Statement of the U.S. Chamber of Commerce

ON: Government Settlement Practices and Enforcement Slush Funds

TO: U.S. House of Representatives Committee on

The Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law

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The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

Statement for the Record Provided by

The U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform

To the Subcommittee on Regulatory Reform, Commercial, and Antitrust Law of the House Committee on the Judiciary

Hearing on "Consumers Shortchanged? Oversight of the Justice Department's Mortgage Lending Settlements"

February 12, 2015

This statement is being provided by the U.S. Chamber of Commerce (the "Chamber") and the U.S. Chamber Institute for Legal Reform ("ILR"). The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than three million companies of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system. ILR is an affiliate of the Chamber dedicated to making our nation's overall civil legal system simpler, fairer, and faster for all participants.

The Chamber and ILR applaud the Subcommittee for holding this hearing regarding the federal government's practices in connection with settlements of enforcement proceedings. The Constitution vests Congress with authority to control and direct the spending of public resources. Federal agencies are circumventing this clear command by directing private parties to make payments to *other private parties* as part of settlement—in effect creating a federal grant program that is administered by the agencies without statutory authorization. Simply put, there is no statutory or constitutional basis for allowing federal Executive agencies to selectively distribute public funds to favored private parties.

These unauthorized and unchecked activities by federal agencies do not simply undermine the structure specified in the Constitution. They also create perverse incentives for agency officials to pursue enforcement activities that are based not on the public interest, but on the individual officials' narrow private interests in obtaining funds for favored private parties.

Indeed, the government frequently imposes these financial requirements as the price of settlement—and private parties often are forced to settle, regardless of the merits of the government's underlying claims, in order to avoid the brand and reputational damage that may result from an indictment or lengthy litigation. Here are just a few examples:

- The Justice Department in 2012 required the Gibson Guitar Corporation to make a $50,000 "community service payment" to the National Fish and Wildlife Foundation ("NFWF"), even though that entity was not a victim of and had no direct relationship to the alleged offense—the claimed violation of a restriction on wood imports.[1]

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

- British Petroleum was obligated to "donate" nearly $2.5 billion to the NFWF over a five-year period, in connection with resolving a criminal investigation related to the Gulf of Mexico oil spill.[2] Shortly after the BP settlement was announced, then-Senator Mary Landrieu (whose state was arguably the biggest victim on the Gulf of Mexico spill) complained publicly about the DOJ's decision to direct so much recovery money to a single foundation, the board of which "include[d] only one person from the Gulf of Mexico."[3]

- The phenomenon is not new: The U.S. Attorney for Connecticut in 2006 required a wastewater treatment firm accused of violating the Clean Water Act to "donate" $1 million to the Alumni Association for the United States Coast Guard Academy in New London, Connecticut to fund an Endowed Chair of Environmental Studies.[4] The wastewater treatment firm was also forced to pay an additional $1 million to the Greater New Haven Water Pollution Control Authority in New Haven, Connecticut, to fund unspecified "environmental improvement projects."[5]

There is no justification for these "private grant programs," which violate the Constitution, lack any legitimate statutory basis, and threaten the public interest. Congress should prohibit them.

Just as troubling, though occasionally authorized by statute, is the frequent practice of agencies retaining for their own use the proceeds of private parties' payments to the federal government in connection with settlements—in effect, self-generated supplements to the agency's statutory appropriation. Are enforcement actions that include such payments really justified by the public interest, or are they instead grounded in a desire to expand the agency's size, scope, and influence as well as to be an end run around Congress' power over the purse?

Perhaps the most notorious example of this practice is the Justice Department's asset forfeiture program. In 1985, when the DOJ's asset forfeiture fund was first initiated, it took in only approximately $27 million annually. By 2011, that figure had ballooned to $1.8 *billion*.[6]

Discussing the potential problems and perverse incentives created by the DOJ's equitable sharing program and asset forfeiture practices, the American Civil Liberties Union stated: "When salaries and perks are on the line, officers have a strong incentive to increase the seizures, as

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[2] *See* Juliet Elperin, "BP Settlement a Boon to Conservation Group," Washington Post (Nov. 16, 2012), available at http://www.washingtonpost.com/national/health-science/bp-settlement-a-boon-to-conservation-group/2012/11/16/ddcb2790-302b-11e2-a30e-5ca76eeec857_story.html.

[3] *Id.*

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

[5] *Id.*

[6] U.S. GAO, GAO-12-736, JUSTICE ASSETS FORFEITURE FUND: TRANSPARENCY OF BALANCES AND CONTROLS OVER EQUITABLE SHARING SHOULD BE IMPROVED, at 11 (2012) available at http://www.gao.gov/assets/600/592349.pdf.

evidenced by an increase in the regularity and size of such seizures in recent years."[7] Other commentators have also explained that allowing authorities to retain forfeited assets can distort legitimate enforcement priorities by incentivizing the pursuit of more valuable assets rather than more dangerous criminals and encouraging authorities to divert investigative resources away from those cases that are less likely to produce lucrative asset seizures.[8] Indeed, concerns over the DOJ's asset forfeiture program reached such a fever pitch that even Attorney General Eric Holder was forced to admit "a comprehensive review" of the program was needed.[9]

But the asset forfeiture program is not at all unique. The Consumer Financial Protection Bureau,[10] the Environmental Protection Administration,[11] and the Departments of Justice and Health and Human Services[12] each maintain similar "slush fund" accounts in which settlement payments are deposited and then expended by the agencies, without congressional action. The total amounts of money involved ranges in the multiple billions of dollars.

In our view, Congress should reassert its constitutional authority, eliminate these accounts, and require all settlement proceeds to be deposited into the Treasury.

The Subcommittee's attention to these troubling abuses of executive authority is timely and welcome. The Chamber and ILR would be happy to provide any additional information that would be useful to the Subcommittee's inquiry.

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[7] ACLU, "Law Reform: Civil Asset Forfeiture" (2015), available at https://www.aclu.org/criminal-law-reform/civil-asset-forfeiture.

[8] *See* Eric Blumenson & Eva Nilsen, "Policing for Profit: the Drug War's Hidden Economic Agenda", 65 U. Chi. L. Rev. 35, 66 (1998).

[9] *See* DOJ Press Release, "Attorney General Prohibits Federal Agency Adoptions of Assets Seized by State and Local Law Enforcement Agencies Except Where Needed to Protect Public Safety," (Jan. 16, 2015), available at http://www.justice.gov/opa/pr/attorney-general-prohibits-federal-agency-adoptions-assets-seized-state-and-local-law.

[10] *See* 12 C.F.R. § 1075.100 (describing the CFBP's administration of the fund); *see also* CFPB Release, "Strategic plan, budget, and performance plan and report" (2015), at 12 & 22, available at http://files.consumerfinance.gov/f/strategic-plan-budget-and-performance-plan-and-report-FY2013-15.pdf.

[11] *See* 47 U.S.C. § 1395i(k); *see also* HHS & DOJ, "Health Care Fraud and Abuse Control Program, Annual Report for Fiscal Year 2013" at 8. (Feb. 2014), available at http://oig.hhs.gov/publications/docs/hcfac/FY2013-hcfac.pdf.

[12] *See*, *e.g.*, 42 U.S.C. § 9622 (b)(3).