



June 16, 2015

VIA ELECTRONIC MAIL

Mr. James M. Kovakas
Freedom of Information/Privacy Act Officer
Civil Division
U.S. Department of Justice
Room 8020
1100 L Street, NW
Washington, D.C. 20530
Civil.routing.FOIA@usdoj.gov

Re: Freedom of Information Act Request

Dear Mr. Kovakas:

I write on behalf of Cause of Action, a government oversight group committed to ensuring that discretionary decision-making is accountable, transparent and fair.¹ 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”),² the \$7 billion settlement agreement between DOJ and Citigroup dated July 14, 2014 (the “Citigroup Settlement Agreement”),³ and the \$13 billion settlement agreement between DOJ and JP Morgan

¹ CAUSE OF ACTION, available at www.causeofaction.org.

² See BoA Settlement Agreement (Aug. 20, 2014), available at <http://www.justice.gov/iso/opa/resources/3392014829141150385241.pdf>; see also BoA Settlement Agreement, Annex I - 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>.

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

Chase & Co. dated November 19, 2013 (the “JP Morgan Settlement Agreement”)⁴ (collectively, the “RMBS Settlements”)⁵ were in the best interests of the public.

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.⁶ 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”).⁷ 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?⁸

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

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

⁵ 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>.

⁶ 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 (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).

⁷ 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”).

⁸ 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).

Program.⁹ 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.”¹⁰ 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 Program and the Housing Finance Agency Hardest Hit Fund) and any proprietary or other modification program.”¹¹ 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.¹² The left-leaning Poverty and Race Research Action Center reached similar conclusions as ProPublica.¹³

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 records referring or relating to DOJ’s authority to agree to the Consumer Relief Donation Provisions of the RMBS Settlements.
2. All records referring or relating to DOJ’s authority to assume the contractual claims/settlement terms of the FDIC and SEC.
3. All records referring or relating to DOJ’s authority to enter into and/or reasons to execute the RMBS Settlements without notice and comment rulemaking.
4. All communications within DOJ, and/or between DOJ and any of the following:
 - a) Bank of America; b) Citigroup; c) JP Morgan; d) FDIC; e) SEC; f) HUD;
 - 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

⁹ 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.”).

¹⁰ *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/>.

¹¹ 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).

¹² 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>.

¹³ 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 (detailing how the “consumer relief” provisions of the settlements actually benefit banks versus serve as penalties).

communications referring or relating to “Operation ChokePoint”, “CDFI”, HUD-approved housing counsel*”, “Neighborworks”, “Home Affordable Mortgage Program” and “HAMP”.

5. All records referring or relating to DOJ’s authority to bind private parties to comply with HAMP by entering into the RMBS Settlements.
6. 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.

Request for Public Interest Fee Waiver

Cause of Action requests a public interest waiver of all applicable fees.¹⁴ 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.”¹⁵ In this case, the requested records would unquestionably shed light on the “operations or activities of the government,” namely, the manner in which the DOJ settles cases 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 specifically, or DOJ’s settlement practices generally.

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.¹⁶ 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 the DOJ’s settlement practices and the use of settlement funds received by federal agencies and third parties.

¹⁴ 5 U.S.C. § 552(a)(4)(A)(iii).

¹⁵ *Id.*; see also 28 C.F.R. § 16.10(k)(1).

¹⁶ See 28 C.F.R. § 16.10(k)(2)(iii) (providing that one factor is the “requester’s expertise in the subject area as well as the requester’s ability and intention to effectively convey information to the public”).

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.¹⁷ 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.¹⁸ 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.¹⁹ These distinct works are distributed to the public through various media, including Cause of Action’s website, which has been viewed approximately 100,000 times in the past year alone.²⁰ 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.”²¹ In light of the foregoing, numerous federal agencies have appropriately recognized Cause of Action’s news media status in connection with its FOIA requests.²²

¹⁷ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 28 C.F.R. § 16.10(b)(6).

¹⁸ 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.

¹⁹ *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 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>.

²⁰ Google Analytics for <http://www.causeofaction.org> (on file with Cause of Action).

²¹ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

²² *See, e.g.*, 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).

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.

Thank you for your attention to this matter.

Sincerely,



DANIEL Z. EPSTEIN
EXECUTIVE DIRECTOR
CAUSE OF ACTION INSTITUTE

EXHIBIT 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

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

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”),⁴ its \$7 billion settlement agreement between DOJ and Citigroup dated July 14, 2014 (the “Citigroup Settlement Agreement”),⁵ and its \$13 billion settlement agreement with JP Morgan Chase & Co. dated November 19, 2013 (the “JP Morgan Settlement Agreement”)⁶ (collectively, the “RMBS Settlements”).⁷ 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-

¹ 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).

² 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.

³ 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).

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

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

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

⁷ 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.⁸

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,



DANIEL Z. EPSTEIN
EXECUTIVE DIRECTOR
CAUSE OF ACTION INSTITUTE

⁸ 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

In re:

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

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”).

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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,



DANIEL Z. EPSTEIN
EXECUTIVE DIRECTOR
CAUSE OF ACTION INSTITUTE