Written Testimony of

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"Settling the Question:
Did Bank Settlement Agreements Subvert Congressional Appropriations Powers?"

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Chairman Duffy, Vice Chairman Fitzpatrick, Ranking Member Green, and members of the Subcommittee, thank you for inviting me here to testify. My name is David Min and I am an Assistant Professor at the University of California Irvine School of Law, where I teach and research in the areas of business law, with a focus on banking, housing finance, and other financial regulation. Before coming into academia, I spent over a decade working in financial regulation, both in private practice and in the federal government, including as a Senior Policy Advisor for the Joint Economic Committee of Congress, where I had the pleasure of working with several of you and your staff. I thank you for the opportunity to testify today on the topic of whether the consumer relief provisions of the settlements negotiated by the U.S. Department of Justice (DOJ) and various state Attorneys General with financial institutions over alleged misconduct in the creation, marketing and sale of residential mortgage-backed securities (RMBS) are illegal or unconstitutional. Today's hearing focuses specifically on provisions contained in three of the five RMBS settlements, which allow the bank defendant to fulfill some of its settlement obligations by donating money to third party charitable efforts (such as foreclosure prevention). There has been significant criticism about this type of settlement provision.

The title of today's hearing is *Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriations Powers?* This question really has two parts. First, are the consumer relief provisions at issue legally permissible? As I shall describe, this is a settled question—yes, these types of settlement provisions are clearly allowed (and are indeed quite ubiquitous) under the Miscellaneous Receipts Act, which is the governing statute, so long as they meet two criteria. First, the settlement must be executed prior to an admission or finding of liability. Second, the federal government must not retain post-settlement control over the funds. If these two criteria are met, the federal government's control over the settlement funds is deemed to be so attenuated that it cannot be said to have "received" the money, and thus any concerns about bypassing the appropriations process are, at least from a legal perspective, inapplicable.

The second question that today's hearing implicitly asks is whether these types of settlement provisions—which allow banks to fulfill some of their settlement obligations by donating money to charities—<u>should</u> be permitted under current law. One of your colleagues, Rep. Goodlatte, has introduced a bill that would prohibit these types of charitable payment provisions in federal settlements. As I discuss, these charitable payment provisions serve many important public policy goals and have very little actual downside. A close analysis of these provisions indicates that the concerns raised by critics of charitable payment provisions are overstated. Moreover, the particular RMBS settlements that are the subject of today's hearing appear to be well designed, they serve a strong deterrent function, and they likely provide much greater benefits than could be gained through simply seeking civil penalties alone.

I. <u>Background</u>

The settlements at issue were negotiated pursuant to investigative findings made by the Residential Mortgage-Backed Securities Working Group, a collaborative effort involving resources committed by a wide variety of state and federal agencies, including the U.S. Department of Justice (DOJ), the U.S. Attorneys' Offices, the U.S. Securities & Exchange Commission, the U.S. Department of Housing and Urban Development, the Federal Bureau of

Investigation, and the New York Attorney General's Office.[1] There have been five settlements made related to wrongful or fraudulent disclosures and other misconduct around the creation, marketing and sale of RMBS, involving JP Morgan Chase, Bank of America, Citigroup, Morgan Stanley and Goldman Sachs (collectively, the RMBS settlements).

These settlements resolve a broad array of federal and state civil claims.[2] For example, the recent settlement with Goldman Sachs resolved claims by the States of California, Illinois and New York under their respective state laws; claims by the Federal Home Loan Bank of Chicago and the Federal Home Loan Bank of Des Moines under state securities laws; claims by the National Credit Union Administration Board under state securities laws; and claims by the federal government under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).

Four of the five RMBS settlements—those negotiated with Bank of America, Citigroup, Goldman Sachs and JP Morgan Chase—include "consumer relief" provisions that require the settling bank to direct funds to efforts to "remediate harms resulting from the alleged unlawful conduct" of the settling financial institution.[3] The settling bank agrees to donate a total amount of money towards these consumer relief efforts, but is permitted to choose how it allocates this money among a broad array of different activities, including foreclosure prevention efforts (such as principal reductions or refinancing options for struggling homeowners), increased low- and moderate-income lending, greater resources for affordable rental housing, and community reinvestment and stabilization (also referred to as anti-blight) initiatives.

Three of these settlements with consumer relief provisions—those negotiated with Bank of America, Citigroup, and JP Morgan Chase—allow banks to satisfy some of their consumer relief obligations by donating money to private charitable groups, such as non-profit groups, legal aid organizations, community equity restoration funds, and HUD-approved housing counseling groups. It is these particular charitable payment provisions that are the focus of today's hearing. A number of commentators, including several members of Congress, have expressed concern that the federal government's negotiation of settlements, such as these RMBS settlements, that allow for payments to third parties bypasses the Congressional appropriations process.[4] As you are all aware, Rep. Goodlatte, the Chairman of the House Judiciary Committee,

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[1] *See* Press Release, Dept. of Justice, Residential Mortgage-Backed Securities (RMBS) Working Group Announces New Resources to Investigate RMBS Misconduct (May 24, 2012), *available at* https://www.justice.gov/opa/pr/residential-mortgage-backed-securities-rmbs-working-group-announces-new-resources-investigate.

[2] It is worth noting that these five settlements expressly exclude criminal liability. Thus, any analysis based on the settlement of criminal prosecutions (such as with non- or deferred prosecution agreements) is inapt for this particular hearing.

[3] The lone exception to this is Morgan Stanley's settlement agreement.

[4] *See, e.g.*, Press Release, Congressman Bob Goodlatte, Goodlatte Introduces Bill to Halt DOJ Slush Fund Money to Activist Groups (Apr. 27, 2016), *available at* http://goodlatte.house.gov/press_releases/887 (describing DOJ settlements with third party payment provisions as a "pattern or practice" of "systematically subverting Congress's budget authority); *Consumers Shortchanged? Oversight of the Justice Department's Mortgage Lending Settlement: Hearing Before the House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (2015) (statement of Paul J. Larkin, Jr.) (arguing that third party payment provisions "should not be included in a… civil settlement… unless an act of Congress expressly and specifically authorizes the government to impose any such obligation") (hereinafter "Larkin Testimony"); U.S. Chamber of Commerce

has introduced legislation that would prohibit any settlement agreements made on behalf of the U.S. government that include "a term requiring that any donation be made to any person by any party (other than the United States)."[5]

As I mentioned earlier, today's hearing really focuses on two discrete questions. First, are these RMBS settlements with charitable payment terms legally permissible? Second, should they be? I will address each of these questions in turn.

II. Charitable Payment Terms Are Clearly Permissible Under Current Law

The threshold question of today's hearing is whether the RMBS settlement terms allowing banks to direct monies to third party charitable groups violate Congress's appropriations powers. The very clear answer under current law is that they do not. Indeed, the House Judiciary Committee has implicitly acknowledged the legality of charitable payment terms by passing H.R. 5063 out of Committee. H.R. 5063, which would prohibit DOJ from negotiating settlements that included terms allowing for such charitable payment clauses, would not be necessary if this practice was impermissible under existing law.

The DOJ of course enjoys broad authority in deciding when and how to settle governmental claims. Since its creation in 1789, the office of Attorney General has been recognized as possessing plenary power over all legal affairs involving the United States (except for those matters in which Congress has expressly granted authority over such affairs to a specific agency).[6] This plenary authority extends to the DOJ, and includes the power to compromise and settle litigation involving the federal government.[7] In wielding this authority, DOJ has the duty to represent both the interests of any particular "client" agencies that are involved, but also the interests of the broader Executive Branch. This determination of whether and how to settle may be made "on the basis of national policies espoused by the Executive."[8] The only limitations on DOJ's settlement authority are statutes that specifically and expressly relate to the litigating authority of the Attorney General (such as H.R. 5063's proposed limitations on payments to third parties) and, more generally, Article II, § 3 of the Constitution, which imposes a duty on the President to faithfully execute the laws of the United States.[9] Thus, at a high level, the RMBS settlements seem quite appropriate and consistent with the plenary authority over federal litigation granted to DOJ.

A. RMBS Settlements Are Permissible Under the Miscellaneous Receipts Act

A specific critique that has been raised by some commentators is that the charitable payment provisions of these RMBS settlements violate Congress's appropriations and oversight

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Institute for Legal Reform, *Enforcement Slush Funds: Funding Federal and State Agencies with Enforcement Proceeds* (Mar. 2015) (stating that these types of settlements "raise serious constitutional concerns under Article I, which grants to Congress—and to Congress alone—the power to control and direct spending from the public fisc").

[5] Stop Settlement Slush Funds Act of 2016 (H.R. 5063).

[6] *See* Assistant Attorney General Theodore Olsen, Office of Legal Counsel, The Attorney General's Role as Chief Litigator for the United States, Memorandum Opinion for the Attorney General, Jan. 4, 1982, at 47-48.

[7] *Id*. at 49-51, 59-60.

[8] *Id*. at 60 (citing *Smith v. United States*, 375 F.2d. 243 (5th Cir.), *cert . denied*, 389 U.S. 841 (1967)).

[9] *Id*. at 60.

authority. For example, my fellow witness, Dr. Paul Larkin, a Senior Legal Research Fellow at the conservative Heritage Foundation, has argued that settlement provisions containing charitable payment provisions are impermissible under both federal statutes and the Constitution because they constitute an appropriation and thus "circumvent the constitutional process for appropriating taxpayer dollars."[10] This claim, while perhaps rhetorically appealing, is inaccurate as a matter of law today.

As Dr. Larkin notes, the Constitution quite clearly establishes Congress's exclusive power over the appropriations of new money.[11] But the President of course has always had broad authority in executing and enforcing the laws passed by Congress, and this has led to numerous instances, dating back to the origins of the Republic, in which the Executive Branch has taken actions that might be seen as encroaching on the Legislative Branch's power over the purse.[12] In response, Congress has passed several laws specifically designed to limit executive encroachment on Congress's appropriations authority. The most important of these, for the purposes of this hearing, is the Miscellaneous Receipts Act of 1849 (MRA), which requires that, unless expressly otherwise stated, "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury…"[13]

Whether or not a federal official actually receives any money is irrelevant. As the Office of Legal Counsel stated in 1980, as long as a federal agency could have accepted possession and retains discretion to direct the use of the money, it will be constructively found to have received money for purposes of the MRA.[14] But OLC has also advised the Executive Branch that settlement proceeds can be directed to private charitable groups, so long as two criteria are met: (1) the settlement is executed before an admission or finding of liability in favor of the federal government; and (2) the federal government does not retain post-settlement control over the disposition or management of the funds or any projects carried out under the settlement, except for ensuring that the parties comply with the settlement.[15] As long as these two criteria are met, "then the governmental control over settlement funds is so attenuated that the Government cannot be said to be 'receiving money for the Government'" and thus MRA (along with other principles of appropriations oversight) would not apply.[16]

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

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

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

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

[14] Deputy Assistant Attorney General Larry A. Hammond, Office of Legal Counsel, Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General, Memorandum Opinion for the Associate Attorney General, June 13, 1980, at 688.

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

[16] *Id*. At least one court has upheld this reasoning, finding that settlement agreements in which the defendants does not admit liability are not prohibited from including terms requiring them to make payments to private third parties. *See Sierra Club* v. *Electronic Controls Design, Inc*., 909 F.2d 1350, 1355 (1990).

Based on this legal framework, the federal government has crafted a wide variety of settlements with terms providing for payments to private charitable groups. Indeed, the Environmental Protection Agency has expressly encouraged the use of such provisions in settlements (which it calls Supplemental Environmental Projects or SEPs), stating that enforcement staff should "consider every opportunity to include more environmental significant SEPs wherever possible."[17]

Importantly, the Comptroller General, which represents Congress, appears to tacitly agree with this reasoning. As the Comptroller General has stated, the federal government's "discretionary authority to 'compromise, or remit, with or without conditions,' civil penalties… empowers it to adjust penalties to reflect the special circumstances of the violation or concessions exacted from the violator, but does not extend to remedies unrelated to the correction of the violation in question."

In other words, in crafting settlements, the federal government may "adjust" penalties on a case-by-case basis, so long as the remedies are not "unrelated to the correction of the violation in question."[18] As Andrew Spalding, a law professor at University of Richmond School of Law, has described, this logic is essentially a concession that government settlement terms calling for payments to charitable or community service groups "could actually fall within the Executive's legitimate enforcement and not run afoul of either Congress's Article I power of the purse or the MRA."[19]

The RMBS settlements at issue plainly fall within the criteria outlined by OLC. They do not include a finding of liability on the part of the banks, and the federal government does not maintain post-settlement control over the disposition or management of the funds. Indeed, the banks themselves maintain full control over how they can disburse the funds under the consumer relief provisions, and there is no requirement that they donate <u>any</u> funds to third parties under the terms of these agreements. They appear to be clearly permissible under current law.

B. <u>Charitable Payment Terms Are Valid as Settlements of State Claims</u>

It is also worth noting that the three RMBS settlements at issue involved state government plaintiffs. As the OLC noted in 1980, in cases where there are both federal and state plaintiffs, there is no reason why the MRA must be implicated, since any potentially offending settlement term can be attributed to the state sovereign, which has its own claims upon which to base any settlement agreement.[20]

III. <u>Charitable Payment Terms Are Desirable From a Public Policy Perspective</u>

Having dispensed with the first question—are the charitable payment provisions of the RMBS settlements legally permissible—let us move on to the second question—should these

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

[18] U.S. Envtl. Prot. Agency, B-247155.2, 1993 WL 798227 (Comp. Gen. Mar. 1, 1993).

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

[20] Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General, *supra* note 14 at 688-89.

types of settlement terms continue to be allowed, or should Congress take action to prohibit them? Despite the concerns raised by my fellow witnesses, I think that the charitable payment provisions in the RMBS settlements can serve a valuable purpose and that the federal government should continue to be given broad discretion in fashioning settlements that are best tailored to the particular facts of a party's alleged misconduct.

It is undeniable that charitable payment provisions can serve a valuable purpose. Indeed, even Dr. Larkin, who is the leading critic of these provisions, has acknowledged this point:

> The government and a defendant could find third-party contribution requirements mutually valuable. Requiring a target to make a charitable contribution enables the government to evade statutory limitations on the amount of fines that could be imposed if the prosecution believes that the statutory cap provides an insufficient penalty. The government may find that such conditions have considerable public relations value, particularly in the community benefitting from them. A corporate target also might jump at the opportunity to engage in a charitable endeavor… Moreover, the contribution may have important public relations value for the corporation as well.[21]

As Dr. Larkin's statement describes, charitable payment provisions can be mutually beneficial for both the government and the private defendant. From the government's perspective, these provisions can effectively increase the total amount of the settlement by a large amount and also benefit injured parties. From the defendant's perspective, charitable payment provisions can provide significant public relations and community outreach benefits. Moreover, to the extent that the federal government may, but is not required to, negotiate charitable payment terms as part of its settlements, this provides it with additional flexibility to help negotiate, as one of our current Presidential candidates likes to say, the <u>best</u> deal. For example, DOJ negotiated a settlement with Morgan Stanley that did not contain any consumer relief provisions. Presumably, DOJ made the determination that, due to the specific facts and negotiating posture around that settlement, it was not in the best interests of the federal government to seek charitable payment provisions in its settlement with Morgan Stanley.

A. <u>Charitable Payment Provisions Are Unobjectionable on Policy Grounds</u>

So why would anyone oppose these provisions which help the public good and can be beneficial to all involved parties? I have come across several public policy objections to charitable payment provisions in federal settlements, but none of them appear to be particularly problematic, as I describe.

1. <u>*Charitable Payment Provisions Do Not Take Money From the Public Fisc*</u>

One objection is that such third party payment provisions potentially redirect money away from the federal treasury. As Dr. Larkin has stated this point, "[a]ny sum that the government demands that a corporation hand over to a private party is money that the corporation would otherwise pay into the federal treasury." But as Dr. Larkin himself notes, the federal government is often bound by statutory limitations on the amount of civil penalties it can seek. Thus, it is incorrect to assume that each dollar of charitable payment secured in a

[21] Larkin Testimony, *supra* note 4, at 6.

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

Indeed, the RMBS settlements appear to provide an illustration of this type of scenario. The DOJ's primary federal claims in each of the RMBS settlements were claims of FIRREA violations. Penalties for FIRREA violations are capped at $1 million.[22] Thus, it is not clear that DOJ could have procured much more in civil penalties than it received from the RMBS settlements, even if it had litigated these cases and won, due to FIRREA's statutory cap on civil penalties. The charitable payment provisions appear to have allowed DOJ to procure much more than it would have been able to get if it had been limited to civil penalties. The consumer relief provisions negotiated by DOJ were quite substantial in size, totaling many billions of dollars. It seems likely that in the absence of any charitable payment provisions, the total effective amount paid by the banks would have been many billions of dollars lower.

2. *Charitable Payment Provisions Are Consistent With the Policy Rationale Behind Civil Penalties*

Another criticism of charitable payment provisions is that they undermine the public policy purposes behind civil penalty schemes, insofar as they do not compensate actual victims of the alleged misconduct, but direct the money towards uninjured third parties (with the goal of helping victims). This critique, which has been expressed by Dr. Larkin[23] and Rep. Goodlatte,[24] among others, seems to be implicitly rooted in a restitutionary theory of civil penalties. For example, Rep. Goodlatte has stated that "[t]he purpose of DOJ enforcement actions should be punishment and redress to actual victims."[25]

But the assumption underlying this view is incorrect. The penalties sought in governmental litigation (such as DOJ actions) are generally not based on a theory of restitutionary or restorative justice, but rather are based on two different but overlapping objections—deterrence and general compensation to society.[26] As the prominent administrative law scholar Colin Diver has described, "[b]y definition, a civil money penalty does not serve a 'specific' compensatory function" of redressing the harms done to the victim of a particular

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[22] 12 U.S.C. 1833a(b)(1).

[23] Larkin Testimony, *supra* note 4, at 7-8 (arguing that "the practice of required third-party contributions is inconsistent with the federal laws that supply financial assistance to the victims of crime").

[24] Press Release, Congressman Bob Goodlatte, Goodlatte Praises Committee Passage of Bill to Stop Obama's Settlement Slush Fund (May 11, 2016), *available at* http://goodlatte.house.gov/press_releases/894 (stating that settlement funds should go to either the federal government or to injured victims).

[25] *Id*.

[26] *See* Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1455-56 (1979). Indeed, it is worth noting that principles of restorative justice may be particularly inapt for civil penalties, where there is often not a particular identifiable "victim" other than the general public.

wrong, since this is the role of remedies in private causes of action.[27] Rather, the compensatory function of civil money penalties is "to compensate 'society' at large for harm that it has suffered at the hands of a violator."[28] While there have been some recent efforts to try to recast civil money penalties as implements of restorative justice,[29] the general consensus is still that these penalties are primarily grounded in principles of deterrence and general compensation.[30]

As described in the previous section, charitable payment provisions can significantly increase the total amount of the settlement, and this is beneficial for both the goals of deterrence and general compensation. Obviously, a larger amount paid by the alleged wrongdoer would have a larger deterrent effect on other potential wrongdoers. And, to the extent that this money is used to remediate some of the effects of the wrongdoing, this can increase the general compensation (and for that matter, any restorative) principles behind civil penalties. The RMBS settlements appear to be good examples of this point. It appears that the banks agreed to pay far more because of these consumer relief provisions than they would have otherwise. Thus, the consumer relief provisions were consistent with and for that matter enhanced the public policy goals behind civil penalty authority.

B. **Concerns About Cronyism Are Overstated and Can Be Addressed Through Intermediate Steps**

Another concern that has been raised about charitable payment provisions is that they create a potential for political cronyism, insofar as DOJ and other litigating federal agencies can require payments be made to political allies. In my view, this concern is valid but greatly overstated. Theoretically, the problem of DOJ settlements being used to create backdoor "slush funds," as the RMBS settlements have been sensationally characterized, is a huge one. But in reality, there is simply no evidence that this is an actual concern.

As I discussed previously in Part I, in order to be in compliance with the Miscellaneous Receipts Act, any charitable payment provision that is part of a government settlement must be designed such that the federal government does not retain post-settlement control over the disposition or management of the funds. This alone would mitigate many of the potential self-dealing and "slush fund" problems that have been described by critics of the RMBS settlements. But government settlements typically also comply with several other criteria, that have been put in place specifically to mitigate concerns about cronyism and favoritism. For example, charitable payment terms are required to be consistent with the provisions of the underlying statute(s), and they must advance at least one of the objectives of the underlying statute(s) that is the basis of the enforcement or litigation action.[31] In other words, there must be a nexus between the charitable payment and the violation.[32]

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[27] *Id*.
[28] *Id*.
[29] *See, e.g.*, Spaulding, *Restorative Justice for Multinational Corporations*, *supra* note 19.
[30] Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. POL. REV. 453, 460-61 (2010).
[31] *See* Environmental Protection Agency website, *Supplemental Environmental Projects*, *available at* https://www.epa.gov/enforcement/supplemental-environmental-projects-seps#policy.
[32] *See* Kris Sighe, *Organizational Community Service in Environmental Crimes Cases*, *in* UNITED STATES ATTORNEYS' BULLETIN (2012).

The charitable payment terms of the RMBS settlements seem particularly unobjectionable in this regard. The banks can choose to donate to any one (or more) of hundreds of charities and community groups. Some conservative commentators, including Rep. Goodlatte, have noted that these options include a number of community groups that are seen as ideologically aligned with liberals, but they notably omit that there are many conservative groups represented in this regard as well. Moreover, this criticism also ignores the fact that these particular charities are also among the most effective at delivering information and aid to many of the low- and moderate-income homeowners who were hardest hit by the mortgage crisis. NCRC or La Raza may or may not be ideologically aligned with the Obama administration, but it is fairly hard to argue that they are not better positioned than most organizations at reaching out to distressed homeowners. The types of services that these organizations offer, including legal aid and housing counseling, have been empirically proven to be among the most effective means of preventing preventable foreclosures.[33]

Finally, it is important to recognize that there are already laws and rules in place designed to prevent exactly the type of self-dealing that has been alleged by Rep. Goodlatte and others. The non-profit groups eligible to receive donations from banks under the terms of the RMBS settlements are subject to rigorous oversight to ensure that the money goes to its intended purposes—foreclosure prevention, anti-blight, and community stabilization—rather than to other, potentially nefarious ends. In the absence of any actual evidence that there has been any wrongdoing, it is hard to argue that there has been any real problem of political cronyisms or self-dealing.

C. **Charitable Payment Provisions in the RMBS Settlements Are Well Designed**

I would like to conclude my testimony by pointing out how well designed the RMBS settlements actually have been. In case we have all forgotten, we are only now emerging from the worst mortgage and housing crisis of our lifetimes, which was caused in large part by the wrongful conduct of RMBS sponsors and underwriters, which helped to create a massive housing bubble followed by an even larger housing bust. Millions of Americans have not yet recovered from this housing crisis, and run the risk of being left behind. To the extent that DOJ was able to negotiate sizable settlements that exceeded all but the most wildly optimistic estimates, which help the struggling homeowners and communities most affected by the crisis, we should be applauding these actions. This is particularly true, given that they were designed in such a careful and judicious way so as to clearly address and avoid the various concerns raised by my fellow panelists.

The charitable payment provisions of the RMBS settlements were designed to give banks significant flexibility in how they might provide consumer relief, by effectively providing them with a broad menu of options among which they could choose. Such flexibility was likely essential to procuring such large consumer relief provisions.

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

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