

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

CAUSE OF ACTION INSTITUTE	)	
1875 Eye Street, NW	)	
Suite 800	)	
Washington, DC 20006,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 16-1438
	)	
UNITED STATES DEPARTMENT OF	)	
HOUSING AND URBAN DEVELOPMENT	)	
451 7th Street S.W.,	)	
Washington, DC 20410	)	
	)	
	)	
Defendant.	)	
	)	

**COMPLAINT**

1. Plaintiff Cause of Action Institute brings this action under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), seeking the release of records requested by Cause of Action Institute (“CoA Institute” or Plaintiff) from the United States Department of Housing and Urban Development (“HUD”).

**NATURE OF ACTION**

**Background**

2. This matter involves a FOIA Request related to HUD’s role in three agreements between the federal government and three banks (the “Three Agreements”) that issued residential mortgage backed securities (“RMBS”).

3. CoA Institute submitted its FOIA request to HUD in July 2015 more than one year ago. HUD has failed to substantively respond this request.

4. The HUD failure to make any determination or produce timely relevant documents in response to this FOIA request violates its legal obligations and is especially damaging given serious questions regarding the HUD role in the Three Agreements.

5. The Three Agreements, which followed the economic crisis in 2007 and 2008, were ostensibly for billions of dollars. Under these agreements, the three settling banks could direct up to a total of \$13.5 billion of the settlement funds to third party organizations instead of to the federal government. These payments were allegedly for “consumer relief.” However, they were, and are being, made to HUD-approved Housing Counseling Agencies and to NeighborWorks America (“NeighborWorks”), a congressionally chartered nonprofit organization that is also one of the HUD-approved counseling agencies and whose board of directors includes HUD general counsel.

6. Because of a concern about the re-direction of settlement funds from the Federal Treasury to third party groups, CoA Institute launched an investigation and submitted a FOIA request to HUD. Instead of producing responsive records and providing transparency into payment of, potentially, billions of dollars to third party groups, HUD has failed, for more than a year, to produce a single responsive record in response to the CoA Institute FOIA request.

### **RMBS**

7. RMBS are securities backed by loans secured with residential property. Mortgage loans are purchased primarily from banks and mortgage companies and then assembled into loan pools by another bank or government entity (such as the Government National Mortgage Association (“Ginnie Mae”)). The entity pooling the loans together then issues securities to investors representing claims on the principal and interest payments made by loan borrowers. Thus, the ability to pay investors is based on, and supported by, monies received from

homeowners' payments of interest and principal pursuant to the terms of individual agreements with mortgage lenders.<sup>1</sup>

8. In the early to mid-2000s demand for RMBS increased greatly and a number of large investment and commercial banks sought to capitalize by increasing sales of these securities to investors, including federally insured financial institutions. Prior to selling the RMBS, the banks did their due diligence on loans (including credit, compliance, and valuation due diligence). When the banks then securitized and issued the RMBS, they would provide representations in offering documents about the characteristics of the underlying loans.

9. Following the economic crisis in 2007 and 2008, which, according to some reports, led to a loss of nearly \$11 trillion in household wealth and involved the foreclosure of potentially thirteen million homes<sup>2</sup>, government investigations, litigation, and reporting revealed that some banks had, *inter alia*, allegedly received negative information during their diligence process regarding the quality of the underlying mortgage loans. This information conflicted with the representations the banks provided to investors about the pools of loans in the various RMBS.<sup>3</sup>

10. To address these and related issues, President Obama formed an interagency Financial Fraud Enforcement Task Force (the "Task Force"), led by the Department of Justice and including senior level officials from HUD.<sup>4</sup>

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<sup>1</sup> See U.S. Securities & Exchange Commission, *Fast Answers*, <https://www.sec.gov/answers/mortgagesecurities.htm> (last visited July 8, 2016).

<sup>2</sup> See The Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report* at 11, 23 (2011), available at [http://fcic-static.law.stanford.edu/cdn\\_media/fcic-reports/fcic\\_final\\_report\\_full.pdf](http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf).

<sup>3</sup> See *id.* at 165-169, 187.

<sup>4</sup> Financial Fraud Enforcement Task Force, *Task Force Organization and Leadership*, <http://www.stopfraud.gov/tfs.html> (last visited July 8, 2016).

11. The Task Force’s role involved coordinating “investigations and prosecutions of financial frauds” and maximizing “the ability both to recover the proceeds of these frauds and obtain just and effective punishment of those who commit them.”<sup>5</sup>

12. The Task Force formed a Residential Mortgage-Backed Securities Working Group (“RMBS Working Group”) to “investigate RMBS misconduct” and to seek “evidence of false or misleading statements, deception, or other misconduct by market participants (such as loan originators, sponsors, underwriters, trustees, and others) in the creation, packaging, and sale of mortgage-backed securities.”<sup>6</sup> In 2013 and 2014, the government – supported by the efforts of the RMBS Working Group – entered into the Three Agreements with three large, national banks.

13. The federal government (and several states that were also part of the RMBS Working Group) entered into the Three Agreements ostensibly to resolve the government’s civil and criminal claims against the banks including claims under the Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1833a (“FIRREA”) and the False Claims Act, 31 U.S.C. § 3729, *et seq.* (“FCA”). The Three Agreements are substantially similar and include provisions in which the bank directly pays third party groups in lieu of paying civil and/or criminal fines to the United States Treasury.

### **Pre-Suit Settlement**

14. Although the Three Agreements are styled as “settlements”,<sup>7</sup> all of these agreements were reached prior to the occurrence of any court action. In other words, these agreements are all pre-suit “settlements” without any judicial approval or involvement.

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<sup>5</sup> Financial Fraud Enforcement Task Force, *About*, <http://www.stopfraud.gov/about.html> (last visited July 8, 2016).

<sup>6</sup> <https://www.stopfraud.gov/rmbs.html>

<sup>7</sup> *See, e.g.*, Department of Justice, Press Release, “Bank of America to Pay \$16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis” (Aug. 21, 2014)

15. On November 19, 2013 the United States, several states and JP Morgan Chase & Co.<sup>8</sup> entered into an agreement (the “JP Morgan Agreement”) resolving federal and state allegations that JP Morgan Chase & Co. knowingly sold billions of dollars in faulty mortgage-backed securities to investors prior to and during the 2008 financial crisis.<sup>9</sup> The JP Morgan Agreement is allegedly valued at \$13 billion and includes “consumer relief” provisions that allow - but unlike the later Citigroup and BoA Agreements (as defined below) do not *require* - “donations” to government-approved third parties.

16. On July 14, 2014, the United States, several states and Citigroup, Inc.<sup>10</sup> entered into an agreement (the “Citigroup Agreement”) resolving federal and state allegations that Citigroup knowingly sold billions of dollars in faulty mortgage-backed securities to investors prior to and during the 2008 financial crisis.<sup>11</sup> The Citigroup Agreement is allegedly valued at \$7 billion and includes “consumer relief” provisions mandating “donations” by Citigroup to government-approved third parties.

17. Finally, on August 20, 2014, the United States, several states and Bank of America Corporation (“BOA”)<sup>12</sup> entered into an agreement (the “BoA Agreement”) resolving federal and state allegations that BoA knowingly sold billions of dollars in faulty mortgage-backed securities to investors prior to and during the 2008 financial crisis.<sup>13</sup> The Department of

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available at <https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading>).

<sup>8</sup> The agreement involved JP Morgan Chase & Co., as well as numerous subsidiaries; for the purposes of convenience, all of the banking entities in this agreement are referred to as “JP Morgan”.

<sup>9</sup> See JP Morgan Agreement (November 19, 2013), available at <https://www.justice.gov/iso/opa/resources/69520131119191246941958.pdf>.

<sup>10</sup> The agreement involved Citigroup, Inc., as well as numerous subsidiaries; for the purposes of convenience, all of the banking entities in this agreement are referred to as “Citigroup.”

<sup>11</sup> See Citigroup Agreement (July 14, 2014), available at <http://www.justice.gov/iso/opa/resources/471201471413656848428.pdf>.

<sup>12</sup> The agreement involved Bank of America Corporation as well as numerous subsidiaries; for the purposes of convenience, all of the banking entities in this agreement are referred to as “Bank of America.”

<sup>13</sup> See BoA Agreement (Aug. 20, 2014), available at <http://www.justice.gov/iso/opa/resources/3392014829141150385241.pdf>.

Justice values the BoA Agreement at \$16.65 billion. The BoA Agreement includes \$7 billion dollars in “consumer relief” provisions, a portion of which involves “donations” by BoA to government-approved third parties.<sup>14</sup>

18. The Three Agreements purport to provide approximately up to \$13.5 billion in “consumer relief” including by way of corporate “donations” to unrelated third parties but do not require public disclosure of the particular government-approved beneficiaries or control how those beneficiaries may use these funds, all of which are purportedly being paid as the result of agency action taken to enforce the law and vindicate government interests.

19. The “consumer relief” provisions allow the banks, the alleged violators, to pay government-approved third parties as a way to satisfy obligations owed the United States and limit payments required, by law, to be made to the United States Treasury. Further, the “consumer relief” provisions do not ensure that the actual victims of the alleged harms are compensated in any identifiable, quantifiable way. Instead, third parties reap the benefit.

20. The BoA Agreement requires BoA to, *inter alia*, make donations to HUD-approved Housing Counseling Agencies. Utilizing incentive credits, BoA could donate \$2 billion to a HUD-approved Housing Counseling Agency and receive \$4 billion in settlement credit.<sup>15</sup>

21. If BoA does not fulfill its consumer relief obligation by August 31, 2018, BoA must pay liquidated damages in an amount equal to the shortfall. BoA must pay 25% of the

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<sup>14</sup> See e.g., BoA Agreement, *Annex 2 – Consumer Relief* (Aug. 20, 2014), available at <http://www.justice.gov/iso/opa/resources/8492014829141239967961.pdf> (“Annex 2”); The BoA Agreement also includes payment of \$800 million for claims of the Federal Housing Administration (“FHA”), an agency within HUD, and \$200 million for contractual claims related to Ginnie Mae, a wholly-owned government corporation within HUD. The FHA claims relate to submission of potentially false claims for reimbursement of amounts already recovered from other parties. The Ginnie Mae claims relate to a breach of contract involving BoA’s role as a master servicer for Ginnie Mae mortgage holdings. See BoA Agreement at 6-7.

<sup>15</sup> See BoA Agreement Annex 2, Menu Items 3.E – 3.G (specifying \$100 million in donation minimums, but no maximum). The Bank has an incentive to make such donations, because a \$1.00 payment equals a \$2.00 credit.

liquidated damages amount to NeighborWorks America (“NeighborWorks”), a Congressionally chartered nonprofit organization that is also one of the HUD-approved counseling agencies<sup>16</sup>, and 75% of the liquidated damages amount to Interest on Lawyer Trust Accounts (“IOLTA”) organizations.<sup>17</sup>

22. Further, the BoA Agreement provided for a tax relief payment account to assist homeowners who may owe additional income tax as a result of modifications made to their mortgages. The BoA Agreement additionally provided that if Congress passed its own tax relief measure any available funds in the account would transfer to NeighborWorks (25% of the surplus) and IOLTA organizations (75% of the surplus).<sup>18</sup>

23. The Citigroup Agreement and JP Morgan Agreement are similar in structure to the BoA Agreement except that while the BoA and Citigroup Agreements require minimum donations to third-party organizations, the JP Morgan Agreement gave the bank the option of making such donations.

24. All three agreements give the banks strong incentives to pay these organizations instead of the Treasury by providing the banks with incentive credits for such donations. For example, the donation component of the consumer relief activities in the BoA Agreement allows BoA to receive a \$2.00 credit for every \$1.00 given to an approved third party organization and there is also a 115% early incentive credit for donations completed by August 31, 2015. Thus, utilizing incentive credits, BoA could, for example, donate \$2 billion to a HUD-approved Housing Counseling Agency and receive \$4 billion in settlement credit.

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<sup>16</sup> The BoA Agreement provides a link (<http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm>) to the list of HUD-approved Housing Counseling Agencies. *See id.* at fn. 22. The website lists NeighborWorks under “Washington, DC” as “NEIGHBORHOOD REINVESTMENT CORP. DBA NEIGHBORWORKS AMERICA.”

<sup>17</sup> *See* BoA Agreement Annex 2 at 10.

<sup>18</sup> *See* BoA Agreement Annex 3, available at <https://www.justice.gov/iso/opa/resources/4922014829141329620708.pdf>.

25. Because the Three Agreements allow for donations to potentially go to politically favored organizations and rest on legally dubious grounds in terms of the allocation of funds to third-parties, rather than into the Treasury, CoA Institute launched an investigation and submitted a series of FOIA requests to agencies involved in the Three Agreements, including the request to HUD at issue here.<sup>19</sup>

26. Indeed, as recently revealed by Congressman Sean Duffy, chairman of the House Financial Services Oversight & Investigations Subcommittee, HUD also continues to stonewall Congressional requests for documents pursuant to its investigation of the Three Agreements. This despite (or perhaps because of) evidence developed by Chairman Duffy's subcommittee that the Three Agreements were structured, in a DOJ-HUD collaboration, with a "keen eye to make sure conservative groups could not access any money through these settlements." See Timothy R. Homan, *Rep. Duffy Says 'Left-Wing Radical Groups' Benefit From DOJ Mortgage Settlements*, Morning Consult (May 20, 2016), <http://bit.ly/27SwIWQ>; see also Staff of S. Comm. on Homeland Sec. & Gov't Affairs, 114th Cong., *The Justice Department's Housing Settlements: Millions Of Consumer Relief Funds Disbursed With No Guarantees Of Helping Homeowners* (2016), available at <http://1.usa.gov/1XAxYJA> (questioning the nature and oversight of the Three Agreements fund disbursements).

27. Meanwhile, groups such as NeighborWorks have benefited greatly from the RMBS Agreements. In December 2014 and December 2015, Congress passed legislation

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<sup>19</sup> Through its role on the Task Force, as well as the department whose agencies were impacted by the banks' alleged actions, HUD was involved with the Three Agreements and a beneficiary of them. See, e.g., HUD, Press Release, *Obama Administration Settlement With Bank Of America Will Strengthen FHA Fund, Provide Billions In Consumer Relief* (Aug. 21, 2014) available at <http://1.usa.gov/24FG3wY>.



providing for tax relief to homeowners with modified mortgages. Thus, pursuant to the BoA Agreement, funds set aside in a tax relief account instead shifted to NeighborWorks.<sup>20</sup>

28. As a result, NeighborWorks received \$122,540,000 from the BoA tax relief account. NeighborWorks has received an additional \$1.6 million as part of the consumer relief provisions of the BoA Agreement.<sup>21</sup>

29. The HUD general counsel sits on the NeighborWorks board, as do other prominent government officials. The relationship between HUD and NeighborWorks raises concerns – which are the subject of the Cause of Action Institute FOIA requests – regarding the HUD role in potentially steering RMBS Agreement funds to favored organizations.<sup>22</sup>

30. NeighborWorks has received such massive funding and special treatment despite being the subject of frequent criticism and controversy. *See, e.g.,* Tom Schoenberg and Clea Benson, *The Nonprofit Behind Billions in Mortgage Aid is a Mess*, BloombergBusiness (Mar. 18, 2015), <http://bloom.bg/1VkJCH1G> (reporting on NeighborWorks mismanagement and potential conflicts of interest in contractual relationships).

### **JURISDICTION AND VENUE**

31. Jurisdiction is asserted pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 552(a)(4)(B), (a)(6)(E)(iii).

32. Venue is proper pursuant to 28 U.S.C. § 1391(e) and 5 U.S.C. § 552(a)(4)(B).

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<sup>20</sup> *See supra* at 18.

<sup>21</sup> *See* Eric D. Green, Fifth Progress Report Monitoring the Performance of Bank of America (May 31, 2016), available at <http://bankofamerica.mortgagesettlementmonitor.com/Reports/May-31-2016-Report-2014-Bank-of-America-Mortgage-Settlement.pdf>.

<sup>22</sup> By statute, NeighborWorks' board of directors consists of the head of the federal financial regulatory agencies and the Secretary of HUD, or their designated representatives. 44 U.S.C. § 8103. The Secretary of HUD has designated his authority to the HUD general counsel, Helen Kanovsky. *See* NeighborWorks America, *About Us/Leadership*, <http://www.neighborworks.org/About-Us/Leadership>.

### **PARTIES**

33. Cause of Action Institute is a non-profit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair. In carrying out its mission, Plaintiff uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. Plaintiff regularly requests access under FOIA to the public records of federal agencies, entities, and offices, and disseminates its findings, analysis, and commentary to the general public.

34. HUD is an agency within the meaning of 5 U.S.C. § 552(f)(1) and has possession, custody, and control of records to which Plaintiff seeks access and which are the subject of this Complaint.

### **FACTS**

35. On July 8, 2015, CoA Institute submitted a FOIA request to HUD seeking records related to the HUD involvement in the Three Agreements. Ex. 1.

36. The request focused on the HUD communication with other relevant parties, both within and outside of the government, regarding the Three Agreements (and specific topics related to the agreements), the disbursement of funds pursuant to the Three Agreements and records related to the HUD views on government spending and on potential beneficiaries of the Three Agreements.

37. Specifically, the request sought access to the following records (for the time period of January 1, 2013 to the present):

- a. All communications within HUD, and/or between HUD and any of the following:
  - a) Bank of America; b) Citigroup; c) JP Morgan; d) FDIC; e) SEC; f) DOJ; g) Treasury; h) the White House; i) the RMBS Working Group; and j) the states of California, Delaware, Illinois, Kentucky, Maryland, Massachusetts, and New York, regarding the RMBS Settlements. You may limit the scope of this search to communications referring or relating to “Operation ChokePoint”, “CDFI”, HUD-

approved housing counsel\*”, “Neighborworks”, “Home Affordable Mortgage Program” and “HAMP”.

- b. All records regarding the (past or future) disbursement of funds pursuant to the RMBS Settlements, whether to a federal agency, third-party, state, or other, including: a) the name of the recipient(s), b) the amount of funds, and c) any limitations/restrictions on the use of funds.
- c. All records referring or relating to (a) Huduser.org; (b) OMB Circular A-25; (c) the Chief Financial Officers Act; (d) the Anti-Deficiency Act; (e) “publicity or propaganda”; (f) the Colorado Division of Housing; (g) Empire Justice Center; (h) Center for New York City Neighborhoods. You may limit the scope of this search to records concerning the Consumer Relief Donation Provisions.

38. By letter, dated August 3, 2015, HUD acknowledged receipt of Plaintiff’s request and assigned it the tracking number 15-FI-HQ-01726. HUD did not invoke or request any extension of the statutorily mandated time period within which to respond to COA’s request. Ex. 2.

39. On October 6, 2015, HUD sent an email to CoA Institute, informing Plaintiff that a search for records was ongoing and apologizing for the delay in processing the request. Ex. 3.

40. Through the date of this Complaint, HUD has failed to respond to the CoA Institute FOIA request, now more than a year old, beyond these pro forma acknowledgments and updates.

**COUNT 1**

**Violation Of FOIA: Failure To Comply With Statutory Deadlines**

41. Plaintiff repeats paragraphs 1 through 24.

42. FOIA requires agencies to respond to requests with a final determination within twenty (20) business days or, in “unusual circumstances,” within thirty (30) business days. 5 U.S.C. §§ 552(a)(6)(A)–(B). If an agency requires additional time, FOIA mandates that the agency provide the requester “an opportunity to arrange with the agency an alternative time frame for processing the request[.]” *Id.* § 552(a)(6)(B)(ii).

43. HUD failed to issue a final determination on or produce any documents responsive to Plaintiff’s request within the applicable FOIA time limits.

44. HUD also failed to comply with FOIA in that it never “arrange[d] . . . an alternative time frame” for responding to the FOIA requests. Neither HUD’s acknowledgement letter nor other communications provide an estimated date of completion or an invitation to contact the agency for the purposes of negotiating an “alternative” response date for the request.

45. Plaintiff has fully exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C).

**RELIEF REQUESTED**

WHEREFORE, Plaintiff respectfully requests and prays that this Court:

- a. order HUD to process FOIA request No. 15-FI-HQ-01726 expeditiously and make a final determination within twenty (20) business days of the date of the Order;
- b. order HUD to produce all responsive records promptly after issuing their final determination;

- c. order HUD to issue a *Vaughn* index accompanying the records produced explaining each redaction or withholding;
- d. award Plaintiff its costs and reasonable attorney fees incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and
- e. grant such other relief as the Court may deem just and proper.

Date: July 13, 2016

Respectfully submitted,

/s/ Julie Smith

Alfred J. Lechner, Jr. (*pro hac vice* pending)

Julie Smith

D.C. Bar. No. 435292

David Fischer

D.C. Bar. No. 477236

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*Counsel for Plaintiff*

# Exhibit 1



Advocates for Government Accountability

A 501(c)(3) Nonprofit Corporation

July 8, 2015

**VIA CERTIFIED MAIL**

Ms. Vicky J. Lewis  
Office of the Executive Secretariat  
U.S. Department of Housing and Urban Development  
451 7th St., S.W., Room 10139  
Washington, D.C. 20410

**Re: Freedom of Information Act Request**

Dear Ms. Lewis:

I write on behalf of Cause of Action, a government oversight group committed to ensuring that discretionary decision-making is accountable, transparent and fair.<sup>1</sup> We seek records to ensure that the \$16.65 billion settlement agreement between the Department of Justice (“DOJ”) and Bank of America dated August 20, 2014 (the “BoA Settlement Agreement”),<sup>2</sup> the \$7 billion settlement agreement between DOJ and Citigroup dated July 14, 2014 (the “Citigroup Settlement Agreement”),<sup>3</sup> and the \$13 billion settlement agreement between DOJ and JP Morgan Chase & Co. dated November 19, 2013 (the “JP Morgan Settlement Agreement”)<sup>4</sup> (collectively, the “RMBS Settlements”)<sup>5</sup> were in the best interests of the public.

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<sup>1</sup> CAUSE OF ACTION, *available at* [www.causeofaction.org](http://www.causeofaction.org).

<sup>2</sup> *See* BoA Settlement Agreement (Aug. 20, 2014), *available at* <http://www.justice.gov/iso/opa/resources/3392014829141150385241.pdf>; *see also* BoA Settlement Agreement, *Annex 1 - Statement of Facts* (Aug. 20, 2014), *available at* <http://www.justice.gov/iso/opa/resources/4312014829141220799708.pdf>. The BoA Settlement Agreement purports to resolve claims by, among others, the Securities and Exchange Commission (“SEC”) and the Federal Deposit Insurance Corporation (“FDIC”). *See* BoA Settlement Agreement at 7. Specifically, the BoA Settlement Agreement includes a \$135.84 million payment to DOJ, of which \$20 million is termed a penalty, pursuant to the SEC’s Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities and Exchange Act of 1934, Making Findings, and Imposing Cease-and-Desist Order and Civil Penalty (Aug. 20, 2014), *available at* <http://www.justice.gov/iso/opa/resources/4792014829141540824781.pdf>. Similarly, the BoA Settlement Agreement includes a \$1.03 billion payment to DOJ pursuant to an August 20, 2014 Settlement and Release Agreement with the FDIC, *available at* <http://www.justice.gov/iso/opa/resources/3492014829141527747058.pdf>.

<sup>3</sup> *See* Citigroup Settlement Agreement (July 14, 2014), *available at* <http://www.justice.gov/iso/opa/resources/471201471413656848428.pdf>.

<sup>4</sup> *See* JP Morgan Settlement Agreement (Nov. 19, 2013), *available at* <http://www.justice.gov/iso/opa/resources/69520131119191246941958.pdf>.

<sup>5</sup> Based on publicly available information, the RMBS Settlements were a result of the efforts, in part, of President Obama’s Financial Fraud Enforcement Task Force and its Residential Mortgage-Backed Securities (“RMBS”) Working Group. *See* Press Release, Dep’t. 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* (Aug. 21, 2014, updated

Policy experts have written and testified before Congress expressing their concern that the RMBS Settlements impermissibly settle claims of DOJ and other agencies, improperly distribute funds to unrelated third parties, and do not ensure that the funds DOJ and third parties receive are used to redress the harms identified in the RMBS Settlements.<sup>6</sup> By way of example, the BoA Settlement Agreement contains provisions that require Bank of America to pay at least \$20 million to U.S. Department of Housing and Urban Development (“HUD”)-approved housing counseling agencies, and at least \$50 million to U.S. Department of Treasury (“Treasury”) certified Community Development Financial Institutions (“CDFIs”).<sup>7</sup> However, additional questions remain. First, under what authority did DOJ enter into the consumer relief portions of the RMBS Settlements? Under what authority did DOJ assume the contractual claims of the FDIC and SEC? Further, why were the RMBS Settlements entered into without notice and comment rulemaking?<sup>8</sup>

Lastly, it appears that the RMBS Settlements represent an attempt to revitalize a long-criticized federal program set to expire on December 31, 2016: the Making Home Affordable Program.<sup>9</sup> In 2011, House Democrats and Republicans passed H.R. 389, “The HAMP Termination Act,” to end what was described as a “false hope” for homeowners who were more likely to be “kicked out of the program than have received permanent relief.”<sup>10</sup> The terms of the consumer relief portion of the RMBS Settlements state, “[e]ligible modifications **may be** made under the Making Home Affordable Program (including the Home Affordable Modification

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Oct. 8, 2014), <http://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading>; Press Release, Dep’t 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, updated Oct. 8, 2014), <http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement>; Press Release, Dep’t of Justice, *Justice Department, Federal and State Partners Secure Record \$13 Billion Global Settlement with JPMorgan for Misleading Investors About Securities Containing Toxic Mortgages* (Nov. 19, 2013, updated Oct. 8, 2014), <http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement>.

<sup>6</sup> See, e.g., *Consumers Shortchanged? Oversight of the Justice Department’s Mortgage Lending Settlements: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law, 114th Cong.* (2015), available at <http://judiciary.house.gov/index.cfm/hearings?ID=54921679-400A-40C3-854D-4B7574364D61> (hearing regarding the RMBS Settlements); see also Paul J. Larkin, Testimony Before the House Comm. on the Judiciary, Subcomm. on Regulatory Reform, Commercial and Antitrust Law (Feb. 12, 2015), available at [http://www.heritage.org/research/testimony/2015/consumers-shortchanged-oversight-of-the-justice-departments-mortgage-lending-settlements#\\_ftn30](http://www.heritage.org/research/testimony/2015/consumers-shortchanged-oversight-of-the-justice-departments-mortgage-lending-settlements#_ftn30) (testifying as to novelty of DOJ’s practice of designating recipients of settlement funds rather than ordinary practice of depositing funds into Treasury, which enables Congress to specify ways in which to spend funds).

<sup>7</sup> See BoA Settlement Agreement, *Annex 2 – Consumer Relief* (Aug. 20, 2014), available at <http://www.justice.gov/iso/opa/resources/8492014829141239967961.pdf>, Menu Items 3.D – 3.G (the “Consumer Relief Donation Provisions”).

<sup>8</sup> See Letter from Cause of Action to Lance Auer, Deputy Assistant Secretary for Financial Institutions Policy, Treasury, and Elana Tyrangiel, Principal Deputy Assistant Attorney General, DOJ (June 16, 2015) (attached as Ex. 1, with Petition for Rulemaking).

<sup>9</sup> See *What is “Making Home Affordable” all about?* (updated May 30, 2012), <http://www.makinghomeaffordable.gov/about-mha/faqs/Pages/default.aspx> (“HAMP expires on December 31, 2016. You must have submitted your Initial Package by that date.”).

<sup>10</sup> *Issa Applauds Passage of Legislation to End HAMP* (Mar. 30, 2011), <http://issa.house.gov/press-releases/2011/03/issa-applauds-passage-of-legislation-to-end-hamp/>.



Program and the Housing Finance Agency Hardest Hit Fund) and any proprietary or other modification program.”<sup>11</sup> As you may be aware, groups that generally support federal affordable housing policies have been sharply critical of the Making Home Affordable Program. ProPublica, the nonprofit investigative journalism organization, described the Making Home Affordable Program and the Home Affordable Modification Program (“HAMP”) as policy failures, not the least because they failed to help those they aimed to support: struggling homeowners.<sup>12</sup> The left-leaning Poverty and Race Research Action Center reached similar conclusions as ProPublica.<sup>13</sup>

To ensure that government decision-making is transparent and fair in order to protect against the misuse of tax dollars and arbitrary abuses of discretion by the unelected, Cause of Action requests access to the following documents pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”):

1. All communications within HUD, and/or between HUD and any of the following: a) Bank of America; b) Citigroup; c) JP Morgan; d) FDIC; e) SEC; f) DOJ; g) Treasury; h) the White House; i) the RMBS Working Group; and j) the states of California, Delaware, Illinois, Kentucky, Maryland, Massachusetts, and New York, regarding the RMBS Settlements. You may limit the scope of this search to communications referring or relating to “Operation ChokePoint”, “CDFI”, HUD-approved housing counsel\*”, “Neighborworks”, “Home Affordable Mortgage Program” and “HAMP”.
2. All records regarding the (past or future) disbursement of funds pursuant to the RMBS Settlements, whether to a federal agency, third-party, state, or other, including: a) the name of the recipient(s), b) the amount of funds, and c) any limitations/restrictions on the use of funds.
3. All records referring or relating to (a) Huduser.org; (b) OMB Circular A-25; (c) the Chief Financial Officers Act; (d) the Anti-Deficiency Act; (e) “publicity or propaganda”; (f) the Colorado Division of Housing; (g) Empire Justice Center; (h) Center for New York City Neighborhoods. You may limit the scope of this search to records concerning the Consumer Relief Donation Provisions.

The time period for this search is January 1, 2013 to the present.

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<sup>11</sup> BoA Settlement Agreement, *Annex 2 – Consumer Relief* (Aug. 20, 2014), available at <http://www.justice.gov/iso/opa/resources/8492014829141239967961.pdf> (emphasis added); Citigroup Settlement Agreement, *Annex 2 – Consumer Relief* (July 14, 2014), available at <http://www.justice.gov/iso/opa/resources/649201471413721380969.pdf> (emphasis added); JP Morgan Settlement Agreement, *Annex 2 – Consumer Relief* (Nov. 19, 2013), available at <http://www.justice.gov/iso/opa/resources/64420131119164759163425.pdf> (emphasis added).

<sup>12</sup> See Olga Pierce and Paul Kiel, *By the Numbers: A Revealing Look at the Mortgage Mod Meltdown*, PROPUBLICA (Mar. 8, 2011), <http://www.propublica.org/article/by-the-numbers-a-revealing-look-at-the-mortgage-mod-meltdown>.

<sup>13</sup> Demelza Baer and Philip Tegeler, *Investing in Integration? A Fair Housing Review of the Multi-Billion Dollar Bank Settlements*, POVERTY & RACE RESEARCH ACTION COUNCIL (Mar. 2015), available at [http://www.prrac.org/pdf/FairHousing\\_BankSettlements.pdf](http://www.prrac.org/pdf/FairHousing_BankSettlements.pdf) (detailing how the “consumer relief” provisions of the settlements actually benefit banks versus serve as penalties).

### **Request for Public Interest Fee Waiver**

Cause of Action requests a public interest waiver of all applicable fees.<sup>14</sup> This provision provides that agencies shall furnish requested records without or at reduced charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”<sup>15</sup> In this case, the requested records would unquestionably shed light on the “operations or activities of the government,” namely, the manner by which HUD-approved housing counseling agencies receive funds from DOJ settlements with financial institutions. This information is likely to contribute significantly to public understanding because, to date, the public knows very little about the RMBS Settlements generally, or the funds directed to HUD-approved housing counseling agencies specifically.

Cause of Action has both the intent and ability to make the results of this request available to a reasonably broad public audience through various media. Cause of Action’s staff has a wealth of experience and expertise in government oversight, investigative reporting, and federal public interest litigation. These professionals will analyze the information responsive to this request, use their editorial skills to turn raw materials into a distinct work, and share the resulting analysis with the public, whether through Cause of Action’s regularly published online newsletter, memoranda, reports, or press releases. Further, Cause of Action, a nonprofit organization under section 501(c)(3) of the Internal Revenue Code, does not have a commercial interest in making this request. The requested information will be used to educate the general public about DOJ’s settlement practices and HUD’s role in the ability of third-parties to receive and use settlement funds.

### **Request to be Classified as a Representative of the News Media**

For fee status purposes, Cause of Action qualifies as a “representative of the news media” under FOIA.<sup>16</sup> Specifically, Cause of Action gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.<sup>17</sup> Cause of Action gathers the news it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. Cause of Action does not merely make raw information available to the public, but rather distributes distinct work products, including articles, blog posts, investigative reports, and newsletters.<sup>18</sup> These distinct works are distributed to the public through various media, including

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<sup>14</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>15</sup> *Id.*; see also 24 C.F.R. § 15.110(h).

<sup>16</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 24 C.F.R. § 15.110(b)(4).

<sup>17</sup> Cause of Action notes that DOJ’s newly promulgated definition of “representative of the news media” (see 28 C.F.R. § 16.10(b)(6)) is in conflict with the statutory definition. DOJ improperly retained the outdated “organized and operated” standard that Congress abrogated when it provided a statutory definition in the Open Government Act of 2007. Under either definition, however, Cause of Action qualifies as a representative of the news media.

<sup>18</sup> See, e.g., *Cause of Action Launches Online Resource: ExecutiveBranchEarmarks.com*, CAUSE OF ACTION (Sept. 8, 2014), available at <http://goo.gl/935qAi>; *Legal and Political Issues Raised by the Loss of Emails at the IRS*, CAUSE OF ACTION (July 8, 2014), available at <http://goo.gl/PaoEyi>; CAUSE OF ACTION, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), available at <http://goo.gl/BiaEaH>; see also CAUSE OF ACTION, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY

Cause of Action's website, which has been viewed approximately 100,000 times in the past year alone.<sup>19</sup> Cause of Action also disseminates news to the public via Twitter and Facebook, and it provides news updates to subscribers via e-mail.

The statutory definition of a "representative of the news media" unequivocally contemplates that organizations such as Cause of Action, which electronically disseminate information and publications via "alternative media[,] shall be considered to be news-media entities."<sup>20</sup> In light of the foregoing, numerous federal agencies have appropriately recognized Cause of Action's news media status in connection with its FOIA requests.<sup>21</sup>

### **Record Production and Contact Information**

In an effort to facilitate document review, please provide the responsive documents in electronic form in lieu of a paper production. If readily reproducible, the production should consist of load files that are compatible with Concordance® Evolution. If a certain portion of responsive records can be produced more readily, Cause of Action requests that those records be produced first and the remaining records be produced on a rolling basis as circumstances permit.

Thank you in advance for your anticipated cooperation in this matter. I look forward to receiving your response to this request within 20 business days, as the statute requires. If you have any questions about this request, please contact a Cause of Action representative at (202) 499-4232 or at [laura.begun@causeofaction.org](mailto:laura.begun@causeofaction.org).

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CRONYISM (Sept. 23, 2013), *available at* <http://goo.gl/N0xSvs>; CAUSE OF ACTION, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), *available at* <http://goo.gl/GpP1wR>.

<sup>19</sup> *Google Analytics* for <http://www.causeofaction.org> (on file with Cause of Action).

<sup>20</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>21</sup> *See, e.g.*, FOIA Request No. 145-FOI-13785, Dep't of Justice (Jun. 16, 2015); FOIA Request 15-00326-F, Dep't of Educ. (Apr. 08, 2015); FOIA Request 2015-26, Fed. Energy Regulatory Comm'n (Feb. 13, 2015); FOIA Request HQ-2015-00248, Dep't of Energy (Nat'l Headquarters) (Dec. 15, 2014); FOIA Request F-2015-106, Fed. Commc'n Comm'n (Dec. 12, 2014); FOIA Request HQ-2015-00245-F, Dep't of Energy (Dec. 4, 2014); Dep't of State, F-2014-21360 (Dec. 3, 2014); Nat'l Labor Relations Bd. (Dec. 1, 2014); FOIA Request 201500009F, Exp.-Imp. Bank (Nov. 21, 2014); FOIA Request 2015-OSEC-00771-F, U.S. Dep't of Agric. (OCIO) (Nov. 21, 2014); FOIA Request OS-2015-00068, U.S. Dep't of Interior (Office of Sec'y) (Nov. 20, 2014); FOIA Request CFPB-2015-049-F, Consumer Fin. Prot. Bureau (Nov. 19, 2014); FOIA Request GO-14-307, Dep't of Energy (Nat'l Renewable Energy Lab.) (Aug. 28, 2014); FOIA Request HQ-2014-01580-F, Dep't of Energy (Nat'l Headquarters) (Aug. 14, 2014); FOIA Request LR-20140441, Nat'l Labor Relations Bd. (June 4, 2014); FOIA Request 14-01095, Sec. & Exch. Comm'n (May 7, 2014); FOIA Request 2014-4QFO-00236, Dep't of Homeland Sec. (Jan. 8, 2014); FOIA Request DOC-OS-2014-000304, Dep't of Commerce (Dec. 30, 2013); FOIA Request 14F-036, Health Res. & Serv. Admin. (Dec. 6, 2013); FOIA Request 2013-073, Dep't of Homeland Sec. (Apr. 5, 2013); FOIA Request 2012-RMA-02563F, Dep't of Agric. (May 3, 2012); FOIA Request 2012-00270, Dep't of Interior (Feb. 17, 2012); FOIA Request 12-00455-F, Dep't of Educ. (Jan. 20, 2012).

Vicky Lewis  
July 8, 2015  
Page 6

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel Z. Epstein". The signature is written in a cursive style with a large, stylized "D" and "E".

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DANIEL Z. EPSTEIN  
EXECUTIVE DIRECTOR  
CAUSE OF ACTION INSTITUTE

# **EXHIBIT 1-1**



June 16, 2015

**VIA CERTIFIED MAIL**

Lance Auer  
Deputy Assistant Secretary for Financial Institutions Policy  
U.S. Department of Treasury  
1500 Pennsylvania Avenue, N.W.  
Washington, DC 20220

Elana Tyrangiel  
Principal Deputy Assistant Attorney General  
U.S. Department of Justice  
Office of Legal Policy  
Room 4234 Main Justice Building  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-0001

**Re: Petition for Rulemaking Regarding “Consumer Relief” Settlements**

Dear Mr. Auer and Ms. Tyrangiel:

Pursuant to Section 553(e) of the Administrative Procedure Act, 5 U.S.C. § 553 (“APA”), Cause of Action Institute (“Cause of Action”) hereby petitions the U.S. Department of Treasury (“Treasury”) and the U.S. Department of Justice (“DOJ”), respectively, to commence a rulemaking clarifying both the federal government’s authority to enter into settlement agreements between government agencies and private persons, including financial institutions, that vindicate the interests of the United States through specified “donations” to unrelated third parties, and specifying the circumstances and terms under which such donations may be made. Such conduct arguably is a facial violation of the Miscellaneous Receipts Act (“MRA”), 31

U.S.C. § 3302,<sup>1</sup> and the Government Corporation Control Act (“GCCA”), 31 U.S.C. § 9102,<sup>2</sup> and raises significant Anti-Augmentation Principle concerns.<sup>3</sup>

Cause of Action believes a rulemaking is particularly necessary now because of DOJ’s standardless-use of “consumer relief” provisions mandating “donations” by alleged violators to government-approved third parties in its \$16.65 billion settlement agreement with Bank of America dated August 20, 2014 (the “BoA Settlement Agreement”),<sup>4</sup> its \$7 billion settlement agreement between DOJ and Citigroup dated July 14, 2014 (the “Citigroup Settlement Agreement”),<sup>5</sup> and its \$13 billion settlement agreement with JP Morgan Chase & Co. dated November 19, 2013 (the “JP Morgan Settlement Agreement”)<sup>6</sup> (collectively, the “RMBS Settlements”).<sup>7</sup> The RMBS Settlements are not authorized by any statute or regulation and were never subject to judicial scrutiny or public notice and comment, yet purportedly resolve claims of other agencies, while the consumer relief portions distribute funds to unrelated, but government-

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<sup>1</sup> The MRA’s primary purposes are to ensure that Congress retains control of the public purse and to protect Congress’ constitutional power to appropriate monies. *See* 67 Comp.Gen. 353, 355 (1988); 51 Comp.Gen. 506, 507 (1972).

<sup>2</sup> GCCA prohibits the government from funding third parties to carry out government functions and/or serve as “instrumentalities” of government agencies. *See* Application of the Government Corporation Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Settlement Agreement, 30 OPINIONS OF THE OFF. OF LEGAL COUNS. 6-7 (Aug. 22, 2006). By using government-favored third party groups as a vehicle to vindicate the government’s interests with respect to the RMBS Settlements – in other words, to carry out a regulatory enforcement purpose – DOJ has arguably violated GCCA.

<sup>3</sup> The Anti-Augmentation Principle is that a federal agency may not supplement a Congressionally-funded program by adding to the amount that Congress has appropriated for the particular activity because appropriations are solely a Congressional function. Therefore, absent specific statutory authorization settlement agreements should not be used to augment or add to a program that Congress has already authorized and funded at a specific amount, or to fund those Congress has decided not to fund. *See* 31 U.S.C. § 1341(a)(1)(A); *Motor Coach Industries, Inc. v. Dole*, 725 F.2d 958, 964-65 (4th Cir. 1984); General Accounting Office, Office of the General Counsel, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, Vol. II, 6-162–6-163 (3rd ed. 2006).

<sup>4</sup> *See* BoA Settlement Agreement (Aug. 20, 2014), available at <http://www.justice.gov/iso/opa/resources/3392014829141150385241.pdf>.

<sup>5</sup> *See* Citigroup Settlement Agreement (July 14, 2014), available at <http://www.justice.gov/iso/opa/resources/471201471413656848428.pdf>.

<sup>6</sup> *See* JP Morgan Settlement Agreement (November 19, 2013), available at <http://www.justice.gov/iso/opa/resources/69520131119191246941958.pdf>.

<sup>7</sup> Based on publicly available information, the RMBS Settlements were a result of the efforts, in part, of President Obama’s Financial Fraud Enforcement Task Force and its Residential Mortgage-Backed Securities (“RMBS”) Working Group. *See* Press Release, Dep’t. 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* (Aug. 21, 2014, updated Oct. 8, 2014), <http://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading>; Press Release, Dep’t 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, updated Oct. 8, 2014), <http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement>; Press Release, Dep’t of Justice, *Justice Department, Federal and State Partners Secure Record \$13 Billion Global Settlement with JPMorgan for Misleading Investors About Securities Containing Toxic Mortgages* (Nov. 19, 2013, updated Oct. 8, 2014), <http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement> (collectively, the “RMBS Press Releases”).

approved, third parties, and do not ensure that the individuals actually harmed by alleged corporate fraud are compensated.<sup>8</sup>

Furthermore, the “consumer relief” provisions of the RMBS Settlements, made without specific statutory authorization or regulatory limits, fuels the appearance of government cronyism, both with respect to the apparently highly preferential treatment afforded the alleged violators, and to the beneficiaries of their largess. Under the BoA Settlement Agreement, for example, the alleged violator is incentivized by a two-to-one credit for “donations” to a government-designated non-profit known as “NeighborWorks.”

To illustrate the public harms such consumer relief presents, consider that NeighborWorks’ own special audit in 2010 revealed that NeighborWorks’ appropriations from the Department of Housing and Urban Development (“HUD”) were made available as grants to rebranded Association of Community Organizations for Reform Now (“ACORN”) affiliates that are HUD-approved housing counseling agencies. Congress, however, has denied ACORN and ACORN-related entities federal funding.

Executive Branch agencies should not condition private organizations to direct monies to government favored third-party “community groups,” as the “consumer relief” provisions in the RMBS Settlements most assuredly do, at the expense of the taxpayers and contrary to law. Cause of Action believes the DOJ’s practice of using “donations” by alleged violators to third-party groups to vindicate government interests is contrary to law and nearly indefensible public policy, especially absent the regulations, public notice and comment and judicial review needed to ensure the game is fair and that the government’s incentive to use settlements as a means for rewarding political friends and punishing political enemies is well-checked. Therefore, Cause of Action believes a rulemaking is appropriate.

Respectfully submitted,



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DANIEL Z. EPSTEIN  
EXECUTIVE DIRECTOR  
CAUSE OF ACTION INSTITUTE

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<sup>8</sup> The alleged harms include activities that contributed to the 2008 financial crisis and are summarized in the RMBS Press Releases and the RMBS Settlements’ Statement of Facts. *See, e.g.*, BoA Settlement Agreement, *Annex 1 - Statement of Facts* (Aug. 20, 2014), available at <http://www.justice.gov/iso/opa/resources/4312014829141220799708.pdf>.





UNITED STATES DEPARTMENT OF THE TREASURY  
UNITED STATES DEPARTMENT OF JUSTICE

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In re:

*Cause of Action Institute Petition for  
Rulemaking: Department of Justice Settlement  
Authority, Third Party Payments*

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**Petition for Rulemaking**

1. Petitioner Cause of Action Institute (“Cause of Action”) is a nonprofit government accountability organization committed to ensuring that discretionary decision-making is accountable, transparent and fair. In carrying out its mission, Cause of Action uses various legal tools to protect against the misuse of tax dollars and arbitrary abuses of discretion by the unelected.

2. Cause of Action is an “interested party” under 5 U.S.C. § 553(e) with the right “to petition for the issuance, amendment, or repeal of a rule” from the U.S. Department of the Treasury (“Treasury”) and the U.S. Department of Justice (“Justice”).

3. To vindicate the interests of the United States, Justice has entered into a \$16.65 billion settlement agreement with Bank of America dated August 20, 2014 (the “BoA Settlement Agreement”), a \$7 billion settlement agreement with Citigroup dated July 14, 2014 (the “Citigroup Settlement Agreement”), and a \$13 billion settlement agreement with JP Morgan Chase & Co. dated November 19, 2013 (the “JP Morgan Settlement Agreement”) (collectively, the “RMBS Settlements”).

4. The RMBS Settlements contain “consumer relief” provisions, including mandating payments to third parties who were not directly harmed by alleged violations or otherwise entitled to restitution.

5. By way of example, the BoA Settlement Agreement requires Bank of America to pay at least \$20 million to U.S. Department of Housing and Urban Development (“HUD”)-approved housing counseling agencies, and at least \$50 million to Treasury certified Community Development Financial Institutions (“CDFIs”).

6. In fact, the RMBS Settlements purport to provide approximately \$13.5 billion in “consumer relief” including by way of corporate “donations” to unrelated third parties but do not require public disclosure of the particular government-approved beneficiaries or control how those beneficiaries may use these funds, all of which are purportedly being paid as the result of agency action taken to enforce the law and vindicate government interests.

7. The “consumer relief” provisions allow alleged violators to pay government-approved third parties as a way to compromise obligations owed the United States and limit payments required, by law, to be made to the Treasury.

8. Furthermore, the “consumer relief” provisions of the RMBS Settlements do not ensure that the actual victims of the alleged harms are compensated in any identifiable, quantifiable way. Instead, third parties, including politically-connected non-profit groups, will reap the benefit.

9. The consumer relief provisions of the RMBS Settlements are not specifically authorized by statute and arguably violate the Miscellaneous Receipts Act (“MRA”), 31 U.S.C. § 3302, the Government Corporation Control Act (“GCCA”), 31 U.S.C. § 9102, and the Anti-Augmentation Principle.

10. Treasury has not issued regulations under MRA authorizing “consumer relief” or other similar provisions and practices that redirect funds owed the Treasury to politically-favored third parties.

11. Justice has not issued regulations authorizing it to compromise civil and/or criminal claims brought on behalf of the United States by way of payments to government-approved third parties. *See, e.g.,* 28 C.F.R. § 0.45, 0.166 *et seq.*

WHEREFORE, Cause of Action petitions Treasury and Justice to commence notice and comment rulemaking to:

A. Delineate the legal authority for the “consumer relief” provisions in the RMBS Settlements and for other, similar third party payment schemes;

B. Provide clear standards and requirements for the use of such schemes in the future. These standards should, at a minimum: (1) Forbid third party payment provisions from being included in future settlements absent prior public notice and comment and, when appropriate, judicial review; and (2) Require that any settlement agreement allowing for or directing payments by the alleged violator to unrelated third parties must include the identity of all beneficiaries, specify how any funds must be used, and impose a mechanism by which the recipient must publicly account for such use.

Dated: June 16, 2015

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Daniel Z. Epstein". The signature is written in a cursive, flowing style with some capital letters.

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DANIEL Z. EPSTEIN  
EXECUTIVE DIRECTOR  
CAUSE OF ACTION INSTITUTE

# Exhibit 2



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
WASHINGTON, DC 20410-3000

OFFICE OF ADMINISTRATION

August 3, 2015

Mr. Daniel Z. Epstein  
Executive Director  
Cause of Action  
1919 Pennsylvania Avenue, NW  
Suite 650  
Washington, DC 20006

RE: Freedom of Information Act Request  
FOIA Control No.: 15-FI-HQ-01726

Dear Mr. Epstein:

This letter acknowledges the Department of Housing and Urban Development's receipt of your Freedom of Information Act (FOIA) request dated July 8, 2015. Your request was received on July 13, 2015, and you requested a fee waiver.

In your request, you asked for a waiver of all processing fees. Pursuant to HUD regulations at 24 C.F.R. § 15.110(h), HUD may waive or reduce the fee if it determines that (1) disclosure of the information you seek is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and (2) that you are not seeking the information for your own commercial interests. To satisfy the public interest requirement, four factors must be considered in sequence when determining whether the fee waiver request concerns documents that will contribute to the greater public understanding of government activities. See *D.C. Technical Assistance Organization, Inc., et al., v. HUD*, 85 F. Supp. 2d 46 (D.C. Cir. 2000). Those factors are as follows: (1) whether the subject matter of the requested documents specifically relates to "operations or activities of the government;" (2) whether the requested documents will be "likely to contribute" to an understanding of specific government activities or operations; (3) whether the disclosure will contribute to a greater understanding on the part of the public at large; and (4) whether disclosure of the requested documents will contribute "significantly" to the public's understanding of government activities or operations. *Id.*

Your request fails to meet the criteria stated above. Therefore, your request for a fee waiver is denied. A requester seeking a fee waiver bears the initial burden of identifying the public interest to be served, and that public interest must be asserted with reasonable specificity. See *Physicians Committee for Reasonable Medicine v. HHS*, 480 F. Supp. 2d 119 (D.C. Cir. 2007) citing *National Treasury Employees Union v. Griffin*, 811 F.2d 644, 647 (D.C. Cir. 1987). The courts have held that "conclusory statements that the disclosure will serve the public interest are not sufficient" to meet the requester's burden of showing that the fee waiver requirements are met. See *id.* citing *Judicial Watch, Inc. v. DOJ*, 185 F. Supp. 2d 54, 60 (D.D.C. 2001).

You also requested fee status as a representative of the news media. See Cause of Action v. FTC, No. 1:12-CV-00850-EGS, 2013 WL 4406875 (D.D.C. 2013), in which the United States District Court for the District of Columbia determined that Cause of Action did not qualify as a representative of the news media with regard to FOIA requests. Therefore, you will be classified as an "other requester."

While the Department seeks to waive fees where appropriate, HUD is also obligated to safeguard the public treasury by refusing to grant waivers except as provided by the FOIA. As the proper focus must be on the benefit to be derived by the general public, any personal benefit by the requester, or the requester's particular financial situation, are not factors entitling the requester to a fee waiver.

You may appeal this determination within 30 days from the date of this letter. If you decide to appeal, your appeal should include copies of your original request and this response, as well as a discussion of the reasons supporting the appeal. The envelope should be plainly marked to indicate that it contains a FOIA appeal and should be addressed to:

U.S. Department of Housing and Urban Development  
Attention: FOIA Appeals  
Office of Ethics, Appeals and Personnel Law  
Ethics and Appeals Division  
451 Seventh Street, SW, Suite 2130  
Washington, DC 20410

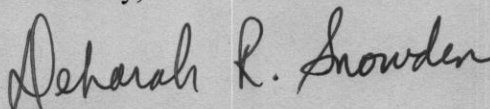
Telephone: (202) 708-3815

I will comply with your request to the extent permissible by law. Any records not subject to an exemption will be forwarded to you promptly upon the completion of HUD's search and review process.

For your information, your FOIA request, including your identity and any information made available, is releasable to the public under subsequent FOIA requests. In responding to these requests, the Department does not release personal information, such as home address, telephone, or Social Security number, all of which are protected from disclosure under FOIA Exemption 6.

If you have any questions regarding your request, please contact Mr. Ethan Bodell at (202) 402-3450. Thank you for your interest in the Department's programs and policies.

Sincerely,



Deborah R. Snowden  
Chief, FOIA Branch  
Office of the Executive Secretariat

# Exhibit 3

**From:** "Bodell, Ethan G" <[Ethan.G.Bodell@hud.gov](mailto:Ethan.G.Bodell@hud.gov)>  
**Date:** October 6, 2015 at 9:50:52 AM EDT  
**To:** Daniel Epstein <[daniel.epstein@causeofaction.org](mailto:daniel.epstein@causeofaction.org)>  
**Subject:** FOIA Request 15-FI-HQ-01726

Mr. Epstein,

I wanted to provide you a brief update on the status of your FOIA request. Because you asked for various types of communications between the Department of Housing & Urban Development and other outside parties, some of which may be in the form of emails, we have submitted an e-discovery request. As an alternative to searching for hard-copy documents or records contained in traditional computer file databases, an e-discovery request allows the agency to search for various terms, senders/recipients, and date ranges in email message form. This process is conducted by an outside party, and depending on the search parameters and timeframe can take some time to fulfill. This request was submitted on August 7, 2015, and is still in progress. We apologize for the delay in processing your request, but want you to know where we are in the search. As soon as this information comes back, we will finalize any responsive records and send them out to you immediately.

Thank you for your interest in the Department's programs and policies.

**Ethan G. Bodell**

Presidential Management Fellow – FOIA Specialist  
U.S. Department of Housing and Urban Development  
Office of the Executive Secretariat  
FOIA Branch, Room 10139  
(202) 402-3450 | [ethan.g.bodell@hud.gov](mailto:ethan.g.bodell@hud.gov)