at* <http://www.justice.gov/iso/opa/resources/4922014829141329620708.pdf>; Settlement between DOJ and Bank of America, Aug. 21, 2014, pg. 9, *available at*, <http://www.justice.gov/iso/opa/resources/3392014829141150385241.pdf>.

B. Committee Oversight & DOJ Delay

The investigation formally commenced on November 25, 2014, when the Judiciary and Financial Services Committees requested DOJ documents pertaining to the genesis of these unprecedented and controversial settlement terms.

Nevertheless, for over a year, DOJ provided *none* of the requested *internal* communications pertaining to the controversial settlement provisions. Rather, DOJ provided just sixty pages of emails between DOJ and outside parties. Furthermore, because of duplicative email chains, those sixty pages amounted to fewer than ten distinct emails. What little information DOJ did provide confirmed that third-party groups, which stood to gain from mandatory donation provisions, actively lobbied for their inclusion in the settlements.

In response to further Judiciary Committee inquiries, DOJ claimed in September 2015 not to have understood that internal communications were sought. This contention is difficult to credit in light of the unambiguous language in Committee letters and hearing questions. For example, at a May 19, 2015 hearing, Chairman Goodlatte pressed Civil Division Principal Deputy Assistant Attorney General Benjamin Misner specifically on internal documents: “the Department has sent a paltry 60 pages of email between the Department of Justice and outside groups, no internal Department of Justice emails. And those are critical . . . When will we get those documents?”²⁰

Finally, on March 18, 2016, 15 months after the initial request, DOJ relented and agreed to let the Committee review the internal documents, but only at DOJ, and subject to restrictions on releasing the documents’ contents.

The internal documents confirm that DOJ conceived of the mandatory donation provisions. It also seems quite possible that then Associate Attorney General Tony West was the driving force behind the effort. Indeed, an August 22, 2014 email from the President of the National Association of IOLTA Programs (NAIP) to senior legal aid colleagues, obtained independently by the Committee, stated:

I would like to discuss ways we might want to recognize and show appreciation for the Department of Justice and specifically Associate Attorney General Tony West *who by all accounts was the one person most responsible* for including the IOLTA provisions. (Emphasis added.)

In response, the Executive Director of the Hawaii Legal Aid Foundation wrote, “[f]rankly, I would be willing to have us build a statue [of West] and then we could bow down to this statue each day after we get our \$200,000+.”²¹

On April 8, 2016, the Committee requested transcribed interviews with four DOJ officials who, according to the documents the Committee reviewed, were most involved in inserting the mandatory donation provisions into the settlements.

²⁰ *Ongoing Oversight: Monitoring The Activities Of The Justice Dep’t’s Civil, Tax And Env’t And Nat. Resources Divisions And The U.S. Trustee Program*: Hearing Before the H. Subcomm. On Reg. Reform, Com. and Antitrust Law, 114th Cong. 81 (2015) (statement by Rep. Bob Goodlatte, Chairman, H. Judiciary Comm.).

²¹ Email from Bob LeClair, Executive Director of the Hawaii Legal Aid Foundation, to Charles Dunlap et al, President of NAIP, Aug 22, 2014, on file with the House Judiciary Committee.

C. DOJ is Ignoring Congressional Concerns

In the meantime, rather than suspending the practice of mandatory donation provisions in response to legitimate Congressional concerns, the Department of Justice has doubled down.

On March 3, 2015, a full 3 months after the Judiciary Committee first expressed concerns with mandatory donations, the U.S. Trustee Program (UST) entered into an over \$50 million settlement with JP Morgan relating to robo-signing.²² Seven-and-one-half million of those dollars did not make it to victims. Instead, it went to a third-party, largely to educate high school and college students about using credit cards responsibly.²³

Similarly, DOJ's September 2015 settlement with Hudson City Savings Bank requires the defendant to "[s]pend \$750,000 on local partnerships."²⁴

Most recently, on April 11, 2016, DOJ announced a \$5 billion Residential Mortgage Backed Securities (RMBS) settlement with Goldman Sachs.²⁵ The consumer relief provision requires \$240 million in "Financing and/or donations to fund affordable rental and for-sale housing."²⁶

IV. THE CRUX OF THE SUBVERSION OF CONGRESS' SPENDING POWER

The subversion of Congress' spending power can take several forms. In some cases, mandatory donation provisions reinstate funding Congress specifically cut. In others, funding is not reinstated, but funding decisions that should properly be made only by an accountable Congress are instead made at the unilateral discretion of the Executive. In both cases, it is not only Congress that is sidestepped, but also the standard grant-oversight process that ensures money is spent as intended.

A. Reinstating Funding Congress Specifically Cut

In the most egregious cases, DOJ is using mandatory donations to restore funding that Congress specifically cut.

In 2011, Congress eliminated \$88 million in funding for HUD's "housing counseling assistance" program.²⁷ Congress reinstated about \$45 million for the program in 2012.²⁸ Grantee groups lamented the 50% cut. For 2014 and 2015, Congress continued to

²² Robo-signing is the practice of signing legal documents without verifying the accuracy of their contents. In this case, DOJ alleged that bank officials filed "payment change notices" required in certain bankruptcy cases that "were improperly signed, under penalty of perjury, by persons who had not reviewed the accuracy of the notices."

²³ In re: Belzak, Case No. 10-23963-dob (Bankruptcy Court E. D. Mi, Northern Div. Bay City) (Order Approving Settlement between the United States Trustee Program and JPMorgan Chase Bank N.A.) available at, http://www.justice.gov/ust/eo/public_affairs/press/docs/2015/pr20150303_order.pdf.

²⁴ Consent Order with Hudson City Savings Bank, p 17, Sept. 24, 2015, available at <https://www.justice.gov/opa/pr/justice-department-and-consumer-financial-protection-bureau-reach-settlement-hudson-city>.

²⁵ Settlement Agreement between DOJ and Goldman Sachs, *Annex2—Consumer Relief*, Apr. 11, 2016, Menu Item 2 available at <https://www.justice.gov/opa/file/839906/download>.

²⁶ <https://www.justice.gov/opa/file/839906/download>.

²⁷ Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 2245, 125 Stat 38 (2011).

²⁸ Press Release, Nat'l Council of La Raza, *Settlement With Top Mortgage Service Providers A Win For Struggling Homeowners* (Feb. 9, 2012), http://www.nclr.org/index.php/about_us/news/news_releases/settlement_with_top_mortgage_service_providers_a_win_for_struggling_homeowners.

provide just \$45 MM and \$47MM respectively.²⁹ Thus, the groups were understandably pleased with the mandatory donation provisions in the 2014 Citi settlement.

The settlements promised to reinstate all or more of the eliminated funding. Compared to the pre-2011 baseline of \$88MM, HUD grants for 2014 and 2015 fall “short” by a combined \$84MM. The DOJ settlements require \$30MM to go specifically to groups in the HUD grant program, so 36% is recouped directly. In addition, some HUD grantees will also be eligible for a portion of the remaining \$120MM in mandatory donations, not to mention the \$490MM in the tax relief fund. For example, NeighborWorks is an eligible HUD grantee, but will also receive \$122MM from BoA’s Tax Fund since Congress extended the non-taxable treatment of loan forgiveness in December 2015. This means that DOJ’s mandatory donation provisions, which were negotiated in consultation with HUD, are restoring at least \$152MM (\$122+\$30) to HUD grantees in place of the \$88MM reduction mandated by Congress.

B. Usurping Congress’ Authority to Decide Funding Priorities

The beneficiaries of mandatory donation provisions may or may not be worthy, non-partisan entities, but that is entirely beside the point. Under our system of government, Congress gets to decide how money is spent, not DOJ.

The authority to settle cases necessarily includes the ability to obtain redress and remediation for victims. That is not in dispute. The issue is that Federal law understands victims to be those “directly and proximately harmed” by a defendant’s bad acts.³⁰ Once those victims have been compensated, deciding what to do with additional funds extracted from defendants becomes a policy question properly decided by elected representatives in Congress, not agency bureaucrats or prosecutors. It is not that DOJ officials are necessarily funding bad projects, it is that, outside of securing compensation for actual victims, it is not their decision to make.

For example, consider UST’s March 3, 2015 robo-signing settlement referenced above. It required JP Morgan to donate \$7.5 million to a third-party: the American Bankruptcy Institute’s (ABI) endowment for financial education and support for the Credit Abuse Resistance Education Program (CAREP).

CAREP educates high school and college students on the responsible use of credit and credit cards.³¹ The underlying harm UST was addressing in the settlement was compliance failures at banks impacting homeowners already in bankruptcy. As such, the connection between the activity giving rise to the settlement and the work of the third-party receiving donations under it is attenuated. This creates a significant question whether the payment violates the Miscellaneous Receipts Act. Either way, it is clear that CAREP is not remediating the direct harm caused by JP Morgan’s alleged wrongdoing. As such, CAREP has no clearer claim to settlement funds than any number of other worthy causes. The spending-priority issue is a question for Congress, not DOJ.

²⁹ See, <http://www.lis.gov/cgi-lis/query/D?c113:7:/temp/-c113yBgthU>; see also, *H.R.3547—Consolidated Appropriations Act, 2014*, U.S. Congress, <https://www.congress.gov/bill/113th-congress/house-bill/3547/text>.

³⁰ 18 U.S.C. § 3771(e).

³¹ About CARE, available at, <http://care4yourfuture.org/about>.

Importantly, UST seemed unaware of just how much money the settlement provided to ABI as a percentage of ABI's current assets. According to its financial statements, at the end of 2013 ABI had \$13.6 MM in total assets, with \$9.5 MM in net assets. The mandatory donation was \$7.5 MM.³²

ABI is not an ideological group. It is a non-profit with a reputation for good work. Nevertheless, if its efforts are to be subsidized by the government, that is a decision Congress must make, for which Congress will be accountable to the people. It is inappropriate for the Executive Branch to secure, at its unilateral discretion, the near-doubling of the entire net worth of an organization—however worthy the organization may be.

C. Circumventing Grant Oversight

Federal grants come with a litany of rules and procedures designed to ensure that funds are used as intended. When entities are funded out of settlements rather than appropriations, this careful system of oversight and accountability is undone. That is a key reason that requiring third-party payments in DOJ settlements is so troubling. It evades oversight.

Federal grant recipients are subject to a variety of administrative requirements detailed in the grant agreement, including detailed financial and program reporting requirements. Federal agencies are required to follow government-wide guidance, known as circulars, when entering into grant agreements. These circulars, issued by the Office of Management and Budget, set standards for a range of grant management activities, including financial reporting, audit requirements and suspension and debarment provisions. Federal agencies administering grant programs then incorporate the standards into regulations for specific grant programs.³³

Such controls are entirely absent in DOJ's banking settlements. DOJ officials claim that there is oversight because each settlement has an independent monitor. That is misleading. It is true that monitors ensure that the banks comply with all the settlement terms, including the mandatory donations. However, the monitors' jurisdiction extends only to the banks, not to the grant recipients. Nothing in the settlement agreements gives the monitors authority to conduct ongoing oversight of recipients to ensure that they are using donated funds as intended.

In fact, in some settlements, DOJ has explicitly disclaimed any oversight responsibility for the donations defendants are required to make. Consider again DOJ's March 3, 2015 settlement with JP Morgan that required a \$7.5 million donation to the American Bankruptcy Institute (ABI). DOJ was adamant that neither it nor the bank retained ongoing oversight over ABI to ensure the donated money is used as intended. Indeed, the settlement specifically provides that "*the Parties understand and agree that neither has any involvement in or oversight over the American Bankruptcy Institute or the Credit Abuse Resistance Education Program and*

³² American Bankruptcy Institute, 2014 Annual Report, available at, <http://www.abi.org/about-us/annual-reports>.

³³ Congressional Research Service, *Federal Grant Recipient Financial Reporting Requirements*, April 24, 2015.

*neither will monitor the use of the contribution by the recipient.*³⁴
This is a remarkable admission.

V. THE “STOP SETTLEMENT SLUSH FUNDS ACT OF 2016”

H.R. 5063 prohibits terms in DOJ settlements that direct or provide for payments to non-victim third-parties.

The legislation explicitly permits payments to remediate or otherwise directly remedy the direct harm, including environmental harm, done by defendants’ wrongful activity. For example, a liable defendant could be required to pay for long-term healthcare monitoring for individuals poisoned by toxic exposure to the defendant’s carcinogenic chemicals. Such care directly remedies direct harm to victims.

The bill also explicitly permits payments for services rendered in connection with a case, for example, to a settlement monitor. The bill applies prospectively only, so as not to disturb any settlements already concluded.

Hearings

On May 28, 2016, the Subcommittee on Regulatory Reform, Commercial and Antitrust Law conducted a legislative hearing on the “Stop Settlement Slush Funds Act of 2016.” The witnesses at the hearing were: The Honorable Daniel E. Lungren, Esq., Principal, Lungren Lopina LLC; Prof. Paul F. Figley, Associate Director of Legal Rhetoric, American University Washington College of Law; and Prof. David M. Uhlmann, Director, Environmental Law and Policy Program, The University of Michigan Law School.

Two of the three witnesses testified in support of the bill. They detailed the importance of Congress’ spending power and the need to preserve it. They also suggested improvements to the bill, including revisions incorporated into the substitute amendment. The Minority witness testified that he understood the concern that mandatory donations encroach on legislative authority and can create the appearance of conflicts of interest. Nevertheless, he objected to the bill because he was concerned that it could prevent the government from addressing generalized harm, particularly in environmental cases. The bill, however, is clear that DOJ may require payments to redress direct environmental harm. Generalized harm may be addressed as well, but how best to do so is a policy question that is appropriately left to Congress rather than DOJ.

Committee Consideration

On May 11, 2016, the Committee met in open session and ordered the bill H.R. 5063 favorably reported, with an amendment, by a rollcall vote of 18 to 6, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee’s consideration of H.R. 5063:

³⁴ *Supra* note 23 (emphasis added).

1. Amendment #1, by Mr. Conyers. The Amendment would exempt certain discrimination settlements from the bill's ban on third-party payments. Defeated by a rollcall vote of 9 to 15.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Smith (TX)		X	
Mr. Chabot (OH)			
Mr. Issa (CA)			
Mr. Forbes (VA)			
Mr. King (IA)			
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)			
Mr. Labrador (ID)		X	
Mr. Farenthold (TX)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Ms. Walters (CA)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)			
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)			
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)	X		
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Mr. Peters (CA)	X		
Total	9	15	

2. Amendment #2, by Ms. Jackson Lee. The Amendments, offered en bloc, would exempt settlements resolving workplace sexual harassment, violence or discrimination or providing restitution to a State from the bill's ban on third-party payments. Defeated by a rollcall vote of 7 to 16.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Smith (TX)		X	
Mr. Chabot (OH)			
Mr. Issa (CA)			
Mr. Forbes (VA)		X	
Mr. King (IA)			
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)			
Mr. Labrador (ID)		X	
Mr. Farenthold (TX)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Ms. Walters (CA)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member			
Mr. Nadler (NY)			
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)	X		
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Peters (CA)			
Total	7	16	

3. Amendment #3, by Mr. Johnson. The Amendment would exempt antitrust settlements from the bill's ban on third-party payments. Defeated by a rollcall vote of 7 to 15.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Smith (TX)			
Mr. Chabot (OH)			
Mr. Issa (CA)			
Mr. Forbes (VA)		X	

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. King (IA)			
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)			
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)			
Mr. Labrador (ID)		X	
Mr. Farenthold (TX)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Ms. Walters (CA)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member			
Mr. Nadler (NY)			
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)	X		
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Mr. Peters (CA)			
Total	7	15	

4. Amendment #4, by Mr. Cicilline. The Amendment would exempt settlements pertaining to protecting privacy from the bill's ban on third-party payments. Defeated by a rollcall vote of 6 to 15.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Smith (TX)			
Mr. Chabot (OH)			
Mr. Issa (CA)			
Mr. Forbes (VA)		X	
Mr. King (IA)			
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)			
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)			

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Marino (PA)		X	
Mr. Gowdy (SC)			
Mr. Labrador (ID)		X	
Mr. Farenthold (TX)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Ms. Walters (CA)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member			
Mr. Nadler (NY)			
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)			
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Mr. Peters (CA)	X		
Total	6	15	

5. Reporting H.R. 5063. The bill prohibits terms in DOJ settlements that direct or provide for payments to non-victim third-parties. Reported by a rollcall vote of 18 to 6.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)	X		
Mr. Smith (TX)			
Mr. Chabot (OH)			
Mr. Issa (CA)	X		
Mr. Forbes (VA)	X		
Mr. King (IA)			
Mr. Franks (AZ)	X		
Mr. Gohmert (TX)	X		
Mr. Jordan (OH)			
Mr. Poe (TX)	X		
Mr. Chaffetz (UT)	X		
Mr. Marino (PA)	X		
Mr. Gowdy (SC)			
Mr. Labrador (ID)	X		
Mr. Farenthold (TX)			
Mr. Collins (GA)	X		
Mr. DeSantis (FL)	X		

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Ms. Walters (CA)	X		
Mr. Buck (CO)	X		
Mr. Ratcliffe (TX)	X		
Mr. Trott (MI)	X		
Mr. Bishop (MI)	X		
Mr. Conyers, Jr. (MI), Ranking Member			
Mr. Nadler (NY)			
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)			
Mr. Johnson (GA)		X	
Mr. Pierluisi (PR)		X	
Ms. Chu (CA)		X	
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)		X	
Mr. Jeffries (NY)		X	
Mr. Cicilline (RI)		X	
Mr. Peters (CA)	X		
Total	18	6	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 5063, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
 CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 13, 2016.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 5063, the “Stop Settlement Slush Funds Act of 2016.”

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Marin Burnet, who can be reached at 226–2860.

Sincerely,

KEITH HALL,
 DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
 Ranking Member

H.R. 5063—Stop Settlement Slush Funds Act of 2016.

As ordered reported by the House Committee on the Judiciary
 on May 11, 2016.

H.R. 5063 would prohibit government officials from entering into or enforcing any settlement agreement for civil actions on behalf of the United States if that agreement requires the other party to the settlement to make a donation to a third party. That prohibition would not include payments to provide restitution or another remedy that is associated with the basis for the settlement agreement. In recent settlements with the United States, large corporations, such as Goldman Sachs and Bank of America, have been required to donate funds to charitable institutions as a part of their restitution. Such donations typically constitute a very small fraction of overall settlement amounts.

By precluding any such donations in civil settlements that have not been finalized, H.R. 5063 could affect the number and content of future settlements relative to current law. However, CBO cannot determine whether enacting the legislation would lead to an increase or a decrease in the number of such settlements or to a change in the Federal receipts and forfeitures stemming from future settlements.

Pay-as-you-go procedures apply because enacting H.R. 5063 could affect direct spending and revenues; however, CBO cannot determine the magnitude or timing of those effects.

CBO estimates that enacting H.R. 5063 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

H.R. 5063 contains no intergovernmental or private-sector mandates as defined in the Unfunded mandates Reform Act and would not affect the budget of State, local, or tribal governments.

The CBO staff contact for this estimate is Marin Burnett. The estimate was approved by H. Samuel Papenfuss, Deputy Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 5063 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 5063 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. § 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 5063 prohibits terms in DOJ settlements that direct or provide for payments to non-victim third-parties.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 5063 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short title.

Section 1 sets forth the short title of the bill as the “Stop Settlement Slush Funds Act of 2016.”

Section 2. Limitation on Donation Terms in Settlements to which the U.S. is a Party

Section 2(a) Limitation on Required Donations: A U.S. official or agent may not enter into or enforce any U.S. government settlement directing or providing for a payment to any person other than the United States. However, it permits a payment that provides restitution for, or otherwise directly remedies, actual harm (including to the environment) directly and proximately caused by the party making the payment, or that constitutes payment for services rendered in connection with the case.

Section 2(b) Penalties: Violators of section (a) are subject to the same penalties applicable to violations of 31 U.S.C. § 3302 (the Miscellaneous Receipts Act).

Section 2(c) Effective Date: Subsections (a) and (b) apply only in the case of a settlement agreement concluded on or after the date of enactment of this Act.

Section 2(d) Definitions: “Settlement Agreement” means a settlement agreement resolving a civil action or potential civil action.

Dissenting Views

INTRODUCTION

H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” is a deeply flawed proposal that would establish sweeping changes to the enforcement of the law by civil enforcement agencies. Based on unsubstantiated allegations that ignore established law and agency practice, the bill would prohibit any official or agent of the government from consummating or enforcing a settlement agreement that includes payments to parties who are not “directly and proximately” harmed by the unlawful conduct of the settling party. In doing so, H.R. 5063 would undermine the ability of agencies to hold unlawful conduct accountable and provide complete restitution for violations of the law, or tailor remedies to address systemic or diffuse harms to unidentifiable victims, the public health, or the environment. The cumulative effect of H.R. 5063 would be to deter agencies from the efficient resolution of civil complaints through settlement agreements. By forcing agencies into needless litigation, the bill would waste agency time and resources as well as taxpayer dollars and delay the timely enforcement of the law and the provision of full relief for victims.

Although proponents of this legislation argue that settlement payments to third parties are effectively “slush funds” paid to “activist groups,”¹ there is no evidence to substantiate such concerns. For example, the Majority has for the last 18 months conducted an extensive investigation into certain settlement agreements structured by the Department of Justice. To date, however, no credible facts have been discovered evidencing that these settlements included so-called slush funds otherwise subject to appropriations, despite voluminous document production by the Justice Department and private parties. These proponents also ignore well-established law and agency practice governing the propriety of settlement payments to third parties, as recognized by the non-partisan and independent Government Accountability Office (GAO) and Congressional Research Service (CRS),² and which the Majority itself admits is lawful.³

¹Memorandum from U.S. Rep. Bob Goodlatte (R-VA) for Markup of H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” to Members of the H. Comm. on the Judiciary 9 (May 9, 2016) (on file with Democratic staff of the H. Comm. on the Judiciary); *Consumers Short Changed? Oversight of the Justice Department’s Mortgage Lending Settlements: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 8 (2015) (statement of U.S. Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary) [hereinafter “Judiciary Oversight Hearing”].

²*See, e.g.*, DAVID CARPENTER, CONG. RESEARCH SERV., LEGAL PRINCIPLES ASSOCIATED WITH MONETARY RELIEF PROVIDED AS PART OF FINANCIAL-RELATED LEGAL SETTLEMENTS & ENFORCEMENT ACTIONS 1 (2015); DAVID CARPENTER & EDWARD LIEU, CONG. RESEARCH SERV., MONETARY RELIEF TO THIRD PARTIES AS PART OF FEDERAL LEGAL SETTLEMENTS 3 (2016); U.S. GOV’T ACCOUNTABILITY OFFICE, B-210210, MATTER OF: COMMODITY FUTURES TRADING COMM’N—DONATIONS UNDER SETTLEMENT AGREEMENTS (1983) (donations must be reasonably related to prosecutorial authority under statutory goals); U.S. GOV’T ACCOUNTABILITY OFFICE, B-238419, MATTER OF: NUCLEAR REGULATORY COMMISSION’S AUTH. TO MITIGATE CIVIL PENALTIES (1990) (settlements may not impose punishments unrelated to prosecutorial objectives).

³Memorandum from U.S. Rep. Bob Goodlatte (R-VA) for Markup of H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” to Members of the H. Comm. on the Judiciary 1 (May 9, 2016) (“Since the government never receives the money the MRA is not triggered. This idea is

Continued

Not surprisingly, the Justice Department, in its strenuous opposition to H.R. 5063, states the bill would “unwisely constrain the government’s settlement authority and preclude many permissible settlements that would advance the public interest,” while interfering with the Department’s ability to address, remedy, and deter systemic harm caused by unlawful conduct.⁴ Several leading environmental and banking law experts similarly oppose the bill because it would undermine the restitution of generalized harm in various cases.⁵

For these reasons and those discussed below, we respectfully dissent and urge our colleagues to oppose this seriously flawed bill.

DESCRIPTION AND BACKGROUND

DESCRIPTION

H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” prohibits the enforcement or consummation of settlement agreements that direct payments to parties not “directly and proximately” harmed by the unlawful conduct of the settling party (“settlement donations”). A violation of this measure would constitute a violation of the Miscellaneous Receipts Act, which prohibits the augmentation of agency appropriations through enforcement policy.⁶ The intent of this legislation is to prevent the Justice Department and other civil enforcement agencies from crafting settlement agreements that direct funds to non-government organizations, which according to the Majority,⁷ circumvent Congress’ appropriations power under article I, section 9, clause 7 of the U.S. Constitution.⁸ A detailed section-by-section explanation of the bill appears at the end of these views.

BACKGROUND

I. PROSECUTION OF MISCONDUCT IN CONNECTION WITH THE GREAT RECESSION

In 2008, the economy of the United States nearly collapsed, resulting in millions of Americans losing their jobs and their homes.⁹ Unprecedented since the Great Depression, the crisis severely de-

echoed in a 2006 DOJ Office of Legal Counsel memo.”) (on file with Democratic staff of the H. Comm. on the Judiciary).

⁴Comments from the Dep’t of Justice on H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” to Members of the H. Comm. on the Judiciary 1, 3 (May 17, 2016) (on file with Democratic staff of the H. Comm. on the Judiciary).

⁵*Stop Settlement Slush Funds Act of 2016: Hearing on H.R. 5063 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 3 (2016) [hereinafter “H.R. 5063 Hearing”] (written statement of Joel Mintz, Professor, Nova Southeastern University College of Law) (on file with Democratic staff of the H. Comm. on the Judiciary); *Id.* (statement of David Uhlmann, Director, Environmental Law and Policy Program, University of Michigan School of Law, and former Chief of the Environmental Crimes Section of the Justice Department), <https://judiciary.house.gov/wp-content/uploads/2016/04/Uhlmann-Testimony.pdf>; *Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriations Powers?: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 114th Cong. (2016) [hereinafter “Financial Services Oversight Hearing”] (statement of David K. Min, Assistant Professor of Law, University of California Irvine School of Law), <http://financialservices.house.gov/uploadedfiles/hhrg-114-ba09-wstate-dmin-20160519.pdf>.

⁶31 U.S.C. § 3302 (b), (d) (2016).

⁷Memorandum from U.S. Rep. Tom Marino (R-PA) for Hearing on H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” to Members of the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary 6 (Apr. 25, 2016).

⁸U.S. CONST. art. I, § 9 (“No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law.”).

⁹Nelson D. Schwartz, *Can the Mortgage Crisis Swallow a Town?*, N.Y. TIMES, Sept. 4, 2007.

pressed the values of home prices nationwide, destabilized the home building sector and other industries, and created international economic instability.¹⁰ More than 13 million homes were lost to foreclosure between 2006 and 2014.¹¹

A significant cause of this fiscal crisis¹² was the fraudulent packaging and trading of residential mortgage-backed securities.¹³ Investments in these securities created a cycle of failure in the housing market: weaknesses in the market undermined the value of these securities, while the securities' declining value "cratered the housing market."¹⁴

In response, the Justice Department established the Residential Mortgage-Backed Securities (RMBS) Working Group "to investigate those responsible for misconduct contributing to the financial crisis through the pooling and sale of residential mortgage-backed securities."¹⁵ The broader purpose of the RMBS Working Group is to "hold accountable those who broke the law, speed assistance to homeowners, and help turn the page on an era of recklessness that hurt so many Americans."¹⁶ The broad focus of the Justice Department's investigation reflects the diffuse impact of misconduct in the mortgage-backed securities market on the "entire financial system and the American economy as a whole."¹⁷

¹⁰*Id.*; Judiciary Oversight Hearing, *supra* note 1, at 1 (statement of Geoffrey Graber, Deputy Associate Attorney General and Director of the Residential Mortgage-Backed Securities Working Group of the Financial Fraud Enforcement Task Force), <https://judiciary.house.gov/wp-content/uploads/2016/02/Graber-RMBS-Testimony-HJC-Sbcmtte-Hearing-12Feb15.pdf>.

¹¹Daniel Indiviglio, *Could Foreclosuregate Really Cost Big Banks \$17 Billion?* THE ATLANTIC (May 28, 2011), <http://www.theatlantic.com/business/archive/2011/05/could-foreclosuregate-really-cost-big-banks-17-billion/239600/#>; see REALTYTRAC, *1.1 Million U.S. Properties with Foreclosure Filings in 2014, Down 18 Percent From 2013 to Lowest Level Since 2006* (Jan. 14, 2015), <http://www.realtytrac.com/news/foreclosure-trends/1-1-million-u-s-properties-with-foreclosure-filings-in-2014-down-18-percent-from-2013-to-lowest-level-since-2006/>.

¹²*United States v. Bank of Am. Corp.*, No. 3:13-CV-00446-MOC, 2014 WL 2777397, at *8 (W.D.N.C. June 19, 2014) ("The court need not reach far outside the Complaint or be an expert in economics to take notice that it was the trading of toxic RMBS between financial institutions that nearly brought down the banking system in 2008."); Judiciary Oversight Hearing, *supra* note 1, at 2 (statement of Geoffrey Graber, Deputy Associate Attorney General and Director of the Residential Mortgage-Backed Securities Working Group of the Financial Fraud Enforcement Task Force), <https://judiciary.house.gov/wp-content/uploads/2016/02/Graber-RMBS-Testimony-HJC-Sbcmtte-Hearing-12Feb15.pdf>; *The Administration's Report to Congress: Reforming America's Housing Finance Market: Hearing Before the S. Comm. on Banking, Housing and Urban Affairs*, 112th Cong. (2011) (prepared statement of Timothy Geithner, Secretary, U.S. Treasury Dep't).

¹³A residential mortgage-backed security is comprised of a "pool of mortgage loans created by banks and other financial institutions" that derives value from the "characteristics of the borrowers and the value of the properties underlying" the security. DEPT OF JUSTICE, *Morgan Stanley Agrees to Pay \$2.6 Billion Penalty in Connection with Its Sale of Residential Mortgage Backed Securities* (Feb. 11, 2016), <https://www.justice.gov/opa/pr/morgan-stanley-agrees-pay-26-billion-penalty-connection-its-sale-residential-mortgage-backed>.

¹⁴Judiciary Oversight Hearing, *supra* note 1, at 2 (statement of Geoffrey Graber, Deputy Associate Attorney General and Director of the Residential Mortgage-Backed Securities Working Group of the Financial Fraud Enforcement Task Force), <https://judiciary.house.gov/wp-content/uploads/2016/02/Graber-RMBS-Testimony-HJC-Sbcmtte-Hearing-12Feb15.pdf>.

¹⁵DEPT OF JUSTICE, U.S. Attorney General Holder, *State and Federal Officials Announce Collaboration to Investigate Residential Mortgage-backed Securities Market* (2012), <http://www.justice.gov/opa/pr/us-attorney-general-holder-state-and-federal-officials-announce-collaboration-investigate>.

¹⁶WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, REMARKS BY THE PRESIDENT IN STATE OF THE UNION ADDRESS (Jan. 24, 2012), <https://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address> (announcing the creation of an investigatory unit to "hold accountable those who broke the law, speed assistance to homeowners, and help turn the page on an era of recklessness that hurt so many Americans."); Edward Wyatt & Shaila Dewan, *New Housing Task Force Will Zero in on Wall Street*, N.Y. TIMES (Jan. 25, 2012), <http://www.nytimes.com/2012/01/26/business/new-housing-task-force-takes-aim-at-wall-st.html>.

¹⁷Judiciary Oversight Hearing, *supra* note 1, at 1 (statement of Geoffrey Graber, Deputy Associate Attorney General and Director of the Residential Mortgage-Backed Securities Working Group of the Financial Fraud Enforcement Task Force), <https://judiciary.house.gov/wp-content/uploads/2016/02/Graber-RMBS-Testimony-HJC-Sbcmtte-Hearing-12Feb15.pdf>.

To date, the RMBS Working Group has facilitated record settlements with five financial institutions—Bank of America, Citigroup, Goldman Sachs, Morgan Stanley, and JPMorgan Chase—for alleged misconduct involving the packaging, marketing, and sale of residential mortgage-backed securities. In 2013, the Justice Department agreed to a \$13 billion settlement with JPMorgan Chase following an investigation by the RMBS Working Group of the bank’s sale, marketing, and use of residential mortgage-backed securities.¹⁸ At the time, this settlement represented the largest settlement with a single entity in American history, as well as the largest civil penalty for a claim rising under Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA).¹⁹ Thereafter, the Justice Department in 2014 agreed to a \$7 billion settlement with Citigroup stemming from its allegedly fraudulent “packaging, securitization, marketing, sale, and issuance of residential mortgage-backed securities,”²⁰ which also included a \$4 billion civil penalty under FIRREA. That same year, the Justice Department entered into a settlement agreement with the Bank of America for nearly \$17 billion to resolve claims arising from the company’s fraudulent sale, arrangement, marketing, and other uses of mortgage-backed securities and collateralized-debt obligations.²¹ Anne Tompkins, U.S. Attorney for the Western District of North Carolina, said that the settlement “attests to the fact that fraud pervaded every level of the RMBS industry, including purportedly prime securities,” and that the settlement demonstrates that even “reputable institutions like Bank of America caved to the pernicious forces of greed and cut corners, putting profits ahead of their customers.”²² In 2016, the Justice Department settled potential claims relating to Morgan Stanley’s alleged misconduct in the market pursuant to which Morgan Stanley would pay a \$2.6 billion penalty.²³ Most recently, the Justice Department announced a \$5.06 billion settlement with Goldman Sachs—including a \$2.385 billion civil penalty under FIRREA—relating to its allegedly fraudulent packaging, securitization, marketing, sale and issuance of mortgage-backed securities.²⁴

In addition to significant monetary penalties, these settlements also include statements of facts describing the significant fraud and misrepresentation relating to the settling banks’ sale and underwriting of securities, serving as “an acknowledgement by the banks

¹⁸ DEPT. OF JUSTICE, *Justice Department, Federal and State Partners Secure Record \$13 Billion Global Settlement with JPMorgan for Misleading Investors about Securities Containing Toxic Mortgages* (2013), <http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement>.

¹⁹ *Id.*; 12 U.S.C. § 1833a (2016); *United States v. Bank of New York Mellon*, No. 11 Civ. 6969 LAK 2 (S.D.N.Y. Apr. 24, 2013).

²⁰ DEPT. OF JUSTICE, *Justice Department, Federal and State Partners Secure Record \$7 Billion Global Settlement with Citigroup for Misleading Investors about Securities Containing Toxic Mortgages* (2014), <http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement>.

²¹ DEPT OF JUSTICE, BANK OF AMERICA TO PAY \$16.65 BILLION IN HISTORIC JUSTICE DEPARTMENT SETTLEMENT FOR FINANCIAL FRAUD LEADING UP TO AND DURING THE FINANCIAL CRISIS (2014), <http://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading>.

²² *Id.*

²³ DEPT OF JUSTICE, *Morgan Stanley Agrees to Pay \$2.6 Billion Penalty in Connection with Its Sale of Residential Mortgage Backed Securities* (Feb. 11, 2016), <https://www.justice.gov/opa/pr/morgan-stanley-agrees-pay-26-billion-penalty-connection-its-sale-residential-mortgage-backed>.

²⁴ DEPT OF JUSTICE, *Goldman Sachs Agrees to Pay More than \$5 Billion in Connection with Its Sale of Residential Mortgage Backed Securities* (Apr. 11, 2016), <https://www.justice.gov/opa/pr/goldman-sachs-agrees-pay-more-5-billion-connection-its-sale-residential-mortgage-backed>.

to their shareholders and the American public of the misconduct uncovered by the Department of Justice.”²⁵ For example, one of the settling banks acquired pools of mortgage-backed securities that the bank graded poorly, such as loans with high loan-to-value or debt-to-income ratios.²⁶ Notwithstanding the poor quality of these securities, the bank continued to securitize, package, and sell them to investors.²⁷ In another example, a settling bank “knowingly securitized and sold mortgage loans with significant percentages of material defects,” while making positive representation to investors about the quality of the loans it securitized.²⁸ In an internal communication, one of the bank’s traders stated that he “would not be surprised if half of these loans went down,” and that the bank should “start praying.”²⁹

Several of these settlements also include “consumer relief” provisions that require the settling banks to remediate harms resulting from the banks’ allegedly unlawful conduct.³⁰ These provisions provide the settling banks with discretion to choose various forms of consumer relief, including principal forgiveness, community reinvestment and stabilization initiatives to remediate neighborhood blight, foreclosure prevention programs, affordable housing resources, and income-based lending for “borrowers who lost homes to foreclosure.”³¹ Additionally, two of these settlements, with Citigroup³² and Bank of America,³³ require donations to third-

²⁵Judiciary Oversight Hearing, *supra* note 1, at 3 (statement of Geoffrey Graber, Deputy Associate Attorney General and Director of the Residential Mortgage-Backed Securities Working Group of the Financial Fraud Enforcement Task Force), <https://judiciary.house.gov/wp-content/uploads/2016/02/Graber-RMBS-Testimony-HJC-Sbcmtte-Hearing-12Feb15.pdf>.

²⁶DEPT OF JUSTICE, JPMORGAN STATEMENT OF FACTS 6–8 (2013), <http://www.justice.gov/iso/opa/resources/94320131119151031990622.pdf>.

²⁷*Id.*

²⁸DEPT OF JUSTICE, *Justice Department, Federal and State Partners Secure Record \$7 Billion Global Settlement with Citigroup for Misleading Investors about Securities Containing Toxic Mortgages* (July 14, 2014), <http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement>.

²⁹*Id.*

³⁰*See, e.g.*, DEPT OF JUSTICE, *Justice Department, Federal and State Partners Secure Record \$7 Billion Global Settlement with Citigroup for Misleading Investors About Securities Containing Toxic Mortgages* (July 14, 2014), <http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement>; DEPT OF JUSTICE, ANNEX 2: CITIGROUP CONSUMER RELIEF REPORT (2014), <http://www.justice.gov/iso/opa/resources/649201471413721380969.pdf> [hereinafter “Citigroup Consumer Relief Report”]; *Citi Monitorship First Report*, JENNER & BLOCK LLP at 6–7 (Jan. 2015), http://www.citigroupmonitorship.com/uploads/3/5/1/9/3519321/citi_monitorship_initial_report_2015-01-21.pdf.

³¹Financial Services Oversight Hearing, *supra* note 5, at 3 (statement of David K. Min, Assistant Professor of Law, University of California Irvine School of Law), <http://financialservices.house.gov/uploadedfiles/hhrg-114-ba09-wstate-dmin-20160519.pdf>; *see, e.g.*, Citigroup Consumer Relief Report, *supra* note 14, at 11–15; DEPT OF JUSTICE, ANNEX 2: CONSUMER RELIEF REPORT (2013), <http://www.justice.gov/iso/opa/resources/64420131119164759163425.pdf>.

³²The consumer relief portions of the Justice Department’s settlement with Citigroup include a two-to-one payment credit for donations to legal assistance groups to “help rectify the harm caused by Citi’s conduct.” These groups include: (1) community development financial institutions (CDFIs), land banks subject to state or local regulation, or community development funds administered by non-profits or local governments (at least \$25 million); (2) state-based Interest on Lawyers’ Trust Account (IOLTA) organizations that provide funds to legal aid organizations (at least \$15 million); and (3) HUD-approved housing counseling agencies (HCAs) to “provide foreclosure prevention assistance and other housing counseling activities” (at least \$10 million). Citigroup Consumer Relief Report, *supra* note 30, at 11–15.

³³The Bank of America settlement includes a two-to-one credit for donations to third-party groups, such as donations to: (1) Community Development Financial Institutions (CDFIs), land banks, or community development funds administered by non-profits or local governments; and (2) state-based Interest on Lawyers’ Trust Account (IOLTA) organizations that provide funds to legal aid organizations; and (3) HUD-approved housing counseling agencies (HCAs) to “provide foreclosure prevention assistance and other housing counseling activities.” DEPT OF JUSTICE, ANNEX 2: BANK OF AMERICA CONSUMER RELIEF REPORT 6–8 (2014), <https://www.justice.gov/iso/opa/resources/8492014829141239967961.pdf>.

party charitable organizations, including legal aid organizations, community development financial institutions, and housing counseling groups that have been certified by the U.S. Department of Housing and Urban Development (HUD). These donations account for less than 1% of the overall amount of each settlement and will “support services provided by housing counselors and other trusted intermediaries that enable consumers to access the consumer relief to which they are entitled under the settlements.”³⁴ Geoffrey Graber, who formerly served as the Director of the RMBS Working Group, testified that these settlements embody the goals of the RMBS Working Group in several ways:

First, each settlement achieved accountability by requiring a significant (and in some cases record) monetary penalty, as well as a statement of facts acknowledging the evidence underlying the government’s allegations. These penalties will hopefully serve to deter future misconduct; and the statements of facts serve as an acknowledgement by the banks to their shareholders and the American public of the misconduct uncovered by the Department of Justice.

Second, each bank committed to provide many billions of dollars of consumer relief, of a type that is designed to enable many Americans to stay in their homes, and will enable many more to secure homeownership for the first time (the particular settling banks had origination and/or servicing operations that helped facilitate this type of relief). These consumer relief provisions—in which the settling banks agreed to provide billions of dollars in relief for consumers in the housing market—provide an especially salient feature of these settlements. This type of relief likely could not have been ordered by a court, even if the government had prevailed at trial.³⁵

II. OVERSIGHT OF THE JUSTICE DEPARTMENT’S INCLUSION OF DONATIONS IN SETTLEMENT AGREEMENTS

The Majority is conducting an oversight investigation into the consumer relief provisions of the Justice Department’s settlements with Citigroup and Bank of America (“RMBS settlements”).³⁶ On November 25, 2014, House Judiciary Committee Chairman Bob Goodlatte (R-VA) and Financial Services Chairman Jeb Hensarling (R-TX) commenced a formal “pattern-or-practice investigation” into these settlements.³⁷ They issued a joint letter to the Justice Department requesting production of “all communications relating to what became the ‘Community Reinvestment and Neighborhood Sta-

³⁴ Letter from Julia Gordon, Center for American Progress (CAP), to Members of the H. Comm. on the Judiciary (Feb. 12, 2015) (on file with Democratic staff of the H. Comm. on the Judiciary).

³⁵ Judiciary Oversight Hearing, *supra* note 1, at 3 (statement of Geoffrey Graber, Deputy Associate Attorney General and Director of the Residential Mortgage-Backed Securities Working Group of the Financial Fraud Enforcement Task Force), <https://judiciary.house.gov/wp-content/uploads/2016/02/Graber-RMBS-Testimony-HJC-Sbente-Hearing-12Feb15.pdf>.

³⁶ Memorandum from U.S. Rep. Tom Marino (R-PA) for Hearing on H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” to Members of the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary 6 (Apr. 25, 2016) (on file with Democratic staff of the H. Comm. on the Judiciary).

³⁷ *Id.* at 3, 6.

bilization' provisions in the Citigroup and BoA settlements,"³⁸ explaining that the settlements "appear to serve as a vehicle for funding activist groups."³⁹ Prior to the Majority's investigatory letter, Spencer Bachus (R-AL), the former Chairman of the Regulatory Reform, Commercial and Antitrust Law (RRCAL) Subcommittee, sent a letter to the Justice Department's Civil Division expressing similar concerns and also requesting additional information on the consumer-relief portions of these settlements.⁴⁰ On February 12, 2015, the RRCAL Subcommittee held an oversight hearing entitled "Consumers Short Changed? Oversight of the Justice Department's Mortgage Lending Settlements,"⁴¹ where Chairman Goodlatte and RRCAL Subcommittee Chairman Tom Marino (R-PA) accused the Justice Department of using "its controversial settlements" to "funnel money to activist groups instead of consumers."⁴² Chairman Goodlatte and Chairman Hensarling sent another letter on May 14, 2015 asking for "all documents and communications generated or transmitted by non-profit, charitable, or similar organizations," as well as "all communications pertaining to what became Annex Three ("Tax Fund") of the Bank of America settlement."⁴³ At a subsequent oversight hearing in the RRCAL Subcommittee on March 19, 2015,⁴⁴ Chairman Goodlatte complained that the Justice Department's production of 60 pages of emails did not include internal communications.⁴⁵

The Justice Department initially complied with the Majority's request on May 29, 2015 through a production of "hundreds of pages of documents" relating to the consumer relief provisions of the RMBS settlements.⁴⁶ In a letter to Chairman Goodlatte describing the full scope of the Justice Department's efforts to accommodate the Majority's request, Assistant Attorney General Peter Kadzik explained:

The Department has provided written responses dated January 6, 2015, March 31, 2015, May 18, 2015, May 29, 2015, and November 6, 2015, which included the production of hundreds of pages of documents. The Department also testified about the RMBS settlements on February 12, 2015, and responded to written questions for the record on

³⁸ Letter from U.S. Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary, & U.S. Rep. Jeb Hensarling, Chairman, H. Comm. on Financial Services, to Eric Holder, U.S. Attorney General 3 (Nov. 25, 2014) (on file with staff of the H. Comm. on the Judiciary).

³⁹ *Id.* at 3.

⁴⁰ Letter from U.S. Rep. Spencer Bachus, Chairman, Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, to Stuart Delery, Dep't of Justice, Civil Div., Assistant Attorney Gen. (Sept. 10, 2014).

⁴¹ Judiciary Oversight Hearing, *supra* note 2.

⁴² H. COMM. ON THE JUDICIARY, *Regulatory Reform Subcommittee Holds Hearing on the Justice Department's Controversial Mortgage-Lending Settlements* (Feb. 5, 2015), <https://judiciary.house.gov/press-release/regulatory-reform-subcommittee-holds-hearing-on-the-justice-department-s-controversial-mortgage-lending-settlements/>.

⁴³ Letter from U.S. Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary, to Loretta Lynch, U.S. Attorney General (May 14, 2015) (on file with staff of the H. Comm. on the Judiciary).

⁴⁴ *Ongoing Oversight: Monitoring The Activities of the Justice Dept's Civil, Tax And Env't And Nat. Resources Divisions And The U.S. Trustee Program: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 81 (2015) (statement by Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary).

⁴⁵ *Id.* ("the Department has sent a paltry 60 pages of email between the Department of Justice and outside groups, no internal Department of Justice emails. . . . When will we get those documents?").

⁴⁶ Letter from Peter J. Kadzik, Assistant Attorney General, to U.S. Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary, et al. (May 29, 2015) (on file with staff of the H. Comm. on the Judiciary).

May 18, 2015. In addition to this testimony and our formal written responses, the Department also briefed your staff on January 15, 2015, and has spoken with your staff during numerous telephone conversations. Through these actions, the Department has sought to address all of the Committee’s stated information needs regarding the RMBS settlements. The Department’s accommodation efforts described above have been guided by discussions with your staff regarding the scope and focus of the Committee’s inquiry.⁴⁷

Following this production, the Justice Department supplemented its earlier responses through another transmission of documents on November 6, 2015.⁴⁸ This production includes approximately 300 additional pages of emails, internal Justice Department communications as well as references to communications with third parties.⁴⁹ Thereafter, the Justice Department also provided an *in camera* review of nearly 500 pages of documents, including internal work product, memoranda, and communications relating to the inclusion of the consumer relief provisions in the RMBS settlement agreements.⁵⁰

Notwithstanding the Justice Department’s substantial cooperation with the Majority’s request, proponents of H.R. 5063 now argue that the Justice Department has ignored congressional concerns with settlement agreements and “doubled down” on “mandatory donation provisions” in settlements.⁵¹ The Majority now plans to interview a representative from HUD regarding these settlements.

CONCERNS WITH H.R. 5063

I. H.R. 5063 IS A POORLY-DESIGNED SOLUTION TO AN UNDOCUMENTED PROBLEM

Proponents of H.R. 5063 argue that the Justice Department has structured settlements to direct “slush funds” to “activist groups,”⁵² even though they offer no proof in support of their contention.⁵³ Notwithstanding significant document production by the Justice Department—including an extensive *in camera* review, private briefings and telephone conversations, and internal work product and communications,⁵⁴ along with hundreds of pages of docu-

⁴⁷ *Id.*

⁴⁸ Letter from Peter J. Kadzik, Assistant Attorney General, to U.S. Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary, et al. (Nov. 6, 2015) (on file with staff of the H. Comm. on the Judiciary).

⁴⁹ *Id.*

⁵⁰ Letter from Peter J. Kadzik, Assistant Attorney General, to U.S. Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary, et al. (Feb. 29, 2016) (on file with staff of the H. Comm. on the Judiciary).

⁵¹ Memorandum from U.S. Rep. Tom Marino (R-PA) for Hearing on H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” to Members of the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary 8 (Apr. 25, 2016) (on file with Democratic staff of the H. Comm. on the Judiciary).

⁵² Memorandum from U.S. Rep. Bob Goodlatte (R-VA) for Markup of H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” to Members of the H. Comm. on the Judiciary 9 (May 9, 2016).

⁵³ H.R. 5063 Hearing, *supra* note 5, at 1, 5 (written statement of Joel Mintz, Professor, Nova Southeastern University College of Law) (on file with Democratic staff of the H. Comm. on the Judiciary).

⁵⁴ Letter from Peter J. Kadzik, Assistant Attorney General, to U.S. Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary, et al. (Feb. 29, 2016) (on file with staff of the H. Comm. on the Judiciary).

ments produced by private parties—the Majority’s investigation of the Justice Department’s settlement agreements has produced no evidence that these settlements included unlawful or politically motivated terms.⁵⁵

Although proponents of H.R. 5063 claim that the Justice Department’s RMBS settlements are unlawful,⁵⁶ the Justice Department has broad enforcement discretion when settling litigation involving the Federal Government,⁵⁷ a traditional power of the Executive Branch.⁵⁸ Under the Take Care Clause of the Constitution,⁵⁹ civil enforcement agencies have substantial flexibility in crafting settlement agreements within their statutory enforcement authority that provide remedies for the alleged misconduct of an entity.⁶⁰ Since its creation in 1789, the Justice Department has possessed plenary authority for all litigation on behalf of the Government or a Federal agency except as otherwise provided by law.⁶¹ The authority to compromise and settle litigation is inherent within this broad grant of plenary authority over government litigation,⁶² and extends beyond mere litigation strategy to include the “national policies espoused by the Executive.”⁶³ As Professor Christopher Schroeder of Duke University Law School observed in his testimony before the Committee, this discretion is one of the “unavoidable features in executing almost all laws.”⁶⁴ In its landmark decision, the Supreme Court noted in *Heckler v. Chaney* that agency enforcement decisions involve “a complicated balancing of a number of factors that are peculiarly within its expertise,” making the agency “far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.”⁶⁵ Professor Joel Mintz of Nova Southeastern University College of Law, a former chief attorney with the Environmental Protection Agency (EPA), explains that this same rationale clearly applies to settlement

⁵⁵ See H.R. 5063 Hearing, *supra* note 5, at 2 (written statement of Joel Mintz, Professor, Nova Southeastern University College of Law) (“The Random House Dictionary of the English Language defines the phrase ‘slush fund’ as ‘a sum of money used for illicit or corrupt political purposes, as for buying influence or votes, bribing public officials, or the like.’ The SEPs permitted by EPA cannot be fairly considered slush funds in any sense.”) (on file with Democratic staff of the H. Comm. on the Judiciary).

⁵⁶ See generally Memorandum from U.S. Rep. Bob Goodlatte (R-VA) for Markup of H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” to Members of the H. Comm. on the Judiciary 9 (May 9, 2016).

⁵⁷ 28 U.S.C. § 516 (2016); Letter from Peter J. Kadzik, Assistant Attorney General, to Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary, et al. (May 29, 2015) (The Justice Department has “long been authorized to manage the Federal Government’s litigation interests . . . a responsibility that includes the authority to settle or compromise cases based on such terms as the Department sees fit.”) (on file with Democratic staff of the H. Comm. on the Judiciary).

⁵⁸ Agencies also have ample discretion when making determination *not* to enforce a law in light of enforcement priorities and resources. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

⁵⁹ U.S. CONST. art. II, § 3 (the President “shall take Care that the Laws be faithfully executed.”).

⁶⁰ DAVID CARPENTER, CONG. RESEARCH SERV., LEGAL PRINCIPLES ASSOCIATED WITH MONETARY RELIEF PROVIDED AS PART OF FINANCIAL-RELATED LEGAL SETTLEMENTS & ENFORCEMENT ACTIONS 1 (2015).

⁶¹ Assistant Attorney General Theodore Olsen, Office of Legal Counsel, *The Attorney General’s Role as Chief Litigator for the United States, Memorandum Opinion for the Attorney General*, Jan. 4, 1982, at 47–48, <https://www.justice.gov/sites/default/files/olc/opinions/1982/01/31/op-olc-v006-p0047.pdf>.

⁶² *Id.* at 59.

⁶³ *Id.* at 60; *Smith v. United States*, 375 F.2d 243, 248 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967). (“The Federal Government’s decisions concerning enforcement of its criminal statutes comprise a part of its pursuit of national policy.”).

⁶⁴ *Enforcing the President’s Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 55 (2014) (statement of Christopher H. Schroeder, Charles S. Murphy Professor of Law and Professor of Public Policy Studies, Duke University), <https://www.gpo.gov/fdsys/pkg/CHRG-113hhrg86841/pdf/CHRG-113hhrg86841.pdf>.

⁶⁵ *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985).

terms, which “involve numerous complicated technical issues as well as important judgments respecting the use of limited prosecutorial resources,” and are “best left in the hands of expert agencies and prosecutors, rather than dictated by Congress or the Federal courts.”⁶⁶

Furthermore, donations under settlement agreements (“settlement donations”) are a lawful exercise of Justice Department’s enforcement discretion.⁶⁷ The Miscellaneous Receipts Act (MRA)⁶⁸ and other appropriations laws⁶⁹ establish a general prohibition against augmentation of agency appropriations through enforcement policy.⁷⁰ These laws effectuate Congress’ role in appropriating funds and ensuring that Congress retains control of the public purse.⁷¹ Importantly, however, this prohibition is clearly inapplicable to funds that are not received by the Government.⁷²

The non-partisan and independent Government Accountability Office (GAO) has issued several opinions clarifying settlement donations are not “for the Government” within the meaning of the MRA.⁷³ The GAO explains that an agency’s enforcement discretion includes the use of settlement donations as long as the remedies have a nexus to the correction of an underlying violation and the agency’s prosecutorial objectives.⁷⁴ Indeed, GAO has stated that “settlements may contain terms and undertakings that go beyond the [agency’s] remedies,”⁷⁵ and that an enforcement agency “may adjust penalties to reflect the special circumstances of the violation or concessions exacted from the violator.”⁷⁶ As Professor David Min of the University of California Irvine School of Law observes, the thrust of this policy is to allow the Federal Government to “adjust” penalties on a case-by-case basis, so long as the remedies are not

⁶⁶ See H.R. 5063 Hearing, *supra* note 5, at 3 (written statement of Joel Mintz, Professor, Nova Southeastern University College of Law) (on file with Democratic staff of the H. Comm. on the Judiciary).

⁶⁷ Financial Services Oversight Hearing, *supra* note 5, at 6 (statement of David K. Min, Assistant Professor of Law, University of California Irvine School of Law), <http://financialservices.house.gov/uploadedfiles/hhrg-114-ba09-wstate-dmin-20160519.pdf>; Comments from the Dept of Justice on H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” to Members of the H. Comm. on the Judiciary 1 (May 17, 2016) (on file with Democratic staff of the H. Comm. on the Judiciary).

⁶⁸ 31 U.S.C. § 3302(b) (2016); 19 U.S.C. § 527 (2016) (requiring deposit of customs fines, penalties, and forfeitures to the Treasury).

⁶⁹ 31 U.S.C. § 1301(a) (2016) (restricting the use of appropriated funds to their intended purposes); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2 (2004). The Antideficiency Act also prohibits Federal agencies from receiving Federal funds or volunteer services for which there was no existing appropriation. 31 U.S.C. § 1341(a) (2016).

⁷⁰ U.S. GOV’T ACCOUNTABILITY OFFICE, NUCLEAR REGULATORY COMMISSION’S AUTH. TO MITIGATE CIVIL PENALTIES 17, 19 (1990).

⁷¹ U.S. Const. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”); U.S. Const. art. I, § 8, cl. 1 (“The Congress shall have Power . . . to pay the Debts and provide for the common Defense and general Welfare of the United States.”).

⁷² 31 U.S.C. § 3302(b) (2016). Penalties for violating this statute include the possibility of removal from office and forfeiture of funds to the U.S. Treasury. 31 U.S.C. § 3302(d) (2016).

⁷³ See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, B-210210, MATTER OF: COMMODITY FUTURES TRADING COMM’N—DONATIONS UNDER SETTLEMENT AGREEMENTS (1983) (donations must be reasonably related to prosecutorial authority under statutory goals); U.S. GOV’T ACCOUNTABILITY OFFICE, B-238419, MATTER OF: NUCLEAR REGULATORY COMMISSION’S AUTH. TO MITIGATE CIVIL PENALTIES (1990) (settlements may not impose punishments unrelated to prosecutorial objectives).

⁷⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, B-210210, MATTER OF: COMMODITY FUTURES TRADING COMM’N—DONATIONS UNDER SETTLEMENT AGREEMENTS (1983).

⁷⁵ *Id.*

⁷⁶ U.S. ENVTL. PROT. AGENCY, B-247155.2, 1993 WL 798227 (Comp. Gen. Mar. 1, 1993), <http://www.gao.gov/assets/200/195921.pdf>

‘unrelated to the correction of the violation in question.’”⁷⁷ Thus, in light of GAO decisions on this matter, these settlement terms “fall within the Executive’s legitimate enforcement authority and [do] not run afoul of either Congress’s Article I power of the purse or the MRA.”⁷⁸

The non-partisan Congressional Research Service (CRS) likewise agrees that settlement donations are a lawful exercise of agency enforcement discretion.⁷⁹ Noting that enforcement agencies have “tremendous flexibility to craft the terms of legal settlements with entities for alleged misbehavior,” CRS has observed that remediation under a settlement “could take numerous legal forms, such as civil money penalties, civil forfeiture, or restitution to harmed investors, consumers, or public programs.”⁸⁰ Furthermore, private parties may lawfully distribute relief to third parties—including state or local governmental entities or private parties—under the terms of a settlement.⁸¹ These payments, CRS explains, are “not ‘for the Government’ for purposes of the miscellaneous receipts statute” and are “wholly outside ‘the statutory mosaic Congress has enacted to implement its constitutional power of the purse.’”⁸²

Courts have also broadly upheld the use of settlement donations.⁸³ The Supreme Court has long held that a settlement may impose broader relief than would be available through litigation. In 1986, the Court ruled in *Firefighters v. City of Cleveland* that settlements may include broader forms of relief than those outlined in the underlying statute, as long as these terms come within the general scope of the case, further an objective upon which the law is based, and do not violate the underlying statute.⁸⁴ Unlike civil penalties imposed by a court, which must be paid to the U.S. Treasury,⁸⁵ the Court characterized settlements as contracts because the “voluntary nature of a consent decree is its most fundamental characteristic.”⁸⁶

Lower courts have similarly held that settlement donations are in the public interest.⁸⁷ In 1990, the Ninth Circuit construed *Firefighters v. City of Cleveland* to allow lawful payments to third par-

⁷⁷ Financial Services Oversight Hearing, *supra* note 5, at 6 (statement of David K. Min, Assistant Professor of Law, University of California Irvine School of Law), <http://financialservices.house.gov/uploadedfiles/hhrg-114-ba09-wstate-dmin-20160519.pdf>.

⁷⁸ Andrew Brady Spalding, *Restorative Justice for Multinational Corporations*, 76 OHIO ST. L.J. 357, 394–95 (2015).

⁷⁹ DAVID CARPENTER & EDWARD LIEU, CONG. RESEARCH SERV., MONETARY RELIEF TO THIRD PARTIES AS PART OF FEDERAL LEGAL SETTLEMENTS 1 (2016).

⁸⁰ *Id.* at 1–2.

⁸¹ DAVID CARPENTER, CONG. RESEARCH SERV., LEGAL PRINCIPLES ASSOCIATED WITH MONETARY RELIEF PROVIDED AS PART OF FINANCIAL-RELATED LEGAL SETTLEMENTS & ENFORCEMENT ACTIONS 6 (2015).

⁸² *Id.*

⁸³ *See, e.g.*, *Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1355 n.7 (9th Cir. 1990) (“Consent decrees, such as the one at issue here, are also consistent with current practice. Courts throughout the country have entered consent judgments in civil suits requiring defendants to make payments to various environmental organizations and, in some cases, the defendants have not been required to pay penalties to the U.S. Treasury.”).

⁸⁴ *Local No. 93, Int’l Ass’n of Firefighters, AFL–CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 517–18, 525–26 (1986); *see* *Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990) (construing *Local No. 93*) (“While it is clear that a court cannot order a defendant in a citizens’ suit to make payments to an organization other than the U.S. treasury, this prohibition does not extend to a settlement agreement whereby the defendant does not admit liability and the court is not ordering non-consensual monetary relief.”).

⁸⁵ *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 53 (1987).

⁸⁶ *Id.* at 521.

⁸⁷ *See, e.g.*, *Friends of the Earth v. Eastman Kodak Co.*, 656 F. Supp. 513, 513 (W.D.N.Y.), *aff’d*, 834 F.2d 295 (2d Cir. 1987) (upholding payments to environmental organizations in a consent decree).

ties under a settlement.⁸⁸ There, the court found that these payments furthered Congress' purpose of the underlying statute and that Congress did not intend to prevent these forms of payments:

The Clean Water Act also does not render the proposed consent judgment unlawful. The provisions of the Act provide no limitation on the type of payments to which parties to citizens' suits can agree in a settlement. There is no indication that where a defendant agrees to a settlement it must also agree to pay penalties to the treasury. Likewise, the Act's legislative history reveals no Congressional intent that private parties be precluded from entering into settlements which do not require the defendant to tender civil penalties to the United States. . . . We therefore find that the proposed consent decree furthers the purpose of the statute upon which the complaint was based and does not violate its terms or policy. The payments to the environmental organizations are not in recognition of liability under the Clean Water Act and are not civil penalties. No liability was ever judicially established. The district court abused its discretion in failing to enter the proposed consent judgment.⁸⁹

In *Northwest Environmental Defense Center v. Unified Sewerage Agency*, the District Court for the District of Oregon similarly ruled that a consent decree directing funds to restore waters of the Tualatin River, which included funding for staff positions to ensure compliance with the agreement, was lawful under the Clean Water Act.⁹⁰ The district court explained:

What better use of the penalty type payments in an action like this than to facilitate water quality improvements to the affected watershed in ways which could not be required under law. These additional enhancements to water quality, the payment for which also serves as a hefty sanction to defendant, fully meet congressional intent that there be penalty aspects of Clean Water Act consent decrees to discourage other polluters. The proposed consent decree here accomplishes other important and worthwhile purposes. It allows rehabilitation of the resource to begin immediately, rather than suffer possible future pollutant insult and/or exacerbation during months or years more of litigation. This is one of the important reasons that courts should encourage settlement of these actions. Settlements, like that proposed here, fully meet the intent of Congress in providing the Clean Water Act as a friend and protector of our precious natural water resources. The litigants will now become cooperative partners in protecting water quality rather than merely remaining opposing litigants in a court battle, which, without more, offers little utility.⁹¹

⁸⁸ *Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1356 (9th Cir. 1990).

⁸⁹ *Id.*

⁹⁰ *Nw. Env'tl. Def. Ctr. v. Unified Sewerage Agency of Washington Cty.*, No. CIV. 88-1128-HO, 1990 WL 191827, at *1-2 (D. Or. July 27, 1990).

⁹¹ *Id.*

Settlement donations are also valid under longstanding Justice Department policy so long as the agency does not actually or constructively receive funds through a settlement.⁹² In 1980, the Justice Department Office of Legal Counsel (OLC) advised that the Government may constructively receive a third part payment under a settlement in cases where an “agency *could* have accepted possession and retains discretion to direct the use of the money.”⁹³ In 2006, OLC stated in another opinion that there are two criteria to avoid constructively receiving funds through a settlement agreement:

- (1) the settlement be executed before an admission or finding of liability in favor of the United States; and (2) the United States not retain post-settlement control over the disposition or management of funds or any projects carried out under the settlement, except for ensuring that the parties comply with the settlement.⁹⁴

Settlements meeting these conditions do not violate the Miscellaneous Receipts Act because the government does not actually or constructively “receive money for the Government.”⁹⁵

In the context of the RMBS settlements, the Justice Department resolved the potential civil liability of these banks by requiring a donation of less than 1% of the overall settlement agreement amounts to provide affected consumers with legal assistance funds to access the relief they were entitled to under the settlements.⁹⁶ The terms of these agreements arise from the Justice Department’s statutory enforcement authority under FIRREA⁹⁷ and have a substantial prosecutorial nexus to the underlying conduct giving rise to the claim (i.e., foreclosure prevention). The RMBS settlements also satisfy the Justice Department’s own longstanding guidelines. As Professor David Min of the University of California Irvine School of Law explains:

They do not include a finding of liability on the part of the banks, and the Federal Government does not maintain post-settlement control over the disposition or management of the funds. Indeed, the banks themselves maintain full control over how they can disburse the funds under the consumer relief provisions, and there is no requirement that they donate any funds to third parties under the

⁹² Financial Services Oversight Hearing, *supra* note 5, at 6 (statement of David K. Min, Assistant Professor of Law, University of California Irvine School of Law), <http://financialservices.house.gov/uploadedfiles/hhrg-114-ba09-wstate-dmin-20160519.pdf>.

⁹³ *Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General*, 4B Op. O.L.C. 684, 688 (1980).

⁹⁴ *Application of the Government Corporation Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Settlement Agreement*, 30 Op. O.L.C. 111, 119 (2006).

⁹⁵ 31 U.S.C. § 3302(b) (2016); see *Sierra Club v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1355 (1990) (upholding a consent decree directing funds to third-party charitable organizations).

⁹⁶ Letter from Julia Gordon, Center for American Progress (CAP), to Members of the H. Comm. on the Judiciary (Feb. 12, 2015) (on file with Democratic staff of the H. Comm. on the Judiciary).

⁹⁷ FIRREA authorizes the Department of Justice to file a complaint against any persons who commits a predicate offense under FIRREA that involves or affects financial institutions and government agencies. FIRREA also authorizes the Department of Justice (DOJ) to issue administrative subpoenas to witnesses requiring production of relevant records. 12 U.S.C. § 1833a (2016); *United States v. Bank of New York Mellon*, No. 11 Civ. 6969 LAK 2 (S.D.N.Y. Apr. 24, 2013).

terms of these agreements. They appear to be clearly permissible under current law.⁹⁸

In sum, funds paid under the RMBS settlements are not “drawn from the Treasury,” nor are they actually or constructively received “for the Government.”⁹⁹ These settlements plainly fall within the Justice Department’s lawful enforcement authority and outside the “the statutory mosaic Congress has enacted to implement its constitutional power of the purse.”¹⁰⁰ Indeed, by the Majority’s own admission, settlements donations that the government never receives do not trigger the MRA.¹⁰¹ Further, the Majority “has implicitly acknowledged the legality of charitable payment terms by passing H.R. 5063 out of Committee,” as Professor Min notes.¹⁰²

In addition to clearly satisfying the existing legal framework for settlement donations, the RMBS settlements are also well-designed as a matter of policy, obviating the need for a legislative fix. Under the consumer-relief terms of the Citigroup and Bank of America settlements, for example, each bank has committed to providing funds to prevent foreclosure and enable first-time homeownership.¹⁰³ Housing-counseling agencies, as well as other forms of legal assistance contemplated by consumer-relief provisions of the RMBS settlements, are empirically very effective at foreclosure prevention.¹⁰⁴ Julia Gordon, the former Senior Director of Housing and Consumer Finance at the Center for American Progress (CAP), notes that homeowners that receive assistance from HUD-certified housing counselors are three times more likely to avoid foreclosure than homeowners that do not receive assistance.¹⁰⁵ Housing intermediaries also ensure that banks comply with the terms of settlements, which Ms. Gordon adds, “is not always a given.”¹⁰⁶

While H.R. 5063’s proponents have claimed, without evidence, that the recipients of RMBS settlement donations are “activist groups,” the Majority has overlooked the fact that conservative

⁹⁸ Financial Services Oversight Hearing, *supra* note 5, at 6 (statement of David K. Min, Assistant Professor of Law, University of California Irvine School of Law), <http://financialservices.house.gov/uploadedfiles/hhrg-114-ba09-wstate-dmin-20160519.pdf>.

⁹⁹ Comments from the Dep’t of Justice on H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” to Members of the H. Comm. on the Judiciary 1, 3 (May 17, 2016) (on file with Democratic staff of the H. Comm. on the Judiciary).

¹⁰⁰ *See, e.g.*, U.S. Const. art. I, §9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”); U.S. Const. art. I, §8, cl. 1 (“The Congress shall have Power . . . to pay the Debts and provide for the common Defense and general Welfare of the United States.”); 31 U.S.C. §3302(b) (2016); DAVID CARPENTER & EDWARD LIEU, CONG. RESEARCH SERV., MONETARY RELIEF TO THIRD PARTIES AS PART OF FEDERAL LEGAL SETTLEMENTS 3 (2016).

¹⁰¹ Memorandum from U.S. Rep. Bob Goodlatte (R-VA) for Markup of H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” to Members of the H. Comm. on the Judiciary 1 (May 9, 2016) (“Since the government never receives the money the MRA is not triggered. This idea is echoed in a 2006 DOJ Office of Legal Counsel memo.”).

¹⁰² Financial Services Oversight Hearing, *supra* note 5, at 6 (statement of David K. Min, Assistant Professor of Law, University of California Irvine School of Law), <http://financialservices.house.gov/uploadedfiles/hhrg-114-ba09-wstate-dmin-20160519.pdf>.

¹⁰³ Judiciary Oversight Hearing, *supra* note 1, at 2 (statement of Geoffrey Graber, Deputy Associate Attorney General and Director of the Residential Mortgage-Backed Securities Working Group of the Financial Fraud Enforcement Task Force), <https://judiciary.house.gov/wp-content/uploads/2016/02/Graber-RMBS-Testimony-HJC-Sbcmt-Hearing-12Feb15.pdf>.

¹⁰⁴ *See* Judiciary Oversight Hearing, *supra* note 1, at 2 (statement of Alan White, Professor, CUNY School of Law), <https://judiciary.house.gov/wp-content/uploads/2016/02/AW-testimony-Judiciary-Feb-12-2015.pdf>.

¹⁰⁵ Letter from Julia Gordon, Center for American Progress (CAP), to Members of the H. Comm. on the Judiciary 2 (Feb. 12, 2015) (on file with Democratic staff of the H. Comm. on the Judiciary).

¹⁰⁶ *Id.*

groups may also receive funds through the RMBS settlements.¹⁰⁷ Furthermore, numerous mechanisms within the settlement terms prevent the misuse of settlement funds.¹⁰⁸ At a hearing on the RMBS settlements, Professor Alan White of CUNY School of Law addressed the Majority's concerns directly:

First, it is entirely up to the banks which legal aid agencies and housing counselors to fund. The banks may choose from hundreds of housing counselors and legal aid agencies, including many faith-based organizations and non-partisan community development groups whose political orientations range from left to centrist to nonpartisan to right. If a bank sees a particular nonprofit agency as too controversial, because of the work that agency does with its other funding, the bank can simply leave the group off of its donation list. Second, less than one percent of the consumer relief dollars in these settlements is earmarked for housing counselors and legal aid. There is simply no significant diversion of money from the billions in required consumer relief. Third . . . the nonprofit legal aid and housing counseling agencies are all subject to auditing and oversight that prevents misuse of public and private funds for political activity of any kind.¹⁰⁹

Lastly, even if it were desirable to change existing law in response to the RMBS settlements, H.R. 5063 does not achieve this goal. The consumer relief provisions of the RMBS settlement agreements were tailored to provide relief to third parties directly affected by the misconduct of the settling banks. These parties are likely entitled to direct relief through third-party payments under section 2(a) of H.R. 5063 as these provide restitution for actual harm (i.e., home foreclosures) caused by the settling banks' allegedly unlawful conduct.

In the absence of any credible evidence that the Justice Department or other Federal agencies have circumvented Congress' spending power or directed money to favored groups, H.R. 5063 simply addresses a non-existent problem.

II. H.R. 5063 WOULD UNDERMINE PUBLIC HEALTH AND SAFETY BY ELIMINATING THE GENERAL ENFORCEMENT AND REMEDIATION OF UNLAWFUL CONDUCT IN ALL CIVIL ENFORCEMENT CASES

A. *Settlement Donations Serve the Twin Enforcement Goals of General Deterrence and Compensation*

Unlike injuries in the context of tort or contract liability, penalties sought in the public enforcement of Federal statutes are based on theories of deterrence and general compensation to soci-

¹⁰⁷ Financial Services Oversight Hearing, *supra* note 5, at 10 (statement of David K. Min, Assistant Professor of Law, University of California Irvine School of Law), <http://financialservices.house.gov/uploadedfiles/hrg-114-ba09-wstate-dmin-20160519.pdf>.

¹⁰⁸ Judiciary Oversight Hearing, *supra* note 1, at 1 (statement of Alan White, Professor, CUNY School of Law), <https://judiciary.house.gov/wp-content/uploads/2016/02/AW-testimony-Judiciary-Feb-12-2015.pdf>.

¹⁰⁹ *Id.*

ety.¹¹⁰ Administrative law expert Colin S. Diver explains that while the primary function of civil enforcement is to “motivate future behavior,” an important secondary function is to provide general compensation to society:

By definition, a civil money penalty does not serve a “specific” compensatory function of making whole an identifiable individual specifically injured by the offending conduct. Money penalties can, however, be used to serve a “general” compensatory function—that is, to compensate “society” at large for harm that it has suffered at the hands of a violator. Alternatively, one might view the payment as compensation to the government for the costs incurred by it in enforcing the substantive standard.¹¹¹

This form of “general compensation” is particularly appropriate in cases where a party’s unlawful conduct involves diffuse or systemic harms, or injures an unidentifiable victim, the public health, or the environment. Charlie Garlow, a former senior EPA attorney, explains that environmental injuries cannot be remedied solely through funds directed to the Treasury:

For violations of environmental statutes, restitution is indeed the correct penalty to be imposed if the goals of rehabilitation, deterrence and retribution are to be served. However, to be effective, the doctrine of restitution in environmental law must be defined in terms of restoration and recompense, rather than monetary or prison sentencing alone.¹¹²

To provide for complete restitution to generalized harms, environmental settlements sometimes include “offset projects.” For example, the EPA may include Supplemental Environmental Projects (SEPs) in settlement terms to offset the harms of unlawful conduct by requiring parties to undertake an environmentally beneficial project or activity that “is not required by law, but that a defendant agrees to undertake as part of the settlement of an enforcement action.”¹¹³ As with other settlement donations, these projects must have a sufficient nexus to the underlying conduct of the defendant.¹¹⁴ In practice, this requirement entails that these projects “are generally carried out at the site where the violation occurred, at a different site within the same ecosystem, or within the same immediate geographic area.”¹¹⁵ The EPA has also clarified that they cannot include cash donations to community groups, environmental organizations, or other third parties.¹¹⁶ As courts have ob-

¹¹⁰ Financial Services Oversight Hearing, *supra* note 5, at 8 (statement of David K. Min, Assistant Professor of Law, University of California Irvine School of Law), <http://financialservices.house.gov/uploadedfiles/hrg-114-ba09-wstate-dmin-20160519.pdf>.

¹¹¹ Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1456 (1979).

¹¹² Charlie Garlow, *Environmental Recompense*, 1 APPALACHIAN J.L. 1, 5–6 (2002).

¹¹³ See, e.g., ENVTL. PROTECTION AGENCY, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, ISSUANCE OF THE 2015 UPDATE TO THE 1998 U.S. ENVIRONMENTAL PROTECTION AGENCY SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY (2015), <https://www.epa.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf>.

¹¹⁴ *Id.* at 7.

¹¹⁵ See H.R. 5063 Hearing, *supra* note 5, at 3 (written statement of Joel Mintz, Professor, Nova Southeastern University College of Law) (on file with Democratic staff of the H. Comm. on the Judiciary).

¹¹⁶ ENVTL. PROTECTION AGENCY, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, ISSUANCE OF THE 2015 UPDATE TO THE 1998 U.S. ENVIRONMENTAL PROTECTION AGENCY SUPPLE-

served, these forms of settlement donations better serve the purposes of the underlying statute than merely directing funds to the Treasury.¹¹⁷

In addition to serving the public interest, settlement donations may also be in the interest of private parties. Professor Joel Mintz of Nova Southeastern University College of Law, a former chief attorney with the EPA, notes in his written statement on H.R. 5063 that these types of donations create “win-win” for all parties in civil enforcement cases:

SEPs demonstrate EPA’s willingness to cooperate with the regulated community, and they create a more flexible regulatory climate. SEPs also benefit environmental violators by reducing some of the civil penalties those parties would otherwise have to pay. They help repair corporate public images that would otherwise be further harmed by negative environmental publicity; and they promote settlements, allowing businesses to avoid the costs and risks of litigation. Finally, SEPs increase the likelihood that communities forced to bear the burden of environmental degradation will benefit directly from enforcement actions against violators.¹¹⁸

B. H.R. 5063 Would Prohibit Civil Enforcement Agencies from Fully Protecting the Public Interest

H.R. 5063 applies far beyond the Justice Department’s settlement authority to all civil enforcement agencies. Section 2(a) of the bill prohibits *any* officer or agent of the Government from resolving the civil liability of a party through a settlement agreement that directs or provides payments for a payment to any person or entity other than the Government, subject to minor exceptions. This represents a sweeping change in the enforcement of current law, which authorizes civil enforcement agencies to resolve a party’s civil liability through a settlement that provides both direct and indirect forms of restitution for injuries caused by unlawful conduct.¹¹⁹ It is therefore unsurprising that the Justice Department, which has plenary authority to enforce the law and defend the interests of the United States,¹²⁰ strongly opposes the bill.¹²¹ In comments on H.R. 5063, the Justice Department has expressed concerns that “this bill would unwisely constrain the government’s set-

MENTAL ENVIRONMENTAL PROJECTS POLICY 17 (2015), <https://www.epa.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf>.

¹¹⁷Nw. Envtl. Def. Ctr. v. Unified Sewerage Agency of Washington Cty., No. CIV. 88–1128–HO, 1990 WL 191827, at *1 (D. Or. July 27, 1990).

¹¹⁸H.R. 5063 Hearing, *supra* note 5, at 3 (written statement of Joel Mintz, Professor, Nova Southeastern University College of Law) (on file with Democratic staff of the H. Comm. on the Judiciary).

¹¹⁹*See, e.g., id.* (written statement of David Uhlmann, Professor, University of Michigan Law School).

¹²⁰Assistant Attorney General Theodore Olsen, Office of Legal Counsel, *The Attorney General’s Role as Chief Litigator for the United States, Memorandum Opinion for the Attorney General*, Jan. 4, 1982, at 47–48, <https://www.justice.gov/sites/default/files/olc/opinions/1982/01/31/op-olc-v006-p0047.pdf>.

¹²¹Comments from the Dep’t of Justice on H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” to Members of the H. Comm. on the Judiciary 1 (May 17, 2016) (on file with Democratic staff of the H. Comm. on the Judiciary).

tlement authority and preclude many permissible settlements that would advance the public interest.”¹²² The Department explains:

The bill prohibits payments by a party other than those made to directly remedy “actual harm” that the party directly and proximately caused or for services rendered in connection with the case . . . this language 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. The language would further impede the government’s ability to address the root causes of violations and establish effective remedies that are effective retrospectively (correcting noncompliance) and prospectively (addressing root causes of noncompliance to prevent recidivism). . . . In certain cases, as part of negotiated settlement terms, a defendant or potential 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.¹²³

To illustrate this concern, Representative David Cicilline (D-RI) offered an amendment to exempt from the bill any settlement agreement concerning privacy protections. He explained that his amendment would preserve “the ability of civil enforcement agencies to compel large corporations to adopt programs to protect consumer data,” which would be undermined by H.R. 5063’s prohibition of settlement donations.¹²⁴ He also noted that in cases of diffuse or systemic privacy violations, “the most appropriate remedy may involve prescribing steps that effectively prevent future misconduct.”¹²⁵ H.R. 5063 would expressly prohibit the inclusion of these types of projects in settlements by making unlawful payments that do not remedy a harm directly caused by the alleged conduct of a settling party.¹²⁶

Speaking in opposition to this amendment, Chairman Bob Goodlatte (R-VA) argued that the bill’s exception for “services rendered in connection with the case” would apply to the settlement donations contemplated by the amendment.¹²⁷ In response, Representative Cicilline observed that the bill’s language is specific to “costs associated with the litigation, not the settlement.”¹²⁸ Indeed, while numerous statutes authorize attorney’s fees and other forms of pay-

¹²² *Id.* at 2.

¹²³ *Id.*

¹²⁴ Tr. of Markup of H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” by the H. Comm. on the Judiciary, 114th Cong. 58 (May 11, 2016).

¹²⁵ *Id.* at 59.

¹²⁶ See H.R. 5063 Hearing, *supra* note 5, at 3 (written statement of Joel Mintz, Professor, Nova Southeastern University College of Law) (“[T]he proposed Stop Settlement Sludge Funds Act appears likely to prohibit many of the important benefits now provided by EPA’s SEPs program.”) (on file with Democratic staff of the H. Comm. on the Judiciary).

¹²⁷ Tr. of Markup of H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” by the H. Comm. on the Judiciary, 114th Cong. 64 (May 11, 2016).

¹²⁸ *Id.* at 65.

ment in connection with litigation,¹²⁹ these statutes commonly specify the appropriate recipient of funds and the intended scope of services to be covered by the statute.¹³⁰ Moreover, we are unaware of any statute containing the bill’s exact language. Furthermore, cases construing similar language contemplate attorney’s fees or other litigation expenses,¹³¹ but not payments for monitoring, compliance programs, workplace training, or other forms of relief currently available under settlements. It is therefore unclear whether courts would broadly construe this exception to include settlement donations designed to prevent future misconduct. Notwithstanding ample bipartisan support for protecting Americans’ privacy rights, however, the amendment was defeated by a vote of 6 to 15.¹³²

C. H.R. 5063 Would Undermine the Enforcement of Civil Rights Laws

Civil rights laws embody core values of equality of opportunity and freedom from discrimination. Congress passed the Civil Rights Act of 1964¹³³ to remove discriminatory barriers and to promote equality of employment opportunities.¹³⁴ As the Supreme Court recently noted, however, “[m]uch progress remains to be made in our Nation’s continuing struggle against racial isolation” and toward “our historic commitment to creating an integrated society.”¹³⁵

Cases involving discrimination claims often occur without identifiable victims and tend to affect the interests of persons who are not likely to receive compensation for unlawful conduct (e.g., unidentifiable victims such as former and future employees).¹³⁶ In these cases, a settling party that violated antidiscrimination laws may seek to resolve its civil liability through workplace monitoring or training programs that seek to remedy systemic unlawful conduct. As the Justice Department has observed, remedies can correct both noncompliance and recidivism through settlement terms that require a party to undertake activity to prevent future misconduct.¹³⁷ Without the ability to include these forms of relief in settlements, H.R. 5063, the Department argues, would hamper the enforcement of myriad civil rights laws:

In settling such cases that the Department has brought to redress a pattern or practice of systemic discrimination, the Department seeks both compensation for individual victims harmed by the unlawful practices, and injunctive relief to correct or prevent discrimination. Unfortunately, it is often extraordinarily difficult to prospectively identify

¹²⁹The Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (2016).

¹³⁰*See id.* at (d)(2) (defining “fees and other expenses”); *see, e.g.*, *Conrad, Rubin & Lesser v. Pender*, 289 U.S. 472, 475–76 (1933) (attorney’s fees in bankruptcy proceedings).

¹³¹*See, e.g.*, *Dell v. Bowen*, No. CIV–83–480E, 1986 WL 12482, at *1 (W.D.N.Y. Nov. 5, 1986) (attorney’s fees under the Equal Access to Justice Act (28 U.S.C. § 2412(d)(1)(A)).

¹³²Tr. of Markup of H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” by the H. Comm. on the Judiciary, 114th Cong. 70 (May 11, 2016).

¹³³42 U.S.C. §§ 2000e et seq. (2016).

¹³⁴*Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971).

¹³⁵*Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).

¹³⁶Mark E. Recktenwald, *Collateral Attacks on Employment Discrimination Consent Decrees*, 53 U. Chi. L. Rev. 147 (1986).

¹³⁷Comments from the Dep’t of Justice on H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” to Members of the H. Comm. on the Judiciary 4 (May 17, 2016) (on file with Democratic staff of the H. Comm. on the Judiciary).

all of the possible victims in certain cases, due to the nature of the discriminatory practices, the mobility of the possible victims, or both. Accordingly, the Department enters into consent orders requiring defendants to establish a settlement fund to compensate victims who will be identified post-settlement. In such cases, the defendants deposit a negotiated amount into an interest-bearing escrow account and provide notice targeted to reach possible victims. After the notice period ends, and victims have been identified, the United States submits the proposed disbursements to the Court for approval. If unclaimed monies remain in the settlement fund after all identified victims have been paid, the decrees provide that the court may order that unclaimed funds be paid to a non-profit organization that is dedicated to addressing and preventing the kind of discriminatory practices that gave rise to the lawsuit. These organizations must have the requisite qualifications and expertise in the areas specified in the consent order.¹³⁸

To highlight this concern, Ranking Member John Conyers, Jr. (D-MI) offered an amendment that would have exempted from the bill any settlement agreement that pertains to the enforcement of civil rights laws. He explained that his amendment was necessary because “the bill’s broad and ill-defined prohibition would effectively deter civil enforcement agencies from providing general relief in discrimination cases, discourage courts from enforcing these settlements, and invite costly and needless litigation concerning these provisions.”¹³⁹ Unfortunately, this amendment failed by a vote of 9 to 15.¹⁴⁰

To further underscore these concerns, Representative Sheila Jackson Lee (D-TX) offered an amendment that would have exempted from H.R. 5063 settlement agreements that pertain to payments to indirectly remediate and prevent sexual harassment, violence, or discrimination in the workplace. She explained H.R. 5063 would prevent settlement donations for workplace monitoring and other payments to remedy generalized harm, including remedies designed to prevent the recurrence of sexual violence or discrimination.¹⁴¹ This amendment also failed by a vote of 7 to 16.¹⁴²

D. H.R. 5063 Would Prevent the General Remediation of Environmental Injuries and Compensation to States and Local Communities

Environmental laws, such as the Clean Air Act and Clean Water Act, expressly authorize restitution for generalized harm. The Clean Air Act, for example, grants authority in environmental enforcement cases for “beneficial mitigation projects” to “enhance the public health or the environment,”¹⁴³ which require that a settling party remedies, reduces, or offsets the harm caused by its alleged

¹³⁸ *Id.*

¹³⁹ Tr. of Markup of H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” by the H. Comm. on the Judiciary, 114th Cong. 19 (May 11, 2016).

¹⁴⁰ *Id.* at 26.

¹⁴¹ *Id.* at 31.

¹⁴² *Id.* at 44.

¹⁴³ 42 U.S.C. § 7604 (2016).

violations. These terms are typically included in settlements where a party's unlawful emissions or discharges cause general harm to the public, wildlife, or the environment.¹⁴⁴ Since the enactment of the Clean Air Act, Congress has additionally authorized courts to direct funds to beneficial mitigation projects in the final judgment of a citizen suit,¹⁴⁵ and likewise refrained from enacting guidelines for the inclusion of these agreements in civil penalties or settlement agreements, generally deferring to the courts and agencies.¹⁴⁶

H.R. 5063, however, would effectively circumvent these statutes to prevent the general remediation of environmental injuries. Professor David Uhlmann of the Michigan Law School, who formerly served as Chief of the Environmental Crimes Section of the Justice Department, explained in his testimony at the hearing on the bill that corporate defendants in large, catastrophic pollution cases are typically required to direct funds to congressionally-chartered foundations for the purpose of addressing the general harms caused by vessel pollution.¹⁴⁷ To resolve its liability for one uniquely catastrophic spill, British Petroleum (BP) agreed to direct funds for environmental projects “to address the catastrophic harm to the Gulf of Mexico ecosystem that occurred because of BP’s misconduct,” in addition to the largest penalties for an environmental crime in history.¹⁴⁸ H.R. 5063 would eliminate these forms of remedies to major environmental misconduct.

Proponents of the bill argue that H.R. 5063 allows agencies to redress direct environmental injuries, and where direct remediation is impractical, “the violator is not let off the hook” because funds are paid to the Treasury, leaving Congress to decide how best to remediate environmental damage.¹⁴⁹ This argument, however, is wrong for several reasons.

First, H.R. 5063’s exception for environmental remediation is drafted too narrowly to allow for environmental projects.¹⁵⁰ As Professor Mintz observes, the bill would prohibit the following “entirely legitimate, appropriate” use of settlement funds permitted under current law:

- 1) Pollution prevention projects that improve plant procedures and technologies, and/or operation and maintenance practices, that will prevent additional pollution at its source;
- 2) Environmental restoration projects including activities that protect local ecosystems from actual or potential harm resulting from the violation;

¹⁴⁴ ENVTL. PROTECTION AGENCY, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, SECURING MITIGATION AS INJUNCTIVE RELIEF IN CERTAIN CIVIL ENFORCEMENT SUITS 2 (2012).

¹⁴⁵ 42 U.S.C. § 7604 (g)(2) (2016).

¹⁴⁶ See Edward Lloyd, *Supplemental Environmental Projects Have Been Effectively Used in Citizen Suits to Deter Future Violations As Well As to Achieve Significant Additional Environmental Benefits*, 10 WIDENER L. REV. 413, 425 (2004).

¹⁴⁷ H.R. 5063 Hearing, *supra* note 5, at 4 (statement of David Uhlmann, Professor, University of Michigan Law School), <https://judiciary.house.gov/wp-content/uploads/2016/04/Uhlmann-Testimony.pdf>.

¹⁴⁸ *Id.*

¹⁴⁹ Memorandum from U.S. Rep. Bob Goodlatte (R-VA) for Markup of H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” to Members of the H. Comm. on the Judiciary 12 (May 9, 2016) (on file with Democratic staff of the H. Comm. on the Judiciary).

¹⁵⁰ H.R. 5063 Hearing, *supra* note 5, at 5 (written statement of Joel Mintz, Professor, Nova Southeastern University College of Law) (on file with Democratic staff of the H. Comm. on the Judiciary).

- 3) Facility assessments and audits, including investigations of local environmental quality, environmental compliance audits, and investigations into opportunities to reduce the use, production and generation of toxic materials;
- 4) Programs that promote environmental compliance by promoting training or technical support to other members of the regulated community; and
- 5) Projects that provide technical assistance or equipment to a responsible state or local emergency response entity for purposes of emergency planning or preparedness.¹⁵¹

These projects are unlikely to be construed as redressing the “actual (environmental) harm, directly and proximately caused” by unlawful conduct and, accordingly would be unlawful under H.R. 5063, notwithstanding the beneficial nature of such settlement donations.¹⁵²

Secondly, H.R. 5063 would foreclose settlement donations to local communities and states harmed by violations of the law. In 2012, for example, the EPA and Justice Department resolved the civil liability of several corporations in connection with the Deepwater Horizon oil spill through a settlement that directed funds to several Gulf states, including Texas, which was not a party to the complaint, but received \$3.25 million for Supplemental Environmental Projects (SEPs) and other responsive actions to remediate the generalized harm of the oil spill.¹⁵³ As the Justice Department notes, this common feature of settlements in environmental enforcement actions would likely be barred by H.R. 5063:

The United States frequently enters into joint settlement of environmental cases with States; those cases nearly always provide for payment of civil penalties to the participating State. Such civil penalties appear to be payments prohibited under the bill. Similarly, the United States may settle litigation brought by third parties against Federal agencies under various environmental, natural resources, and other statutes for the payment of specified monies. Such payments are arguably barred by the bill. If the term “payment” is interpreted to have a meaning broader than monetary payments, or to include payments made to third parties who implement terms of a settlement, there could be additional consequences for environmental settlements.¹⁵⁴

Third, in response to the Majority’s argument that Congress should decide how best to allocate compensatory funds, not agencies, Congress has *already* made this decision through the passage of environmental laws that specifically contemplate settlement do-

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ ENVTL. PROTECTION AGENCY, *MOEX Offshore 2007 LLC Settlement* (Feb. 17, 2012), <https://www.epa.gov/enforcement/moex-offshore-2007-llc-settlement#sep>.

¹⁵⁴ Comments from the Dep’t of Justice on H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” to Members of the H. Comm. on the Judiciary 3 (May 17, 2016) (on file with Democratic staff of the H. Comm. on the Judiciary).

nations.¹⁵⁵ As courts have noted, the purposes of these laws are “to improve water quality, not endow the Treasury.”¹⁵⁶ Furthermore, as Charlie Garlow, a former senior EPA attorney, notes, funds directed to the Treasury seldom fully remedy environmental injuries:

Money served to the Treasury does little to “make the environment whole again.” It is making the environment whole that is the ultimate goal of environmental restitution. The environment, for the purposes of this criminal law analogy, is “the victim,” against which the offender commits a crime. Once a defendant’s egregious acts are proven and he is convicted of the environmental crime, restoration and recompense provide the doctrinal mechanism through which rehabilitation of the offender can occur. Just as in the criminal context, the offender is forced to face the responsibility he owes to society as a whole to preserve the environment. Instead of merely paying a fine to a general governmental unit and continuing his business as usual, the defendant must confront and address the damage he has directly caused.¹⁵⁷

Lastly, Congress lacks the time, expertise, and resources to properly review and make these enforcement decisions on behalf of Federal agencies.¹⁵⁸ Requiring a congressional appropriation for each environmental project would greatly strain Congress’ already limited legislative resources and scarce time, while opening the doors to industry influence and obstruction in routine enforcement matters.¹⁵⁹ The cost of delays associated with this scheme would have devastating consequences for the public health, environment, and local communities.

In response to these concerns, Representative Sheila Jackson Lee (D-TX) offered an amendment that would have exempted from H.R. 5063 settlement agreements that provide restitution to states that are not parties to litigation.¹⁶⁰ This amendment failed by a vote of 7 to 16.¹⁶¹

III. H.R. 5063’S VAGUE PROVISIONS WILL RESULT IN NEEDLESS LITIGATION AND DELAY

As drafted, H.R. 5063 is inherently vague. The bill, for instance, fails to define key terms, which will undoubtedly engender legal challenges to proposed settlements, deter agencies from pursuing settlements, and ultimately force courts to interpret them.

For example, the bill does not define what constitutes a “payment.” Professor David Uhlmann of the University of Michigan Law School explains that “courts interpreting the legislation could conclude that it precludes third-party payments as part of civil set-

¹⁵⁵ 42 U.S.C. § 7604 (2016).

¹⁵⁶ *Nw. Env’tl. Def. Ctr. v. Unified Sewerage Agency of Washington Cty.*, No. CIV. 88–1128–HO, 1990 WL 191827, at *1 (D. Or. July 27, 1990).

¹⁵⁷ Charlie Garlow, *Environmental Recompense*, 1 APPALACHIAN J.L. 1, 5–6 (2002).

¹⁵⁸ See *The REINS Act of 2013: Promoting Jobs, Growth, and American Competitiveness: Hearing on H.R. 367 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust L. of the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Ronald M. Levin, William R. Orthwein Distinguished Professor of Law, Washington University in St. Louis).

¹⁵⁹ *Id.*

¹⁶⁰ Tr. of Markup of H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” by the H. Comm. on the Judiciary, 114th Cong. 31 (May 11, 2016).

¹⁶¹ *Id.* at 44.

tlement agreements, other than restitution, even in cases of generalized harm to the environment or consumers.”¹⁶² He is concerned that, even as ordered reported by the Committee in its amended form, H.R. 5063 continues to raise a “host of questions about what payments are covered,” while failing to meaningfully define terms or address the bill’s underlying problems.¹⁶³

H.R. 5063 also fails to define “official or agent of the Government.” This term could be construed to apply to any state actor, including a Federal judge or local official. Thus, a Federal judge could hesitate to enforce even clearly valid settlements in actions involving the Government to avoid violating the bill’s prohibition. This may also be true for purely private actions, as it could be argued that a Federal judge enforces these settlements as an “official or agent of the Government . . . on behalf of the United States.” This provision may also prevent the payment of funds to private parties through a settlement where the Government is a defendant in a civil action, such as class action litigation directing undistributed funds to charitable organizations.

Combined with these unclear provisions, the bill’s chilling penalties—removal from office—may prevent Federal agencies from making payments even where statutorily authorized, such as payments to whistleblowers under FIRREA.¹⁶⁴

SECTION-BY-SECTION EXPLANATION OF H.R. 5063

A description of the bill’s principal substantive provisions follows.

Section 2(a) of the bill prohibits an officer or agent of the Government from resolving the civil liability of a party through a settlement agreement that directs or provides payments to any person or entity other than the Government, subject to two exceptions. First, settlement agreements may direct payments to third parties to provide restitution for the actual harm that was “directly and proximately” caused by the unlawful conduct that is the basis of the settlement agreement. Second, settlement agreements may include payments to third parties for “services rendered in connection with the case” (e.g., attorney’s fees).

Under section 2(b) of the bill, a violation of section 2(a) constitutes a violation under the Miscellaneous Receipts Act, which include the possibility of removal from office and forfeiture of received funds to the U.S. Treasury.¹⁶⁵

Section 2(c) sets forth the effective date as the date of enactment, clarifying that the bill only applies to settlement agreements concluded on or after the enactment date.

Section 2(d) defines “settlement agreement” to include a resolution of a civil action or potential civil action through settlement agreement.

¹⁶² H.R. 5063 Hearing, *supra* note 5, at 4 (statement of David Uhlmann, Professor, University of Michigan Law School), <https://judiciary.house.gov/wp-content/uploads/2016/04/Uhlmann-Testimony.pdf>.

¹⁶³ Email from Prof. David Uhlmann, Professor, University of Michigan Law School, to Democratic staff of the H. Comm. on the Judiciary (May 9, 2016) (on file with Democratic staff of the H. Comm. on the Judiciary).

¹⁶⁴ U.S.C. § 4205(d)(1) (2016); Comments from the Dep’t of Justice on H.R. 5063, the “Stop Settlement Slush Funds Act of 2016,” to Members of the H. Comm. on the Judiciary 2 (May 17, 2016) (on file with Democratic staff of the H. Comm. on the Judiciary).

¹⁶⁵ 31 U.S.C. § 3302(d) (2016).

CONCLUSION

Similar to the multitude of the Majority's anti-regulatory bills that our Committee has considered over this and the last two Congresses, H.R. 5063 is yet another solution in search of a problem that is rife with unintended consequences. There is no credible evidence substantiating the underlying premise of this bill, namely, that settlement donations are an unconstitutional subversion of congressional spending authority or that agencies have included unlawful terms in settlement agreements. Longstanding appropriations law and agency policy—as recognized by the Government Accountability Office and the Congressional Research Service—clearly contemplate these concerns and prevent civil enforcement agencies from directing funds to politically-favored groups or circumventing Congress to augment their own appropriations. Nevertheless, H.R. 5063 would establish sweeping changes to the enforcement of Federal statutes and severely undermine the ability of agencies to respond to unlawful conduct through the provision of general compensation for indirect harm. Further, H.R. 5063's unclear provisions and chilling penalties will generate needless litigation and dissuade the timely resolution of civil complaints through settlement.

Accordingly, we strongly oppose H.R. 5063 and we urge our colleagues to join us in opposition.

MR. CONYERS, JR.
MS. LOFGREN.
MS. JACKSON LEE.
MR. COHEN.
MR. JOHNSON, JR.
MR. DEUTCH.
MR. JEFFRIES.
MR. CICILLINE.

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