Statement of the U.S. Chamber of Commerce

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ON: H.R. ___ "Stop Settlement Slush Funds Act of 2016"

TO: U.S. House of Representatives Committee on Judiciary Subcommittee on Regulatory Reform, Commercial and Administrative Law

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The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

The U.S. Chamber's Institute for Legal Reform is an affiliate of the Chamber dedicated to making our nation's overall civil legal system simpler, fairer, and faster for all participants.

Good morning. Thank you for the opportunity to appear before the Committee today on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform ("ILR"). The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system. ILR is an affiliate of the Chamber dedicated to making our nation's overall civil legal system simpler, fairer, and faster for all participants.
As Attorney General of California, I focused on strong, effective, and fair law enforcement; and most of today's law enforcement officials follow these same principles. And as a Member of Congress and this committee for 18 years, I diligently worked with many of you to enact laws that encouraged that behavior – as well as to ensure that Congress fulfilled its own constitutional duties when making the laws that law enforcement officials carry out.

Like many of you, I have observed with concern an American public who appears to have lost some considerable faith with the present state of our politics and governance. In other words, a healthy skepticism of government – recognized and enshrined in our founding documents – has been replaced by an unhealthy dose of cynicism. There are many reasons for this corrosive development, most too numerous to mention here. Yet, it does establish a context for our discussion today.

I fear that a growing trend in law enforcement is contributing to the erosion of the public's trust that it will receive impartial and fair justice. And it is intruding on core prerogatives of Congress as well.

Let me be clear about my starting point: detecting violations of law and prosecuting and punishing true law-breakers is essential to protecting our fellow citizens, society, democracy, and free-market economy. Playing by the rules is critical, and imposing appropriate sanctions on those who fail to do so is necessary both to punish violations of law and to deter future misconduct.

However, enforcement officials can play this important role only if they satisfy the crucial requirements of fundamental fairness: their decisions must be motivated by the public interest, not politically-motivated self-interest. I am concerned that is not true of all law enforcement decisions today.

We must return to the essential values of fairness and acting in the public interest – the central maxim that must guide *all* enforcement decision-making. I hope that today's hearing will provide an important step toward that goal.

Enforcement officials exercise great power. They decide who to investigate, who to sue civilly, who to prosecute in the criminal courts, and what sanctions to seek. While the discretion of other executive branch employees is constrained by a variety of factors, such as judicial review, each of these determinations made by federal prosecutors and enforcement officials is typically exempt from such oversight.

That is why, as California's Attorney General, I reminded my Deputy Attorneys General and department investigators that they should always keep in mind the possibility that "they were wrong" in their assessment of a case or a defendant. Prosecutors' and investigators' first responsibility is to pursue justice. Without question, the awesome power of the state or federal government is necessary to protect the innocent from those who would do them harm. At the same time, that same power wrongly brought against the innocent is wrong – and overwhelmingly so.

The only option readily available to an enforcement target, whether civil or criminal, is to fight the charges in court – an undertaking that inevitably inflicts substantial monetary and reputational injury, and therefore is not a realistic option for many individuals and corporations, even if they have done nothing wrong. That is why it is critical that this vast discretionary power be guided exclusively by the public interest. And for the reasons discussed below, that principle is under serious threat today.

First, executive branch agencies now use settlements of enforcement actions to fund private parties whose activities further the policy (or in some instances, the personal) goals of agency officials. As a result, non-prosecution agreements and deferred-prosecution agreements increasingly require, or at least strongly encourage, donations to private groups.

This ability to use law enforcement authority to channel funds to favored groups creates a serious threat that the authority to prosecute is being used to further officials' personal or political goals rather than the public interest standard that must govern law enforcement decisions. Furthermore, these decisions are being made outside of the normal appropriations process.

Let's be honest. Does anyone believe that these donations are freely-given, voluntary monetary expressions of support for these organizations? No, they are coerced payments to these entities mandated by officials acting with the full power and majesty of the government. In addition, this is a problem that exists at both the federal and state levels of government.

Here are just a few examples of this "grant" phenomenon:

- In 2012, the Department of Justice (DOJ) forced Gibson Guitars to pay a $50,000 "community service payment" to the National Fish and Wildlife Foundation even though the foundation was not a victim of the alleged crime and had no direct connection to the case. It was simply a non-governmental organization that DOJ employees liked.[1]

- In 2006, the DOJ forced a wastewater plant that had been accused of violating the Clean Water Act to give $1 million to the U.S. Coast Guard Alumni Association.[2] Again, the Association had absolutely no connection to the case and had suffered no harm, direct or indirect.

- This committee is to be commended for your investigation into the contours of DOJ's settlements with our country's largest banks over their mortgage lending practices. These settlements offered banks credit for donations to selected community redevelopment organizations and only opened the door wider for more creative quasi-legislative appropriation decisions by DOJ.[3]

  The Bank of America settlement is most curious. The bank was to set aside $490 million to pay any potential tax liability to be incurred by their customers occasioned by loan modification/forgiveness. That seems logical as the directly affected consumers would be made whole. Yet, with Congress subsequently deciding to continue to extend non-taxable status to these modification "windfalls," there was no damage suffered in this regard. The result was that DOJ caused the money to be "donated" to NeighborWorks America and Interest on Lawyer's Trust Account groups (IOLTAs).

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[1] *See* Paul J. Larkin, "Funding Favored Sons and Daughters: Nonprosecution Agreements and 'Extraordinary Restitution,'" 47 Loy. L. Rev 1, 6-7 (2013).

[2] News Release, U.S. Attorney's Office (D. Conn.), "OMI and U.S. Enter into Deferred Prosecution Agreement" (Feb. 8, 2006), *available at* www.usdoj.gov/usao/ct/press2006/20060208.html.

[3] *See* Letter from Peter J. Kadzik, Ass't Att'y Gen'l, to Bob Goodlatte, Chairman, H. Comm. on the Judiciary, & Jeb Hensarling, Chairman, H. Comm. on Financial Servs. (Jan. 6, 2015); *see also* Statement of Honorable Bob Goodlatte (Feb. 12, 2015), *available at* http://judiciary.house.gov/index.cfm/hearings?Id=54921679-400A-40C3-854D-4B7574364D61&Statement_id=BDEB0AAA-3EF1-482F-A403-8D28CDE00ECF.

- During my last term in Congress, we had very difficult budget choices. In 2011, we voted to eliminate $88 million of the Department of Housing and Urban Development's (HUD) "housing counseling assistance" program. We reinstated about 55 percent of that amount the following year. In the Congress that followed, the appropriations decision was to maintain the funding at that level. However, under the terms of the CitiBank settlement as well as additional provisions of the Bank of America settlement, $150 million worth of mandated donations went to housing non-profits. In a very direct way, the executive branch was able to establish federal funding priorities inconsistent with those set by the Congress.

Now, members of this committee or I might find that some or all of these groups represent noble causes and deserve financial support. Certainly, the U.S. Coast Guard alumni have served our country well and should be honored for that service, and businesses that have run afoul of the law should be punished in a fair and just manner. Yet, those important considerations do not answer the fundamental question: "Who in government should decide where the money goes?"

Allowing law enforcement officials to use coercive government power to reward favored groups is bad enough. But, in a deeper sense, this practice also violates core constitutional principles.

The Constitution provides that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made in Law" by Congress and that "[a]ll Bills for raising Revenue shall originate in the House of Representatives."[4]

James Madison in Federalist Paper No. 51 warned us that a system of checks and balances was necessary to guard against undue concentrations of power within our government and the natural temptation of self-interest by those in government. "Ambition must be made to counteract ambition." While this may result in a less-efficient federal government, Madison reminded us that it is essential "to the preservation of [our] liberty."

The allocation to the People's House of the power to spend money is a critical element of this separation of powers. Indeed, James Madison explained that Congress' "power over the purse may, in fact, be regarded as the most complete and effectual

[4] U.S. Constitution, Art. I, Sect. 7, Cl. 1.

weapon with which any constitution can arm the immediate representatives of the people . . ."[5]

It is not by accident that the first Article of the Constitution is dedicated to the creation of the Congress – not the executive or the judicial branch – and that Congress was given the power of the purse.

Let me highlight two historic examples where Congress acted to guard against perceived encroachments by a President and his appointees on its authority to control spending.

Although he did not begin the practice, President Richard Nixon aggressively impounded funds that Congress had appropriated for programs at amounts with which he disagreed. Over his veto, the Democratically controlled Congress passed the Congressional Budget and Impoundment Control Act of 1974 barring future such impoundments. In the 1980s, the Iran-Contra controversy was tied to the so-called "Boland Amendments," which sought to restrict funds from going to the Contras. Much of the dispute revolved around the question of whether prohibited "funds" were "directed" by the executive branch in contravention of the Congressionally-mandated prohibition.

No matter your position on the underlying policies, it is important to note that in both instances Congress recognized its primary role in the direction of funds by the federal government.

In addition to the separation of powers argument, the late Senator Robert Byrd pointed out that "the power of the purse is more than a procedural device to fence in the Executive; it is also a way of ensuring that spending decisions are made by the more representative and open political institution."[6] The settlement-mandated donation exercise, while sometimes the subject of triumphant press releases, is often hidden from view. This reality has caused the U.S. Senate Committee on Appropriations to include language in their report accompanying the 2017 Commerce and Justice, Science and Related Agencies Appropriations Bill a requirement to report on all third-party donations.

Indeed, the question of transparency in the spending of public funds is of recurrent interest to the Congress. Perhaps this is best exemplified in the bipartisan Federal

[5] Federalist No. 51, at 298 (James Madison) (Ian Shapiro ed., 2009).

[6] Senator Robert C. Byrd, "The Control of the Purse and the Line Item Veto Act," 35 Harv. J. Leg. 297, 312 (1998).

Funding Accountability and Transparency Act signed into law by President George W. Bush in 2006. Unanimously passed by the Senate and House, its original cosponsors were Senators Tom Coburn, Barack Obama, Tom Carper and John McCain. In his floor statement on September 11, 2006, then-Senator Obama praised the bill which created "a user-friendly website to search all Government contracts, grants, earmarks and loans, opening up Federal financial transactions to public scrutiny."[7] He referred to the "veil of secrecy in Washington" regarding federal monies, including grants.[8] He ended with these words: "the American people demand greater transparency and accountability, and it is our honor and privilege – indeed, it is our duty – to provide the tools to help make that possible."[9]

No doubt some will argue that settlement-imposed donations are not federal funds, and therefore, not covered by the various Constitutional provisions. The taxing and spending clauses, in the first instance, deal with a "tax," commonly understood to be "a sum of money demanded by a government for its support or for specific facilities or services, levied upon incomes, property, sales, etc." (A similar definition is found in the Oxford English Dictionary: "a compulsory contribution to state revenue, levied by the government on workers' income and business profits or added to the cost of some goods, services, and transactions.") Settlement-imposed donations to third parties are, by their very nature, compulsory – sums of money demanded by the government for the support of a specific entity. They would not exist in the absence of government legal action.

It is impossible to imagine our founding fathers contemplating a system of government that allows individual government officials to use the considerable power of the federal government to allocate money to causes of their liking, thereby bypassing the lawful congressional appropriations process.

The answer to this persistent problem, at least at the federal level, is fairly straight-forward. Congress should enact a simple statute that prohibits the U.S. government from entering into a settlement agreement requiring a defendant to donate to an organization or individual not a party to the litigation. Chairman Goodlatte's "Stop Settlement Slush Funds Act of 2016" would accomplish this goal, and I hope it will be adopted.

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[7] CONGRESSIONAL RECORD (Sept. 11, 2006), at S9297.

[8] *Id.*

[9] *Id.*

Second, law enforcement officials and their offices increasingly have a direct financial stake in the outcome of prosecutions – because they can use financial proceeds to fund their own operations, above and beyond the amounts received from the legislative branch – and, in too many instances, that financial interest appears to be overshadowing the public interest.

At the federal level, the asset forfeiture and equitable sharing programs allow law enforcement agencies to retain a share of forfeiture proceeds. Let me be clear – I was present at the creation of the 1984 iteration of these programs and proudly claim some share of authorship.

But let's review the history: asset forfeiture in the early 1980s was envisioned as a tool to combat wealthy organized crime operations, primarily dealing with the illegal drug trade. At that time, policing agencies across the country were badly outgunned by the drug gangs, and it was more than appropriate to turn the drug cartels "ill-gotten gains" against them. The original rationale for these programs remain and, in my judgment, justify their continued existence. Just this week, the *Washington Post*, in criticizing the excesses of the programs, also recognized that "[t]here are some legitimate reasons for the practice, such as cracking down on sophisticated organized-crime rings, that manage to separate criminals from tainted assets."[10]

At the same time, however, criticisms of how forfeiture works in other contexts are powerful.

Various government and private-sector reports have outlined problems which have developed in these programs – particularly as they have expanded far beyond what was anticipated by those of us who championed them at their inception. Take for example, the case of Mandrel Stuart highlighted by the *Washington Post*. Mr. Stuart was a barbeque restaurant owner pulled over by Fairfax County, Virginia police for having tinted windows and a video playing in his line of sight. According to the article, the police took $17,550 he said he needed to buy restaurant supplies. Mr. Stuart was released without charges, but did not get his money back from the DEA for one year. According to the *Washington Post*, he lost his business in the meantime.

As an original supporter of the programs, I still hold out hope for their utility, but I acknowledge the need for reform. As you know, the DOJ has instituted limits on these programs, but whether those limits are sufficient to resolve the demonstrated

[10] Editorial, "The feds get back into the stealing business," WASHINGTON POST (Apr. 23, 2016), *available at* https://www.washingtonpost.com/opinions/the-feds-get-back-into-the-stealing-business/2016/04/22/813107b0-08a5-11e6-a12f-ea5aed7958dc_story.html.

problems can only be answered by vigorous oversight by this committee and your counterparts in the Senate. While I continue to believe that asset forfeiture provisions are appropriate in organized crime and serious drug cases, Congress should carefully examine whether changes to the program are appropriate, such as potentially requiring funds to go into the federal general fund rather than being available directly to DOJ.

More importantly, there are many other federal programs that create skewed incentives but have not received the same level of scrutiny as the forfeiture program.[11] For example:

- Federal law permits the DOJ to retain for its own use three percent of amounts recovered in many cases for the federal government.[12]

- The Consumer Financial Protection Bureau is permitted to place the proceeds of settlements and judgments into a "Civil Penalty Fund" that is supposed to compensate injured consumers but in fact appears to be retained by the Bureau for its own purposes.[13]

- The Department of Health and Human Services and the DOJ share a "Health Case Fraud and Abuse Control Account" for proceeds of healthcare fraud cases – and can decide for themselves how to use the billions of dollars deposited into the account, without any of the checks and balances of the appropriations process.[14]

- The Environmental Protection Agency also maintains a revolving enforcement trust fund for the proceeds of settlements relating to Superfund clean-up actions, with no congressional oversight of how the funds are spent.[15]

Early in our country's history, tax collectors and customs agents were paid on the basis of the amounts they collected. And prosecutors were paid on a per-conviction

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[11] These programs are discussed in detail in a paper published in March 2015 by the U.S. Chamber's Institute for Legal Reform entitled "Profit Over Principle: How Law Enforcement for Financial Gain Undermines the Public Interest and Congress's Control of Federal Spending" at pages 9-15, *available at* http://www.instituteforlegalreform.com/uploads/sites/1/Enforcement_Slush_Funds_web.pdf.

[12] 28 U.S.C. § 527 note.

[13] *See Profit Over Principle*, *supra*, at pages 9-11.

[14] *Id.* at 11-12.

[15] *Id.* at 14-15.

basis. But "[m]ost U.S. jurisdictions abandoned such payment schemes by the turn of the twentieth century, due in large part to concerns that bounty-based public enforcement would result in the same kind of overzealousness — a failure to exercise appropriate prosecutorial discretion — that we have come to expect from private enforcement. This historical episode, while largely forgotten, served to cement the tradition of fixed salaries for public employees, 'mak[ing] the absence of the profit motive a defining feature of government.'"[16]

Unfortunately, the examples I have discussed demonstrate that the profit motive is returning to government law enforcement decision-making—and eroding Congress's constitutional authority over expenditures.

Congress can and must take back its constitutional authority, by requiring that these settlement proceeds be deposited into the Treasury's general fund and expended only as Congress directs.

Third, these practices have not been limited to the federal government. State enforcement officials, including state attorneys general, have used settlements to fund their own operations and to create new grant programs outside the state legislative process.[17]

And some enforcement officials' have adopted a practice of ceding their authority to self-interested plaintiffs' lawyers – allowing enforcement actions to be brought on a contingency-fee basis, with proceeds shared between the enforcement official's office and the outside contingency fee attorney. For example, the *Wall Street Journal* reported that "[p]laintiffs' law firms have been pitching new consumer-protection lawsuits to state attorneys general" and "[s]ome states have outsourced such litigation to outside counsel."[18] For example, there are numerous examples of Attorneys General using outside contingency-fee lawyers to prosecute securities class actions.[19] As a result,

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[16] Margaret H. Lemos & Max Minzer, "For-Profit Public Enforcement," 127 HARV. L. REV. 853, 862 (2014).

[17] See generally the paper published in March 2015 by the U.S. Chamber's Institute for Legal Reform entitled "Undoing Checks and Balances: State Attorneys General and Settlement Slush Funds" at pages 23-49, *available at* http://www.instituteforlegalreform.com/uploads/sites/1/Enforcement_Slush_Funds_web.pdf.

[18] Peter Loftus, "States Take Drug Makers to Court Over Marketing," WALL STREET JOURNAL (Apr. 23, 2013), at page B3.

[19] U.S. Chamber Institute for Legal Reform, "Unprincipled Prosecution" (Oct. 2014), at page 11, *available at* http://www.instituteforlegalreform.com/uploads/sites/1/unprincipled-prosecution.pdf.

these actions are grounded in significant part in the profit motive rather than the public interest.

The latter practice is precluded at the federal level by Presidential Executive Order No. 13433.[20] But that order could be revoked by a future President, and Congress should consider codifying it.

Finally, the modern 24-hour news cycle has transformed the public information domain and how public officials react. In the midst of the maelstrom of edited and non-edited stories, rumors, and innuendoes, there lies the public official charged with the responsibility of exercising his or her authority "without fear or favor." As pressures mount, how do we ensure that some officials are not acting based upon "fear" of how the public might perceive a decision not to act or to seek a lesser penalty, even when fully justified on the merits, or seeking the "favor" of public applause for a harsh settlement even if the merits counseled a different result?

While there is no substitute for character and rectitude, our founding fathers wisely recognized the frailties of human nature in all of us, including our public officials. In Federalist Paper No. 51, James Madison put it this way: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and the next place oblige it to control itself."

One way to control government in this context is by ensuring that enforcement officials' discretion is appropriately channeled in order to reduce their ability to make unjustified prosecutorial decisions. That means:

- There should be clear rules of the road so that individuals and businesses know what is legal and what is not, and prosecutors cannot impose retroactive liability based on vague standards.

- Defendants should be given a fair chance to defend themselves, rather than being subjected to multiple, overlapping enforcement actions that leave no choice but an unfair and unjust settlement.

- Punishments should fit the offense and prohibit excessive demands that coerce settlements from the innocent.

[20] 72 Fed. Reg. 28441 (May 16, 2007). The Order bars the use of contingent fee counsel unless a statute requires otherwise.

Clear Rules of the Road & Reining in Abuses of Prosecutorial Discretion. The courts have said repeatedly that the target of an enforcement action must have "fair notice" that his or her conduct was unlawful before criminal or civil penalties may be imposed.[21] Increasingly, however, prosecutors rely on novel interpretations of vague statutory language.

This approach has been used to expand beyond any recognition the reach of the Foreign Corrupt Practices Act[22]; the Financial Institutions Reform, Recovery, and Enforcement Act[23]; and many other federal statutes.

For every defendant able and willing to fight such unfair charges there are many who are forced to settle because they cannot afford the financial and reputational injury that result from lengthy litigation with the government.

The consequence: uncertainty about what the law permits and chilling of innovation, because a businesses and individuals cannot anticipate whether or not their behavior might retroactively be declared "unlawful."

Further, we expect our prosecutors to "do justice," rather than rack up victories for the sake of racking up victories. Abuses of prosecutorial discretion are a major impediment to fairness in our justice system. The poster child for abuse of prosecutorial discretion is perhaps the federal government's decision to charge a fisherman for violating the Sarbanes-Oxley "anti-shredding" laws for throwing three fish back into the Gulf of Mexico. As a result, the fisherman, Mr. Yates, faced decades in prison for what should have been a minor offense. The Supreme Court rebuked the federal government for its interpretation of Sarbanes-Oxley, holding that Congress never intended a provision designed to punish those who destroy documents to be used to throw the book at a fisherman for tossing a fish back into the ocean. The Yates case is just one example of this phenomenon.[24]

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[21] *See*, *e.g.*, Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.") (footnote omitted); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.") (citations omitted).

[22] U.S. Chamber Institute for Legal Reform, "Legal Limbo: Seeking Clarity in How and When the Department of Justice Declines to Prosecute" (Oct. 2012), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/DeclinationsBooklet.pdf.

[23] U.S. Chamber Institute for Legal Reform, "The FIRREA Revival" (Oct. 2014) *available at* http://www.instituteforlegalreform.com/uploads/sites/1/firrea.pdf.

[24] *Yates v. United States*, 135 S. Ct. 1074 (2015).

A Fair Chance to Defend. It is a fundamental principle of the American system of justice that everyone deserves a chance to defend themselves. Abusive law enforcement practices today undermine this basic principle.

The *Economist* recently explained this phenomenon:

> "The formula is simple: find a large company that may (or may not) have done something wrong; threaten its managers with commercial ruin, preferably with criminal charges; force them to use their shareholders' money to pay an enormous fine to drop the charges. . . . Then repeat with another large company."[25]

The key to this practice is that the company is targeted by multiple law enforcement officials – state AGs, the DOJ, other federal agencies, and even local governments. As one state Attorney General explained, "[w]hen threatened by a suit by multiple AGs [or other regulators] most publicly held companies conclude they can't afford the fight."[26] Even if innocent, companies have to settle.

At least some in the DOJ have recognized the unfairness of this "piling on" by multiple law enforcement officials. According to a recent *Financial Times* article, Andrew Weissmann, the chief of the Fraud Section of DOJ's Criminal Division said: "There is a problem with piling up: there is both a fairness issue but it's also in law enforcement's interest to do a better job."[27] Leslie Caldwell, the head of the DOJ's Criminal Division, has also referred to the unfair phenomenon of "regulatory piling on" in domestic enforcement.[28]

We simply cannot tolerate a system in which the innocent are, as a practical matter, unable to defend themselves. Limits on multiple duplicative investigations and

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[25] "The criminalisation of American business," THE ECONOMIST (Aug. 30, 2014), available at http://www.economist.com/news/leaders/21614138- companies-must-be-punished-when-they-dowrong-legal-system-has-become-extortion.

[26] Monisha Bonsai, "State AGs Critical of Some Colleagues' Activism," CNS NEWS (July 7, 2008).

[27] Caroline Binham, "Enforcers concerned about 'piling on' in bank probes," Financial Times (Jan 22, 2016), *available at* http://www.ft.com/intl/cms/s/0/3735ba00-c11c-11e5-846f-79b0e3d20eaf.html#axzz46wc3FE00.

[28] Assistant Attorney General Leslie R. Caldwell, "Remarks at the New York City Bar Association's Fourth Annual White Collar Crime Institute" (May 12, 2015), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-city-bar-0.

prosecutions are essential to preserve fairness in our system of justice – and our overall economy.

Prohibit Excessive Demands that Coerce Settlements. Federal laws set no meaningful limits on the monetary fines that law enforcement officials may seek in civil or criminal enforcement actions. Even if the statute specifies a sanction "per offense," government officials define the "offense" so as to multiply the demand exponentially.

Facing claims in the billions or tens of billions of dollars – and no clear statutory standard for assessing penalties, such as proportionality between the penalty and harm actually inflicted – any rational defendant will settle to avoid the downside risk of a huge monetary penalty. This occurs even if the defendant has strong arguments that he or she did not violate the law.

Clearer standards for setting penalties are essential to ensure that punishment is proportionate to the actual wrongdoing and harm done and that unfair settlements cannot be coerced through the threat of draconian penalties.

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Fairness in the law enforcement process is important because it is cornerstone of our entire system of government. But we also must recognize that prosecution motivated by self-interest, rather than the public interest, imposes other real-world costs. The hundreds of millions of dollars that businesses and individuals must spend to navigate an unfair system—and the billions exacted in unjustified settlements— mean less money to pay employees and higher prices for consumers. Even more important, these practices mean less money to invest in new products and services—including new drugs, or new technologies that have the potential to improve the lives of all of our citizens.

Congress can and must step in to recalibrate our system, and ensure that that the public interest is the only guide for exercising this critical government power.

Thank you for allowing me to testify today on this important topic, and I am happy to answer any questions you may have.