Written Testimony of

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"Executive Overreach in Regulatory Enforcement and Infrastructure"

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Chairman King, Ranking Member Cohen, and distinguished members of the Task Force, my name is David Min and I am an Assistant Professor at the University of California Irvine School of Law, where my research focuses on the federal regulation of banking, housing finance and capital markets. Before coming into academia, I spent over a decade working in financial regulation, both in private practice and in the federal government, including as a Senior Policy Advisor for the Joint Economic Committee of Congress, where I had the pleasure of working with several of your colleagues. UC Irvine is only a short drive away from the districts represented by Congressman Issa. Congresswoman Chu, and Congressman Peters, so I appreciate the opportunity to testify in front of my fellow Southern Californians today on the question of Executive Branch overreach.

The topic of today's hearing is incredibly broad, and spans a very large number of highly complex issues in constitutional and administrative law. The question of the proper bounds of Executive Branch action, vis-à-vis either the Legislative and Judiciary Branches of the federal government, or the States, or citizens, has been occupying top legal minds since the Founding of this great country of ours. Because of the sweeping breadth of today's hearing, I will discuss only one discrete aspect of this issue, one with which you are all quite familiar. To what degree do settlements negotiated between federal agencies and private parties over alleged violations of federal law impinge upon Congressional appropriations authority, when those settlements include provisions calling for charitable donations to be made to third party recipients?

These charitable payment provisions are, of course, the subject of H.R. 5063, the "Stop Settlement Slush Funds Act of 2016." H.R 5063 would expressly prohibit the Department of Justice and other federal agencies from negotiating these types of charitable payment provisions, unless they "provide restitution for or otherwise remedy the actual harm… directly and proximately caused by the alleged conduct of the party." As I will discuss, I think H.R. 5063 is a solution in search of a problem. While there are many potential nightmare scenarios being floated around about the potential for these types of charitable payment provisions leading to the creation of federal government "slush funds" used to aid political allies and the like, there is little or no evidence that this is actually happening.

At the same time, H.R. 5063 is likely to have many negative collateral consequences. It will inhibit the federal government's ability to negotiate the best deals. It is a first principle of negotiations that negotiators should have flexibility and open-ended authority. H.R. 5063 flies in the face of this accepted wisdom. H.R. 5063 also would undermine the longstanding goals of civil penalty enforcement—deterrence and general compensation—by effectively reducing the size of the settlements that the federal government can seek on behalf of the United States. Finally, it is likely that H.R. 5063 would lead to more costly litigation, which would increase uncertainty for companies doing business in the United States and thus have negative implications for capital formation and economic growth.

I. General Comments About Executive Overreach

Before I discuss the topic of charitable payment provisions, I would like to make two brief observations about the broader topic of today's hearing, Executive Branch overreach. First, it is important to recognize that there is a difference between what the law, as it currently stands, allows the Executive Branch to do, and what the law should allow the Executive Branch to do.

The former question is largely settled as a matter of law—despite a large number of hyperbolic, and in my view, irresponsible claims to the contrary, the Executive Branch actions being discussed today do not appear to violate the Constitution or any federal laws. The latter question—whether and to what extent Executive Branch actions should be curbed—is a matter of great importance, but one that must require deep and serious analysis from our country's leading legal experts.

Second, while there has been much criticism, including by my fellow witnesses and many of the distinguished members of this Task Force, over the supposed overreach of state and federal prosecutors in recent years, the alternative—not zealously prosecuting highly publicized and costly corporate wrongdoing—seems both unrealistic and undesirable. Critics of so-called "swarm litigation" have pointed to the large number of government investigations over the past decade of mortgage originators, investment banks, and pharmaceutical companies as evidence of a new paradigm of governmental overreach. But let me suggest an alternative explanation that I believe is more consistent with the empirical evidence—there has been more governmental prosecution of business misconduct because there has been much more business misconduct, especially misconduct that has been highly publicized and with clear and substantial negative costs for average Americans.

Lest we have forgotten, let me remind you all that we recently had the worst financial crisis in our lifetimes. This financial crisis was in large part the result of extensive wrongdoing in the U.S. financial services industry,[1] and resulted in a total cost of $22 trillion to the American people.[2] It would be highly unusual—and an indication that it was not doing its job of representing the American people—if the federal government was not seeking to prosecute more financial crimes in the aftermath of this crisis. Similarly, given the gravity of the allegations levied against the pharmaceutical industry and the large potential costs of these alleged crimes,[3] it seems somewhat curious to claim that the government has been overzealous in seeking to prosecute these allegations of criminal misconduct.

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[1] *See generally* PHIL ANGELIDES ET AL., THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES (U.S. Government Printing Office 2011).

[2] U.S. GOVT. ACCOUNTABILITY OFFICE, FINANCIAL REGULATORY REFORM: FINANCIAL CRISIS LOSSES AND POTENTIAL IMPACTS OF THE DODD-FRANK ACT, GAO Report No. 13-180, Jan. 16, 2013.

[3] For example, Johnson & Johnson's subsidiary Janssen admitted to illegal promotion of off-label, non-approved uses of the drug Risperdal. Janssen was also accused of marketing this drug to children and the developmentally disabled without approval; of making false claims about the safety and effectiveness of this drug, including ignoring and covering up data indicating increased risk of strokes and other adverse side effects; and of paying kickbacks to doctors and pharmacists for writing more prescriptions for Risperdal. *See* Press Release, Dept. of Justice Office of Public Affairs, Johnson & Johnson to Pay More Than $2.2 Billion to Resolve Criminal and Civil Investigations (Nov. 4, 2013), *available at* https://www.justice.gov/opa/pr/johnson-johnson-pay-more-22-billion-resolve-criminal-and-civil-investigations. At the same time, J&J earned over $11.7 billion from sales of Risperdal over the period of alleged wrongdoing. *See* Peter Sullivan, *Drop in Drug Company Settlements Leads to Call for Tougher Enforcement*, THE HILL, Mar. 31, 2016, *available at* http://thehill.com/policy/healthcare/274787-drop-in-drug-company-settlements-leads-to-call-for-tougher-enforcement. While some have argued that this settlement was overly punitive, the extremely serious nature of the charges involved and the outsized gains earned for J&J from this wrongdoing have led many to claim that the DOJ's settlement was lax and overly generous to J&J. *See* Press Release, Public Citizen, Big Pharma Settlements Highlight the Need for Tougher Enforcement (Mar. 31, 2016), *available at* http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=5848.

Turning back to the topic of charitable payment provisions, I want to make three distinct but related sets of points today. First, the negotiation of charitable payment provisions as part of government settlements is unquestionably legal, provided that these provisions meet certain criteria. Second, from a public policy perspective, there is scant or no evidence that charitable payment provisions pose an actual problem. Third, limiting charitable payment provisions would create more problems than it would solve, and thus would have far greater costs than benefits.

II. Negotiating for Charitable Payment Provisions is Legally Permissible

As to the first point, it is well settled under current law that charitable payment provisions are valid, so long as they meet certain conditions. Indeed, this very body has implicitly acknowledged this point by passing H.R. 5063 out of Committee. If charitable payment provisions were already illegal, H.R. 5063 would after all be unnecessary. In recent months, a number of commentators have expressed concern that the negotiation of charitable payment provisions might impermissibly bypass Congress's appropriations and oversight authority.[4] For example, one leading critic of charitable payment provisions has argued that they "circumvent the constitutional process for appropriating taxpayer dollars."[5] This claim, while perhaps rhetorically appealing, is inaccurate as a matter of law.

Of course, the Constitution quite clearly establishes that Congress has exclusive authority over the appropriations of new money.[6] But the Executive Branch has always had broad latitude in executing and enforcing the laws passed by Congress, including plenary authority over litigation matters involving the United States, which extends to the settlement of such claims.[7] The only limitations on this settlement authority are statutes that specifically and expressly relate to the litigating authority of the Attorney General and/or Article II, § 3 of the Constitution, which imposes a duty on the President to faithfully execute the laws of the United States.[8]

Thus, there is a potential tension between the Executive Branch and Congress over settlements that might be seen as encroaching on the latter's power over the purse, one which has

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[4] *See, e.g.*, Press Release, Congressman Bob Goodlatte, Goodlatte Introduces Bill to Halt DOJ Slush Fund Money to Activist Groups (Apr. 27, 2016), *available at* http://goodlatte.house.gov/press_releases/887 (describing DOJ settlements with third party payment provisions as a "pattern or practice" of "systematically subverting Congress's budget authority); *Consumers Shortchanged? Oversight of the Justice Department's Mortgage Lending Settlement: Hearing Before the House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (2015) (statement of Paul J. Larkin, Jr.) (arguing that third party payment provisions "should not be included in a… civil settlement… unless an act of Congress expressly and specifically authorizes the government to impose any such obligation") (hereinafter "Larkin Testimony"); U.S. Chamber of Commerce Institute for Legal Reform, *Enforcement Slush Funds: Funding Federal and State Agencies with Enforcement Proceeds* (Mar. 2015) (stating that these types of settlements "raise serious constitutional concerns under Article I, which grants to Congress—and to Congress alone—the power to control and direct spending from the public fisc").

[5] Larkin Testimony, *supra* note 4, at 8.

[6] U.S. CONST. art. I, § 9, cl. 7 ("[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law…").

[7] *See* Assistant Attorney General Theodore Olsen, Office of Legal Counsel, The Attorney General's Role as Chief Litigator for the United States, Memorandum Opinion for the Attorney General, Jan. 4, 1982, at 47-51, 59-60.

[8] *Id*. at 60.

dated back to the first days of our Republic.[9] Over time, Congress has passed several laws specifically designed to limit executive encroachment on Congress's appropriations authority in this regard. The most important of these, for the purposes of this hearing, is the Miscellaneous Receipts Act of 1849 (MRA), which requires that, unless expressly otherwise stated, "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury…"[10] The MRA, and appropriations law more generally, is intended to prohibit federal agencies from augmenting their appropriations through their enforcement policy.[11] But this prohibition applies only to funds that are received by the federal government, as I have explained in prior testimony before the House Financial Services Committee's Subcommittee on Oversight and Investigations.[12]

To ensure that settlements between the federal government and private parties containing charitable payment provisions are upheld by the courts, the Office of Legal Counsel (OLC) has advised that such settlements should meet two criteria: first, they should be executed prior to an admission or finding of liability in favor of the federal government; and second, they should be structured so that the government does not retain post-settlement control over the disposition or management of the funds or any projects carried out under the settlement, except for ensuring compliance.[13] As long as these two criteria are met, OLC has asserted that the government's control over the charitable donations "is so attenuated that the Government cannot be said to be 'receiving money for the Government'" and therefore would fall outside the scope of the MRA.[14]

Importantly, the non-partisan Government Accountability Office (GAO), which is charged with advising and supporting Congress, has accepted this interpretation of the MRA and appropriations law.[15] The GAO has stated on several occasions that charitable payment provisions may fall outside the scope of the MRA, so long as the donations have a nexus to remediating a legal violation and the agency's overall prosecutorial goals.[16] Under the GAO's

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[9] *See* Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. REV. 327, 338-42 (2009).

[10] Act of Mar. 3, 1849, ch. 110, 9 Stat. 398, 398 (codified as amended at 31 U.S.C. § 3302(b) (2012)).

[11] *See, e.g.*, *Nuclear Regulatory Commission's Auth. To Mitigate Civil Penalties* 3-4, Comptroller General Decision, File No. B-238419 (1990).

[12] *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) (statement of David K. Min).

[13] Deputy Assistant Attorney General C. Kevin Marshall, Office of Legal Counsel, *Application of the Government Corporation Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Settlement Agreement*, Memorandum Opinion for the General Counsel United States Trade Representative, Aug. 22, 2006, at 8.

[14] *Id*.

[15] The GAO is an independent, nonpartisan agency that works for Congress and is often described as the "congressional watchdog." GAO's mission is to "support Congress in meeting its constitutional responsibilities and to help improve the performance and ensure the accountability of the federal government… [by] provid[ing] Congress with timely information that is objective, fact-based, nonpartisan, nonideological, fair, and balanced." *See* U.S. Government Accountability Office, About GAO, available at http://www.gao.gov/about/index.html.

[16] *See, e.g.*, U.S. Gov't ACCOUNTABILITY OFFICE, COMMODITY FUTURES TRADING COMM'N—DONATIONS UNDER SETTLEMENT AGREEMENTS, GAO File No. B-210210, Sept. 14, 1983 (settlement terms should be limited to "statutorily authorized prosecutorial objectives" including "correction or termination of a condition or practice, punishment, and deterrence"); U.S. GOV'T ACCOUNTABILITY OFFICE, NUCLEAR REGULATORY COMM'N'S AUTH. TO MITIGATE CIVIL PENALTIES, GAO File No. B-238419, Oct. 9, 1990 (while federal agencies have broad prosecutorial discretion in crafting the terms of

legal interpretation, the broad discretionary authority given to federal agencies to settle litigation over alleged violations of federal law "empowers it to adjust penalties to reflect the special circumstances of the violation or concessions exacted from the violator," so long as the remedies sought are related to the underlying violation in question.[17] As Professor Andrew Spalding of the University of Richmond School of Law has described, this logic is essentially a concession that government settlement terms allowing for reduced penalties in exchange for payments to charitable or community service groups "could actually fall within the Executive's legitimate enforcement and not run afoul of either Congress's Article I power of the purse or the MRA."[18]

Finally, it is worth noting that federal courts have long approved and upheld the negotiation and enforcement of charitable payment provisions. As the Supreme Court has described, settlements of litigation claims are best understood as voluntary mutual agreements akin to contracts.[19] As such, "it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based," which creates the binding obligations.[20] Therefore, settlement terms, including charitable payment provisions, are appropriately viewed as contractual terms rather than civil penalties.[21] Based on this reasoning, lower courts across the country have had no issue with granting consent decrees approving settlement agreements containing charitable payment provisions between the federal government and private parties.[22] This includes the recent settlements with British Petroleum and with the various investment banks that were alleged to have violated various provisions of FIRREA with their sale and marketing of mortgage-backed securities.

Based on this clear and (until recently) undisputed legal background, federal agencies have been negotiating charitable payment provisions for several decades. In fact, the Environmental Protection Agency has expressly encouraged its enforcement staff to "consider every opportunity" to negotiate for such charitable payment provisions "whenever possible."[23] So long as charitable payment provisions are negotiated as a part of a settlement that does not include a finding of liability on the part of the banks, the federal government does not maintain post-settlement control over the disposition or management of the donated funds, and there is some nexus between the charitable payments and the underlying prosecutorial objectives of the federal agency that is settling, there is no question that they are legally valid and enforceable under the law today. The federal government cannot be said to have received any funds under

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settlements of litigation with private parties, these terms must relate to the agencies' underlying prosecutorial objectives).

[17] Letter from U.S. Comptroller General James F. Hinchman to Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce Chair John D. Dingell, GAO File No. B-247155.2 (Mar. 1, 1993).

[18] Andrew Brady Spaulding, *Restorative Justice for Multinational Corporations*, 76 OHIO ST. L. J. 357, 394-95 (2015).

[19] Local No. 93, Int'l Ass'n of Firefights, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501, 517-19 (1986).

[20] *Id*. at 522.

[21] *Id*. at 521.

[22] *See, e.g.*, Sierra Club v. Electronic Controls Design, Inc., 909 F.2d 1350, 1355 (1990); Nw. Envt'l Def. Ctr. V. Unified Sewerage Agency of Washington County, No. CIV 88-1128-HO, 1990 WL 191827, at *1-2 (D. Or., July 27, 1990); Friends of the Earth v. Eastman Kodak Co., 656 F. Supp. 513, 513 (W.D.N.Y), *aff'd*, 834 F.2d 295 (2d. Cir. 1987).

[23] Assistant Administrator John Peter Suarez, Environmental Protection Agency, *Guidance Concerning the Use of Third Parties in the Performance of Supplemental Environmental Projects (SEPs) and the Aggregation of SEP Funds*, Memorandum, Dec. 15, 2003.

these circumstances, and thus neither the MRA nor Congress's appropriations authority can be said to have been implicated.

III. There is No Evidence That Charitable Payment Provisions Pose a Public Policy Problem

As the preceding analysis illustrates, it is unquestionable that settlements with charitable payment provisions are legally permissible. But should they be? Obviously, Congress has the power to change the law, so long as those changes are consistent with the Constitution. Should you all take action to restrict the negotiation of charitable payment provisions, as H.R. 5063 contemplates? In order to properly analyze this question, it is necessary to first address the threshold issue of how big a problem charitable payment provisions pose.

A. No Evidence that Charitable Payment Provisions Are Being Abused

While proponents of H.R. 5063 have alleged that the Department of Justice and other federal agencies have abused charitable payment provisions, effectively turning them into "slush funds" for liberal allies of the Obama administration, these allegations have surprisingly little factual support behind them. Despite a number of hearings by the Judiciary Committee, the Financial Services Committee, and numerous requests to the Department of Justice and others that have resulted in the production of thousands of pages of documents to this Committee, there is no evidence that any of the charitable payment provisions were motivated by the types of nefarious self-dealing and political patronage considerations that have been attributed to them. Indeed, much of the substantive support behind these claims appears to be based on incorrect or misleading characterizations of the facts.

A recent hearing hosted by your colleagues on the House Financial Services Committee's Subcommittee on Oversight and Investigations serves as a case in point.[24] That hearing focused on the DOJ's settlements with five financial institutions over fraudulent statements and misconduct related to those banks' packaging, marketing, and sale of mortgage-backed securities. Several of these settlements contained charitable payment provisions allowing the banks to fulfill a part of their overall obligation by donating money towards neighborhood stabilization and foreclosure prevention efforts. The HFSC hearing characterized these settlements as an effort by the Obama administration to create a "slush fund to support liberal activist groups," focusing on the fact that among the groups that the banks could make payments to were groups like NeighborWorks or La Raza, which are arguably seen as more ideologically liberal than conservative.[25]

But this characterization was highly misleading, and ignored several important facts that largely rebut the claim that these settlements represented some sort of abusive or wrongful practice. First, of the five banks that settled MBS claims with the DOJ, only two of them

[24] House Committee on Financial Services Subcommittee on Oversight and Investigations, *Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriations Powers?*, May 19, 2016, *available at* http://financialservices.house.gov/calendar/eventsingle.aspx?EventID=400643.

[25] *See* Press Release, Office of Rep. Sean Duffy (R-WI), Duffy Investigates Obama Administration's Slush Fund for Liberal Activist Groups (May 19, 2016), *available at* https://duffy.house.gov/press-release/duffy-investigates-obama-administration-s-slush-fund-for-liberal-activist-groups.

(Citigroup and Bank of America) required donations to be made to third party charitable organizations. This indicates that, contrary to the claims of those supporting H.R. 5063, private parties have not been strong-armed into these types of settlements.

Second, the assertion that these charitable payment provisions were structured as political giveaways to liberal "activist" groups aligned with the Obama administration—a political "slush fund" as it has been described—is unsupported by the facts and ignores several important and exonerating points. These particular charitable payment provisions allow the banks to choose to donate to one (or more) of hundreds of charities and community groups, including a number of groups that would best be described as faith-based and/or conservatively aligned.[26] The common thread among these different groups is not a shared ideology but rather a demonstrated ability to further the goals of foreclosure prevention and neighborhood stabilization.

Third and relatedly, these charitable payment provisions were intended to redress the harms that had resulted from the alleged misconduct of the banks in question. It is easy to see a clear nexus between the alleged fraud that took place in the sale and marketing of private-label MBS and the remedial goals of preventing foreclosures and/or limiting the destabilizing and wealth-eroding effects of large numbers of defaults. To the extent that some of the potential recipients of these donations might be described as ideologically liberal, this seems to be due primarily to the fact that these provisions were focused on foreclosure prevention and neighborhood stabilization. The fact is that the particular charities that have been certified as potential recipients of these donations are the ones that are most effective at delivering information and assistance to the low- and moderate-income homeowners who were hit hardest by the mortgage crisis. NCRC or La Raza may or may not be accurately described as "liberal" groups, but it seems indisputable that they are better positioned than most organizations at reaching out to distressed homeowners. The types of services that these organizations offer, including legal aid and housing counseling, have been empirically proven to be among the most effective means of preventing preventable foreclosures.[27]

Fourth, the recipients of these donations are already generally subject to strict oversight, including detailed reporting and auditing requirements, designed to ensure that the funds they receive are used only for approved activities, as Professor Alan J. White has explained.[28] To the extent that these groups rely upon federal and state funding, as well as grants from non-profit foundations, they are required to adhere to very rigorous oversight requirements.[29]

Moreover, the claims that charitable payment provisions are being used as vehicles for self-dealing, cronyism, and corruption are contradicted by the legal strictures that guide the federal government's negotiation of charitable payment provisions. As I described previously in Part I, federal agencies are already under clear guidance that any charitable payment provision

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[26] Many of the controversial groups in question are approved by the U.S. Department of Housing and Development as housing counseling agencies. A full list of HUD-approved housing counseling agencies can be found at http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm.

[27] *See Consumers Shortchanged? Oversight of the Justice Department's Mortgage Lending Settlements: Hearing Before the House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (2015) (statement of Alan M. White, Jr.).

[28] *Id*.

[29] *Id*.

must be designed so that the federal government does not retain post-settlement control over the disposition or management of the donated money. This mandate alone eliminates most or all of the concerns around self-dealing and cronyism. Moreover, the requirement that there be a nexus between any remedial provision negotiated in a government settlement (such as charitable payment provisions) and the underlying prosecutorial purpose, a requirement that is drilled into government attorneys,[30] also serves to rein in prosecutorial misconduct that might arise out of negotiated settlements. These requirements buttress existing conflict and ethical rules already in place for federal employees.

In short, there are already procedures in place to address the potential problems that so deeply concern supporters of H.R. 5063. And while there is much incendiary rhetoric to the contrary, there is very little or no actual evidence of which I am aware that these procedures are not working when it comes to charitable payment provisions.

B. Charitable Payment Provisions Do Not Take Money From the Public Fisc

Another objection to charitable payment provisions is that they potentially redirect money away from the federal treasury, thus essentially taking money that belongs to taxpayers and allocating it towards other purposes. The underlying assumption here is that "[a]ny sum that the government demands that a corporation hand over to a private party is money that the corporation would otherwise pay into the federal treasury." But the federal government is often bound by statutory limitations on the amount of civil penalties it can seek. Thus, it is incorrect to assume that each dollar of charitable payment secured in a settlement is a dollar that would otherwise have gone towards civil fines. 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.

Indeed, the recent MBS-related settlements appear to provide an illustration of this type of scenario. The DOJ's primary federal claims in each of the RMBS settlements were claims of FIRREA violations. Penalties for FIRREA violations are capped at $1 million.[31] Thus, it is not clear that DOJ could have procured 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. The charitable payment provisions negotiated by DOJ appear to have allowed it to procure more than it might otherwise have negotiated, if such provisions were prohibited.

IV. Eliminating Charitable Payment Provisions Would Be Detrimental to Public Policy Purposes

[30] *See, e.g.*, Environmental Protection Agency website, *Supplemental Environmental Projects*, *available at* https://www.epa.gov/enforcement/supplemental-environmental-projects-seps#policy; Kris Sighe, *Organizational Community Service in Environmental Crimes Cases*, *in* UNITED STATES ATTORNEYS' BULLETIN (2012).
[31] 12 U.S.C. 1833a(b)(1).

The preceding section illustrates that charitable payment provisions are not a particularly important or pressing problem. As I describe in this section, eliminating these types of provisions, as H.R. 5063 would do, would have steeply detrimental effects on longstanding public policy goals. It is undeniable that charitable payment provisions may serve a valuable purpose. Indeed, even Paul Larkin, a leading critic of these types of provisions, has acknowledged this point:

> The government and a defendant could find third-party contribution requirements mutually valuable. Requiring a target to make a charitable contribution enables the government to evade statutory limitations on the amount of fines that could be imposed if the prosecution believes that the statutory cap provides an insufficient penalty. The government may find that such conditions have considerable public relations value, particularly in the community benefitting from them. A corporate target also might jump at the opportunity to engage in a charitable endeavor… Moreover, the contribution may have important public relations value for the corporation as well.[32]

A. H.R. 5063 Would Weaken Government Attorneys' Capacity to Achieve Optimal Outcomes

It is a first principle of negotiations that the negotiator should be given flexible and open-ended authority, so that she can negotiate a deal that is in the best interests of her clients.[33] Efforts to limit the negotiator's authority will typically lead to a more zero-sum game approach and outcome,[34] and exacerbate principal-agent conflicts between the client and the negotiator.[35] This is not just an academic point. As Republican presidential nominee Donald Trump has noted, it is critically important to have flexibility in negotiating an optimal deal.[36]

By taking charitable donations to third parties off the bargaining table, H.R. 5063 would weaken the federal government's ability to negotiate for Pareto-optimal outcomes. The likely outcome would be more contentious zero-sum oriented outcomes, including litigation.

B. H.R. 5063 Would Undermine Deterrence and General Compensation Goals of Settlements Negotiated in Lieu of Civil Penalties

H.R. 5063 would also undermine the principal policy purposes behind the regulatory enforcement of civil penalties, namely deterrence and general compensation to society.[37] As I

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[32] Larkin Testimony, *supra* note **Error! Bookmark not defined.**, at 6.

[33] *See* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

[34] *See* Don Peters, *Just Say No: Minimizing Limited Authority Negotiating in Court-Mandated Mediation*, 8 PEPPERDINE DISPUTE RESOL. L. J. 273 (2008).

[35] *See* Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994).

[36] Donald J. Trump & Tony Schwartz, The Art of the Deal 50-53 (stating "I always protect myself by being flexible… The worst thing you can possibly do in a deal is seem desperate to make it. That makes the other guy smell blood, and then you're dead.").

[37] *See* Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1455-56 (1979). As Diver notes, in the U.S. legal system, the function of providing specific

previously described, charitable payment provisions can significantly increase the total amount of the settlement, and this is beneficial for both the goals of deterrence and general compensation. Obviously, a larger amount paid by the alleged wrongdoer would have a larger deterrent effect on other potential wrongdoers. And a larger amount can also provide greater remediation of the effects of the misconduct, serving the general compensation principles behind civil penalties as well.

Proponents of H.R. 5063 have argued that civil penalties—or the settlements negotiated in lieu of such penalties—should serve a restitutionary function and provide "redress to actual victims" while eschewing the idea of a broader or more general compensatory function.[38] But this conception of the policy rationales behind regulatory enforcement is ungrounded in any sound theoretical basis, and is contrary to the overwhelming weight of thought as to why we should seek to enforce civil penalties. As the prominent administrative law scholar Colin Diver has described, "[b]y definition, a civil money penalty does not serve a 'specific' compensatory function" of redressing the harms done to the victim of a particular wrong, since this is the role of remedies in private causes of action.[39] Rather, the compensatory function of civil money penalties is "to compensate 'society' at large for harm that it has suffered at the hands of a violator."[40]

In my view, there are several important reasons why the enforcement of civil penalties is an inapt vehicle for seeking specific restitutionary damages. First, federal agencies are not typically tasked, either in terms of their institutional culture or their resources, with serving individual Americans over the general populace. Thus, they are not likely to be very efficient in pursuing this objective. Second, and relatedly, the incentives of federal agencies are unlikely to be well aligned with the incentives of individual victims of misconduct, posing a classic principal-agent problem. Third, there are likely to be high transaction costs in most scenarios in identifying, representing, and distributing monetary damages to injured individuals.

At the same time, private remedies (and the private causes of action that lead to them) have long proven to be an effective and efficient means of allowing victims of legal violations to seek specific restitution for the harms they have suffered. If this Task Force truly believes that more efforts must be made to ensure that victims of business misconduct are compensated, then the clear answer is that it should seek to broaden the number and scope of private causes of action allowing such victims to seek specific restitutionary justice.

Finally, it should be mentioned that one likely collateral consequence of H.R. 5063 is that federal agencies will feel more compelled to prosecute criminal and civil violations, rather than settle them. Lost in all of the criticism of the charitable payment provisions contained in the recent MBS settlements is the intense public pressure to hold Wall Street accountable for the conduct that led to the financial crisis. The charitable payment provisions negotiated between the

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compensatory damages to individuals aggrieved by legal violations "is performed by a system of private remedies, usually enforceable through the courts…" *Id*. at note 135.

[38] *See* Press Release, Office of Rep. Bob Goodlatte (R-VA), Goodlatte Introduces Bill to Halt DOJ Slush Fund Money to Activist Groups (Apr. 17, 2016), *available at* http://goodlatte.house.gov/news/documentsingle.aspx?DocumentID=571.

[39] *Id*.

[40] *Id*.

DOJ and the banks in question constituted a "win-win" situation—the banks got out from under the specter of costly litigation that threatened their reputation and their bottom line, while the federal government could announce a large settlement figure as evidence that it was holding these institutions accountable for their past misconduct. If the DOJ had been unable to negotiate for charitable payment provisions, it seems far likelier that it would have taken these cases to trial (and then appeal). In my view, such an outcome and the waste of resources it represents is bad for both the American public and also for businesses, who face increased uncertainty, the possibility of a "bet the firm" outcome in litigation, and perhaps more stunted capital formation as a result.

In short, I think that proponents of H.R. 5063 have misstated and grossly exaggerated the negative effects of the status quo, while overlooking the significant costs of limiting the federal government's authority to negotiate settlements on behalf of the United States.

I thank you again for your time, and for the opportunity to testify here today on this critically important topic. I look forward to your questions.

Witness Background Statement

David Min is an Assistant Professor of Law at the University of California Irvine School of Law, in Irvine, California, where he teaches and conducts research in the area of financial regulation, corporate law, and contracts. Prior to joining the faculty at UC Irvine, Professor Min served as the Associate Director for Financial Markets Policy at the policy think tank Center for American Progress, Senior Policy Advisor for the Joint Economic Committee of Congress, and Banking Committee Counsel to Sen. Charles E. Schumer (D-NY).

Before working in public policy, Professor Min spent five years in practice, first as a staff attorney in the Enforcement Division of the Securities and Exchange Commission, and then as an associate in the securities regulation and enforcement group of the Washington, DC law firm Wilmer Hale LLP.

Professor Min holds a J.D. from Harvard Law School, and undergraduate degrees from the University of Pennsylvania's Wharton School of Business (B.S., Economics) and College of Arts and Sciences (B.A., Philosophy).

Professor Min has not received any compensation or grants in connection with his testimony. The views expressed in his testimony are his own and do not represent the position of UC Irvine or UC Irvine School of Law.