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Evaluating “Consumer Relief” Payments in Recent Bank Settlement Agreements

Michael Patrick Wilt

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EVALUATING “CONSUMER RELIEF” PAYMENTS IN RECENT BANK SETTLEMENT AGREEMENTS

*Michael Patrick Wilt **

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I. INTRODUCTION

The Department of Justice (DOJ) has entered multiple settlement agreements with financial institutions for their alleged misconduct in the 2007-09 financial crisis. These agreements require civil monetary penalties in the form of payments to various agencies. They also contain provisions for *consumer relief* for some of the banks’ current customers. Some of the agreements also have allowed for donations to third-party, non-profit organizations.

Commentators and legal academics have raised concerns with the DOJ’s settlement process¹ and the third-party payments in recent congressional hearings investigating the settlements.² Considering media reports about potential future settlements with large financial institutions, these concerns remain pertinent.³

This article is the first academic research project to provide a detailed overview of 2012-16 multi-billion-dollar financial institution settlements, the major legal provisions involved, and the allocation of settlement funds to governments, states, agencies, victims, consumers, and other third parties. The settlements, which range from hundreds of millions to billions of dollars, relate to claims under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA),⁴ the False Claims Act,⁵ other federal laws, common law, and state laws.

¹ See e.g., H.R. 5063, the “Stop Settlement Slush Funds Act of 2016”: *Hearing on H.R. 5063 Before the Subcomm. on Reg. Reform, Commercial and Antitrust Law of the H. Comm on the Judiciary*, 114th Cong. 6-7 (2016) (statement of Mr. Goodlatte), available at <https://perma.cc/73T4-D968>; *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).

² See, e.g., Paul J. Larkin, Jr., *Funding Favored Sons and Daughters: Nonprosecution Agreements and “Extraordinary Restitution” in Environmental Criminal Cases*, 47 LOYOLA L.A. L. REV. 1, 35-37 (2013); see also Paul J. Larkin, Jr., *The Problematic Use of Nonprosecution and Deferred Prosecution Agreements to Benefit Third Parties*, THE HERITAGE FOUNDATION (Oct. 23, 2014), <https://perma.cc/QX9E-A8GX>.

³ Emily Glazer & Christina Rexrode, *Justice Department Readies New Bank Settlements*, WALL ST. J. (Jun. 4, 2015, 6:39 PM), available at <https://perma.cc/9Q6V-UWG6>; see also Arno Schuetze, *Deutsche Bank to fight \$14 billion demand from U.S. authorities*, REUTERS (Sept. 16, 2016, 3:32 PM), available at <https://perma.cc/M2LT-9E2M>.

⁴ 12 U.S.C. § 1833(a) (2006).

⁵ 31 U.S.C. § 3729(a) (2006).

Combined, the defendants, nine banks and one credit rating agency,⁶ agreed to pay a total of \$72.43 billion, with \$16.67 billion in penalties specifically under FIRREA, the largest amount under federal law, and \$35.77 billion earmarked for consumer relief. By contrast, only \$1.5 billion was allocated to direct cash payments for foreclosed borrowers directly harmed by the alleged conduct of the banks.

Part II of this article provides background. Part III provides a brief overview of the settlement agreements and the payments required. Part IV discusses in depth the consumer relief provisions and criticisms of the settlements' provisions. Part V considers three related issues: third-party payments in the United Kingdom, the use of settlement funds collected by the Bureau of Consumer Financial Protection (commonly referred to as the CFPB), and third party payment provisions in other DOJ settlements. Part VI discusses several constitutional, statutory, economic, and public policy criticisms of the recent settlements. Part VII looks at possible solutions and offers guidance to Congress in crafting a legislative solution. Part VIII concludes the article.

This article will demonstrate that consumer relief provisions lack a connection to the underlying legal claims against the banks and seem intended to drop the hammer on financial institutions for perceived wrongs from the financial crisis, irrespective of their actual guilt and legal liability under specific laws allegedly violated. For constitutional and accountability reasons, settlements should not include provisions requiring, authorizing, or incentivizing corporate defendants to make payments to third parties. To prevent such settlement provisions, Congress should incorporate into existing agency statutes, FIRREA, the

⁶ Joint State-Federal National Servicing Settlements, NAT'L MORTG. SETTLEMENT (Mar. 12, 2012), <https://perma.cc/BA76-GNGZ>; JP Morgan Chase Settlement Agreement, U.S. DEP'T. OF JUST. (Nov. 19, 2013), <https://perma.cc/2DYN-83RQ>; Citigroup Settlement Agreement, U.S. DEP'T. OF JUST. (Jul. 11, 2014), <https://perma.cc/4QXL-RKTJ>; Bank of America Settlement Agreement, U.S. DEP'T. OF JUST. (Aug. 20, 2014), <https://perma.cc/5DNZ-6SWH>; Sun Trust Settlement Agreement, U.S. DEP'T. OF JUST. (Sept. 30, 2014), <https://perma.cc/VUU6-6FVC>; Standard & Poor's Settlement Agreement, U.S. DEP'T. OF JUST. (Feb. 2, 2015), <https://perma.cc/AJ32-M6QT>; Morgan Stanley Settlement Agreement, U.S. DEP'T. OF JUST. (Feb. 11, 2016), <https://perma.cc/3238-GXW6>; HSBC Settlement Agreement, U.S. DEP'T. OF JUST. (Feb. 5, 2016), <https://perma.cc/575W-C7WC>; Wells Fargo Settlement Agreement, U.S. DEP'T. OF JUST. (Apr. 8, 2016), <https://perma.cc/JK6K-9BQC>; Goldman Sachs Settlement Agreement, U.S. DEP'T. OF JUST. (Apr. 11, 2016), <https://perma.cc/VWU4-XLWA>.

False Claims Act, and other relevant statutes prohibitions on settlements containing third party payments.

II. BACKGROUND

A. Factual Background on Mortgage Backed Securities

Most of the bank settlements discussed in this article arise from allegedly fraudulent transactions relating to residential mortgage backed securities (RMBS).⁷ RMBS are securities that rely on cash flows from residential mortgage debt.⁸ Although there are many theories about what and who caused the financial crisis, many consider transactions involving RMBS, especially those that relied heavily on mortgages to subprime borrowers, to be at the heart of the financial crisis.⁹

⁷ According to the SEC, most Mortgage backed securities are issued by federal entities such as the Government National Mortgage Association (Ginnie Mae), a U.S. government agency, or the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), U.S. government-sponsored enterprises. Private entities such as banks also issue RMBS and sell them to private investors and the government. *See Mortgage-Backed Securities*, SEC (Jul. 23, 2010), <https://perma.cc/Y4CY-BP9G>.

⁸ *See* Brent Radcliffe, *Residential Mortgage-Backed Security (RMBS)*, INVESTOPEDIA (Mar. 7, 2005), <https://perma.cc/2EP9-P8UQ>. The SEC explains: “Mortgage-backed securities... are debt obligations that represent claims to the cash flows from pools of mortgage loans, most commonly on residential property. Mortgage loans are purchased from banks, mortgage companies, and other originators and then assembled into pools by a governmental, quasi-governmental, or private entity. The entity then issues securities that represent claims on the principal and interest payments made by borrowers on the loans in the pool, a process known as securitization.” *See Mortgage-Backed Securities*, *supra* note 7.

⁹ *See* FINANCIAL CRISIS INQUIRY COMMISSION, FINAL REPORT OF THE NATIONAL COMM’N ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES, 1, 119-21 (2011) <https://perma.cc/GB2T-FJVL>. There is great debate over the role that the banks, investment firms, homebuyers, and the government played in causing the financial crisis. Some believe that the government incentivized RMBS and subprime mortgages. *See* Peter J. Wallison, *Common Shock is the Real Cause of the Financial Crisis*, ROLL CALL (Jan. 26, 2012), <https://perma.cc/26PT-R2LA>; *see also* William D. Cohan, *A Crusader Against the Common View of the Financial Crisis*, NY TIMES (Mar. 11, 2015), <https://perma.cc/6PQR-MLTW>; *see also* PETER J. WALLISON, HIDDEN IN PLAIN SIGHT: WHAT REALLY CAUSED THE WORLD’S WORST FINANCIAL CRISIS AND WHY IT COULD HAPPEN AGAIN (Encounter Books) (2012) (discussing the

The DOJ formed a working group to investigate RMBS misconduct, specifically “potential false or misleading statements, deception or other misconduct by market participants in the creation, packaging and sale of mortgage-backed securities.”¹⁰ For example, in one settlement discussed in this article, the DOJ alleged that the bank “structured, offered, and sold over \$850 million” in RMBS, including to federally-insured financial institutions, without disclosing that certain loans were experiencing decreased performance and underwriting issues.¹¹

In addition to RMBS transactions, many of the banks discussed in this article participate in the Department of Housing and Urban Development’s (HUD) Direct Endorsement Program. This program allows the banks to originate mortgages to first-time homebuyers, low-income buyers, and refinancers with Federal Housing Administration (FHA) insurance.¹² In turn, the banks are “obligated to determine whether prospective borrowers meet minimal credit-worthiness criteria and to certify to HUD that borrowers who received loans met the criteria”¹³ because “the FHA guarantees payment of the outstanding portion of the mortgage principal, accrued interest, and costs owed by the borrower.”¹⁴

B. Corporate Incentives to Settle

Settlement pressure on the financial institutions is intense. They may be willing to settle with the government to minimize the bad press associated with their role in the financial crisis. More generally, firms have incentives to settle government investigations, both in the criminal and civil context.¹⁵ Officers and directors negotiating on behalf of a

government’s housing policy and the financial crisis).

¹⁰ (*RMBS Working Group Announces New Resources to Investigate RMBS Misconduct*, DEP’T. OF JUSTICE (May 24, 2012), <https://perma.cc/6PXA-RKSL>).

¹¹ U.S. Dep’t. of Justice, *Bank of America Corp. Statement of Facts*, 1 (2014), <https://perma.cc/YQR9-95ZD>.

¹² *Id.* at 17.

¹³ *Id.* at 16-17.

¹⁴ *Id.*

¹⁵ For an extended discussion of the blurring of the distinction between criminal and civil liability, see John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 221-46 (1991).

corporation also have significant incentives to settle cases.¹⁶ A negative public relations event relating to wrongdoing by a corporation can harm the stock price and the financial health of the company and a legal judgment can devastate the company.¹⁷ Corporations do not like to risk going to trial, so the government has greater leverage in settlement negotiations.¹⁸

Corporations and managers eager for settlement are unlikely to object to settlement terms such as consumer relief or donations to third-party organizations. To the contrary, these provisions may even be desirable from a public relations standpoint. These provisions may also be desirable if they reduce the amount the corporation must spend to resolve its legal claims.

Banks are particularly unlikely to reject a settlement because of consumer relief provisions. It would be a difficult public relations task to explain to shareholders and the public why the bank chose to go to trial rather than agree to a settlement including reductions to mortgages or donations to third-party charities.

An additional incentive to settle derives from banks’ ongoing regulatory relationship with the federal government. Accepting a settlement agreement may be perceived to be necessary for maintaining a good regulatory relationship. Both the factual background and the incentives that firms have to settle fall decisively in the government’s favor when procuring a settlement agreement.

C. Definitions: Types of Payments

The settlements in this article contain several different types of *payments*. These terms describing types of payments are usually similar in the civil and criminal context, but may carry different requirements or be calculated differently based on the underlying legal claim.

¹⁶ Richard Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law on Unconstitutional Conditions*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 38, 41 (NYU Press ed., 2011).

¹⁷ For example, Arthur Andersen surrendered its license after conviction. See News Roundup, *Arthur Andersen Surrenders Its License to Practice Accounting in U.S.*, WALL ST. J. (Sept. 2, 2002, 8:39 PM), <https://perma.cc/GYR2-CMPD>; see also Gerald S. Martin, et. al., *The Foreign Corrupt Practices Act: Economic Impact on Targeted Firms*, SEARLE CIV. JUST. INST. 1, 14-19 (2014), <https://perma.cc/H97R-RVEG>.

¹⁸ Epstein, *supra* note 16, at 56.

Criminal penalties can be determined by statute or by the U.S. Sentencing Guidelines. Congress empowers the U.S. Sentencing Commission to set the Guidelines, which federal judges must follow except in limited circumstances.¹⁹ Civil penalties are determined by statute; for example, a FIRREA penalty is a maximum of \$1.1 million per violation or up to \$5.5 million per violation if it is a continuing violation.

Restitution restores money lost by an identifiable victim.²⁰ Remediation remedies an ongoing harm or prevents ongoing harm by the offender; for example, a product recall or an environmental clean-up order may be ordered as remediation of a defendant's illegal conduct.²¹ Disgorgement is the payment of any gain from an offense that is not paid back through restitution or remediation, and is often deposited in the US Treasury or returned to victims.²² Forfeiture usually involves the taking of property that was acquired or used in an offense.²³

Finally, *consumer relief*, the primary focus of this article, is not defined by statute, but is perhaps most analogous to criminal law's community service. For purposes of this article, consumer relief can be thought of as a type of community service payment. According to the U.S. Sentencing Guidelines for individuals, community service can be imposed as a condition of probation and can be imposed in lieu of fines or penalties in certain circumstances.²⁴ Specifically for corporations, community service can be imposed in criminal cases to repair the harm caused by the offense. The commentary to the Guidelines states:

An organization can perform community service only by employing its resources or paying its employees or others to do so. Consequently, *an order that an organization perform community service is essentially an indirect monetary sanction, and therefore generally less desirable than a direct monetary sanction.* However, where the convicted organization possesses knowledge, facilities, or skills that uniquely qualify it to repair damage caused by the offense, community service

¹⁹ United States v. Booker, 543 U.S. 220, 226 (2005).

²⁰ U.S. SENTENCING GUIDELINES MANUEL, § 8B1.1 (U.S. SENTENCING COMM'N 2015).

²¹ *Id.* at § 8B1.3

²² *Id.* at § 8C2.9.

²³ *Id.* at § 5E1.4.

²⁴ *Id.* at § 5B1.3.

directed at repairing damage may provide an efficient means of remedying harm caused.

In the past, some forms of community service imposed on organizations have not been related to the purposes of sentencing. *Requiring a defendant to endow a chair at a university or to contribute to a local charity would not be consistent with this section unless such community service provided a means for preventive or corrective action directly related to the offense* and therefore served one of the purposes of sentencing set forth in 18 U.S.C. § 3553(a).²⁵ (emphasis added)

As this article discusses, similar restraints might be appropriate for consumer relief in the civil context: a consumer relief provision is appropriate only when it would prevent or correct action directly related to the offense.

III. THE 2012-2016 SETTLEMENT AGREEMENTS

This article examines ten DOJ settlement agreements between 2012 and 2016 involving financial institutions. The 2012 National Mortgage Servicing Settlement Agreement included five different banks: Ally/GMAC, Bank of America, Citigroup, JP Morgan Chase, and Wells Fargo. Between 2013 and 2016, the DOJ also settled individual agreements with JP Morgan Chase, Citigroup, Bank of America, SunTrust, Standard and Poor’s, HSBC, Morgan Stanley, Wells Fargo, and Goldman Sachs. Each agreement is listed in the table below.

Total amounts include all payments, fines, penalties, and donations required as part of the agreement. The total federal amount includes payments to federal agencies and penalties under federal laws such as FIRREA and the False Claims Act. In some cases, the firm did not pay any penalty under FIRREA or the False Claims Act, but the government still released the firm from liability under those laws. In several of these agreements, the government only released the firm from specific liabilities under these laws.

Table 1 on page 263 also tallies how much, if any, consumer relief the agreement requires. The table also records payments of direct

²⁵ *Id.* at § 8B1.

restitution to foreclosed borrowers and donations to non-profit organizations.

Table 1: DOJ-Involved Settlement Agreements

* Includes claims by FHA, qui tam actions

* Agencies include: SEC, FDIC, NCUA, as well as Freddie Mac, Fannie Mae, Ginnie Mae

* Numbers rounded to nearest million/billion, actual figure in accompanying footnote

Bank Name	Settle Date	Total Amount	Total Fed. Amt.	FIRREA Penalty	False Claims Act	State-Based Payments	Fed. Agency Payments*	Consum. Relief	Direct Restitution	Non-Profit Cash
Nat'l Mortg.	4/4/12	~\$24 bil. ¹	\$911 mil. ²	Released	\$911 mil. ³	\$2.6 bil. ⁴	\$0	\$19.1 bil. ⁵	\$1.5 bil. ⁶	No
JP Morgan Chase	11/19/13	\$13 bil.	~\$7.9 bil. ⁷	\$2 bil.	Released	\$1.07 bil. ⁸	\$5.9 bil. ⁹	\$4 bil.	\$0	No
Citigrp.	7/14/14	\$7 bil.	\$4.2 bil. ¹⁰	\$4 bil.	Released	\$2.91 mil. ¹¹	\$2.08 mil. ¹²	\$2.5 mil.	\$0	Yes
Bank of America	8/21/14	\$16.65 mil.	\$8.2 bil. ¹³	\$5 billion	\$1.85 bil.	\$9.43 mil.	\$1.4 bil. ¹⁴	\$7.5 bil. ¹⁵	\$0	Yes
SunTrust	9/30/14	~\$928 mil. ¹⁶	\$428 mil. ¹⁷	Released	Released	\$0	\$0	\$500 mil.	\$40 mil.	No
Standard & Poors	2/3/15	\$1.375 mil.	~\$6.9 mil. ¹⁸	~\$6.9 mil. ¹⁹	Released	~\$6.9 mil. ²⁰	Not Released	\$0.00	\$0	No
HSBC	2/5/16	\$4.698 mil.	\$40.5 mil.	Released	Released	\$59.3 mil.	\$0.00	\$370 mil.	\$0	No
Morgan Stanley	2/11/16	\$2.6 bil.	\$2.6 bil.	\$2.6 bil.	Some Release	\$0	Not Released	\$0.00	\$0	No
Wells Fargo	4/8/16	\$1.2 bil.	\$0	Released	Some Release	\$0	Released	\$0.00	\$0	No
Goldman Sachs	4/11/16	\$5.06 bil.	\$2.96 bil.	~\$2.4 bil. ²¹	Released	\$300 mil.	\$575 mil.	\$1.8 bil.	\$0	No
Total		~\$72 bil. ²²	~\$28 bil. ²³	~16.7 bil. ²⁴	~2.8 bil. ²⁵	~\$5.9 bil. ²⁶	~\$8.1 bil. ²⁷	~\$35.8 bil. ²⁸	\$1.5 bil. ²⁹	

¹ \$24,144,107,454.00

² \$911,777,917.00

³ \$911,777,917.00

⁴ \$2,649,092,379.00

⁵ \$19,112,600,000.00

⁶ \$1,470,637,158.00

⁷ \$7,932,989,690.73

⁸ \$1,067,010,309.00

⁹ \$5,932,989,690.73

¹⁰ \$4,208,250,000.00

¹¹ \$291,750,000.00

¹² \$208,250,000.00

¹³ \$8,236,840,000.00

¹⁴ \$1,386,840,000.00

¹⁵ \$7,490,160,000.00

¹⁶ \$928,271,986.00

¹⁷ \$428,271,986.00

¹⁸ \$687,500,000.00

¹⁹ \$687,500,000.00

²⁰ \$687,500,000.00

²¹ \$2,385,000,000.00

²² \$72,427,179,440.00

²³ \$28,006,129,593.73

²⁴ \$16,672,500,000.00

²⁵ \$2,761,777,917.00

²⁶ \$5,997,652,688.00

²⁷ \$8,103,079,690.73

As the table shows, the DOJ settled with these firms for a total of \$72.4 million. Of that amount, \$35.8 million was directed toward *consumer relief*, while only \$28 million was specifically directed toward federal payments for violations of statutes or to resolve agency claims. Furthermore, only \$1.5 billion was required as direct restitution to foreclosed borrowers, or victims of the financial institution's alleged illegal conduct. Finally, of the seven agreements that required consumer relief, only two required donations to non-profit organizations.

IV. THE CONSUMER RELIEF PROVISIONS

A. The Consumer Relief Provisions in Detail

i. Consumer Mortgage Modifications

The seven agreements that contain consumer relief provisions allow for modification, reduction, or forgiveness of a first lien mortgage. For example, the Bank of America settlement allows \$1 credit for \$1 principal forgiveness on a first lien, but only if Bank of America provides at least a minimum of \$2.5 billion for this type of forgiveness.³⁰ Different types of first-lien forgiveness garner different amounts of credit, depending on, for example, the loan-to-value ratio, the interest rates, the type of loan, and whether the loan is in a "hardest hit area." To qualify for any credit, at least 50 percent of the modifications must be in these areas.³¹

The Bank of America settlement also credits modifications relating to second liens and junior liens. The settlement allows a maximum of \$2.5 billion in credit for principal forgiveness on second liens and \$3 billion for the combination of principal forgiveness on second liens, junior liens, and forgiveness of principal for properties on which foreclosure is not pursued.³² Unlike the Bank of America settlement, the Citigroup settlement allows credit for reducing the rate of or refinancing a mortgage.³³ Finally, both agreements allow the bank to

²⁸ \$35,772,760,000.00

²⁹ \$1,510,637,158.00

³⁰ *Consumer Relief Bank of Am. Settlement Agreement*, DEP'T. OF JUSTICE 1, 2 <https://perma.cc/8Z2B-2KX2> (last visited Mar. 13, 2017).

³¹ *Id.* at 3.

³² *Id.* at 5-6.

³³ *Consumer Relief Citigroup Settlement Agreement*, DEP'T. OF JUSTICE 1, 6

forgive the principal on a mortgage where foreclosure is not pursued and liens are released. In other words, the bank receives credit for walking away from properties that may be worthless anyway.³⁴

Table 2 below shows the division of credited consumer mortgage modification relief for both the Bank of America and Citigroup settlements. Citigroup has directed most of its relief in this category to rate reductions/refinancing and the walk away properties. Bank of America has directed most of its relief to first lien principal forgiveness

<https://perma.cc/YCY9-HBXQ>. (last visited Mar. 13, 2017)

³⁴ See Allan Mallach, *Now You See the Money, Now You Don't*, ROOFLINES (Sept. 22, 2014), <https://perma.cc/YZV3-YNU7>.

Table 2: Consumer Mortgage Modifications in Bank of America & Citigroup Settlements

	Bank of America	Citigroup
First Lien Principal Forgiveness	\$3028890653	\$17096960
Principal Forgiveness of Forbearance	\$565181334	\$0
First Lien Forbearance (Payment Forgiveness)	\$162543379	\$0
Second Lien Principal Forgiveness and Extinguishment	\$0	\$0
First Lien Balance Forgiveness	Not Permitted	\$0
Second Lien Balance Forgiveness	Not Permitted	\$0
Assistance for Borrowers Refinancing Outside of Bank	Not Permitted	\$0
Junior Liens Unsecured Principal Forgiveness/Extinguishment	\$1517824086	\$0
Rate Reductions or Refinancing	Not Permitted	\$306008576
Principal Forgiveness where foreclosure is not pursued and liens are released	\$0	\$459665037
	\$5274439452	\$782770573

ii. *Low-Income Lending and Affordable Housing Rental Projects*

The Bank of America settlement also allows the bank to earn credits for low-to-moderate income lending: a \$10,000 credit for purchase money loans to eligible borrowers in a “hardest hit” area, who lost a home due to foreclosure or short sale, or are first time borrowers/private mortgage insurance borrowers.³⁵ This provision has no minimum or maximum.³⁶ Citigroup also has the same provision for low-income lending.

The Bank of America settlement also provides \$3.75 worth of credit for every \$1 Bank of America *loses* investing in affordable rental

³⁵ Bank of America Consumer Relief, *supra* note 30, at 6-7.

³⁶ *Id.*

housing.³⁷ At least half of the financing must be for *Critical Need Family Housing*, which is defined as “affordable low-income rental housing developments selected by Bank of America” that are located in “Difficult Development Areas” defined by HUD or state defined “High Opportunity/Low Poverty Areas.”³⁸ To qualify for any credits, Bank of America must lose at least \$100 million in financing these developments,³⁹ while Citigroup, which is also eligible for this type of credit, must lose at least \$180 million.⁴⁰

iii. *Donations to Non-Profit Organizations and Community Development/Revitalization*

Bank of America also can obtain credit for community reinvestment and neighborhood stabilization, for example: credit for costs paid for demolition or remediation of abandoned or uninhabitable property; donations of mortgages or bank owned properties to cities; and contributions to land banks, non-profits, or service-members with disabilities.⁴¹ The bank receives \$1 in credit for every dollar paid or contributed.

Bank of America is also eligible for \$2 credit for every \$1 donated to non-profits to facilitate reduction, rehabilitation, or maintenance of abandoned or uninhabitable residential properties. Bank of America must make at least \$50 million in donations to “capitalize certified Community Development Financial Institutions (CDFIs), land banks subject to state or local regulation, or community development funds administered by non-profits or local governments.”⁴² According to the Department of Treasury, the CDFI fund organizations are “mission-driven financial institutions that take a market-based approach to supporting economically disadvantaged communities” by providing “access to financial products and services.”⁴³ Citigroup, which is also

³⁷ *Id.* at 8. Loss is “measured as the difference between the fair value and par value, as reflected on the books and records of Bank of America, on the origination date of the subordinated loan made to facilitate the construction, rehabilitation, or preservation of affordable low-income rental housing.” *Id.* at 8 n.24.

³⁸ *Id.* at 8 n.23.

³⁹ *Id.* at 8.

⁴⁰ Citigroup Settlement Consumer Relief, *supra* note 33, at 6.

⁴¹ Bank of America Consumer Relief, *supra* note 30, at 11.

⁴² *Id.*

⁴³ *Cnty. Dev. Fin. Inst. Fund*, U.S. DEP’T OF THE TREASURY, <https://perma.cc/D5Q4-BKP3> (last visited Apr. 10, 2017).

eligible for this type of credit, must make \$25 million in donations to qualify for credit under its parallel provision.⁴⁴

Both settlements allow credit for donations to Interest on Lawyer Trust Account (IOLTA) and similar legal-aid charities. The Bank of America settlement requires at least \$30 million in donations (and affords \$2 credit for every \$1 donated) to IOLTA organizations or state bar associations that provide funds to legal aid organizations “to be used for foreclosure prevention legal assistance and community redevelopment legal assistance.”⁴⁵ Citigroup must make at least \$15 million in donations under its IOLTA requirement.⁴⁶

The Bank of America and Citigroup settlements offer credit for donations to HUD-approved counseling agencies. Organizations must meet several criteria to become HUD-approved.⁴⁷ Services provided by HUD-approved housing counseling agencies include pre-purchase counseling, predatory lending education workshops, default resolution counseling, and fair housing pre-purchase education workshops.⁴⁸ There are approximately 2,700 HUD-approved housing counseling agencies across the United States.⁴⁹ Many of these have very broad missions that include activities wholly unrelated to housing counseling.⁵⁰ Accordingly, some have questioned whether the DOJ should be requiring banks to make donations to these agencies.⁵¹ The Bank of America settlement requires at least \$20 million in donations (and gives \$2 credit for every

⁴⁴ *Id.*

⁴⁵ Bank of America Consumer Relief, *supra* note 30, at 7.

⁴⁶ Citigroup Consumer Relief, *supra* note 33, at 12.

⁴⁷ For all of the criteria, see Fed. Hous. Comm’r, *Application for Approval as a Housing Counseling Agency*, HUD, <https://perma.cc/MMY7-2VBH>. A few of the important criteria include: non-profit status as a 501(c) organization; experience of at least a year administering a housing counseling program; at least a year functioning in the geographic area; and sufficient resources to implement its counseling plan. See HUD, *Agencies Listed in Washington D.C.*, HUD.GOV, <https://perma.cc/X4CQ-TG8T>.

⁴⁸ *Id.*

⁴⁹ In the District of Columbia, for example, there are nineteen HUD-approved housing counseling agencies. *Id.* In Virginia, there are fifty-one organizations receiving HUD-approval. See HUD, *Agencies Listed in Virginia*, HUD.GOV, <https://perma.cc/HAE2-8MVM>.

⁵⁰ See Monitor of the 2014 Bank of Am. Mortg. Settlement, *Settlement Monitor Report* (2016), <https://perma.cc/L27M-MQJ9>, for a complete list of organizations receiving donations as part of the consumer relief provisions in that settlement.

⁵¹ See Cong. Hearings, *supra* note 1, at 10-11.

\$1 donated) to HUD-approved housing counseling agencies to “provide foreclosure prevention assistance and other housing counseling activities.”⁵² Citigroup’s settlement requires at least \$10 million to be donated to HUD-approved housing counseling agencies and also offers \$2 credit for every \$1 donated.⁵³

iii. Distribution of Bank of America and Citigroup Consumer Relief by Category

As Table 3 below shows, the total amount of consumer relief credited to both Citigroup and Bank of America as of their June and August 2016 reports, respectively, is \$7.268 billion. Of that amount, \$6.057 billion was directed toward consumer mortgage modifications such as loan forgiveness, forbearance, and rate reductions. \$788 million was directed to low-income lending and affordable housing, while \$423 million in credit is for donations made to non-profit organizations, such as legal services organizations, HUD-approved housing counseling agencies, and other community development organizations.

⁵² Bank of America Consumer Relief, *supra* note 30, at 7.

⁵³ Citigroup Consumer Relief, *supra* note 33, at 12.

Table 3: Consumer Relief Credit

Consumer Relief Type	Bank of America Credit (Aug. 2016)	Citigroup Credit (Jun. 2016)	Total Credit
Consumer Mortg. Modifications (Forgiveness, Forbearance, Rate Reduction)	\$5,274,439,452	\$782,770,573	\$6,057,210,025
Low to Moderate Income Lending	\$346,201,500	\$0	\$346,201,500
Donations of Mortgages and Property to Non-Profits	\$68,703,427	\$0	\$68,703,427
Donations for Rehabilitation/Maintenance of Donated Property	\$14,094,058	Not Mandated	\$14,094,058
Donations to Community Development Organizations	\$110,283,564	\$57,500,000	\$167,783,564
Donations to Housing Counseling Organizations	\$46,000,000	\$23,000,000	\$69,000,000
Donations to Legal Services Org.	\$69,000,000	\$34,500,000	\$103,500,000
Donations to Affordable Rental Hous. Projects	\$441,865,938	\$0	\$441,865,938
Total Credit for Relief to Existing Mortg. Customers	\$5,274,439,452	\$782,770,573	\$6,057,210,025
Total Credit for Non-Profit Org. Donations/Cmty. Inv.	\$308,081,049	\$115,000,000	\$423,081,049
Total Credit for Low-Income Lending & Affordable Rental Hous.	\$788,067,438	\$0	\$788,067,438
Total Credit	\$6,370,587,939	\$897,770,573	\$7,268,358,512

B. Donations Made to Non-Profit Organizations Under the Consumer Relief Provisions

The Bank of America Settlement Monitor's⁵⁴ August 2016 Report shows detail of which groups have received funding as of June 2016.⁵⁵ For donations to community development funds, Bank of

⁵⁴ The settlement creates an independent monitor appointed by the defendant and DOJ to oversee the settlement's provisions. *See, e.g.*, Bank of America Settlement, *supra* note 6, at 8 ("An independent monitor will determine whether Bank of America has satisfied the obligations contained in Annex 2 (such monitor to be Eric Green).").

⁵⁵ Bank of America, *supra* note 50, at 106-19.

America received over \$110 million in credit.⁵⁶ For donations to IOLTA groups and bar associations, Bank of America received \$69 million in credit. For donations to HUD-approved housing counseling agencies, Bank of America received \$46 million for affordable rental housing projects; Bank of America received over \$441 million in credit.

The June 2016 Citigroup monitor report details payments made to third party non-profit organizations.⁵⁷ Citigroup has received \$23 million in credit for donations made to housing counseling agencies, \$34.5 million in credit for donations to legal aid organizations, and \$57.5 million in credit for donations to community development organizations, for a total of \$115 million in credit, with an actual total donation amount of \$50 million, demonstrating the *extra credit* given for these donations.

Once a donation is made to a third-party organization, banks are under no obligation to ensure that the organization spends it in any particular way. The DOJ also retains no control over the payment once it has been made. The only limitation on the *nexus* between the payment and the violation appears to come from informal DOJ guidance about the original settlement agreement.⁵⁸ Nor can DOJ control what these third-party organizations do. In fact, to claim compliance with federal law, the DOJ cannot have control over the payment once the settlement agreement has been signed.⁵⁹

⁵⁶ *Id.*

⁵⁷ See *Citigroup Settlement Monitor Report*, CITIGROUP MONITORSHIP (2016), <https://perma.cc/XTB4-XBEW>.

⁵⁸ See *Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriations Powers?: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Fin. Serv.*, 114th Cong. 6 (2016) (written statement of David K. Min), <https://perma.cc/U352-6BGL> (citing Kris Dighe, *Organizational Community Service in Environmental Crimes Cases*, in UNITED STATES ATTORNEY’S BULLETIN 101, 105 (July 2012)).

When negotiating the resolution of a case or requesting that a sentence include a requirement that a defendant perform community service, including the commitment of funds, prosecutors should ensure that a nexus to the violation is present. In other words, a relationship between the violation and the proposed activity should be established.

Id.

⁵⁹ See Deputy Assist’t Att’y Gen’l C. Kevin Marshall, Off. of Legal Couns., Dep T of Justice, *Application of the Governmentt Corporation Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Settlement Agreement*, Memo. Opinion for the Gen’l Counsel U.S. Trade Rep. 8 (Aug. 22, 2006).

Table 4 below shows which non-profit organizations have received donations in excess of \$2 million by category. Bank of America has donated a significant amount to a wide variety of organizations under different categories. Citigroup, which settled for only \$2.5 billion compared to Bank of America's \$7.49 billion settlement, has mostly confined its largest donations to community development and legal services organizations.

Table 4: Non-Profits Receiving Donations Over \$2 Million Total As of June 2016 (Citigroup) and August 2016 (BoA)

* Organizations may have received donations in other categories or through local subsidiaries. This total amount is based on the total amount of donations under the specific category. Additionally, Bank of America's report lumps community development and housing counseling agencies together while Citigroup's separates these categories.

	<u>Non-Profit Organization Name*</u>	<u>Amt. Credited</u>	<u>Type of Donations</u>
Bank of America	Housing Partnership Fund, Inc.	\$45,479,061	Cmty. Dev. and Hous. Counseling
	National Community Stabilization Trust	\$45,155,885	Mortgages/Properties
	Community Restoration Corp.	\$13,932,874	Rehabilitation/Maintenance
	Local Initiatives Support Corporation	\$9,877,002	Cmty. Dev. and Hous. Counseling
	Enterprise Community Loan Fund	\$8,625,000	Cmty. Dev. and Hous. Counseling
	Legal Services Trust Fund Corp. (CA IOLTA)	\$5,715,954	Rehabilitation/Maintenance
	USA Homeownership Foundation	\$4,863,235	Mortgages/Properties
	Community Preservation Corp.	\$4,600,000	Cmty. Dev. and Hous. Counseling
	Texas Equal Access to Justice Foundation	\$4,514,962	Legal Services
	Neighborworks America	\$3,795,000	Cmty. Dev. and Hous. Counseling
	The Reinvestment Fund	\$3,680,000	Cmty. Dev. and Hous. Counseling
	National Council of La Raza	\$3,450,000	Cmty. Dev. and Hous. Counseling
	Habitat for Humanity	\$3,450,000	Cmty. Dev. and Hous. Counseling

	Military Warriors Support Foundation	\$3,373,525	Mortgages/Properties
	Florida Bar Foundation	\$3,210,110	Legal Services
	IOLA Fund of the State of New York	\$3,094,392	Legal Services
	National Urban League	\$2,645,000	Cmty. Dev. and Hous. Counseling
	National Community Reinvestment Coalition	\$2,600,000	Cmty. Dev. and Hous. Counseling
	Carrington Charitable Found.	\$2,459,160	Mortgages/Properties
	Chicago Community Loan Fund	\$2,300,000	Cmty. Dev. and Hous. Counseling
	Ohio Legal Assistance Foundation	\$2,105,826	Legal Services
	Lawyers Trust Fund of Illinois	\$2,079,806	Legal Services
	Detroit Land Bank Auth.	\$2,040,000	Cmty. Dev. and Hous. Counseling
	Georgia Bar Foundation	\$2,021,000	Legal Services
	Opportunity Resource Fund	\$2,020,000	Cmty. Dev. and Hous. Counseling
	Fondo Acceso a la Justicia, Inc. (Puerto Rico)	\$2,003,215	Legal Services
Citigroup			
	Legal Services Trust Fund Program State Bar of California	\$8,280,000	Legal Services
	Interest on Lawyer Account Fund of the State of New York	\$7,728,000	Legal Services
	Enterprise Community Loan Fund, Inc.	\$5,290,000	Cmty. Dev.
	Local Initiatives Support Corp.	\$5,290,000	Cmty. Dev.
	Community Hous. Works Realty & Lending	\$4,600,000	Cmty. Dev.
	Neighborhood Lending Services, Inc.	\$3,680,000	Cmty. Dev.
	Detroit Land Bank Auth.	\$3,450,000	Cmty. Dev.
	Lawyers Trust Fund of Illinois	\$3,450,000	Legal Services
	Massachusetts IOLTA Committee	\$3,450,000	Legal Services

	National Community Reinvestment Coalition	\$3,450,000	Cmty. Dev.
	Neighborhood Hous. Services of South Florida	\$3,450,000	Cmty. Dev.
	Neighborhood Stabilization Corp.	\$3,450,000	Hous. Counseling
	The Housing Partnership Fund, Inc.	\$3,450,000	Cmty. Dev.
	Aura Mortgage Advisors LLC	\$2,990,000	Cmty. Dev.
	Community Loan Fund of New Jersey	\$2,990,000	Cmty. Dev.
	Cuyahoga County Land Reutilization Corp.	\$2,760,000	Cmty. Dev.
	Cook County Land Bank Auth.	\$2,300,000	Cmty. Dev.
	Long Island Hous. Partnership CDFI	\$2,300,000	Cmty. Dev.
	Low Income Investment Fund	\$2,300,000	Cmty. Dev.
	Neighborhood Partnership Housing Services, Inc.	\$2,300,000	Cmty. Dev.
	Northern California Community Loan Fund	\$2,300,000	Cmty. Dev.
	Sacramento Neighborhood Housing Services Inc.	\$2,300,000	Cmty. Dev.
	Maryland Legal Services Corporation	\$2,300,000	Legal Services
	The District of Columbia Bar Foundation	\$2,300,000	Legal Services

C. Which *Consumers* Can Actually Receive Direct Consumer Relief?

Generally, three groups of consumers are eligible for relief under the recent settlements: (1) those actually harmed by the alleged misconduct; (2) those who have suffered harm from conduct similar to the bank's alleged misconduct; and (3) those who have suffered harm in general, but not necessarily as a result of misconduct by the defendant bank or any other bank, for example, those who may be unemployed and unable to make mortgage payments.

The payment of restitution from the settling financial institution is only appropriate for those actually harmed by the bank's alleged

misconduct, the first group. Only in two DOJ settlements, National Mortgage Servicing⁶⁰ and SunTrust,⁶¹ and one CFPB settlement, Ocwen,⁶² is relief directed to identified victims, borrowers foreclosed as a result of the alleged misconduct of those banks. Unlike the consumer relief provisions described above, this direct restitution is aimed at people who are entitled to relief. The banks have no choice as to whether they can provide relief to them, as they do with the consumer relief provisions.

It is unclear, and left open to interpretation, whether the consumer relief provisions are intended to be restitution, remediation, or some other form of relief. What is clear is that the banks get to choose which consumers receive relief, what type, how much, and when. No consumer is entitled to relief. Much of the consumer relief is not directed to identifiable victims.

As seen in the second and third groups, the bank settlement beneficiaries are not limited to clearly identifiable victims of bank misconduct. For example, consumers who have bought a home and fallen into default well after the financial crisis are, in some cases, eligible for relief. Also eligible are consumers who are unemployed, a condition that may be entirely unrelated to the financial crisis, let alone the settling banks’ conduct. The settlements afford the banks considerable latitude to choose who receives this non-victim compensation. Because the settling bank decides which consumers to compensate, there is no way to verify that the selected consumers were actually ever harmed by the bank’s conduct.

Allegedly remedial actions—such as mortgage modifications—that the banks might have undertaken anyway for their own business reasons perhaps should not count at all toward a settlement.⁶³ If the government claims that consumer relief is intended to remediate harms caused by the bank, it should explain how each specific relief menu item and consumer targeted is directly connected to the conduct or would prevent future harm of the specific type alleged.

⁶⁰ Bank of America Settlement Agreement, *supra* note 6, at 8-9.

⁶¹ Sun Trust Settlement Agreement, *supra* note 6, at 4-5.

⁶² See Ocwen Nat’l Serv., *Nat’l Ocwen National Serv. Settlement*, NATIONAL OCWEN (Feb. 22, 2014), <https://perma.cc/2A5N-ETWR>.

⁶³ See Jacob Davidson, *Bank of America Is Paying Up for the Mortgage Mess, But Who Will Get the Money?* TIME (Aug. 29, 2014), <https://perma.cc/W87K-UUTP>; see also Alan Pyke, *The Truth Of The Goldman Sachs Settlement Is In The Fine Print*, THINK PROGRESS (Apr. 11, 2016), <https://perma.cc/4UZL-B9FA>.

D. Recent Developments and Criticism of the Consumer Relief Provisions

The Bank of America and Citigroup settlements have inspired numerous objections. Some commentators objected to giving credit to the banks for donating to non-profits because the settlement is unfair to the banks, consumers, and opposite to the interests of justice.⁶⁴ Others have raised cronyism concerns regarding the government's favorable treatment of certain banks.⁶⁵ Others worry that these settlements will set a precedent for future regulators and government officials.⁶⁶ Critics also have faulted these settlements as Executive Branch incursions on the appropriations power of Congress.⁶⁷ Critics have also argued that the consumer relief provisions incentivize charitable activities that the banks would have engaged in anyway and that these donations may pale in comparison to the damage caused by the banks' alleged misconduct.⁶⁸

Some have also raised concerns about government transparency and accountability. For example, one organization claims that the DOJ has not cited legal authority for diverting settlement money from bank settlements to third party organizations. Other interested groups,⁶⁹ think tank analysts,⁷⁰ and commentators⁷¹ have sought documents related to the

⁶⁴ *Inv. Bus. Daily, CFPB Joins Justice In Shaking Down Banks For Democrat Activist Groups*, INV. BUS. DAILY ED. (Jun. 17, 2015), <https://perma.cc/QK3K-ENH2>.

⁶⁵ *Inv. Bus. Daily, Holder Cut Left-Wing Groups In On \$17 Bil BofA Deal*, INV. BUS. DAILY ED. (Aug. 27, 2014), <https://perma.cc/FW3B-69HS>.

⁶⁶ H.R. 5063, the "Stop Settlement Slush Funds Act of 2016": *Hearing on H.R. 5063 Before the Subcomm. on Reg. Reform, Commercial and Antitrust Law of the H. Comm on the Judiciary*, 114th Cong. 4-5 (2016) (statement of Paul F. Figley).

⁶⁷ *Settling the Question: Did the Bank Settlement Agreements Subvert Congressional Appropriations Power? Before the H. Comm. On Fin. Servs., Subcomm. on Oversight and Investigations* (2016) (Statement of Paul J. Larkin, Jr., Senior Res. Fellow, Heritage Found), <https://perma.cc/XS4R-WF9H>.

⁶⁸ Davidson, *supra* note 63.

⁶⁹ Dan Epstein, *Obama DOJ Channels Bank Shakedown Money to Private Groups*, INV. BUS. DAILY (July 7, 2015), <https://perma.cc/FC6X-UA5Z>.

⁷⁰ *See, e.g., FOIA to Department of Justice, CAUSE OF ACTION* (Jun. 16, 2015), <https://perma.cc/V9NG-ZWGM>; *see also DOJ to Give Leftist Groups Cut of B of A Settlement*, JUD. WATCH (Aug. 28, 2014), <https://perma.cc/X54A-MM74>.

⁷¹ *Consumers Shortchanged? Oversight of the Justice Dep't's Mortg. Lending Settlements before the H. Comm. on the Judiciary, Subcomm. on Regulatory Reform, Commercial and Antitrust Law* (2015) (Written testimony of Paul J. Larkin, Jr., Senior Res. Fellow, Heritage Found), <https://perma.cc/XK8D->

settlements and have questioned the legality and motivation of these settlements.⁷² According to Judicial Watch, the DOJ stated in a 2011 Freedom of Information Act (FOIA) request that it had no guidelines regarding the monitoring or qualification of third party organizations eligible for settlement funds.⁷³

Congressional oversight committee hearings also reflect concerns about the recent settlements and third party payments. The House Judiciary Committee’s Subcommittee on Regulatory Reform, Commercial, and Antitrust Law held a hearing in February 2015,⁷⁴ and Judiciary Committee Chairman Bob Goodlatte offered an amendment to the DOJ appropriations bill that would prohibit the DOJ from requiring payments to third parties in settlement agreements.⁷⁵ Goodlatte later introduced a bill that would extend the prohibition to all government agents and impose penalties for violating the prohibition.⁷⁶ Also introduced in 2016, the Agency Accountability Act, would require that fees, fines, penalties, and proceeds from a settlement be deposited in Treasury’s general fund.⁷⁷ The House Judiciary Committee’s Subcommittee on Regulatory Reform, Commercial, and Antitrust Law⁷⁸ held a hearing in 2016, and the House Financial Services Committee’s Oversight and Investigations Subcommittee also has looked into the issue.⁷⁹

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⁷² Kimberley A. Strassel, *Justice’s Liberal Slush Fund*, WALL ST. J. (Dec. 3, 2015, 7:17 PM), <https://perma.cc/H27S-DKCE>.

⁷³ Nelson D. Hermilla, *Letter in Response to Freedom of Information Act Request by Judicial Watch*, U.S. DEP’T OF JUST. CIV/ RIGHTS DIV. (Apr. 14, 2011), <https://perma.cc/KHT7-X8DV>.

⁷⁴ See *Consumers Shortchanged? Oversight of the Justice Dep’t. Mortg. Lending Settlements*, Hearing before the H. Comm. on the Judiciary, Subcomm. on Regulatory Reform, Commercial and Antitrust Law (2015) <https://perma.cc/J39Z-W52D>.

⁷⁵ REP. GOODLATTE, *H. Amendment 318 to H.R. 2578* (2015), <https://perma.cc/68WY-B6JH>.

⁷⁶ Stop Settlement Slush Funds Act of 2016, H.R. 5063, 114th Cong. (2016), available at <https://perma.cc/TC8C-CA7Q>.

⁷⁷ Agency Accountability Act of 2016, H.R. 5499, 114th Cong. (2016), available at <https://perma.cc/9XQB-BYEW>.

⁷⁸ See Bob Goodlatte, Chair of H.R. Jud. Comm., *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. (2016), <https://perma.cc/DQB4-MCXT>.

⁷⁹ See Fin. Serv. Comm., *Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriations Powers?: Hearing Before the Subcomm.*

V. OTHER EXAMPLES OF SETTLEMENT FUNDS DIVERTED TO THIRD PARTIES

The DOJ is not alone in using settlement as opportunities to direct funds to third-parties who were not harmed by the settling company. This section discusses several examples.

A. United Kingdom's LIBOR Penalties

The practice of diverting settlement funds to third parties is not limited to the United States. The United Kingdom's (UK) Financial Conduct Authority (FCA) has levied over 1.1 billion pounds in fines related to the alleged manipulation of the London Interbank Offered Rate (LIBOR), and Former Chancellor of the Exchequer George Osborne has used some of this money to fund popular causes of his choosing.⁸⁰ In total, UK charities, including especially military-related charities, have

on Oversight and Investigations of the H. Comm. on Financial Services, 114th Cong. (2016), <https://perma.cc/6CPQ-WURU>.

⁸⁰ See Sean Farrell, *FCA's £819m in fines revenue gives Osborne room to fund worthy causes*, THE GUARDIAN (Jul. 5, 2015, 12:50 PM), <https://perma.cc/DLS3-MSVX>; see also George Osborne, Chancellor, Autumn Statement 2014 speech, Oral statement to Parliament (Dec. 2, 2014) (transcript available at <https://perma.cc/NU8G-5GKQ>).

As the *Wall Street Journal* reported, a million dollars had been distributed to a charity group, Agincourt 600, which planned a 600-year commemoration of the Battle of Agincourt. Due to the influx of money, the group changed a modest celebration into an extravaganza and still could not figure out how to spend all of the money. More money was given to other organizations, such as therapeutic bakers, resurfaced tennis courts at a treatment center for injured police, and a camping and crafts organization known to be "hippie Scouts." See Margot Patrick, *England's Bank Fines Are a Boon for a Happy Few*, WALL ST. J. (May 30, 2015, 12:04 AM), <https://perma.cc/EA65-4WT4>.

Additionally, then Prime Minister Cameron pledged to send money from Deutsche Bank's settlement to set up 50,000 in "apprenticeships" for young adults. See Reuters Editorial, *PM says Deutsche Bank's Libor fine to be used for apprenticeships* – *Guardian*, REUTERS (Apr. 28, 2015, 12:57 AM), <https://perma.cc/V49T-FG24>.

received over 400 million pounds.⁸¹ The chancellor’s allocations are subject to parliamentary approval during the annual budgeting process.⁸²

B. The CFPB’s Civil Penalty Fund, CFPB Settlements, and Other Agency Penalty Funds

Domestically, the DOJ is not alone in its practice of adding third-parties to the list of settlement beneficiaries. Several federal agencies have statutory authority to maintain civil monetary penalties in funds that they may distribute to third parties.⁸³ For example, the CFPB can distribute its Consumer Financial Civil Penalty Fund, which is already quite large,⁸⁴ without any oversight from another branch of government.

⁸¹ See Jill Treanor, *£450m Libor fines given to military-related charities and schemes*, THE GUARDIAN (Mar. 16, 2015, 11:54 AM), <https://perma.cc/J9GF-HK7B>.

⁸² See Mikey Smith & Dan Bloom, *Budget 2016 at a glance: All George Osborne’s key announcements*, MIRROR (Mar. 17, 2016, 9:12 AM), <https://perma.cc/KRP3-HB8D>; see also *The Budget & Parliament*, WWW.PARLIAMENT.UK, <https://perma.cc/WJQ3-KKXA> (last visited Apr. 12, 2017).

⁸³ The Commodity Futures Trading Commission has a fund that can be used for customer education purposes in addition to payments to whistleblowers. See 7 U.S.C. §26(g) (2012).

The 2010 Patient Protection and Affordable Care Act established a penalty fund for the Centers for Medicare and Medicaid Services to “improve[] the lives of nursing home residents rather than [making] direct payments to victims of harm.” See 42 U.S.C. 1395i-3(h)(2)(B)(ii) (2012); see also CHAIRWOMAN OF SUBCOMM. ON FIN. INST. & CONSUMER CREDIT ET. AL, CFPB, OPPORTUNITY EXISTS TO IMPROVE TRANSPARENCY OF CIV. PENALTY FUND ACTIVITIES, GOV’T ACCOUNTABILITY OFF. 1 (June 2014), <https://perma.cc/LQ8B-H95C> [hereinafter “GAO report”]. While funds are supposed to be used for the benefit of nursing home residents, the federal government has given states “wide flexibility in using federal penalty funds and has encouraged states to be more creative in the use of penalty funds.” See Theodore Tsoukalis et. al., *The Collection and Use of Funds From Civil Money Penalties and Fines From Nursing Homes*, 46 THE GERONTOLOGIST 6, 759 (2006), <https://perma.cc/5XLR-YTHA>. Dodd-Frank established the SEC’s Investor Protection Fund in 2010, which funds payments to whistleblowers and funds the SEC’s Inspector General. See 15 U.S.C. § 78u-6(g)(2)(A)-(B) (2012).

⁸⁴ The total amount collected as of September 30, 2016, according to the Bureau, is \$526 million. See *About us, Civil Penalty Fund*, CFPB, <https://perma.cc/7U7S-VUW3/> (last visited Apr. 12, 2017). However, a September 2016 settlement with Wells Fargo requires the bank to pay \$100

The Bureau can deposit civil monetary penalties into the fund to compensate eligible victims and for “consumer education and financial literacy programs,” which the statute does not define.⁸⁵

Although authorized by statute, the CFPB’s ability to direct funds to third parties raises concerns about windfalls to favored organizations. Moreover, according to the Government Accountability Office (GAO), the “CFPB did not document the factors the Fund Administrator considered in determining the allocation of funds for consumer education and financial literacy programs for the first allocation period.”⁸⁶ Additionally, the existence of the fund and possibility for abuse has been criticized.⁸⁷ By contrast, as the GAO report notes, the DOJ does not have a penalty fund and penalties are generally not paid to consumers,⁸⁸ and the law requires the DOJ to deposit into the Treasury any money paid to a court or received by court officers (attorneys) in any case pending or adjudicated in court.⁸⁹

As of March 2016, the CFPB’s penalty fund had \$15.7 million remaining to allocate to consumer victims or educational programs.⁹⁰ According to the CFPB’s website, to date, only one initiative has been funded.⁹¹ This program is a financial coaching initiative partnering with the Department of Labor (DOL) and “more than two dozen non-profit social-services providers to place 60 certified coaches in DOL American

million to the penalty fund, which would substantially increase the total amount collected. *See Consumer Fin. Protection Bureau Fines Wells Fargo \$100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts*, CFPB (Sept. 8, 2016), <https://perma.cc/3K39-XHGX>.

⁸⁵ *See* 12 U.S.C. § 5497(d)(2) (2012). The civil penalty fund was established by the Dodd-Frank Act and is codified at 12 U.S.C. § 5497(d)(1).

⁸⁶ *See* GAO report, *supra* note 83, at 23.

⁸⁷ *See* *Inv. Bus. Daily*, *supra* note 64.

⁸⁸ *See id.*

⁸⁹ *See* 28 U.S.C. § 2041 (2012). Other agencies, such as the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency, and the FTC can collect civil monetary penalties. However, these agencies do not have the statutory authority to establish a fund, and their civil penalties must be transferred directly to the Treasury. *See* GAO report, *supra* note 83, at 18. Unless Congress passes a law authorizing such a fund, the money goes to the Treasury. *Id.*

⁹⁰ *See CFO update for the third quarter of fiscal year 2016*, CFPB (Aug. 17, 2016), available at <https://perma.cc/L6RV-GD9R>.

⁹¹ *See Civ. Penalty Fund: Consumer Educ. and Fin. Literacy*, CFPB, <https://perma.cc/MQ4Y-FNKF> (last visited Apr. 12, 2017).

Job Centers and community-centered non-profits across the country.”⁹² Host sites include non-profits,⁹³ workforce resource centers and development boards, legal aid services, homeless shelters, and advocacy groups.⁹⁴ The 2015 annual report indicates that in 2013, the CFPB had allocated \$13.4 million to consumer education and financial literacy programs, meaning that all of this money should have been donated to the non-profits involved in the financial coaching initiative.⁹⁵

The CFPB also entered a settlement agreement that contains consumer relief provisions similar to those in the recent DOJ-bank settlements. In December 2013, the CFPB and every state except Oklahoma settled with Ocwen, a mortgage servicing provider, for alleged violations of state consumer protection laws and Title X of Dodd-Frank.⁹⁶ The Ocwen settlement provides for a \$123.7 million payment to an escrow account for the purpose of dispensing cash payments to eligible foreclosed borrowers from 2009 through 2012.⁹⁷ The settlement describes these cash payments as *remedial* to offset the reduction in proceeds for which Ocwen was responsible due to the foreclosure.⁹⁸ In addition, the agreement provides \$2 billion in consumer relief, including relief to certain borrowers who are currently delinquent on payment or in imminent risk of default; have a home that is worth less than the loan; and have certain income deficiencies.⁹⁹

C. Deferred Prosecution and Non-Prosecution Agreements

⁹² Daniel Dodd-Ramirez & Holly Petraeus, *The launch of the CFPB financial coaching initiative*, CFPB (May 20, 2015), <https://perma.cc/Y7ZR-W8T2>.

⁹³ *Id.*

⁹⁴ For example, the Mississippi Center for Justice is one such advocacy group, and it claims that it is “advancing racial and economic justice through an approach that combines legal services with policy advocacy, community education and media advocacy.” See *About the Center*, MISS. CTR. FOR JUST., <https://perma.cc/QR4S-FRVF> (last visited Apr. 12, 2017).

⁹⁵ See *Fin. report of the Consumer Fin. Protection Bureau, FY 2015*, CFPB, <https://perma.cc/5JL2-V3WS> (Nov. 16, 2015).

⁹⁶ Consent Judgment, *CFPB v. Ocwen Fin. Corp.*, No. 13-cv-2025, 2014 WL 1652004, (KY Dep’t. of Fin. Inst., Feb. 26, 2014), <https://perma.cc/2A5N-ETWR>.

⁹⁷ *Id.*

⁹⁸ Exhibit C, *Ocwen Fin. Corp.*, 2014 WL 1652004 (KY Dep’t. of Fin. Inst., 2014), <https://perma.cc/KB97-YHV9>.

⁹⁹ *Id.*

The settlement agreements between the DOJ and several large banks are just a small subset of settlement agreements between the government and corporations that raise accountability and transparency questions. The DOJ's criminal settlement guidelines prohibit these types of payments to third-party beneficiaries in criminal settlements.¹⁰⁰ Yet, the evidence shows that the DOJ has crafted criminal settlements with similar types of payments as found in the bank settlements. Between 1997 and 2011, there were 157 non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs) with publicly-held corporations.¹⁰¹ In 2015 alone, the DOJ entered into 100 agreements with corporations, more than triple the previous year, to resolve allegedly criminal and civil violations of the law.¹⁰²

There is evidence that the government has used its settlement leverage in recent corporate criminal settlements cases to diverted funds to third party non-profits and other causes.¹⁰³ One such non-profit, the

¹⁰⁰ OFFICES OF THE U.S. ATTORNEYS, U. S. ATTORNEYS' MANUAL § 9-16.325, PLEA AGREEMENTS, DEFERRED PROSECUTION AGREEMENTS, NON-PROSECUTION AGREEMENTS AND EXTRAORDINARY RESTITUTION (2010), available at <https://perma.cc/FMM4-5MPM>.

Plea agreements, deferred prosecution agreements and non-prosecution agreements should not include terms requiring the defendant to pay funds to a charitable, educational, community, or other organization or individual 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. Such payments have sometimes been referred to as 'extraordinary restitution.' This is a misnomer, however, as restitution is intended to restore the victim's losses caused by the criminal conduct, not to provide funds to an unrelated third party. Apart from the limited circumstances described below, this practice is restricted because it can create actual or perceived conflicts of interest and/or other ethical issues.

Id.

¹⁰¹ Cindy R. Alexander and Mark A. Cohen, *Trends in the Use of Non-Prosecution, Deferred Prosecution, & Plea Agreements in the Settlement of Alleged Corporate Criminal Wrongdoing*, SEARLE CIV. JUST. INST., LAW & ECON. CTR, GEORGE MASON UNIV. (Apr. 2015), <https://perma.cc/2JM2-NAAF>.

¹⁰² See *2015 Year End Update on Corp. Non-Prosecution and Deferred Prosecution Agreements*, GIBSON DUNN (Jan. 5, 2016), <https://perma.cc/5ZSY-ZFGT>.

¹⁰³ Inst. for Legal Reform, *Profit Over Principle: How Law Enforcement for Fin. Gain Undermines the Public Interest & Congress's Control of Federal Spending*, in ENFORCEMENT SLUSH FUNDS, 17 (2015), <https://perma.cc/A9S8->

National Fish and Wildlife Foundation, “supports conservation efforts in all 50 states and U.S. territories,” and its grants “are rigorously evaluated and awarded to some of the nation’s largest environmental organizations, as well as some of the smallest.”¹⁰⁴ In 2012, for example, Gibson Guitar was required to donate \$50,000 to the National Fish and Wildlife Foundation, and British Petroleum was required to donate \$2.5 billion to the same nonprofit in settlement of its alleged wrongdoing in the Gulf of Mexico oil spill.¹⁰⁵ In another example, a 2005 deferred prosecution agreement involving Bristol Myers Squibb required the corporation to endow a chair of business ethics at the prosecutor’s private, religiously-affiliated law school alma mater, Seton Hall University Law School.¹⁰⁶

Because of their often out-of-court nature and non-criminal provisions such as corporate governance reforms and third party donations, NPAs and DPAs raise concerns. NPAs and DPAs often resolve both criminal and civil claims, and in some cases may not even detail the difference.¹⁰⁷ Criminal indictments, or even the appearance of criminal allegations, can be harmful to corporations; Arthur Andersen’s indictment and subsequent conviction led to loss of its accounting license and the firm went bankrupt.¹⁰⁸

The DOJ has come under criticism for its structuring of corporate settlements. These settlements have been criticized as a “get-out-of-jail free card[]” by some in favor of more stringent penalties, such as Senator Elizabeth Warren.¹⁰⁹ On the other side of the debate, Professor Richard Epstein has described some DOJ settlements “as battered

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¹⁰⁴ *About Us*, NATIONAL FISH & WILDLIFE FOUNDATION, <https://perma.cc/2Z3W-XMLH> (last visited Apr. 12, 2017).

¹⁰⁵ *Profit Over Principle*, *supra* note 103.

¹⁰⁶ *See Bristol-Meyers Squibb Deferred Prosecution Agreement* (Jun. 15, 2005), available at <https://perma.cc/V7FL-D6GH>. Then U.S. Attorney Chris Christie came under criticism for this agreement’s provision awarding money to his law school alma mater. *See e.g.*, Greg Gordon, *Wanna Settle? Give \$5 Million to Chris Christie’s Law School*, MCCLATCHY (Feb. 11, 2014, 12:33 PM), <https://perma.cc/5E8D-2BZY>.

¹⁰⁷ *See Credit Lyonnais Settlement Agreement*, U.S. ATTORNEYS’ OFFICE (Jun. 7, 1999), <https://perma.cc/8L55-6UN3>. (“[I]ntentional wrongdoing . . . that may have violated United States Laws.”). *Id.*

¹⁰⁸ *Andersen Surrenders Licenses To Practice Accounting in U.S.*, WALL ST. J. (Sept. 2, 2002, 8:39 PM), <https://perma.cc/4PQY-M8DF>.

¹⁰⁹ Zach Carter, *Elizabeth Warren Hammers The Endless Failures Of Wall Street Regulators*, HUFFINGTON POST (Apr. 15, 2015, 6:10 PM), <https://perma.cc/5CYQ-TUP7>.

corporations recant[ing] their past sins and submit[ing] to punishments wildly in excess of any underlying offense.”¹¹⁰ No matter which side of the debate one takes, the inclusion of hard-to-value benefits to third parties makes it harder to assess whether the settlement is appropriate.

DOJ officials are subject to the same public choice considerations as any other government official and may have political or career-oriented incentives to settle with corporations.¹¹¹ The DOJ has repeatedly used its settlement leverage to settle with corporations for large sums of money,¹¹² indicating that the terms of DOJ-involved settlement agreements should be scrutinized.¹¹³ Regardless of whether settlements are civil or criminal in nature, Congress should not allow the Executive Branch to divert settlement funds to its chosen causes.¹¹⁴

VI. LEGAL POLICY ANALYSIS OF THIRD PARTY PAYMENTS

Many recent DOJ settlements with financial institutions allegedly right wrongs to the government, but the nature of the settlements reflects something different. Some of these settlements contain relief provisions that seem to be less about compensating government for harms done to it than making amends for the financial crisis and related recession. Through grants of money to individuals and

¹¹⁰ Richard A. Epstein, *The Deferred Prosecution Racket*, WALL ST. J. (Nov. 28, 2006, 12:01 AM), <https://perma.cc/WCP2-CZG9>.

¹¹¹ See Michael Patrick Wilt, *Who Watches the Watchmen? Accountability in Federal Corporate Criminal Prosecution Agreements*, 43 AM. J. CRIM. L. 61 (2016), <https://perma.cc/C2A3-55BM>.

¹¹² Epstein, *supra* note 110.

¹¹³ The debate over the use and scope of NPAs and DPAs is beyond the scope of this article. See, e.g., Wilt, *supra* note 111, at 66-70; see also Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlement: An Empirical Perspective of Non-Prosecution, Deferred Prosecution, & Plea Agreements*, 52 AM. CRIM. L. REV. 537 (2015), <https://perma.cc/7K38-E5ZN>; Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 861-74 (2007).

¹¹⁴ In fact, the Congress may itself be violating the appropriations clause of the Constitution by failing to provide effective control over appropriations made by the federal government. See Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1345 (1988) (“Congress itself might violate the appropriations clause by failing to exercise effective controls over federal expenditures.”); but see J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1164-73 (1989) for criticisms of Professor Stith's interpretation of the appropriations power as it applies to Congressional de-funding of the President's constitutional prerogatives.

institutions not directly affected by the settling bank’s conduct, these banks do public penance for their role in the financial crisis. The DOJ’s role is to pursue specified violations of the law, obtain relief, and impose penalties authorized under the relevant statutes.

The DOJ should enforce the laws as they are written, and the settlements should be tailored to respond to the laws a company is deemed to have violated. These laws have defined penalties, fines, and monetary payments that give notice to potential violators and constrain the government to a just and efficient outcome. If the DOJ settles a case with provisions for consumer relief, these provisions must be tied to the underlying violation of the law. The DOJ does not have the legal authority to create new penalties or other forms of payments by settling parties. Settlements that direct funds to satisfy extra-statutory purposes not only call into question the legitimacy of the particular enforcement action, but raise broader constitutional concerns.

As both the DOJ’s own criminal sentencing guidance and the U.S. Sentencing Guidelines indicate for corporate criminal cases, community service requirements involving charitable donations must be directly connected to the alleged offense. Providing people with housing counseling or refinancing their mortgages, unless for the purpose of helping those directly harmed by a particular legal violation, do not comport with the spirit of these guidelines.

A. The Appropriations Power

Several commentators and legal academics have raised the separation of powers doctrine and the congressional appropriations power arguments against the continued distribution of settlement funds to third parties.¹¹⁵ Under the constitutional separation of powers principle, different branches of government hold different,

¹¹⁵ See Larkin, *supra* note 67; Figley, *supra* note 66; see also *Settling the Question: Did Bank Settlement Agreement Subvert Congressional Appropriations Powers? Hearing Before the U.S. H. R. Comm. on Fin. Services, Subcomm. on Oversight and Investigations*, (2016) (testimony of Nicholas Quinn Rosenkranz, Professor of Law, Georgetown University), <https://perma.cc/37V8-GJ6T>. There is also a possibility that the distributions also could violate the non-delegation doctrine in the Constitution, as Congress has not provided an “intelligible principle” for delegating its authority. See, e.g., *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 472 (2001). Moreover, it is arguable whether Congress even may not be permitted to delegate its appropriations and lawmaking power in this manner. See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 488 (1998).

complimentary powers; powers are not accumulated in the hands of any one branch.¹¹⁶ Dividing government power helps to prevent government officials from exploiting citizens for their own enrichment.¹¹⁷

One of the most important separators of power is that Congress levies taxes and holds the “power of the purse,” *i.e.*, the power to spend money from the Treasury for constitutionally appropriate purposes. The Executive Branch is charged with implementing Congress’s spending initiatives. Article I, Section 8 of the Constitution grants sole power to Congress to “lay and collect taxes, duties, imposts and excises, to pay the debts,” and Article I, Section 9 provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”¹¹⁸

Each of the following subsections will look at the appropriations power from different angles: statutory and constitutional, economic, and a policymaking perspective.

i. Constitutional and Statutory Analysis

The Constitution is clear that the exercise of the appropriations power must be deliberate and limited by the Constitution and the laws.¹¹⁹ Giving the legislature alone the power to spend reflects James Madison’s belief that the separation of powers and the checks and balances that maintain it would be bolstered by the ambition of each independent branch of government: “Ambition must be made to counteract ambition.”¹²⁰ By vesting the power to appropriate in the legislative branch, the Founders intended elected representatives to make decisions about where to spend the people’s money. Accordingly, it is “the legislative department alone [that] has access to the pockets of the people.”¹²¹

The Framers based the separation of powers and the appropriation of money on the lessons learned before the revolution: the Crown had often attempted to circumvent Parliament by raising money from private sources and distributing the money without the input of

¹¹⁶ THE FEDERALIST NO. 47 (JAMES MADISON)

¹¹⁷ See, e.g., Stefan Voigt, *Constitutional Design of Lawmaking*, in PRODUCTION OF LEGAL RULES, 9-11 (Francisco N. Parisi 2011).

¹¹⁸ U.S. CONST. art. I, § 8, cl. 1; *id.* § 9, cl. 7.

¹¹⁹ Stith, *supra* note 114, at 1347.

¹²⁰ THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison).

¹²¹ THE FEDERALIST NO. 48 (James Madison).

Parliament.¹²² The Framers of the Constitution recognized that control over the power of the purse was an ideal means to prevent executive tyranny.¹²³ Recently, the House of Representatives successfully defended its power to appropriate in *U.S. House of Rep. v. Burwell*,¹²⁴ in which the court explained “appropriations are an integral part of our constitutional checks and balances, insofar as they tie the Executive Branch to the Legislative Branch via purse strings.”

Appropriations are also not just setting aside amounts of money; the legislative power to appropriate defines the “character, extent, and scope of authorized activities.”¹²⁵ The appropriations power also protects the policy priorities of the federal government.¹²⁶ If the money dedicated to consumer and third-party relief is not “public money” under the Constitution, then the government is not entitled to require that it be spent.¹²⁷ If it is the public’s money, then it is the legislative branch, not the Executive, that must decide and account for, where and how that money is spent.¹²⁸

Congress has sought to protect its power by enacting the Miscellaneous Receipts Act of 1849¹²⁹ and the Anti-Deficiency Act.¹³⁰ In these two statutes, Congress has created a “well-constructed statutory defense of its constitutional appropriations prerogative.”¹³¹ The Miscellaneous Receipts Act requires that agencies and officials in government deposit money into the Treasury as soon as practical, preventing agencies from self-funding based on enforcements or judgments in their favor.¹³² The key term in the statute is *receipts*: the government official must actually receive or should have received the money for the law to be operable.¹³³

¹²² Todd D. Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. REV. 327, 330 (2009).

¹²³ See *id.* at 330.

¹²⁴ 185 F. Supp. 3d 165,170 (D.D.C. 2016).

¹²⁵ Stith, *supra* note 114, at 1356.

¹²⁶ See Peterson, *supra* note 122, at 330.

¹²⁷ U.S. CONST. art. I, § 9, cl. 7.

¹²⁸ Peterson, *supra* note 122, at 335-36.

¹²⁹ See generally Miscellaneous Receipts Act of 1849, 31 U.S.C. § 3302 (1994)

¹³⁰ See generally Antideficiency Act, 31 U.S.C. § 1341 (1990).

¹³¹ Peterson, *supra* note 122, at 342.

¹³² See, e.g., Randal J. Meyer, *Congress’s Diminishing Power of the Purse*, THE CATO INST. (Dec. 9, 2015, 11:33 AM), <https://perma.cc/L2HB-DXQZ>.

¹³³ Effect of 31 U.S.C. § 484 on the Settlement Authority of the Att’y Gen. 4B U.S. OP. OFF. LEGAL COUNSEL 684, 688 (1980).

The DOJ's Office of Legal Counsel interprets the law as permitting third party payments so long as the settlement is made before an admission or finding of liability and the government does not retain control post-settlement over distribution of the funds.¹³⁴ As C. Boyden Gray notes, however, this interpretation is "twisted in knots" and not grounded in the text of the law.¹³⁵ Unconditional gifts or donations must be deposited into the Treasury like any other funds.¹³⁶ Congress must provide specific statutory authority for the government to be able to accept a conditional donation – one dedicated to a specific purpose, like settling an enforcement action.¹³⁷

The Anti-Deficiency Act is another congressional attempt to prevent the Executive Branch from appropriating money without authorization from Congress. The law prevents government officials from committing to or making expenditures in excess of the appropriations provided for by law.¹³⁸ Professor Larkin and others have argued that the bank settlements violate the Anti-Deficiency Act because the Executive Branch is committing money that Congress has not appropriated to third parties.¹³⁹ The law prohibits government officials from contractually obligating the government to spend money in excess of appropriations authorized by Congress.¹⁴⁰ Legal settlements are ostensibly contractual obligations:¹⁴¹ in exchange for not enforcing legal rights of the United States, the government arranges for the defendant to provide consumer relief. Congress has not appropriated or authorized

¹³⁴ See Deputy Assist't Att'y Gen'l C. Kevin Marshall, Off. of Legal Couns., Dep't. of Justice, *Application of the Government Corp. Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Settlement Agreement*, Memo. Opinion for the Gen'l Counsel U.S. Trade Rep. (Aug. 22, 2006).

¹³⁵ *Settling the Question: Did Bank Settlement Agreements Subvert Cong. Appropriations Powers? Before the Subcomm. On Oversight and Investigations of the H. R. Comm. On Fin. Servs.*, 114th Cong. 19 (2016) (statement of Ambassador C. Boyden Gray).

¹³⁶ Stith, *supra* note 114, at 1368 n.123.

¹³⁷ *Id.* at 1368.

¹³⁸ Antideficiency Act, 31 U.S.C. § 1341 (1990); see also U.S. GOV'T ACCOUNTABILITY OFF., Anti-Deficiency Act, <https://perma.cc/L4LF-FT4C> (last visited Jan. 1, 2017).

¹³⁹ See Larkin, *supra* note 67, at 16.

¹⁴⁰ Stith, *supra* note 114, at 1374.

¹⁴¹ Contracts are an agreement, with sufficient consideration, to do or not do a particular thing. See *Contracts* BLACK'S LAW DICTIONARY (2nd ed. 1995).

such expenditures, so these settlements arguably violate the Anti-Deficiency Act.

Federal law also requires that “[a]ll moneys paid into any court of the United States, or received by the officers thereof, in any case pending or adjudicated in such court, shall be forthwith deposited with the Treasurer of the United States.”¹⁴² While the DOJ would likely argue that it has not *received* any moneys paid “in any case pending,” arguably the diverted money *should* have been received by government officials instead of third parties.¹⁴³

The recent bank settlements attempt to evade the constitutional and statutory requirements by directly transferring the money from the defendant to third parties. The banks directly donate money to a variety of causes and consumers. The banks have a menu of options and can choose who receives the funds, but the settlement agreement defines the boundaries of those choices. No money technically passes through the hands of government officials,¹⁴⁴ but government officials chart its course.

Some claims to the contrary cite¹⁴⁵ executive agency interpretations, including one from the DOJ,¹⁴⁶ and a holding by the U.S. Court of Appeals for the Ninth Circuit that held:

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.¹⁴⁷

However, in the settlements discussed in this article, the defendants are admitting some liability. The Miscellaneous Receipts Act does not permit third party payments as found in these recent settlements. Even if

¹⁴² 28 U.S.C. § 2041 (2012).

¹⁴³ See Larkin, *supra* note 67, at 16.

¹⁴⁴ See generally *Settling the Question: Did Bank Settlement Agreements Subvert Cong. Appropriations Powers? Before the Subcomm. On Oversight and Investigations of the H. R. Comm. On Fin. Servs., 114th Cong. (2016)* (written testimony of David K. Min).

¹⁴⁵ See *id.*

¹⁴⁶ See Marshall, *supra* note 134, at 8.

¹⁴⁷ See *Sierra Club v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990).

the bank settlement consumer relief provisions are truly conditional “donations,” then Congress would have to statutorily authorize the DOJ to spend that money via settlement.

ii. Constitutional Economics

Economics applied to political decision-making, public choice theory, can also shed light on why the appropriations power is and should remain in the hands of the legislative branch: legislative action is usually harder to accomplish than executive action. The Constitution was designed to both raise and lower transaction costs, depending on the particular governmental task involved.¹⁴⁸ Higher transaction costs limit the scope of government, but the division of labor between the three branches of government can lower costs by allowing each branch to specialize.¹⁴⁹ Clearly, the Constitution requires Congress to specialize in appropriating. However, Congress does not act alone; the Executive Branch has the power of the veto, its own check on the appropriations power.

Enacting legislation entails greater transaction costs than issuing an executive order.¹⁵⁰ Legislation involves the consent of two branches of government, or a supermajority in Congress, if overriding a veto, and the coalition-building of many different political actors. Securing passage of legislation also requires interest groups to have influence with more than one branch of government, raising the cost of lobbying.¹⁵¹ The separation of powers likely “exerts an upward pressure on costs.”¹⁵² Money that is in the Treasury can be appropriated only after an intense, costly legislative process.¹⁵³ Moreover, a properly designed constitutional structure can help minimize rent-seeking, or at least coercive, inefficient transfers of wealth.¹⁵⁴

¹⁴⁸ Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 12 (1987).

¹⁴⁹ *Id.*

¹⁵⁰ Robert D. Cooter, *The Strategic Constitution*, Princeton U. Press 310 (2000), <https://perma.cc/SJ6M-ZVDT>.

¹⁵¹ *Id.* at 333.

¹⁵² Morris Silver, *Economic Theory of the Constitutional Separation of Powers*, 29 PUB. CHOICE 95, 101 (1977).

¹⁵³ See Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 481 (1988).

¹⁵⁴ *Id.* at 494.

The separation of powers and checks and balances, when working together, improve political accountability to the public.¹⁵⁵ Specifically, the “key condition to make separation of powers work in favor of voters is that no policy can be implemented unilaterally, i.e., without the consent of both bodies.”¹⁵⁶ The separation of powers reduces the government’s monopoly of power over citizens.¹⁵⁷ By dividing sovereignty into an oligopoly of three equal branches with reciprocal controls over each other, such as the appropriations power and the veto, the Constitution forces the branches to compete with each other for the citizens’ favors.¹⁵⁸ By forcing the two political branches to compete, compromise, and work together in a complicated appropriations process, the Constitution provides voters with a greater ability to hold political leaders accountable and to elicit information from them.¹⁵⁹

iii. Congress is the Government’s Policymaker through its Appropriations Power

Congress should decide where taxpayer money should be spent. Appropriations decisions are policy decisions. Unlike members of Congress, officials in the DOJ are not elected and only the top officials at the DOJ are appointed by the President.¹⁶⁰ Most DOJ employees are, therefore, not directly accountable to the public for their decisions. DOJ staff may impose their own policy preferences in settlement agreements with corporations, either out of sincere public interest purpose or for personal reasons, such as career advancement.¹⁶¹

Moreover, settlement negotiations lack the transparency of the congressional appropriations process. Government enforcement officials should not make decisions that are constitutionally and statutorily restricted to Congress.¹⁶² Some have criticized the DOJ’s use of the settlement authority before the recent bank settlements. For example, earlier settlements have required, as a condition of settlement, environmental cleanup projects that otherwise would have been paid for

¹⁵⁵ Torsten Persson, Gerard Roland, & Guido Tabellini, *Separation of Powers and Political Accountability*, 112 QUART. J. OF ECON. 1163, 1166 (1997).

¹⁵⁶ *Id.*

¹⁵⁷ Silver, *supra* note 152, at 98.

¹⁵⁸ *See id.*

¹⁵⁹ *See id.*

¹⁶⁰ U.S. CONST. art. II, § 2.

¹⁶¹ *See Wilt, supra* note 111, at 79.

¹⁶² *See Petersen, supra* note 122, at 330.

by the United States, as well as making payments to private parties for political reasons when a private party sues the federal government.¹⁶³

B. Statutory Liability Only Allows Payments to the Federal Government, Not Third Parties

The injured party settling claims in all of the settlements was the United States (as well as States).¹⁶⁴ The bank settlements are based largely on laws that protect the government from fraud. The False Claims Act and FIRREA, both of which protect the government from fraud, are two statutes that figure prominently in the bank settlements.

i. The False Claims Act and FIRREA Provide for Penalties and Restitution to the Government, Not Private Parties

Congress enacted the False Claims Act 165 in 1863 in response to fraud by suppliers of goods to the Army during the Civil War.¹⁶⁶ It remains the government's primary tool to protect itself from fraudulent claims by its business partners.¹⁶⁷ Any person who "knowingly presents, or causes to be presented, [to the U.S. government] a false or fraudulent claim for payment or approval" or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim" is liable to the government for a penalty of \$5500 to \$11,000¹⁶⁸ in damages per false claim plus treble damages.¹⁶⁹ Either the Attorney General or a private person may bring an action under the False Claims Act.¹⁷⁰ The False Claims Act does not provide for remediation or

¹⁶³ *Id.* at 348.

¹⁶⁴ *See, e.g.*, Bank of America Settlement, *supra* note 6, at 1 ("The United States, the States, and Bank of America are collectively referred to herein as "the Parties."").

¹⁶⁵ False Claims Act, 31 U.S.C.A. 3729 (West 2009).

¹⁶⁶ *See, e.g.*, Bank of America Settlement, *supra* note 6, at 3.

¹⁶⁷ James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites, and Patriots*, 81 U. CIN. L. REV. 1261, 1261 (Sept. 18, 2013), <https://perma.cc/5MBM-MQ4V>.

¹⁶⁸ 31 U.S.C.A. § 3729(a)(1)(A),(B) (West 2009).

¹⁶⁹ 31 U.S.C. § 3729(a)(1)(B) (2012).

¹⁷⁰ 31 U.S.C. § 3730(b) (2012). When a private person brings an action under the law, the action is called a *qui tam* and the private person is referred to as a relator. *See Qui Tam* BLACK'S LAW DICTIONARY (2nd ed. 1995). The relator receives a portion of the funds generated for the government by the litigation.

restitution to anyone but the government and, if relevant, the private initiator of a False Claims action. Monetary payments in False Claims Act settlements should compensate the government for its injuries.¹⁷¹ The False Claims Act is intended to recover what is essentially stolen money.

FIRREA’s civil liability provisions outlaw fraud against the government as an insurer of a financial institution. Congress passed FIRREA in 1989 as a “broad legislative attempt to resolve the financial crisis confronting the [Savings and Loan (S&L)] industry.”¹⁷² In addition to significant regulatory oversight changes and reorganization in the federal government,¹⁷³ the law included civil liability provisions intended to prevent fraudulent activity affecting banks. The law allows the Attorney General to bring a FIRREA civil action against anyone who allegedly commits a crime in connection with a financial institution.¹⁷⁴ These crimes include bribery, bank theft, false entries, false statements, criminal false claims, mail fraud, and wire fraud.¹⁷⁵ The DOJ has relied increasingly on FIRREA in recent years.¹⁷⁶

The government may choose to step in and continue the case on its own. *See* § 3730(d).

¹⁷¹ *See, e.g.*, U.S. Dep’t of Justice, *Justice Department Recovers Over \$3.5 Billion From False Claims Act Cases in Fiscal Year 2015* (Dec. 3, 2015), <https://perma.cc/67RW-MYEJ>.

¹⁷² Anthony C. Providenti, Jr., *Playing with FIRREA, Not Getting Burned: Statutory Overview of the Financial Institutions Reform, Recovery and Enforcement Act of 1989*, 59 *FORDHAM L. REV.* 323, 325 (1991).

¹⁷³ *See e.g.*, Michael P. Malloy, *Nothing to Fear but FIRREA Itself: Revising and Reshaping the Enforcement Process of Federal Bank Regulation*, 50 *OHIO ST. L.J.* 1117, 1137 (1989).

¹⁷⁴ 12 U.S.C. §1833a(a), (e) (2006).

¹⁷⁵ Bribery is codified at 18 U.S.C. § 215 (2000). Bank Theft is codified at 18 U.S.C. § 656 (2000). False Entries is codified at 18 U.S.C. § 1005 (2006). False Statements is codified at 18 U.S.C. § 1001 (2006). Criminal False Claims is codified at 18 U.S.C. § 287 (1986). Mail Fraud is codified at 18 U.S.C. § 1341 (2012). Finally, Wire Fraud is codified at 18 U.S.C. § 1343 (2008). The latter two crimes are broad and frequently charged by federal prosecutors in cases involving the mob and terrorism. *See, e.g.*, Christopher M. Matthews, *Prosecutors Broadly Use Mail-Fraud, Wire-Fraud Statutes*, *WALL ST. J.* (Jun. 9, 2015, 1:26 PM), <https://perma.cc/TUF8-T7GW>.

¹⁷⁶ *See* Stephanie Russell-Kraft, *\$1.38B S&P Settlement Cements FIRREA As DOJ Darling*, *LAW360* (Feb. 3, 2015, 6:33 PM), <https://perma.cc/7HMX-SX2B>; *see also* Peter J. Henning, *U.S. Finds Fresh Use for Seldom-Used Statute in Subprime Cases*, *NY TIMES*, (Aug. 11, 2014, 11:33 AM), <https://perma.cc/9XRD-XDS8>.

The use of FIRREA against financial institutions for wrongdoing involving their own institution is controversial,¹⁷⁷ but courts have allowed the government to use FIRREA in this way.¹⁷⁸ FIRREA allows the government to allege criminal wrongdoing, but to prove the elements of the crime only by a preponderance of the evidence.¹⁷⁹ The government may prefer an action under FIRREA, which offers penalties unconstrained by the U.S. Sentencing Guidelines¹⁸⁰ and a lower burden of proof, than to a criminal action.

Like the False Claims Act, FIRREA's civil penalties are not designed to compensate victims, let alone unrelated third parties. The law "assesses a sum of money that is paid to the government rather than providing for compensatory damages to be paid to the injured parties."¹⁸¹

Several law firms have written about the DOJ's use of FIRREA to induce financial institutions to settle claims relating to the financial crisis. *See, e.g.,* Jones Day, *FIRREA Civ. Monetary Penalties: The Gov't's Newfound Weapon Against Fin. Fraud* (May 2013), <https://perma.cc/9X73-XTDG>; Boris Bershteyn & John K. Carroll, *Dusting Off FIRREA: Old Statute Poses Challenges for Fin. Institutions*, Skadden's 2015 Insights – Fin. Reg. (Jan. 2015), <https://perma.cc/LU3S-HSCW>.

¹⁷⁷ *See generally* U.S. Chamber Institute for Legal Reform, *The FIRREA Revival: Dredging Up Solutions to the Fin. Crisis*, (2014), <https://perma.cc/9ZG6-WDQX>.

¹⁷⁸ *See, e.g.,* Filmon M. Sexton IV, Note and Comment, *The Fin. Institutions Reform, Recovery, and Enforcement Act of 1989: The Effect of the "Self-Affecting" Theory on Fin. Institutions*, 19 N.C. BANKING INST. 263 (2015) (discussing the gov't's theory in applying FIRREA to banks for their own conduct); *see generally* U.S. *ex rel. O'Donnell v. Bank of America Corp.*, 33 F.Supp.3d 494 (S.D.N.Y. 2014); *United States v. Menendez*, No. CV 11-06313, 2013 WL 828926 (C.D. Cal. 2013)).

¹⁷⁹ 12 U.S.C. §1833a(f) (2012).

¹⁸⁰ *See generally Organizational Guidelines*, U.S. Sentencing Commission, <https://perma.cc/DPF6-WP2Q>.

¹⁸¹ Nan S. Ellis, Steven B. Dow, & David Safavian, *Use of FIRREA to Impose Liability in the Wake of the Global Fin. Crisis: A New Weapon in the Arsenal to Prevent Financial Fraud*, 18 U. PA. J. BUS. L. 119, 148 (2015).

One of the hallmarks of civil liability is its compensatory nature; the money damage judgments imposed on defendants primarily serve to compensate injured plaintiffs. This is one of the key characteristics that sets civil liability apart from criminal liability. FIRREA does not appear to serve this compensatory goal because it assesses a sum of money that is paid to the government rather than providing for compensatory damages to be paid to the injured parties.

FIRREA’s purpose is to compensate the government and society for losses from fraudulent activity.¹⁸² FIRREA is the federal government’s exclusive domain, private parties cannot bring a FIRREA action.¹⁸³

The False Claims Act and FIRREA do not permit relief to third parties or private victims. These laws are designed to recompense the government for losses incurred and to deter future fraudulent activity against the government or federally insured financial institutions through penalties. Additionally, the False Claims Act provides for monetary rewards for whistleblowers who have alerted the government of fraud.¹⁸⁴ Neither law authorizes the distribution of money to nongovernmental parties, such as homeowners, let alone unharmed consumers or third party non-profit organizations. Just as it would be inappropriate for a private attorney to settle a case on behalf of her clients by agreeing to a payment to a third-party, it is inappropriate for government attorneys to settle claims on behalf of the American people by directing payments to a third party.¹⁸⁵

ii. *Consumer Relief Provisions Do Not
 Constitute Restitution or Remediation*

Proponents of the consumer relief provisions claim that the provisions constitute a kind of “restitution” or “remediation” of harm.¹⁸⁶ However, as the DOJ explains, “restitution is intended to restore the

Id.

¹⁸² *Id.*

¹⁸³ *Id.* at 149.

This is the case with a FIRREA action which may only be initiated by the federal government, not by private parties. This is a traditional characteristic of both criminal law and modern administrative law and distinguishes the statute from a typical civil action that is brought by a private party plaintiff.

Id. The law does provide for limited whistleblower payments to be made. 12 U.S.C. §1831k(b) (2012); *See also* Andrew W. Schilling, *Should FIRREA Whistleblower Bounties Be Higher?*, LAW360 (Sept. 29, 2014, 10:00 AM), <https://perma.cc/9GMV-F2CR>.

¹⁸⁴ FIRREA also allows much more limited whistleblower awards. *See* Financial Institutions Anti-Fraud Enforcement Act, 12 U.S.C. § 4205(d) (2006).

¹⁸⁵ *See* Larkin, *supra* note 67, at 13.

¹⁸⁶ *The Essential Role of Community Service in Addressing the Harm Caused by Envtl. Crimes and Other Regulatory Offenses Before the H. R. Jud. Comm. Subcomm. on Regulatory Reform, Commercial, and Antitrust Law*, 114th Cong. 8 (2016) (testimony of David Uhlmann).

victim's losses caused by the criminal conduct, not to provide funds to an unrelated third party."¹⁸⁷ Under FIRREA and the False Claims Act, the government is the only victim eligible for restitution. These laws do not include provisions for restitution to anyone but the government, nor do the laws include provisions for remediation. The DOJ might counter that common law claims are the basis of the awards to third parties, but the settlement agreements and the DOJ's own statements about the cases suggest that common law claims were not a primary focus.¹⁸⁸

Yet the settlements provide for payments to third parties that are cloaked in terms of restitution and remediation. As an example of actual restitution, the Ocwen and SunTrust settlements included cash payments to foreclosed buyers who suffered harm as a result of the alleged conduct.¹⁸⁹ The Bank of America agreement refers to its consumer relief as remedial in nature.¹⁹⁰ The Citigroup settlement uses the term "remediate" to describe penalty payments made to the states.¹⁹¹

Professor David K. Min argues that civil monetary penalties are not necessarily tied to restitution or remediation, but serve general deterrence purposes and compensate society as a whole.¹⁹² Monetary penalties deposited into the Treasury are better able to benefit society as a whole than consumer relief payments directed to specific parties chosen by the defendant bank under guidelines crafted by the DOJ. If there is specific harm, then, under a law designed to obtain such relief, a

¹⁸⁷ See U.S. Att'y' Manual 9-16.325, *supra* note 100.

¹⁸⁸ See U.S. Dep't of Just., *Fed. & State Partners Secure Record \$13 Billion Global Settlement with JPMorgan for Misleading Investors About Secs. Containing Toxic Mortgages* (Nov. 19, 2013), <https://perma.cc/86BB-CQ62>. ("Today's global settlement underscores the power of FIRREA and other civil enforcement tools for combatting financial fraud," said Assistant Attorney General for the Civil Division Stuart F. Delery, co-chair of the RMBS Working Group).

¹⁸⁹ See Ocwen Settlement, *supra* note 62; see also SunTrust Settlement, *supra* note 63.

¹⁹⁰ See Bank of America Settlement, *supra* note 6, at 8 ("In addition, Bank of America shall provide \$7,000,000,000.00 worth of consumer relief as set forth in Annex 2, attached hereto and hereby incorporated as a term of this Agreement, to remediate harms resulting from the alleged unlawful conduct of Bank of America.").

¹⁹¹ See Citigroup Settlement, *supra* note 6.

¹⁹² See Min, *supra* note 58, at 8 ("The penalties sought in governmental litigation, such as DOJ actions, are generally not based on a theory of restitutionary or restorative justice, but rather are based on two different but overlapping objections—deterrence and general compensation to society.").

defendant should pay to the specifically harmed parties clearly identified in the settlement. If there is generalized harm, then that money should be deposited into the only place where society can be compensated: the Treasury.

iii. *Consumer Relief Provisions Unnecessarily Avoid Statutory Damages Caps*

Some observers contend that consumer relief provisions are a prudent way enable the government to avoid statutory damages caps.¹⁹³ While this appears to be true – the consumer relief does not count toward a penalty or fine under the laws, thus avoiding the cap – it does not seem that this is necessary or even prudent policy. For example, the statutory cap for FIRREA is \$1 million per violation. Given that each transaction under FIRREA and the False Claims Act can count as a violation, a massive penalty could be assessed for each mortgage affected by the bank’s alleged conduct. As Professor Min acknowledges, the government would likely not have received much more in statutory penalties had it gone to trial and won as compared to the total amount of the settlement, not including consumer relief.¹⁹⁴

Thus, the consumer relief enlarges the settlement beyond what the government should have been entitled to under the law. Statutory damages caps are created for a purpose: to cap the amount that a defendant should pay for violating the law. If the consumer relief provisions are intended to avoid those caps, this is a questionable legal approach. It is not sufficient to argue that the caps should be avoided by pursuing charitable donation requirements. Otherwise, prosecutors would

¹⁹³ *Id.* at 8.

For example, one can imagine a situation in which DOJ was constrained by statutory caps from seeking more than \$100 million in civil penalties, due to statutory limitations. The company may be willing, for various reasons, to accept a slightly adjusted civil penalty—say \$90 million—and in return provide an additional \$90 million in charitable donations aimed at remediating its wrongful conduct. In such a scenario, the overall size of the settlement would be far greater—and thus, far more beneficial to the federal government—than the alternative of merely seeking civil penalties.

Id.

¹⁹⁴ *Id.* (“Thus, it is not clear that DOJ could have procured much more in civil penalties than it received from the RMBS settlements, even if it had litigated these cases and won, due to FIRREA’s statutory cap on civil penalties.”).

have little incentive to pursue cases to trial when they could claim much larger settlement amounts by directing every defendant to make charitable donations above and beyond the statutory damage cap set by Congress. This is not the way our legal system is designed to work.

C. Third Party Payments are Similar to Cy-Près, Without Waiting for Settlement Funds to Actually Be Exhausted

Finally, the third party payments could be seen as an extreme, government-sponsored version of cy-près, which is French for “as near as possible.”¹⁹⁵ Cy-près is a legal process where remaining settlement money can be distributed to unrelated third parties after all identifiable victims have been paid.¹⁹⁶ In 1986, the California Supreme Court, rather than ordering the funds to be returned to the defendant, permitted the distribution of the remainder of class action settlement funds to third parties when the class members could no longer benefit from the settlement.¹⁹⁷

Cy-près allows money to be distributed to third parties selected by the attorneys and not necessarily related to the original class member victims.¹⁹⁸ Chief Justice Roberts has called into question the use of cy-près.¹⁹⁹ In the context of the bank settlements, cy-près is inappropriate because the government is the victim in these cases, so there will never be any funds remaining after the identifiable victims are paid.

VII. PROPOSED SOLUTIONS TO THE SETTLEMENT PROBLEM

¹⁹⁵ *Cy-pres*, BLACK’S LAW DICTIONARY (2nd ed. 1995).

¹⁹⁶ *See, generally*, Ronald C. Chester, *Cy Pres: A Promise Unfulfilled*, 54 IND. L.J. 407 (1979).

¹⁹⁷ *State v. Levi Strauss & Co.*, 41 Cal. 3d 460, 715 P.2d 564, 224 Cal. Rptr. 605 (1986). *See also* Theodore H. Frank, *Cy Pres Settlements*, The Federalist Society (Apr. 04, 2008), <https://perma.cc/RRD9-XMZS>.

¹⁹⁸ *See* Hans Bader, *Collusive Deals with Class Action Lawyers before the Supreme Court*, Competitive Enterprise Institute Blog (Mar. 14, 2016), <https://perma.cc/NU6N-YSQ8>; *see also* Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97, 154-56 (2014).

¹⁹⁹ *Marek v. Lane*, 134 S.Ct. 8, 9 (2013)(stating that the “Court may need to clarify the limits on the use of such remedies.”) (statement of Roberts, C.J.).

There are several steps that could help the DOJ return to its purpose of pursuing clear legal violations and obtaining from violators only the types of relief authorized by statute.

A. DOJ Internal Guidance and Rules

The DOJ could voluntarily stop the practice of building third party payments into settlements. Before the recent bank settlements, one author suggested that control over the settlement authority of the DOJ should come from the Executive Branch itself.²⁰⁰ The Department could create its own guidance regarding settlement best practices that embody a respect for the separation of powers and Congress’s appropriations authority.²⁰¹ The DOJ’s Office of Legal Counsel would enforce these internal rules by offering opinions regarding the legality of settlements.²⁰²

Internal guidance by the DOJ on settlement best practices, including, how, if, and when settlement money can be diverted to third parties and oversight mechanisms, would be a positive step. However, only Congress can truly protect its own powers and provide a check on the Executive Branch.

B. Prohibiting Government Officials From Negotiating Settlements Requiring Donations

Congress has considered prohibiting funds appropriated for salaries and expenses of DOJ personnel from being used to negotiate terms in settlement agreements that require payments to third parties.”²⁰³ The amendment was later turned into the Stop Settlement Slush Funds Act of 2016, which applies to all agents or officials of the government and provides penalties for violating the law.²⁰⁴ As Professor Alan White argued in congressional testimony, the banks were not specifically

²⁰⁰ Peterson, *supra* note 122, at 373. This proposal was made with regard to the environmental cleanup and private-party litigation against the United States. *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ The amendment covered agreements that require a defendant to “donate or contribute funds to an organization or individual.” *See Goodlatte, supra* note 71.

²⁰⁴ *See Hearing on H.R. 5063, supra* note 74.

required to make payments to third party non-profit organizations.²⁰⁵ Accordingly, the proposed law does not go far enough.

Structuring settlements to avoid triggering the bill would be easy. Each settlement agreement provides a *menu* of options for the bank's fulfillment of its consumer relief obligations. The agreement could offer the defendant a choice to donate money to third parties through consumer relief or pay twice as much to the government in a fine. In this way, the DOJ could direct payments to third parties without mandating them. Another concern with the proposed law is that it does not extend to criminal settlements. As former DOJ attorney Paul Figley noted in his congressional testimony,²⁰⁶ the government's leverage in a criminal case can be greater than in a civil case. If Congress prohibits these payments, it should prohibit the government from using its enforcement powers to induce a third-party payment in any settlement.

Finally, as Figley also argued,²⁰⁷ the proposed law does not define *donation*. Regardless of congressional intent, the Executive Branch and courts could construe that term very narrowly. A more expansive term that would capture all types of payments made to third parties would better serve the goal of ending third party payments. Additionally, the law does not make it clear that organizations could not receive the payments: it prohibits a donation to *any person*. It would be prudent for Congress to explicitly clarify that organizations such as non-profits cannot receive payments.²⁰⁸

Similarly, the Agency Accountability Act does not go far enough.²⁰⁹ While the proposed law would apply to the DOJ, it runs into the same problem as the Miscellaneous Receipts Act: it uses the term *receives*. The DOJ has indicated that the consumer relief provisions are never actually received by the DOJ, and no proceeds of the consumer relief provisions pass through the hands of a government official. If the proposed law is intended to apply to consumer relief provisions, it must

²⁰⁵ See generally "Consumers Shortchanged? Oversight of the Just. Dep't's Mortgage Lending Settlements" Before the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law, 114th Cong. (2015) (testimony of Alan M. White).

²⁰⁶ See Figley, *supra* note 66.

²⁰⁷ *Id.*

²⁰⁸ While the Supreme Court has made it clear for the purpose of free speech that an organization is a legal person, it is not certain that this interpretation would apply. See generally *Citizens United v. FEC*, 558 U.S. 310 (2010).

²⁰⁹ See Agency Accountability Act, *supra* note 77.

define *receives* in such a way as to make no mistake as to the intent of Congress.

C. Congress Should Prohibit Third Party Payments

The Heritage Foundation’s Paul Larkin, Jr. proposed that Congress could eliminate third-party settlement payments by requiring that all funds paid in any type of civil or criminal settlement agreement be deposited into the Treasury.²¹⁰ Rather than agencies acting as quasi-appropriators, settlement funds would be returned to the Treasury to be used for other purposes and disbursed as part of the ordinary appropriations process.²¹¹

To implement this solution, Congress could add to each federal agency’s enabling statute a prohibition against settlement agreements that include a payment by a defendant to a third party unharmed by the actions of the defendant. Under such a prohibition, an agency such as the SEC or the CFPB would not be able to enter into an agreement, on its own or in conjunction with the DOJ or another agency or State, that required, authorized, or incentivized the defendant to donate money to a third party not directly harmed by the defendant. Judges would be prohibited from approving an agreement with a third-party payment unless a statute explicitly authorized the payment. This prohibition should not extend to restitution for actual victims or any other payment authorized by law under the statute such as payments to whistleblowers.²¹²

This reform would require agencies to refrain from signing on to agreements that include prohibited payments. However, the DOJ or a state’s Attorney General might still be able to enter agreements that include third-party payments while the federal agency enters into its own, separate agreement including statutory penalties. For example, in the Bank of America action, the SEC entered into a separate agreement, which was attached as Exhibit B to the DOJ settlement,²¹³ and the bank must pay the SEC’s portion of the settlement (\$135.8 million) to the DOJ. To be effective, a legislative prohibition would have to apply to

²¹⁰ See Larkin, *supra* note 71.

²¹¹ *Id.*

²¹² See WHISTLEBLOWER INFORMANT AWARD, INTERNAL REVENUE SERVICE (2017).

²¹³ See In the Matter of Bank of Am. Corp., Respondent., Release No. 72888, at *11 (Aug. 21, 2014), <https://perma.cc/MU6F-HH6P>.

any written agreement to which a federal agency is party or in which it is otherwise involved.

Congress could also enact another more specific reform along the lines of the Larkin proposal: write into criminal and civil liability statutes prohibitions on settling violations of the law with third-party payment agreements. For example, Congress could write a provision into statutes, such as FIRREA and the False Claims Act, which would prevent the settlement of claims under those statutes if the settlement requires, authorizes, or incentivizes a payment to a third party. Congress could also legislatively limit how settlement payments can be made in settlement of common law claims brought by the United States.

Such a prohibition would not preclude restitution to victims directly harmed by the defendant's conduct under the relevant law.²¹⁴ Statutorily-authorized legal remedies such as restitution, remediation, disgorgement, forfeiture, fines, and penalties should continue to be legal where specifically authorized by Congress.

Congress would not overstep its bounds by providing direction to the DOJ and other agencies on how to craft settlements. Even though the Attorney General has broad settlement power, the DOJ has acknowledged that he must exercise discretion based on the specific statutory limits that Congress has provided.²¹⁵ Congressional guidelines would help the DOJ and other agencies to focus their settlement efforts and would make settlements more transparent and easier to compare with one another.

VIII. CONCLUSION

To reclaim its appropriations and law-writing powers, Congress should prohibit federal agencies and the DOJ from entering settlement agreements that require or allow payments to non-whistleblower third parties who were not directly harmed by the conduct at issue. The use of the federal government's enforcement powers to distribute money to third parties is de facto appropriations activity. Just as the current DOJ has used these bank settlements to secure funds for non-profits that some may consider politically left, another administration could require that settlement funds be directed to conservative causes and organizations.²¹⁶

²¹⁴ See U.S. Dep't of Justice, *The Restitution Process for Victims of Fed. Crimes*, <https://perma.cc/PVV3-RCM8>.

²¹⁵ See Peterson, *supra* note 122, at 347.

²¹⁶ See Epstein, *supra* note 69.

Our system of constitutionally transparent and accountable government will erode over time and the rule of law will be diminished if the Executive Branch continues to encroach on Congress’s constitutional powers by diverting money from the Treasury to causes favored by the Executive Branch. As scholars and policymakers continue to reexamine the accumulation of power in the Executive Branch at the expense of Congress, they should consider the power with which the DOJ currently induces settlement. Using settlements to distribute a defendant’s money to uninjured, unrelated parties is a misuse of the legal system and an affront to the Constitutional separation of powers.