Written Testimony of

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on

"A Time to Reform: Oversight of the Activities of the Justice Department's Civil, Tax and Environment and Natural Resources Divisions and the U.S."

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Mr. Chairman and Members of the Committee,

Thank you for the opportunity to testify today on regulatory policy issues. I am Robert Weissman, president of Public Citizen. Public Citizen is a national public interest organization with more than 400,000 members and supporters. For more than 40 years, we have advocated with some considerable success for stronger health, safety, consumer protection and other rules, and strong civil and criminal enforcement measures to punish and deter corporate wrongdoing.

My testimony today focuses on U.S. Department of Justice (DOJ) enforcement programs against corporate wrongdoers. It details significant failures in the Department, as well as the need for remedial legislation to curb corporate wrongdoing.

The first section of the testimony analyzes DOJ civil settlements with a number of Big Banks, concluding that those settlements failed to make crucial information available to the public, such that it is impossible to assess their reasonableness. The second section discusses DOJ's extensive use of deferred and non-prosecution agreements for corporate wrongdoers, a practice which has eroded the functioning of the criminal law and deterrence against corporate malfeasance. The third section explores recent developments related to civil and criminal enforcement against corporate wrongdoers. The fourth section analyzes a number of other policy considerations related to corporate wrongdoing, and the fifth section considers two important settlement-related policies. Because it appears that this hearing may touch on issues related to Internal Revenue Service enforcement of electioneering standards for nonprofit organizations, I offer additional comments on this topic as an addendum to the testimony.

I. Settling with the Big Banks

Nine years later, America is still recovering from the Great Recession, a world-historic economic calamity brought on by Big Bank and Wall Street recklessness. Lenders spread toxic and predatory mortgages that helped fuel the housing bubble. Deregulated Wall Street firms and big banks exhibited an insatiable appetite for mortgage loans, irrespective of quality, thanks to insufficiently regulated securitization, off-the-books accounting, the spread of shadow banking techniques, dangerous compensation incentives and inadequate capital standards. Reckless financial practices were ratified by credit ratings firms, paving the way for institutional funders to pour billions into mortgage-related markets; and an unregulated derivatives trade offered the illusion of systemic insurance but actually exacerbated the crisis when the housing bubble popped and Wall Street crashed.

The costs of this set of regulatory failures are staggeringly high. A GAO study found that "[t]he 2007-2009 financial crisis, like past financial crises, was associated with not only a steep decline in output but also the most severe economic downturn since the Great Depression of the 1930s."[1] Reviewing estimates of lost economic output, GAO reported that the present value of cumulative output losses could exceed $13 trillion.[2] Additionally, GAO found that "households collectively

[1] U.S. Government Accountability Office. (2013, Jan. 13). *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 12. Available from: <http://www.gao.gov/products/GAO-13-180>.
[2] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 16.

lost about $9.1 trillion (in constant 2011 dollars) in national home equity between 2005 and 2011, in part because of the decline in home prices."[3]

The recession threw millions out of work, and left millions more jobless or underemployed. "The monthly unemployment rate peaked at around 10 percent in October 2009 and remained above 8 percent for over 3 years, making this the longest stretch of unemployment above 8 percent in the United States since the Great Depression," GAO noted.[4] Thanks to lost income and especially collapsed housing prices, families' net worth plummeted. According to the Federal Reserve's Survey of Consumer Finances, median household net worth fell by $49,100 per family, or by nearly 39 percent, between 2007 and 2010.[5]

Remarkably, given the scale of corporate wrongdoing and devastation wreaked, the perpetrators that caused the Great Recession escaped any criminal prosecution. No criminal prosecution of the giant corporations who ripped off borrowers; no criminal prosecutions for widespread securitization fraud, save for a single, relatively low-level case; no criminal prosecution for the ratings companies that knowingly blessed widespread misconduct. No criminal prosecution of the Big Banks, and no prosecution of their executives.

The failure to prosecute is a major blemish on the record of the Department of Justice. It enabled wrongdoers to escape accountability, left victims uncompensated and failed utterly to establish a commitment to enforcement that will deter future wrongdoing.

Very belatedly, as a kind of mop-up operation, the Department of Justice starting in 2013 entered into a series of settlements of civil claims against the largest banks. The first major "global settlement" was with JPMorgan, for a purported $13 billion, entered into in November 2013.[6] It was followed by a July 2014 purported $7 billion deal with Citigroup,[7] and a purported $16.6 billion settlement with Bank of America in August 2014.[8]

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[3] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 21. There is necessarily a significant amount of uncertainty around such analyses. Other estimates have placed the loss somewhat lower. A recent Congressional Budget Office study estimates the cumulative loss from the recession and slow recovery at $5.7 trillion." (Congressional Budget Office. 2012. *The Budget and Economic Outlook: Fiscal Years 2012 to 2022*. p. 26.) One complicating issue is determining which losses should be attributed to the recession and which to other issues. For example, GAO notes, "analyzing the peak-to-trough changes in certain measures, such as home prices, can overstate the impacts associated with the crisis, as valuations before the crisis may have been inflated and unsustainable.[3] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 17.

[4] *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* pp. 17-18.

[5] Cited in *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act.* p. 16.

[6] Department of Justice, "Justice Department, Federal and State Partners Secure Record $13 Billion Global Settlement with JPMorgan for Misleading Investors About Securities Containing Toxic Mortgages," November 13, 2013, Available at: https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement.

[7] Department of Justice, "Justice Department, Federal and State Partners Secure Record $7 Billion Global Settlement with Citigroup for Misleading Investors About Securities Containing Toxic Mortgages," July 14, 2014, available at: https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement.

[8] Department of Justice, "Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis," August 21, 2014, available at: https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading.

Later deals included a purported $2.6 billion settlement with Morgan Stanley[9] and a purported $5 billion settlement with Goldman Sachs[10] in 2016, and a purported $864 million settlement with Moody's,[11] a purported $7.2 billion settlement with Deutsche Bank,[12] and a purported $5.28 billion settlement with Credit Suisse, all in January 2017.[13]

Although the details of the settlements varied, they aimed to resolve claims related to the improper issuance of residential mortgage-backed securities.

Perhaps because of frustration and resignation over DOJ's decision not to engage in criminal prosecutions, or perhaps because the settlements did involve large sums of money, and although they were front-page news for a day, these giant deals received very little scrutiny. That was a mistake that this Subcommittee should remedy. These settlements were reached through secretive and faulty processes; they failed to provide any serious accounting to the public of what the Department had uncovered and why it thought billions of dollars in penalties and restitution were in order; the public relations hype around the settlements obscured the extent to which substantial portions of the settlement totals imposed no or minimal actual costs on the settling banks; and although the non-transparent aspect of the settlement makes this impossible to determine with certainty, they very likely let the banks off cheap relative to their potential liability. While "rough justice" is sometimes the best that can be obtained, there is an almost ad hoc element to these deals that suggests a mutually face-saving, slipshod negotiation rather than an appropriately deliberative and thoughtful process.

In the case of the JPMorgan settlement, for example, the Department never filed nor published a complaint against the megabank, though DOJ lawyers had apparently drafted a detailed version. Instead, the settlement contains only an 11-page statement of facts that purports to describe the misdeeds of JPMorgan and its acquired Bear Stearns and Washington Mutual operations. This statement of facts may generously be characterized as bare bones.

The organization Better Markets would subsequently challenge the JPMorgan settlement in federal court. Although Better Markets was not able to prevail as a legal matter, there is little doubt, in our view, that the organization was correct as a policy matter. In criticizing the nature of the statement of facts, it elaborated what was not disclosed:

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[9] Justice Department, February 11, 2016, Morgan Stanley Agrees To Pay $2.6 Billion Penalty In Connection With Its Sale Of Residential Mortgage Backed Securities, available at: https://www.justice.gov/usao-ndca/pr/morgan-stanley-agrees-pay-26-billion-penalty-connection-its-sale-residential-mortgage.

[10] Justice Department, April 11, 2016, Goldman Sachs Agrees to Pay More than $5 Billion in Connection with Its Sale of Residential Mortgage Backed Securities, available at: https://www.justice.gov/opa/pr/goldman-sachs-agrees-pay-more-5-billion-connection-its-sale-residential-mortgage-backed.

[11] Department of Justice, January 13, 2017, Justice Department and State Partners Secure Nearly $864 Million Settlement With Moody's Arising From Conduct in the Lead up to the Financial Crisis, available at: https://www.justice.gov/opa/pr/justice-department-and-state-partners-secure-nearly-864-million-settlement-moody-s-arising.

[12] Department of Justice, January 17, 2017, Deutsche Bank Agrees to Pay $7.2 Billion for Misleading Investors in its Sale of Residential Mortgage-Backed Securities, available at: https://www.justice.gov/opa/pr/deutsche-bank-agrees-pay-72-billion-misleading-investors-its-sale-residential-mortgage-backed.

[13] Department of Justice, January 18, 2017, Credit Suisse Agrees to Pay $5.28 Billion in Connection with its Sale of Residential Mortgage-Backed Securities, available at: https://www.justice.gov/opa/pr/credit-suisse-agrees-pay-528-billion-connection-its-sale-residential-mortgage-backed.

> a. the scope of the investigation; b. the underlying illegal conduct; c. the specific violations of law committed; d. the benefits (monetary and otherwise) received by JPMorgan Chase; e. the damages inflicted on investors and other victims by JPMorgan Chase; f. the impact of those violations in terms of contributing to the financial crisis; g. the individuals involved in and responsible for the violations; and h. the appropriateness of the civil monetary penalty and other relief included in the $13 billion agreement under all the facts and circumstances.[14]

Most problematic, Better Markets argued,

> The $13 billion agreement does not describe in any meaningful detail the illegal conduct by JPMorgan Chase that gave rise to the civil monetary penalty, including an explanation of how those 1,605 Subprime Securities [identified in an annex] were selected for coverage under the $13 billion agreement; the number, type, and content of the misrepresentations and omissions that JPMorgan Chase committed, both in documents and orally; and when the acts of misconduct occurred. Nor does the $13 billion agreement attach any of the term sheets and offering materials for the Subprime Securities listed in Annex 3. Instead, the statement of facts employs vague terms and phrases, such as "large amounts;" "in certain instances;" "at least some of the loan pools;" "in various offering documents;" "certain pools;" "a number of;" "certain investors;" "purchasers;" and "a number of loans."[15]

Although the subsequent settlements contained slightly more detail of the covered misconduct than the JPMorgan statement of facts, they followed essentially the same template.

In the case of the JPMorgan settlement, some details are known about the negotiation process, due to subsequent New York Times reporting.[16] JPMorgan was desperate to prevent the filing of a case in court. Just before the DOJ was prepared to file a case, JPMorgan CEO Jamie Dimon called Tony West, then the number three official at DOJ, to negotiate a deal. West insisted that JPMorgan agree to pay billions more than it previously had offered in negotiations, and Dimon agreed. No complaint was filed.

Yet apparently JPMorgan had a copy of the complaint, and actively kept it secret. The Better Markets complaint details that the company refused to turn over a copy in subsequent litigation with the Federal Home Loan Board of Pittsburgh.

JPMorgan's refusal to make public a DOJ draft complaint – which presumably contains detailed allegations of JPMorgan wrongdoing, but obviously no admission from the company – underscores the value to the public of the information that DOJ never disclosed, and makes clear

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[14] Better Markets v. The Department of Justice, Complaint for Declaratory and Injunctive Relief, February 10, 2014, available at: http://www.bettermarkets.com/sites/default/files/Better%20Markets%20v%20%20DOJ-%20Complaint-%202-10-14_0.pdf.

[15] Better Markets v. The Department of Justice, Complaint.

[16] Ben Protess and Jessica Silver-Greenberg, "In Extracting Deal from JPMorgan, US Aimed for the Bottom Line," New York Times, November 19, 2013, available at: http://dealbook.nytimes.com/2013/11/19/13-billion-settlement-with-jpmorgan-is-announced.

that the failure to publish the complaint, or at minimum a far more detailed statement of facts, with actual sources and citations, was a major public disservice.

We applaud the Department for seeking to impose harsh penalties on the Big Banks, and the New York Times reporting makes clear that the Department engaged in tough negotiations over the amount that JPMorgan, and presumably the other banks, would pay. But there is no real way to measure the adequacy of those fines and payments without reference to the wrongdoing and harms for which they are being imposed. Given the nature of Wall Street's wrongdoing, and top DOJ officials' claims that the settlements related to conduct that was centrally related to the mortgage meltdown and the Great Recession, there is good reason to suspect that the penalties are inadequate, both compared to the scale of damage and to achieve appropriate deterrence – particularly in light of the failure to bring any criminal claims.

It is also the case that key elements of the settlements, repeatedly touted by DOJ as "historic" and involving "record" sums, artificially inflate the actual cost to the banks. First, substantial portions appear to be tax deductible, meaning taxpayers are actually subsidizing a significant portion of the penalty payment. Second, each of the settlements involves billions of dollars in relief aid to consumers. While such measures should appropriately be the top priority in mortgage fraud cases, bank write-downs and loan modifications of underwater loans do not impose costs on banks, or at the very least not in the sense that fines do. To be clear, loan modifications are a material benefit to underwater homeowners, and may permit them to stay in homes that they otherwise would be forced to leave. But writing down underwater loans is an action that banks should be taking irrespective of any government mandate, not to serve consumers but to properly account on their books for the value of their loans.

The Big Bank civil settlements deserve ongoing Congressional scrutiny, to determine bank compliance but especially to prevent such flawed deals in the future. One of the final such deals involving the Big Banks for conduct leading up to the financial meltdown, with Deutsche Bank poses complicated specific questions of its own, regarding pressure placed by the German government to avoid harsh penalties.[17] Whether by statute, through exercise of Congressional oversight or DOJ adoption of policy clarity, cases of this scale require a different kind of treatment.

- Such settlements must include a clear and detailed statement of the wrongs alleged, the evidentiary basis for those claims, the laws allegedly violated, and the harm allegedly inflicted.
- At a certain threshold of wrongdoing and penalty, there is a strong argument that such settlements should be subjected to judicial review for adequacy and protection of the public interest.
- Civil action must not be a substitute for criminal enforcement.

[17] Landon Thomas and Chad Bray, "Deutsche Bank Denies Asking Gerrmany to Help in U.S Dispute," New York Times, September 26, 2016, available at: https://www.nytimes.com/2016/09/27/business/dealbook/deutsche-bank-denies-seeking-germanys-help-in-us-dispute.html?mcubz=2&_r=0.

II. Inappropriate use of deferred and non-prosecution agreements

Far too often, corporations are able to commit crimes but escape criminal prosecution, even when caught. In the past decade, there has been a dramatic rise in federal prosecutors choosing not to prosecute corporations that have committed crimes. Instead, the U.S. Department of Justice has adopted an alternative approach, entering into agreements with corporations to either defer prosecution or abstain from prosecution entirely if the corporation meets the terms set out in these agreements. When first introduced, these types of agreements, also known as "pre-trial diversion," were intended to apply not to corporations, but primarily to juvenile delinquents, with the aim of clearing the courts to allow them to attend to major criminal cases.[18] Yet, when deferred and non-prosecution agreements are used in response to massive corporate crimes, it is exactly such perpetrators of major crimes that reap the benefits. Indeed the extent and nature of deferred and non-prosecution of agreements is such that they have turned much of DOJ's corporate criminal practice into a branch of civil enforcement – a deeply problematic state of affairs precisely because criminal and civil enforcement aim to achieve distinct if overlapping objectives.

Prior to 2003, the DOJ entered into fewer than five deferred prosecution agreements and non-prosecution agreements with corporations per year. In the first decade following the millennium, these numbers gradually crept upwards, entering the double digits by 2005. Numbers rose to a high of 42 deferred and non-prosecution agreements in 2007 and continue to number in the dozens every year, according to a forthcoming report from Public Citizen.[19]

Deferred and non-prosecution agreements are a special gift to large corporations, which are enabled to escape prosecution for serious crimes in a manner rarely afforded to individuals or small business. The logic of these agreements is that they permit prosecutors to put in place special compliance mechanisms to prevent future wrongdoing. These compliance mechanisms can equally be obtained through criminal plea agreements, however, so the claim that deferred and non-prosecution agreements offer some unique benefit is incorrect. Worse, deferred prosecution agreements offer little or no deterrent effect, either for the (non-)charged corporation or for others. Corporations entering into deferred and non-prosecution agreements have a strikingly high recidivism rate, including companies such as AIG, Barclays, Bristol-Myers Squibb, Chevron, GlaxoSmithKline, Hitachi, Lucent, Merrill Lynch, Pfizer, Prudential and UBS.[20]

Perhaps the most appalling example of the abuse of deferred prosecution—one which emphasizes how this kid-glove treatment is designed primarily for giant corporations—involves the banking giant HSBC. In December 2012, the company agreed to pay more than $1 billion in fines and entered into a deferred prosecution agreement for anti-money laundering and sanctions violations. Assistant Attorney General Lanny Breuer said the company was guilty of "stunning

[18] Mokhiber, R. (2005). Crime without Conviction: The Rise of Deferred and Non Prosecution Agreements. Available from: <http://corporatecrimereporter.com/deferredreport.htm>.
[19] Ben-Ishai, E. and Weissman, R. (forthcoming, 2017). Justice Deferred -- and Denied. Public Citizen. The most detailed account and analysis of deferred prosecution agreements is contained in Garrett, B. (2014.) Too Big To Jail: How Prosecutors Compromise with Corporations. Harvard University Press.
[20] Ben-Ishai, E. and Weissman, R. (forthcoming, 2016). Justice Deferred -- and Denied. Public Citizen.

failures of oversight—and worse" and that the "record of dysfunction that prevailed at HSBC for many years was astonishing."[21]

Breuer was correct.

The statement of facts attached to the deferred prosecution agreement with HSBC is startling. Just two illustrative examples:

- As regards money laundering for Latin American drug cartels, "Senior business executives at HSBC Mexico repeatedly overruled recommendations from its own AML [anti-money laundering] committee to close accounts with documented suspicious activity. In July 2007, a senior compliance officer at HSBC Group told HSBC Mexico's Chief Compliance Officer that '[t]he AML committee just can't keep rubber-stamping unacceptable risks merely because someone on the business side writes a nice letter. It needs to take a firmer stand. It needs some cojones. We have seen this movie before, and it ends badly.'"[22]

- As regards efforts to facilitate evasion of U.S. government sanctions against other countries, the statement of facts says, "[B]eginning in the 1990s, HSBC Bank plc ("HSBC Europe"), a wholly owned subsidiary of HSBC Group, devised a procedure whereby the Sanctioned Entities put a cautionary note in their SWIFT payment messages including, among others, 'care sanctioned country,' 'do not mention our name in NY,' or 'do not mention Iran.' Payments with these cautionary notes automatically fell into what HSBC Europe termed a 'repair queue' where HSBC Europe employees manually removed all references to the Sanctioned Entities. The payments were then sent to HSBC Bank USA and other financial institutions in the United States without reference to the Sanctioned Entities, ensuring that the payments would be processed without delay and not be blocked or rejected and referred to OFAC. HSBC Group was aware of this practice."[23]

Why did a company engaging in such egregious practices, which facilitated illegal drug trafficking and evasion of U.S. sanctions against foreign countries, escape without a criminal prosecution?

According to Breuer, the worry was that a criminal prosecution of a giant bank like HSBC might bring down the company and threaten the global financial system's stability.[24] "In trying to reach a result that's fair and just and powerful, you also have to look at the collateral consequences,"

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[21] Breuer, L. (2012, December 11.) *Assistant Attorney General Lanny A. Breuer Speaks at the HSBC Press Conference*. Available from: <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1212111.html>.
[22] United States of America Against HSBC Bank USA, N.A. and HSBC Holdings PLC, HSBC Deferred Prosecution Agreement Attachment - Statement of Facts. (2012, December 11.) p. 13. Available from: <http://www.justice.gov/opa/documents/hsbc/dpa-attachment-a.pdf>.
[23] HSBC Deferred Prosecution Agreement Attachment - Statement of Facts. pp. 22-23.
[24] O'Toole, J. (2012, December 12.) *HSBC: Too Big to Jail?* CNNMoney. Available from: <http://money.cnn.com/2012/12/12/news/companies/hsbc-money-laundering/index.html>.

Breuer said at the news conference announcing the deferred prosecution deal.[25] "If you think that by doing a certain thing you risk either a charter being revoked, you think that counterparties in a massive financial institution may go away, you think that there is a risk that many, many innocent people will be harmed from a resolution, and by another resolution you think you can mitigate the risk of innocent people suffering, the economy being affected, and you can home in on those and the institutions and address the issues underlying, to the Department of Justice, that's a very real factor, and so it is a fact that you consider. It's one factor," Breuer said.[26]

In other words, the mere fact of its excessive size enabled HSBC to escape criminal penalties; it has been judged too big to jail.

A smaller bank, presumably, would have received no such deferential treatment.

American Banker—not an outlet known for shrill criticism of the banking industry—eloquently captured the moral outrage of this state of affairs. Shortly after the HSBC deferred prosecution deal, American Banker highlighted the case of G&A Check Cashing, a small firm found to have violated anti-money laundering laws for over $8 million in transactions. (By contrast, HSBC was found to have laundered at least $881 million in drug trafficking proceeds, and failed to monitor properly $200 trillion in wire transfers.) Two of its executives were sentenced to jail terms, and the company was placed on probation for two years. The case highlights "the disparate treatment of certain institutions for violations of anti-laundering laws," American Banker commented. "[M]any have responded to the settlement with disdain for the basic message they said it sent about parity under the law."[27]

The HSBC deal looks even worse in retrospect, as its compliance monitor reports that the bank is failing to adopt appropriate compliance processes and federal prosecutors has considered filing a new criminal case, related to foreign exchange manipulations, against HSBC.[28]

In response to the very strong public criticism around the HSBC and other deferred prosecution deals, top officials at the Department of Justice walked back prior statements that such sweetheart deals were needed because of the potential systemic risk posed by prosecuting Wall Street giants. But there is little doubt that the too-big-to-jail comments reflected the actual views inside the Department of Justice.

Criticisms of disparate treatment for large banks did strike a chord inside the Department of Justice, however. DOJ has recently secured some criminal pleas from giant financial firms, most notably in regards to the extraordinary manipulation of foreign exchange markets by five major banks. These banks—Barclays, Citigroup, JP Morgan Chase, the Royal Bank of Scotland and

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[25] Viswanatha, A. and Wolf, B. (2012, December 12.) HSBC to pay $1.9 billion U.S. fine in money-laundering case. Reuters. Available from: <http://www.reuters.com/article/2012/12/11/us-hsbc-probe-idUSBRE8BA05M20121211>.
[26] Finkle, V. (2013, Jan. 22.) *Are Some Banks 'Too Big To Jail'?* American Banker. Available from: <http://www.americanbanker.com/issues/178_15/are-some-banks-too-big-to-jail-1056033-1.html?zkPrintable=1&nopagination=1>.
[27] *Are Some Banks 'Too Big To Jail'?*
[28] Greg Farrell and Keri Geiger, "US Considers HSBC Charge That Could Upend 2012 Settlement," Bloomberg, September 7, 2016, available at: http://www.bloomberg.com/news/articles/2016-09-07/u-s-said-to-weigh-hsbc-charge-that-could-upend-2012-settlement.

UBS—colluded on the size, timing and nature of their buy and sell orders for U.S. dollars and euros. The conspirators referred to themselves as the "mafia," and one said, "if you ain't cheatin', you ain't tryin'." There is no question of intentionality in this case.[29]

Yet even though guilty pleas were obtained from four of the banks and a deferred prosecution agreement was rescinded for the fifth, UBS, the Department of Justice maneuvered yet again to protect the banks from the normal consequences of law-breaking. A final deal on the guilty pleas was apparently held off until the SEC granted waivers to the banks from rules that would otherwise prevent them from undertaking certain securities activities.[30] It has also been reported that the Department of Justice obtained pleas from the banks' parent companies, rather than from subsidiaries, to protect those subsidiaries from other possible sanctions, including state charter revocation.[31]

DOJ's efforts to protect the banks from the consequences of a criminal plea are so far-reaching that it is fair to say that we may be entering the era of prosecution in name only—deferred prosecution by another name.

Again, it is virtually inconceivable that a small financial firm, or any small business, would be accorded such extraordinary accommodations in the context of pleading guilty to such a far-reaching conspiracy.

To be very clear, the inappropriate use of deferred and non-prosecution agreements is not limited to the financial sector. Consider, for example, the case of the GM ignition switch**.** Starting in 2002, GM sold a host of cars containing a faulty ignition switch that would suddenly shut off the engine during driving, and prevent airbags from deploying in the event of a crash. GM has acknowledged that 174 people have died as a result of ignition switch failures, and the actual number may be much higher.

The problems with the General Motors ignition switch began more than a decade before defective cars were finally recalled. "During the time between GM's approval of the low-torque ignition switch in 2002 and its 2014 recall of 2.6 million vehicles affected by the ignition switch defect, key facts were withheld by, or unrecognized within, GM, making detection of the connection between the faulty ignition switch and non-deployments of air bags difficult for both GM and NHTSA, and leading to a tragic delay in instituting a recall," a National Highway Transportation and Safety Administration (NHTSA) review found. "From 2007 to 2013, GM faced litigation on several more air bag non-deployment fatalities and was repeatedly warned by outside counsel that a defect existed. However, GM failed to make a defect determination and

[29] Department of Justice. (2015, May 20.) Five Major Banks Agree to Parent-Level Pleas. Available from: <http://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas>.
[30] Reuters. (2015, May 20.) U.S. SEC Grants Waivers to Banks After Guilty Pleas. Available from: <http://www.reuters.com/article/2015/05/20/banks-forex-settlement-waivers-idUSL1N0YB1GA20150520>.
[31] Protess, B. and Corkery, M. (2015, May 13.) 5 Big Banks Expected to Plead Guilty to Felony Charges, but Punishments May Be Tempered. New York Times. Available from: <http://www.nytimes.com/2015/05/14/business/dealbook/5-big-banks-expected-to-plead-guilty-to-felony-charges-but-punishments-may-be-tempered.html>.

did not provide the required notification to NHTSA."[32] By spring 2012, the Department of Justice concluded and GM has agreed not to contest, the company definitively knew about the ignition switch failure and its consequences. Yet, it did not disclose the defect for an additional 20 months. "GM's delay in disclosing the defect at issue was the product of actions by certain personnel responsible for shepherding safety defects through GM's internal recall process, who delayed the recall until GM could fully package, present, explain, and handle the deadly problem," according to the Department of Justice.[33]

In September 2015, GM entered into a deferred prosecution agreement with the Justice Department. Simultaneous with the filing of the deferred prosecution agreement, prosecutors filed a criminal information against the company, alleging it had illegally concealed information from NHTSA (under 18 U.S.C. 1001) and engaged in wire fraud by misleading consumers as to the truth about the ignition switch.[34] GM agreed to pay $900 million in penalties as part of the deal. No individuals have been charged in connection with the case, and it is not expected that any will be.

Prosecutors were effusive in praising GM for its cooperation after it finally disclosed the defect, and this plainly impacted the decision to treat the company so lightly. It is notable in reflecting on corporate criminal prosecution that, for a period of six years, GM had notice of the problem with the ignition switch due to litigation with accident victims, and entered into civil settlement deals that required information about the defect be sealed;[35] yet prosecutors did not allege the company had knowledge of the defect during this period. It is notable as well that all reports indicate no individual will be held criminally responsible for any of the 174-plus deaths resulting from the defect and cover-up.

It turns out that a number of individual drivers were prosecuted for manslaughter for crashes that were in fact attributable to the ignition switch defect; the contrast with the ultimate treatment of GM could not be starker in showing the double standards applied to corporate criminal prosecutions and in underscoring the challenges in prosecuting individuals involved in such cases.[36]

When it comes to corporate wrongdoing, our system of criminal justice has gone awry. Because of a lack of will and/or statutory authority, prosecutors fail to prosecute corporations and corporate executives for reckless conduct the likes of which would generate full-on prosecution and harsh sentences if committed by individuals outside of the corporate context. Through

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[32] National Highway Traffic Safety Administration, NHTSA's Path Forward, June 2015, available at: www.nhtsa.gov/staticfiles/communications/pdf/nhtsa-path-forward.pdf.

[33] Department of Justice, "Manhattan U.S. Attorney Announces Criminal Charges Against General Motors And Deferred Prosecution Agreement With $900 Million Forfeiture," September 17, 2015, available at: http://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-criminal-charges-against-general-motors-and-deferred.

[34] United States of America v. General Motors Company, Information, September 17, 2015, available at: http://www.justice.gov/usao-sdny/file/772301/download.

[35] Bill Vlasic, "Inquiry by General Motors Is Said to Focus on Its Lawyers," New York Times, May 17, 2014, available at: http://www.nytimes.com/2014/05/18/business/inquiries-at-gm-are-said-to-focus-on-its-legal-unit.html.

[36] See Jeff Bennett, "Texas Woman Driving GM Recalled Car Cleared In Death of Fiancé," Wall Street Journal, November 24, 2014, available at: http://www.wsj.com/articles/gm-confirms-texas-accident-linked-to-faulty-ignition-switch-1416842193.

deferred and non-prosecution agreements, large companies, and especially but not only big banks, get special treatment, enabling them to avoid criminal prosecution for egregious wrongdoing simply by promising not to commit wrongs in the future. And even criminal prosecutions are engineered to enable giant banks to avoid meaningful penalties.

Aggressive oversight can hopefully cure some of these problems, but oversight alone is not enough.

First, Congress should act to remedy the problem of insufficient criminal penalties by adopting a criminal statute to make it a crime for corporations or corporate executives to conceal information of hazards posing a risk of serious injury or death to workers or consumers. Senators Blumenthal and Casey have introduced such legislation, the Hide No Harm Act.

Second, the abuse of deferred and non-prosecution agreements must be curbed. Whether from inside the Department of Justice or imposed by Congress, there should be new guidelines regarding these arrangements. If they are not prohibited outright, at minimum a strong presumption against such deals should be established, so they are used only in rare cases upon specific showings of their necessity, and never in cases of repeat offenders.

Third, criminal prosecutions and guilty pleas should come with consequences, and not just fines which giant companies can easily absorb, almost no matter the size. If Congress has seen fit to adopt statutes that strip persons or corporations that have pled or been found guilty of a crime of the right to carry out certain activities, sell to the government, hold certain licenses or maintain privileges, then those sanctions should be enforced. Congress should look to prohibit the granting of waivers in these areas, or at minimum imposing tough standards as a prerequisite to such waivers.

Fourth, so long as deferred prosecutions and waivers continue, there should be greatly enhanced transparency around the decision-making process. If government officials are worried that prosecuting a financial firm will pose too much systemic risk, that has important policy consequences, and Congress and the public need to know. They also need to know who is expressing such worries, and how they are interacting with prosecutors. Similarly, if government prosecutors are declining to prosecute drug companies, or manipulating the corporate entity that they prosecute, out of a fear that the government would otherwise not be able to buy needed pharmaceuticals from that company, they should say so explicitly. There is little reason to expect this transparency to come voluntarily. Congress should pass legislation that requires it.

Last, and of crucial importance, there must be prosecution of corporate executives for corporate wrongdoing.[37] Although the DOJ through its Yates Memorandum has indicated that it will pursue such prosecutions as a priority matter, as discussed below the modest early progress made pursuant to this policy now seems at risk.

[37] For discussion of the kinds of remedies highlighted here, but also especially the need for individual corporate executive prosecutions, see Steinzor, R. (2014.) Why Not Jail? Cambridge University Press.

III. Recent developments related to punishment of corporate crime and wrongdoing

In tacit recognition of some of the problems discussed here, particularly the failure to hold any individuals criminally accountable for the Wall Street crash, in 2015 the Justice Department issued the Yates Memorandum, urging more aggressive prosecution of individuals at criminal wrongdoers, and adopted certain prosecutorial guidelines aimed at spurring more such prosecutions.[38]

Although the evidence is mixed after issuance of the memo, there have been some signs of progress. Notably, the Justice Department obtained criminal convictions of the executives associated with the New England Compounding Center-induced fungal meningitis outbreak that killed at least 64 patients,[39] a one-year criminal sentence against former Massey Energy CEO Don Blankenship for willful violation of coal safety rules,[40] a 28-year sentence against the former head of the Peanut Corporation of America in connection with a salmonella outbreak that killed nine people,[41] and a settlement with Volkswagen for its emissions cheating that included more than $4 billion in fines, a criminal plea for the corporation and indictments against numerous VW executives and managers associated with the scandal.[42]

But recent developments in the new administration's Justice Department suggest cause for concern. Attorney General Jeff Sessions has made clear that he aims to seek the toughest sentences permissible for low-level, nonviolent drug offenders, but he has made no comparable statements about corporate wrongdoers, who inflict vastly greater harm on society and, as the utmost rational actors, should be far more responsive to tougher enforcement and criminal sanction.

Last month, the Justice Department settled a case with Citigroup involving what the Department described as criminal violations related to money laundering.[43] The case involved more than 18,000 alerts covering $142 million in what the DOJ called "potentially suspicious remittance transactions" at Citi's Banamex USA division. The Bank Secrecy Act makes it a crime to "willfully fail to establish and maintain" a robust anti-money laundering compliance program.

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[38] Sally Quillian Yates, "Individual Accountability for Corporate Wrongdoing," September 9, 2015, available at: http://www.justice.gov/dag/file/769036/download.

[39] Justice Department, Owner of New England Compounding Center Convicted of Racketeering Leading to Nationwide Fungal Meningitis Outbreak, March 22, 2017, available at: https://www.justice.gov/opa/pr/owner-new-england-compounding-center-convicted-racketeering-leading-nationwide-fungal.

[40] Justice Department, Blankenship Sentenced to a Year in Federal Prison, April 6, 2016, available at: https://www.justice.gov/usao-sdwv/pr/blankenship-sentenced-year-federal-prison.

[41] Kevin McCoy, Peanut Exec in Salmonella Case Gets 28 Years, USA Today, September 22, 2015, available at: https://www.usatoday.com/story/money/business/2015/09/21/peanut-executive-salmonella-sentencing/72549166/. Although filed long before the Yates Memo was issued, this case can fairly be considered part of the Department's recent, stepped-up effort to get somewhat tougher on corporate wrongdoing.

[42] Justice Department, Volkswagen AG Agrees to Plead Guilty and Pay $4.3 Billion in Criminal and Civil Penalties; Six Volkswagen Executives and Employees are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests, January 11, 2017, available at: https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six.

[43] Justice Department, Banamex USA Agrees to Forfeit $97 Million in Connection with Bank Secrecy Act Violations, May22, 2017, available at: https://www.justice.gov/opa/pr/banamex-usa-agrees-forfeit-97-million-connection-bank-secrecy-act-violations.

Details released by the DOJ show that between 2007 and 2012, the firm processed more than 30 million remittances to Mexico covering $8.8 billion with "virtually no investigation for suspicious activity." In one instance, a Mexican beneficiary received 1,400 remittances from more than 950 different senders in 40 different states in the U.S. But the Citi subsidiary never filed a suspicious activity report, which is a bank investigation of the issue. The DOJ charged that the firm made at least $92 million in these transactions -- but it only required Citi to forfeit $97.4 million. Outrageously, Citi was let off with a non-prosecution agreement, notwithstanding its long record of violating the law. It does not appear that any individual prosecutions will be forthcoming.

Generally, it does not appear that the personnel the Trump administration is nominating to top positions at the Justice Department will be inclined to enforce aggressively civil and criminal standards related to corporate wrongdoing. Indeed, the revolving door is spinning between the corporate criminal defense bar and the Justice Department as much as it ever has. Earlier this week, the administration nominated an attorney who had defended BP in the Gulf of Mexico oil disaster litigation to run the Department's Environment and Natural Resources Division.[44] Associate Attorney General Rachel Brand worked at the U.S. Chamber of Commerce attacking environmental, consumer and labor regulations.[45] Noel Francisco,[46] nominated to be Solicitor General, Steven Engel,[47] nominated to be Assistant Attorney General for the Office of Legal Counsel, and Makan Delrahim,[48] nominated to be Assistant Attorney General for the Antitrust Division, all have extensive histories of representing corporate wrongdoers.

Finally, corporate trade associations[49] and their allies[50] continue to urge a change in the intent standard for corporate criminal prosecution (so-called mens rea reform). This push, which centers on the idea of requiring prosecutors to show "willfulness" by corporate wrongdoers, should be rejected categorically. It would make it much harder for prosecutors to criminally prosecute companies and individual executives responsible for the manufacture of dangerous drugs and food that kill or sicken consumers, or who act otherwise to imperil consumers, swindle the public, endanger their workers, or poison the environment. It would insulate reckless and

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[44] Juan Carlos Rodriguez, Trump Picks Kirkland & Ellis Partner For Top DOJ Enviro Spot, Law360, June 6, 2017, available at: https://www.law360.com/energy/articles/931983/breaking-trump-picks-kirkland-ellis-partner-for-top-doj-enviro-spot?nl_pk=d7b31e1f-f9bf-488f-a0b6-44683a154d03&utm_source=newsletter&utm_medium=email&utm_campaign=energy.

[45] U.S. Chamber of Commerce, U.S. Chamber's Litigation Center Names Rachel Brand Chief Counsel for Regulatory Litigation and Kate Comerford Todd Chief Counsel for Appellate Litigation, May 31, 2011, available at: https://www.uschamber.com/press-release/us-chamber%E2%80%99s-litigation-center-names-rachel-brand-chief-counsel-regulatory-litigation.

[46] Marcia Coyle, Noel Francisco, Trump's SG Nominee, Reveals Divestiture Plan in Ethics Pledge, May 2, 2017, The National Journal, available at: http://www.nationallawjournal.com/id=1202785093068/Noel-Francisco-Trumps-SG-Nominee-Reveals-Divestiture-Plan-in-Ethics-Pledge.

[47] See https://www.dechert.com/steven_engel.

[48] C. Ryan Barber, What to Know About Makan Delrahim, Trump's Antitrust Division Pick, The National Journal, March 28, 2017, available at: http://www.nationallawjournal.com/id=1202782210198/What-to-Know-About-Makan-Delrahim-Trumps-Antitrust-Division-Pick.

[49] U.S. Chamber of Commerce, U.S. Chamber Policy Priorities for 2017, available at: https://www.uschamber.com/sites/default/files/2017_policy_priorities_-_2.8.17.pdf.

[50] John Malcolm, The Pressing Need for Mens Rea Reform, Heritage Foundation, September 1, 2015, available at: http://www.heritage.org/crime-and-justice/report/the-pressing-need-mens-rea-reform.

willfully blind behavior from prosecution and violate the basic precept that "ignorance of the law is no defense."[51]

IV. Other policy considerations related to corporate crime and wrongdoing

As the brief discussion above highlights, the rash of corporate crime and wrongdoing over the last decade has called attention to the need for far-reaching reform to penalize corporations and their executives for wrongdoing, provide restitution to victims and deter future misconduct. I have discussed some important reforms above. Here I briefly touch on some additional matters.

Tougher penalties. Although there are important exceptions, civil and criminal penalties for wrongdoing are generally too weak.

In 2015, Congress took a small step to remedy this problem by indexing penalties to inflation. This measure directed agencies to step-up penalties to reflect prior inflation and continuously make inflation adjustments to penalties. It is expected that these adjustments will yield more than $1 billion in additional fines over the next decade.[52]

Generally, however, penalties remain far too weak, including for workplace safety deaths and injuries and for auto safety abuses. Remedial legislation related to the auto safety enforcement penalty structure has been introduced by Senators Blumenthal, Markey and Bill Nelson.[53] Compounding the problem of inadequate fines, agencies such as the Occupational Safety and Health Administration commonly impose fines below the maximum permissible.[54]

Tax Deductibility. Civil and criminal penalties should not be tax deductible, but they typically are. [55] A decade ago, GAO found companies claiming tax deductibility for 20 of 34 studied settlements.[56] Legislation should specify that taxpayers will not subsidize corporate wrongdoers, but DOJ can also take steps to solve the problem by including terms in its settlement agreements that prohibit tax deductibility. The Truth in Settlements Act, introduced by Senators Lankford

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[51] For a further discussion of this topic, see Robert Weissman, The Adequacy of Criminal Intent Standards in Federal Prosecutions, Testimony before the Senate Judiciary Committee, January 20, 2016, available at: https://www.citizen.org/sites/default/files/weissman-senate-judiciary-testimony-january-2016.pdf.

[52] Leon Greenfield, James Lowe, Jeffrey Ayer and Mi Hyun Yoon, "Civil Fines Jump Across Agencies Under Inflation Adjustment Act," July 13, 2016, available at: https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubID=17179882162.

[53] See https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-markey-nelson-introduce-bill-to-eliminate-cap-on-maximum-allowable-civil-fine-dot-can-levy-on-automakers.

[54] Martha T. McCluskey, Thomas O. McGarity, Sidney Shapiro, and Katherine Tracy, "OSHA's Discount on Danger: OSHA Should Revise Its Informal Settlement Policies to Maximize the Deterrent Value of Citations," Center for Progressive Reform, June 2016, available at: http://progressivereform.org/articles/OSHA_Discount_on_Danger_Report.pdf.

[55] U.S. PIRG, "No Tax Write-Offs for Wall Street Wrongdoing," February 20, 2014, available at: http://www.uspirg.org/resources/usp/no-tax-write-offs-wall-street-wrongdoing.

[56] Government Accountability Office, Systematic Information Sharing Would Help IRS Determine the Deductibility of Civil Settlement Payments, September 15, 2005, available at: http://www.gao.gov/products/GAO-05-747.

and Warren, would at least require agencies to specify whether settlements are tax deductible. Senators Grassley and Reed have introduced a bill that would go further, and end deductibility.[57]

Corporate Monitors and Compliance Reports. Particularly with the rise of deferred and non-prosecution agreements, but sometimes also in connection with civil settlements, DOJ has required an array of corporations to install corporate monitors aimed at ensuring future compliance with the law. There is very little evidence that these monitors have materially affected corporate behavior, or what they have done at all.[58] Because of their crucial importance, and because they are often installed as a substitute for legitimate criminal prosecution, these monitors should be an object of Congressional oversight, with much more transparency required about their functioning.

Companies and monitors file frequent compliance reports pursuant to various settlement agreements, but these reports are typically not made public in full or at all. Whether by statute or DOJ practice, all of these reports should presumptively be public, with very little deference to claimed proprietary information. This is particularly important given the likely inadequacy of the monitors themselves.

Direct Fines for Corporate Executives. To the extent possible under existing authority, agencies should seek to include direct fines for CEOs or other management level executives in civil settlements in addition to fines that apply to the entity, and Congress should act to create such authority as needed. Imposing civil penalties on executives would result in enhanced accountability particularly in circumstances where company executives were directly involved in the wrongdoing or were negligent in preventing it. Even more importantly, the prospect of such fines would have a far-reaching deterrent effect. The CFPB has begun incorporating direct fines for CEO in its settlements[59] and this practice should be encouraged across agencies.

V. Other settlement-related issues

As the discussion above indicates, since most civil or criminal cases involving corporate wrongdoing do not go to trial, settlement-related processes are of significant importance. Here I want to briefly discuss two other settlement issues, one in which the government is a defendant and one involving prosecutions.

Deadline suits: In recent years, a contrived controversy has emerged regarding legal settlements where federal agencies are unwilling or unable to follow the law. These settlement agreements have been pejoratively dubbed "sue and settle" agreements by opponents of strong regulatory standards. The criticism of such settlements rest on a number of false and misleading allegations that federal agencies are colluding with public interest groups to enter into settlement agreements that ultimately result in outcomes preferred by those public interest groups. The December 2014

[57] See http://www.grassley.senate.gov/news/news-releases/reed-grassley-introduce-bill-prevent-corporate-penalties-becoming-tax-write-offs.
[58] See Brandon Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations*, Cambridge, MA: Belknap Press, 2014.
[59] http://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-rpm-mortgage-to-pay-19-million-for-steering-consumers-into-costlier-mortgages/

Government Accountability Office (GAO) report, "Impact of Deadline Suits on EPA's Rulemaking Is Limited,"[60] dispels these myths. The report focuses specifically on the Environmental Protection Agency (EPA) and, it should be noted, was requested by Republican members of the House of Representatives Committee on Energy and Commerce of the House of Representatives.

In correcting the false record of misconceptions advanced by opponents of "sue and settle" agreements, the first step is to provide clarity on the substance of the suits that give rise to the untrue allegations of so-called "sue and settle" practices. The GAO report labels lawsuits to enforce statutory mandates "deadline suits"[61] because the lawsuits allege that the EPA failed to perform a nondiscretionary, or mandatory, act by a deadline established by Congress. In other words, these lawsuits allege that agencies such as the EPA broke the law by failing to take a congressionally mandated action by a congressionally mandated date. These lawsuits are among the simplest to understand and prove. To illustrate, if the law says EPA must finalize a rule by June 8th, 2017 and the EPA does not finalize the rule by that date, third parties are entitled to bring a "deadline suit" to enforce the congressionally mandated deadline. The point of these lawsuits is obvious and simple: to enforce the law by holding federal agencies accountable when they ignore Congress. That EPA, working with the Department of Justice (DOJ), seeks to settle these lawsuits instead of going to trial should surprise no one. It makes little sense to waste taxpayer resources to defend against claims that the EPA didn't perform a legal requirement by a congressionally imposed deadline when the parties who are bringing the suit only have to point to the calendar in order to prove their case. In these situations, "it is very unlikely that the government will win the lawsuit" according to the GAO report.[62]

The next needed point of clarity is regarding whether such settlements pre-ordain the *substance* of the agency action that the EPA and other agencies agree to finalize under the terms of the settlement. Again, the GAO report here is very clear, and the answer is a resounding no. According to the report, "EPA officials stated that they have not, and would not agree to settlements in a deadline suit that finalizes the substantive outcome of the rulemaking or declare the substance of the final rule."[63] This is consistent with a 1986 DOJ memo from President Reagan's Attorney General Edwin Meese which prohibits the EPA from entering into settlement agreements that prescribe specific substantive outcomes regarding final rules. Thus, the allegation that "sue and settle" litigation involves back-room negotiations between pro-regulatory groups and complicit federal agencies which result in agreements that dictate the content of rules or bind agency discretion is patently false.

The final point of clarity is with respect to the actual outcome of so-called "sue and settle" litigation. As has been demonstrated by the GAO, the outcome does not at all dictate the substance of any final rule resulting from a settlement agreement. In short, the settlement agreement that results from a "deadline suit" sets out nothing more than a simple timeline for the agency, the EPA in the GAO report, that has missed a Congressionally mandated deadline to

[60] U.S. Government Accountability Office, GAO-15-34, Environmental Litigation: Impact of Deadline Suits on EPA's Rulemaking is Limited, December 2014, available at: http://www.gao.gov/assets/670/667533.pdf.
[61] *Id.* at 3.
[62] *Id.* at 7.
[63] *Id.* at 8.

complete the action. If the action is a rule involving rulemaking, the agency must generally follow the traditional public notice and comment rulemaking process prescribed by the Administrative Procedures Act or procedures prescribed by the agency's authorizing statute. In the case of the EPA, all of the settlements scrutinized by GAO pursuant to the EPA's rulemaking authority under the Clean Air Act went through the public notice and comment process allowing all members of the public an opportunity to comment on the rule before it is finalized.[64] Thus, any claims that "sue and settle" litigation and resulting settlement agreements circumvent the normal rulemaking process or somehow deny the public the ability to participate in that process are completely baseless.

Since all of the allegations claiming the existence of collusion or impropriety in reaching settlement agreements under so-called "sue and settle" litigation have been revealed as unsubstantiated, one can only speculate that the true motivation for this legislation stems from opposition to the regulatory action itself, which in the case of the EPA, more often than not involves air pollution regulations that implement the Clean Air Act. While Congress has multiple remedies available to dispense with regulations it opposes, including repeal of underlying statutes such as the Clean Air Act or repeal of air pollution regulations, blocking "deadline suits" cannot serve this function. Simply put, if some are unhappy with third parties who exercise their right to force agencies such as the EPA to follow the law, they must seek to change the law itself instead of pursuing a thinly veiled attack on ability of third parties to enforce the law and thereby shutting down implementation of the law.

The existence of missed statutory deadlines is a symptom of a much larger problem, namely that our regulatory process is broken due to unacceptable delay and paralysis. The GAO report bears this out with eye-opening examples. For example, the Clean Air Act rules that GAO studied included rules which missed Congressional deadlines by shocking and unacceptable margins. For example, one rule was finally implemented 26 years after the Congressional deadline to finalize the rule.[65] Another missed its deadline by 19 years.[66] A quick review of the rest of the rules paints a sobering picture of significant delay. Blocking "deadline suits" would not shorten these delays, it would lengthen them.

Justice for Victims: Earlier this week, Attorney General Sessions announced a new policy prohibiting settlement terms that require corporate wrongdoers to make payments to third parties who can deliver justice to victims.[67] The new policy with very limited exceptions prohibits settlement terms directing payments to third parties who are not parties to the underlying dispute.

The practical import of this policy will be to deny justice to victims. These payments, which often direct funds to nongovernmental service agencies to alleviate wrongdoing committed by settling defendants, are an important means by which defendants can be required to make restitution. Third party payments have been used, for example, to advance fair housing objectives in the wake of mortgage abuses, or to ameliorate environmental damage. The policy of requiring

[64] *Id.* at 12.
[65] *Id.* at 11
[66] *Id.*
[67] Jeff Sessions, Prohibition Settlement Payments to Third Parties, June 5, 2017, available at: https://www.justice.gov/opa/press-release/file/971826/download.

all payments be made to the government means: 1) overall payments will likely diminish, as the third-party payments often serve as extra payments above what the government would collect on its own; 2) programs will not be carried out to remedy harms to individuals and communities injured by corporate wrongdoing or to remediate environmental damage, with extra funds if any instead reverting to the U.S. Treasury; 3) remedial programs and projects that do move forward may be less efficient or well-tailored to local circumstance than those that could have been carried out by on-the-ground organizations rooted in local communities. Even from the most charitable point of view, this move represents a strange sort of federal bureaucratic centralization from a Justice Department that purports to be advancing the contrary approach.

Third-party payments are especially important to address injuries to the public that may be either non-quantifiable or indeterminate, such as the ecological impact or public health hazards caused by violations of environmental laws, the collateral consequences to communities resulting from predatory lending by financial institutions, or unknown health outcomes to individuals resulting from chemical exposures in the workplace. Preventing such third-party payments will undermine law enforcement goals by reducing the availability of suitable remedies to address these kinds of injuries to the public caused by illegal conduct, and harm the families and communities impacted by injuries that cannot be addressed by direct restitution.

VI. Conclusion

As this brief testimony illustrates, corporate abuses are rampant in the American economy, and they can have devastating consequences on the lives of individuals, communities and even the entire country. That's why aggressive enforcement and mechanisms of accountability are so important. In their absence, corporate catastrophes are sure to continue.

ADDENDUM: The Controversy Around IRS Enforcement of Political Intervention Standards for 501(c)(3) Organizations

Because it appears that this hearing may touch on issues related to Internal Revenue Service enforcement of electioneering standards for nonprofit organizations, I wanted to offer additional comments on this topic.

The issue obviously became extremely controversial following claims that the IRS improperly targeted "tea party" groups for scrutiny related to possible plans for political intervention. From our point of view, what has been lost amid the bickering over the propriety of the particular IRS actions in question is that the subjective language of the Internal Revenue Code fails to define political activity clearly enough to give the IRS a neutral way to measure that activity.

For the last several years, Public Citizen has housed the Bright Lines Project, a nonpartisan project bringing together many of the nation's top nonprofit tax lawyers, with the aim of developing a clearer and more objective standard for determination of political activity. The Bright Lines Project proposed standard establishes: a per se test for political intervention (explicit advocacy for or against a candidate); and objective set of criteria for judging other forms of advocacy; and a set of safe-harbor, permissible actions. This approach favors no political faction, and would provide certainty for the IRS and nonprofits alike about what exactly qualifies as electioneering activity.

Here follows our proposed legislative solution to this problem:

BRIGHT LINES PROJECT

Proposed Legislation

Draft February 10, 2017

Chapter 42 of Title 26, United States Code, is amended by adding new section 4956 as follows:

SEC. 4956. POLITICAL INTERVENTION.

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(a) Cross-references. If and only if an organization engages in political intervention as described in subsection (b) of this section, such activity shall constitute--

(1) For all purposes under section 501, participating in, or intervening in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office;

(2) For all purposes under section 162, participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for public office;

(3) Under section 4945, influencing the outcome of any specific public election;

(4) Under section 4955, participation in, or intervention in (including the publication or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office;

(5) Under section 271, influencing or attempting to influence the election of presidential or vice-presidential electors or of any individual whose name is presented for election to any Federal, State, or local elective public office, whether or not such individual is elected; and

(6) Under section 527, a political function.

(b) Determinations of political intervention--(1) In general. If an organization--

(i) Conducts an activity described in this section as *per se* intervention, it shall be determined to be engaged in political intervention;

(ii) Conducts an activity described in this section as within a safe harbor, it shall not be determined to be engaged in political intervention; or

(iii) Conducts an activity not described in this section as *per se* intervention nor as within a safe harbor, it shall be determined to be engaged in political intervention only upon an objective facts and circumstances analysis described in this section.

(2) *Per se* intervention. The following activities are *per se* intervention, as further described in the definitions set forth in subsection (c):

(i) **Explicit advocacy.** Communications, made at any time or place and in any manner, that explicitly advocate that recipients take one or more of the following actions:

(A) With respect to one or more clearly identified candidates, or groups of candidates identified by political party affiliation or otherwise--

(*1*) Vote for, vote against, elect, defeat, support, or oppose such candidates(s); or

(*2*) Make contributions to elect, defeat, support, or oppose such candidate(s), in the form of contributions to candidates, to political parties, to political committees, or to any organization having the primary purpose of political intervention; or

(B) Select a candidate or group of candidates to support or oppose based on one or more criteria that clearly distinguish certain candidates from other candidates, including but not limited to positions on certain issues, past actions, expected future actions, or characteristics such as gender, age, race, or religion, or any other criterion or qualification stated in the communication.

(ii) **Paid mass media advertising with election reference.** Communications that refer to and reflect a view on one or more clearly identified candidates, groups of candidates, or political parties that are delivered by paid mass media advertising and contain an election reference.

(iii) **Election-year communications targeted to close contests.** Communications that refer to and reflect a view on one or more clearly identified candidates, groups of candidates, or political parties that do not come within a safe harbor, and are targeted to close contests within the candidate's election year.

(iv) **Biased voter engagement.** Voter engagement communications that refer to and reflect a view on one or more clearly identified candidates, groups of candidates, or political parties (unless such view is contained in comparative voter education materials), or that are targeted based on the voter's expressed candidate or party preference.

(v) **Resource transfers.** Providing an organization's resources by transfer to another, if the transferee uses such resources for political intervention, if such use was reasonably foreseeable, and if the transferor did not take reasonable steps to prevent such use, except for ordinary business transactions and affiliate transactions.

(vi) Reportable contributions.

(vii) Dual function communications.

(3) Safe harbors. The following activities are within safe harbors, as further described in the definitions set forth in subsection (c):

(i) **Neutral communications.** Communications that do not refer to and reflect a view on one or more candidates and contain no voter engagement communication.

(ii) **Permitted exceptions.** Communications that refer to and reflect a view on one or more candidates, not consisting of paid mass media advertising, solely to--

(A) Influence official action, with no election reference;

(B) Provide comparative voter education;

(C) Engage in self-defense; or

(D) Make personal oral remarks at a meeting.

(iii) **Prior to election year.** Communications that refer to and reflect a view on one or more candidates, not consisting of paid mass media advertising, with no election reference, made prior to the candidate's election year.

(iv) **Voter engagement.** Voter engagement communications--

(A) That are untargeted, targeted to the organization's natural constituency, or targeted to under-represented voters; and

(B) In which any references to specific candidate elections or to wedge issues do not indicate any preference for a candidate, political party, or issue outcome, and if any view is reflected on a candidate, it is solely in the context of comparative voter education that is not distributed by paid mass media advertising, except for postal mailings.

(v) **Resources not used for intervention.** A use of resources that does not consist of political intervention, directly or indirectly, by the organization itself or by another to whom an organization's resources are provided.

(vi) A use of resources in an ordinary business transaction.

(vii) A use of resources in an affiliate transaction.

(viii) Activities that are within previously established safe harbors.

(4) Objective facts and circumstances analysis. A viewpoint-neutral "objective facts and circumstances analysis" is used to determine whether an activity is or is not political intervention in cases of activities that are neither *per se* intervention nor within a safe harbor. The burden of proof is on the organization to demonstrate that the activity, more probably than not, (i) directly furthered an exempt purpose or a proper business or investment purpose of the organization and (ii) was unrelated to supporting or opposing one or more candidates. All relevant objective mainfestations of political intervention may be considered, including but not limited to the timing, scope, and impact of the activity; the full content, any disclaimers or disclosures, audience selection, and method of distribution of any communications; the events leading up to the activity; the context or environment in which the activity occurs; the relationship of the activity to the organization's ongoing programs, projects, and operations; the impartiality of the organization's methods; and any steps taken to limit, correct, or curtail the activity. However, evidence of the organization's intent, motive, or desire to intervene or not to intervene is irrelevant to the analysis. No presumption that the activity constitutes political intervention shall arise from the fact that the activity is not within a safe harbor described in this section.

(c) Definitions. For the purposes of this section--

(1) Activity. An "activity" means a communication attributed to an organization or a use of its resources permitted by an organization.

(2) Attributed. A communication is "attributed" to an organization if it is made by its directors or trustees, officers, employees, volunteers or agents acting in its name or on its behalf. Principles of agency under the common or civil law in the jurisdiction applicable to the organization shall determine whether a communication made by another is made on behalf of an organization. Communications by others that the organization knowingly permits to occur on premises controlled by the organization, in its publications, at its official functions, on its website or on other physical or electronic locations it controls, shall also be attributed to an organization unless contained within a defined space and time or portion of a larger communication that utilizes an insubstantial part of the organization's resources, is identified as set aside for individuals within the organization's natural constituency to express their personal views, and is accompanied by a disclaimer of intervention.

(3) Candidate--(i) In general. A "candidate" is a person who offers himself or herself as a candidate for election to public office. A person is not a candidate merely because there is public speculation that the person will seek election to public office, because the person is expected by the organization to seek election or re-election, or because the person is proposed by others to be a candidate. A person becomes a candidate when he or she either publicly states an intention to seek election to public office, or takes affirmative public steps to launch a candidacy, such as forming or maintaining a campaign committee to accept contributions or seeking endorsements.

(ii) Candidates proposed or opposed by the organization. With respect to an organization, the term "candidate" also includes a person whose candidacy for elective public office is expressly proposed, encouraged, supported, discouraged, or opposed in a communication made by that organization.

(iii) Recall elections. In the case of a recall election, a public official becomes a candidate when petitions begin to circulate to recall the public official (or, with respect to an organization, when

a communication made by the organization expressly proposes, encourages, supports, discourages, or opposes the recall of the public official).

(4) Candidate pledge. A communication reflects a view on candidates if it contains the results of a "candidate pledge" solicitation, which is a request by an organization made to one or more candidates, asking the candidate to pledge his or her support or opposition, to sign or endorse, or to otherwise take a stand or make a commitment in favor of a position suggested by the organization, if the organization publicizes or otherwise causes the candidates' responses or failures to respond to be communicated to others. However, if all candidates for a specific public office make substantially identical responses, a communication containing the responses does not reflect a view on the candidates.

(5) Clearly identified. A candidate is "clearly identified" if a communication refers to the candidate by name or title, or includes the candidate's voice or image, or uses nicknames or epithets publicly associated with the candidate, or uses any other description or image that, in context, would be understood as a reference to a particular candidate by a reasonably informed reader, viewer or listener. A group of candidates is "clearly identified" if a communication clearly identifies each of the candidates, or if the communication refers to a group of candidates by party, political, ideological, or issue affiliation, or by characteristics such as gender, race, ethnicity, religion, or occupation, or otherwise uses a descriptive term from which a reasonable reader, viewer or listener would be able to distinguish those candidates included within the reference from those who are not.

(6) Communication. The term "communication" means any oral, written, or visual communication to the public, to the organization's natural constituency, or to any segment of either. A "communication" includes, without limitation, brochures, newsletters, or other printed material of any length; letters; emails and messages distributed through social networking media or other electronic communications services; website content; content delivered on broadcast media or by film, video, or other recordings; billboards, signs, posters, or other visual displays; and speeches or oral communications, delivered in person, by telephone or by other means. All material presented to the reader, viewer, or listener at the same time and in the same manner constitutes the same communication. The content of the communication includes not only the material appearing within the communication itself, but also that material immediately presented to the reader, viewer, or listener upon taking any action that is encouraged by the organization in the communication, at the time the action is encouraged by the organization and for 30 days thereafter.

(7) Comparative voter education--(i) In general. The term "comparative voter education" means a communication that provides information about the candidates to prospective voters using an even-handed process in the selection and presentation of content. Such communications may compare the candidates for an office on issues of importance to the organization or to the electorate in general, and may include the organizations' views on such issues in addition to the candidates' views, provided that the organization's share of the content is no greater the share provided to any of the candidates. Comparative voter education may include, without limitation, preparing, disseminating, and publicizing the results of candidate questionnaires, sponsoring candidate debates or forums, preparing questions to be asked of all candidates at public appearances or debates, and compiling and disseminating statements made to the public by

candidates about campaign issues, so long as an equal opportunity to participate is provided to candidates. Comparative voter education may also consist of preparing and distributing objective campaign data.

(ii) Equal opportunity to participate. An "equal opportunity to participate" in comparative voter education means that all candidates seeking the same public office (or all who meet an objective threshold of viability) shall be offered the same process for participation; all such candidates shall be offered equal time at any debate, public forum, or series of public forums, or in any audio or video recording, and an equal amount of space or text in written materials. If participation by a candidate requires an appearance, a written or oral response, or other action by the candidate, then all such candidates must be provided with a full description of the planned comparative voter education communication, a copy of any content describing the organization's views that will be presented in the materials or at the event, and the requirements (including any deadlines) for the candidate's participation. Such information must be provided to the candidates with reasonable advance notice before any deadline for a candidate's participation and before the date and time scheduled for the event or appearance. The amount of advance notice that is reasonable will depend on all of the facts and circumstances, but in no event will notice of less than 72 hours for a written response, or less than one week for a personal appearance, be considered reasonable. If the final comparative voter education communication is reduced or altered from the full description provided to the candidates, the change must not be favorable or unfavorable toward any candidate.

(iii) Materials compiled by the organization independently. If the comparative voter education communication is compiled from public statements of the candidates, or from public records, or from polling or other data or information gathered without participation of the candidates, the communication must provide equivalent information using the same methodology for all candidates seeking the same public office (or for all who meet an objective threshold of viability), and must devote approximately equal time, text, or space to each such candidate taking into account variations in the amount of publicly available data. In such cases, the organization must present the materials gathered about each candidate to that candidate, and give each candidate an equal opportunity to participate in the preparation of the communication by providing reasonable corrections or explanations pertaining to such materials for inclusion in the final communication. However, if the comparative voter education communication consists solely of objective campaign data, the organization is not required to comply with the immediately preceding sentence.

(iv) Objective campaign data. The term "objective campaign data" means only the conduct and presentation of the results of scientific surveys of public opinion, including voters' candidate preferences prior to elections, and the reporting of data from public campaign finance disclosure records, so long as the communication contains no element of opinion indicating that the organization has a preference for or against the election of any candidate.

(v) Lack of participation by candidates. Provided that all candidates (or all who meet an objective threshold of viability) have been given an equal opportunity to participate, the communication will still qualify as comparative voter education even if some candidates do not appear at debates or forums, or respond to questionnaires, or otherwise take action that is required to participate in the activity. However, at least two candidates must participate to

qualify as a comparative voter education communication, even if there is only one viable candidate for election to the office.

(vi) Objective threshold of viability. The term "objective threshold of viability" means a percentage or other minimum standard of support in a scientific survey of public opinion on voters' candidate preferences, for the purpose of selecting two or more leading candidates seeking the same public office to be featured in a comparative voter education communication that does not include all candidates seeking that office.

(8) Disclaimer of intervention. A "disclaimer of intervention" is a prominent oral or written statement made in connection with an individual's remarks about one or more candidates, stating that such remarks are his or her personal opinion only. The individual's title or affiliation with a specific organization may be disclosed in connection with such remarks, but only within a disclaimer prominently stating that his or her title or affiliation is provided for identification purposes only and that such remarks are not made on behalf of the named organization. A disclaimer of intervention is not valid if the individual's remarks are made in the course and scope of employment by the organization, or are requested, directed, authorized, or funded by the organization.

(9) Dual function. A "dual function" communication is one that includes both political intervention and content that is not political intervention. A dual function communication is treated as entirely political intervention.

(10) Educational methodology. The term "educational methodology" used in the permitted self-defense exception refers to advocacy of particular viewpoints or positions that is "educational" within the meaning of section 501(c)(3) and looks to the method used by the organization to develop and present its views. The method used by the organization is not considered educational if it fails to provide a factual foundation for the viewpoint or position being advocated or fails to provide a development from the relevant facts that materially aids a reader, viewer, or listener in a learning process. The facts that purport to support the viewpoints or positions must not be distorted. The presentation must not make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations. The method must not fail to consider the reader, viewer, or listener's background or training in the subject matter.

(11) Election. An "election" is a process culminating in a vote by the public to determine whether a candidate will serve in a public office. The term "election" includes general, special, and runoff elections; recall and confirmation elections; and votes by members of a political party or by voters generally to select nominees for an elective office, whether by open or closed primary election, or by caucus, convention, or other means. The term "election" does not include the process of filling a vacancy in an otherwise elective office by executive appointment or by the vote by a legislative or administrative body. If the law of the jurisdiction requires another decision-making process beyond the vote of the public to finally select the public official, such as a vote by the U.S. House of Representatives taken when no presidential candidate has a majority of electoral votes or the electoral vote is tied, that process is part of the "election." However, efforts to resolve uncertainty or disputes as to the final result of the public vote, such as recounts or litigation, shall not be regarded as part of the "election." A non-

electoral procedure by which a public officeholder may be removed, such as resignation or conviction upon impeachment, is not an election. Solely for the purposes of this section, an "election" does not include votes by the public upon initiatives, referenda, constitutional amendments, bond issues, or other ballot measures, whether or not such voting occurs at the same time as voting upon candidates.

(12) Election reference. A communication includes an "election reference" if it refers to a future election, to voting in a future election, to the fact that a person is a candidate in a future election, or to one or more of the person's opponents in a future election. Such references may be direct or indirect, such as referring to the date of the election, a future term that the candidate might serve, the contested public office, or other similar phrasings.

(13) Election year. The "election year" means the period of 365 days prior to the date of the general election ultimately determining whether a specific candidate serves in a public office.

(14) Exempt purposes. "Exempt purposes" are the purposes for which an organization is organized and operated that justify its claim to be described in a subsection of section 501(c).

(15) Explicitly advocate. To "explicitly advocate" means to urge readers, viewers, or listeners to take one or more of the actions listed in subsection (b)(2)(i) above, including words, slogans, images, photos, drawings, symbols, or other forms of expression which, in context, are susceptible of no reasonable interpretation other than to urge recipients to take one or more of such actions.

(16) Influence official action. A communication is made to "influence official action," if it reflects a view on a public official and the view has a direct, limited, and reasonable relationship to specific actions that the official may yet perform within his or her current term of office. Such specific actions include, without limitation, introducing, voting upon, ratifying, or vetoing legislation, pursuing an official investigation, hearings, law enforcement, or a judicial procedure, issuing or modifying regulations or rulings, taking executive or administrative action, appointing or removing another public official, or resigning. The relationship between the view and the specific action is "direct" if it refers expressly to the action, it is "limited" if it does not go beyond facts and arguments that pertain to the action, and it is "reasonable" if the connection between the view and persuading the official to take the action is logical and apparent to the reasonable reader, viewer, or listener. The action is one that the official "may yet perform" if he or she has the power and authority to initiate the action, or if there are objective, ascertainable facts making it reasonable to conclude that there is a significant chance that the opportunity to take or not take the action will be presented to the official.

(17) Natural constituency. An organization's "natural constituency" includes its members, employees, students, patients, clients, visitors, subscribers, customers, event attendees, donors, volunteers, shareholders, and others who have provided contact information to the organization in the ordinary course of the organization's exempt purpose program or trade or business, and not obtained in the course of any political intervention activity. A communication by an organization is targeted to its natural constituency if its distribution is designed to reach its entire natural constituency, or the communication is made available to its natural constituency at times

when and locations where the organization is conducting programs or activities unrelated to any election.

(18) Organization. The term "organization" refers to any entity, nonprofit or for-profit, whether incorporated or not, to which the Internal Revenue Code applies. For purposes of the business expense deduction under section 162, "organization" refers to any taxpayer engaged in trade or business, including individual taxpayers.

(19) Paid mass media advertising. The term "paid mass media advertising" means a communication to the general public placed for a fee on one of the following media operated by another person: a broadcast, cable, or satellite facility, newspaper, magazine, outdoor advertising facility, mass mailing service, telephone bank, another person's web site or internet communications service, or similar mass media. "Mass mailing" means a mailing by United States mail or fax delivery of more than 500 pieces of material of an identical or substantially similar nature within any 30-day period. The Commissioner shall issue a public notice containing a list of "similar mass media" to identify advertising media of similar reach and impact, to be modified as of January 1st of even-numbered years as needed to reflect changes in communications technology and election campaign utilization as they occur.

(20) Personal oral remark at a meeting. A "personal oral remark at a meeting" is an oral statement made by anyone (other than a candidate) who is present in person at an official meeting or function held in the ordinary course of an organization's regular and customary activities, provided that all of the following apply—

(i) The remark is delivered in person to an audience that is physically present in a single room or location, and the organization does nothing to cause any broader or later communication of the remark to occur, whether written, electronic, recorded, broadcast, or otherwise transmitted (except to the extent reasonably necessary to accommodate disabled access);

(ii) No communication that announced or promoted the meeting or function contained any election reference; and

(iii) A disclaimer of intervention as prescribed by paragraph (c)(8) of this section is made during the meeting or function, which includes a statement that no speaker is advocating that listeners vote for or vote against any candidates for public office, make contributions to elect or defeat any candidates or parties, or use any specific criteria to choose candidates to be supported or opposed.

(21) Previously established safe harbors. Nothing in this section shall be interpreted to cause an activity to be political intervention to the extent that previous regulations, revenue rulings, court decisions or other precedential federal tax authorities have declared the activity to be not political intervention, including but not limited to rulings affecting educational programs of universities, incumbent legislative voting records, candidate appearances in non-candidate capacities, and incidental fringe benefits of employment.

(22) Public office. A "public office" is a position in the executive, legislative, or judicial branch of a federal, state, local, or foreign government.

(23) Reflects a view. A communication "reflects a view" on one or more clearly identified candidates if it praises or criticizes the candidate or his or her policy views (or indicates that the candidate supports or opposes the organization's views), or otherwise portrays the candidate in a positive or negative light, considering the communication as a whole (including content, tone, and images). Thus, a communication reflects a view only if it is favorable or unfavorable to the candidate and a reasonable reader, viewer, or listener would discern the organization's candidate preference from the communication, knowing the contemporary context in which it is made. A written or oral biographical statement about a person, without an election reference, presented to introduce or describe the person in a situation entirely unrelated to any election activity, such as a public speech, community service recognition, or published writing, does not reflect a view even if the person is, at the same time, a candidate.

(24) Self-defense--(i) In general. A "self-defense" communication is a response by an organization to a public or publicly-reported statement by a candidate or candidates that either--

(A) Disparages or criticizes the organization, whether expressly or by implication;

(B) Comments upon a specific public policy position or action that the organization has taken publicly in furtherance of its exempt or business purposes within the 12 months preceding the communication; or

(C) Results in unsolicited press inquiries to the organization in the wake of the candidate's statement.

To be described as a self-defense communication, the response must be prepared using an educational methodology and any references to a clearly identified candidate must be limited to addressing the topic of the candidate's statement.

(ii) Dissemination of a self-defense communication. A communication that is distributed in response to a candidate statement described in subparagraphs (i)(A) or (i)(B) above is made in self-defense only if it is disseminated in a manner commensurate in medium and scale, and proximate in time, to the publicity of the candidate's statement to which the communication responds. The dissemination is commensurate in medium and scale to the publicity of the candidate's statement if the medium of distribution and the recipients of the distribution are reasonably calculated to enable the organization's response to reach an audience comparable to the audience for the publicity of the candidate's statement. The response must not deliberately exceed the scale of the publicity of a candidate's statement by attempting to reach a broader audience. A self-defense communication distributed in response to unsolicited press inquiries described in subparagraph (i)(C) above must be disseminated only to the requesting press organizations.

(25) Targeted--(i) In general. A communication is "targeted" if its distribution is designed to reach a specific audience based upon criteria used to select certain potential voters to receive the communication while not selecting others. Thus, an "untargeted" communication is one designed to reach the public or potential voters generally, without taking into consideration any criteria for selection.

(ii) Close contest. An organization's communications are targeted to a "close contest" as a selection criterion if their distribution is designed to reach more than the lesser of 50,000 or 5%

of the individuals, cumulative per election, within an electoral jurisdiction or district (including states in a United States presidential election) during all times in which two candidates for a specific public office are within ten or fewer percentage points of each other in a scientific survey of voter opinion the results of which were first publicly reported within the prior 30 days. All contests within a state, whether by primary election, caucus, or convention, to select a political party's presidential nominee, shall be treated as "close contests" regardless of any voter opinion survey results.

(iii) Under-represented voters. A communication is targeted to "under-represented voters" as a selection criterion if its distribution is designed to reach groups of potential voters who have below-average rates of registration or voting, based on voting records or on demographic characteristics correlated historically with such below-average rates.

(26) Use of resources--(i) In general. The term "resources" includes any money, facilities, or property (including tangible and intangible property) owned, leased, or controlled by an organization, the compensated time of any organization employee, consultant, or agent, and any services provided by the organization using either paid staff or volunteers. The term "use of resources" means any activity by an organization that is not a communication and involves the deployment of any of its resources in any way, including (A) providing the resource by gift, grant, loan, sale, rental, exchange or any other method of transfer to another person or entity or (B) putting the resource to use itself.

(ii) Reasonable steps to prevent use for political intervention. When an organization transfers its resources to another, the requirement for "reasonable steps to prevent use for political intervention" is ordinarily satisfied by contractual or legal restrictions regarding the authorized or allowable use of resources by the transferee, unless the organization doubts or reasonably should doubt the transferee will comply with such restrictions. Reasonable steps also consist of the following--

(A) Transfers to section 501(c)(3) or 501(c)(29) organizations. If a transfer is made to an organization described in section 501(c)(3) or section 501(c)(29), the transferor organization is deemed to have taken reasonable steps to prevent use for political intervention if, prior to the transfer, the transferor organization verifies that that the transferee is described in section 501(c)(3) or section 501(c)(29), unless the transferor organization doubts or reasonably should doubt the transferee's compliance with its prohibition on political intervention.

(B) Expenditure responsibility and controlled grants. A transferor organization that makes a grant to another is deemed to have taken reasonable steps to prevent use for political intervention if the transferor (1) exercises expenditure responsibility with respect to the grant, within the meaning of section 4945(h), or (2) makes a controlled grant. For the purposes of this subparagraph (B), a "controlled grant" is a grant that meets the following requirements:

(*1*) The grantor limits the use of the grant to a specific project, program, or use that furthers the grantor's exempt purposes and that does not include political intervention; and

(*2*) The grantor maintains records to establish that the grant was used in furtherance of the grantor's exempt purposes and was not used for political intervention.

(iii) Ordinary business transaction. An "ordinary business transaction" is a transfer of resources to a person or entity that is--

(A) Made by the organization in return for consideration that equals or exceeds the fair market value of the resources provided by the organization,

(B) Similar to other transactions engaged in by the organization, and

(C) Without preference for or against any candidate, group of candidates, or group having the primary purpose of political intervention.

"Without preference" means that the resource is available to candidates or groups involved in the same election on an equal basis. If the organization provides the resource only to those candidates or groups who request to use it, that does not indicate a preference. Providing the resource, or taking affirmative steps to offer it, to competing candidates or groups is not required to avoid a preference. However, "without preference" does mean that the organization must not decline similar requests from or impose different terms and conditions upon competing candidates or groups, and must not make the availability of the resource known to certain candidates or groups and not to their competitors.

(iv) Affiliate transaction. An "affiliate transaction" is a transaction between an organization and one or more of its chapters, branches, or other affiliated entities in which the organization provides a resource to the affiliate consisting of--

(A) A license or other permission to use the organization's name, logo, or other trademarks or service marks as part of the affiliate's branding, whether or not the affiliate provides consideration for the resource, so long as the affiliate's communications using such name or mark are clearly and conspicuously distinct from communications by the organization and identified as communications of the affiliate; or

(B) Mailing lists or other intellectual property (including lists with email addresses, phone numbers, or any other form of contact information), so long as the affiliate provides consideration that equals or exceeds the fair market value of the resource provided by the organization; or

(C) Any other resource, in return for either consideration that equals or exceeds the fair market value of the resource provided by the organization, or reimbursement of the actual cost to the organization to provide it.

(v) Reportable contribution. A "reportable contribution" is any transaction or other use of resources by an organization that is subject to public disclosure, whether under applicable campaign finance law, tax law, or other law governing funds used to influence candidate elections, in any jurisdiction to which the organization is subject, as a contribution made to, for the benefit of, or at the behest of, a candidate or an organization that has the primary purpose of engaging in political intervention.

(27) Voter engagement. A "voter engagement" communication is a communication directed to potential voters that encourages them to register to vote, or assists or offers to assist them in

registering to vote, or encourages them to cast their ballots or offers to assist with voting in an election.

(28) Wedge issue. A "wedge issue" is a federal, state, or local public policy issue on which two or more candidates have publicly expressed clearly distinct positions, other than a ballot measure to be voted on by the public at the same time as the candidates' election.

(d) Regulations. The Secretary of the Treasury shall prescribe, update, and modify such regulations as may be necessary or appropriate to clarify further the standards set forth in this section in light of current and future changes in campaign practices, to meet the objectives of this section to promote civic participation in democracy, curb abuses, and allow organizations to reasonably anticipate the tax consequences of their activities in advance.

(e) Effective date. This section shall apply to all taxable years of an organization that begin after the date this section is enacted.