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**Enforcing Appropriations or Appropriating Enforcement?  
Financial Enforcement and Agency Spending Practices**

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## INTRODUCTION

In 1979, Professor Colin S. Diver observed that “[t]he administrative civil money penalty has unquestionably come of age. . . . [I]n the past decade the civil fine has assumed a place of paramount importance in the compliance arsenal of federal regulators.”<sup>1</sup> What may have been true then is certainly true now. As Professor Max Minzner observed over two decades: “Administrative enforcement, especially the use of large civil penalties, is on the upswing. In recent years, administrative agencies have imposed historically large civil penalties on an agency-by-agency basis. . . . The dollar figures are big and the number of cases large, but the breadth of agencies involved is equally significant.”<sup>2</sup> While legal scholars have considered the significance of this from the perspective of fields like administrative law,<sup>3</sup> it is also of tremendous budgetary significance; all of that money has to go somewhere.

This is the central topic this paper aims to address. It endeavors to provide—from an appropriations perspective—an overview of how agencies involved in financial enforcement actions process the funds that defendants pay. To that end, this paper will proceed in two parts. Part I will provide constitutional, statutory, and procedural background relevant to the consideration of these practices. Part II will outline specific agency practices in the context of three areas of recent enforcement: financial crime-related asset forfeiture, post-financial crisis mortgage settlements, and enforcement actions brought by the Consumer Financial Protection Bureau (“CFPB”).

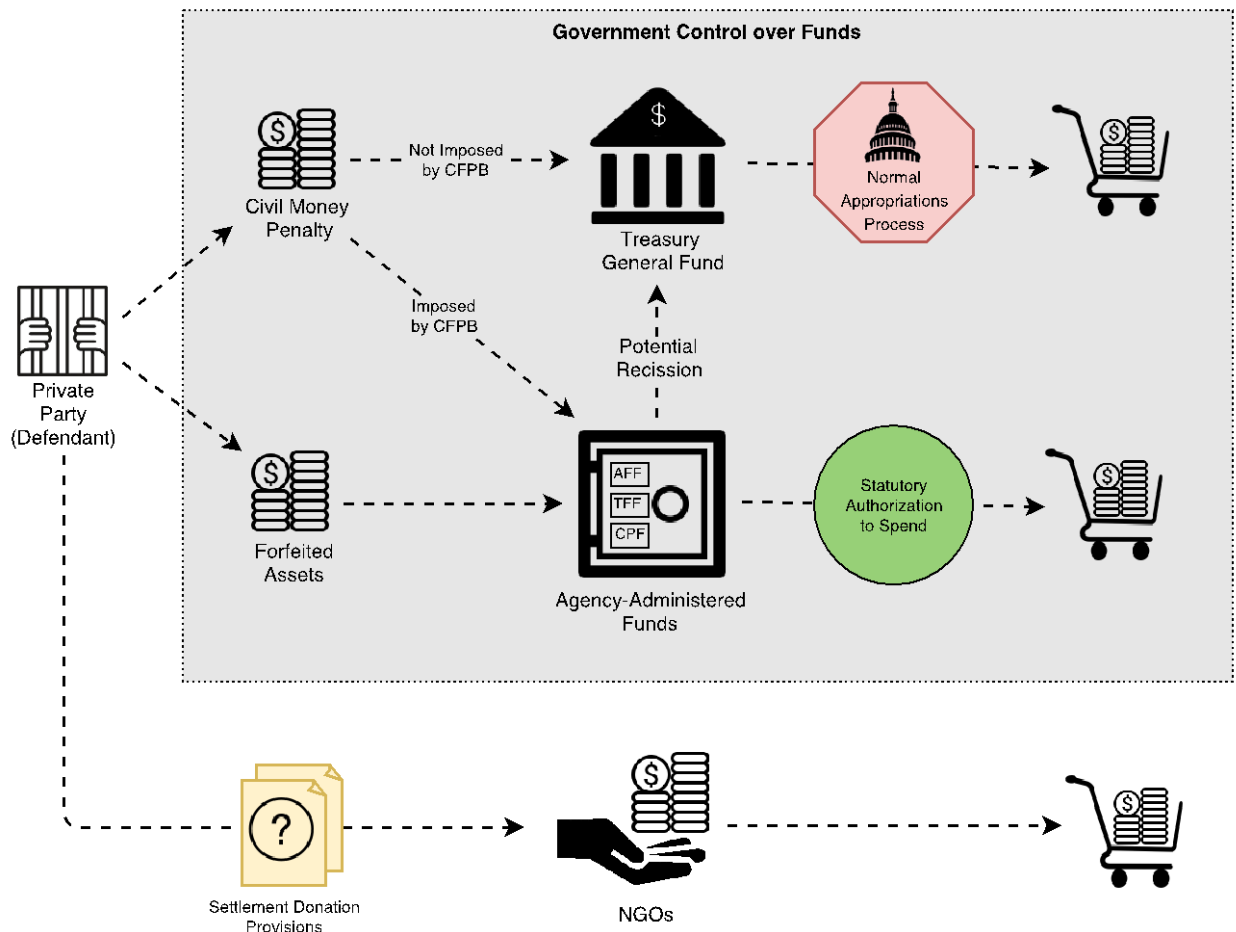
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<sup>1</sup> Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1436 (1979).

<sup>2</sup> Max Minzner, *Should Agencies Enforce?*, 99 MINN. L. REV. 2113, 2113–14 (2015).

<sup>3</sup> See, e.g., David L. Markell & Robert L. Glicksman, *A Holistic Look at Agency Enforcement*, 93 N.C. L. REV. 1 (2014).

As will be explained in greater detail below, current agency practice can be broken down into roughly three patterns: (1) civil money penalties which, unless imposed by the Consumer Financial Protection Bureau, are transferred to the Treasury General Fund where they are then subject to the normal appropriations process; (2) forfeited assets are transferred to an agency-administered forfeiture fund where, if not rescinded, they may be spent in accordance with statutory authorization; or (3) specific provisions in settlement agreements specify that a funds are to be paid to a private third party. These patterns can be summarized visually in the following chart:



## THE APPROPRIATIONS PRINCIPLE

### Constitutional Sources

The appropriations principle—the idea that Congress possesses ultimate and exclusive power over federal government spending—can be traced to Article I of the U.S. Constitution. Article I mandates that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”<sup>4</sup> The Constitution also instructs that revenue raising bills—those which generate funds for appropriations—not only must originate in congress, but in the chamber most directly accountable to the people: the House of Representatives.<sup>5</sup> The expansive nature of Congress’s power over governmental finances—the so-called “power over the purse”—was something the framer’s understood and intended.<sup>6</sup> And the Supreme Court has consistently reinforced its broad scope.<sup>7</sup> For example, in *United States v. MacCollom* the Court held that Article I requires that government spending be affirmatively authorized by congress, not merely unprohibited:

The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress. . . . This particular statute contains a limited grant of authority to the courts to authorize the expenditure of public funds for furnishing [court] transcripts to plaintiffs in [*habeas corpus*] actions. The fact that the statute does

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<sup>4</sup> U.S. CONST. art. I, § 9, cl. 7.

<sup>5</sup> U.S. CONST. art. I, § 7, cl. 1 (“All bills for raising revenue shall originate in the House of Representatives.”).

<sup>6</sup> *See, e.g.*, THE FEDERALIST NO. 58, at 384 (James Madison) (Harvard Univ. Press ed., 2009) (“The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse—that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.”).

<sup>7</sup> *See, e.g.*, *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 425 (1990) (“Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury.”).

not “prohibit” the furnishing of free transcripts in other circumstances is of little significance, since most such statutes speak only in terms of granting authority for the expenditure of federal funds. *Where Congress has addressed the subject as it has here, and authorized expenditures where a condition is met, the clear implication is that where the condition is not met, the expenditure is not authorized.*<sup>8</sup>

Congress’s Article I power of the purse thus includes both the power to provide money and the power to direct how that money is spent. As Professor Kate Stith has observed:

The “Appropriations” required by the Constitution are not only legislative specifications of money amounts, but also legislative specifications of the powers, activities, and [p]urposes . . . for which appropriated funds may be used. . . . [A]ppropriations do not merely set aside particular amounts of money; they define the character, extent, and scope of authorized activities. If the Executive could avoid limitations imposed by Congress in appropriations legislation—by independently financing its activities with private funds, transferring funds among appropriations accounts, or selling government assets and services—this would vitiate the foundational constitutional decision to empower Congress to determine what actions shall be undertaken in the name of the United States.<sup>9</sup>

According to Stith’s account, the appropriations power should be understood not merely as a way for congress to check the overall extent of executive power, but as a way of influencing and directing the policies that the executive is to implement.

To that end, Stith divides the Constitution’s broad appropriations principle into two subprinciples that together form a useful framework for analyzing appropriations questions raised by recent financial settlement practices.<sup>10</sup> First, she identified what she calls “the Principle of the Public Fisc: All funds belonging to the United States—received from whatever source,

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<sup>8</sup> *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (citing *Reeside v. Walker*, 11 How. 272, 291 (1851)) (emphasis added). The Government Accountability Office has dubbed the *MacCollom* Court’s holding to be a “quintessential axiom [that] animates the entire body of appropriations law.” OFFICE OF THE GEN. COUNSEL, U.S. GEN. ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1–1 (4th ed. 2016).

<sup>9</sup> Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1352–56 (1988).

<sup>10</sup> Though the full extent of her argument is contested, *see, e.g.*, J. Gregory Sidak, *The President’s Power of the Purse*, 1989 DUKE L.J. 1162 (1989), her framework has been cited approvingly by courts, *see, e.g.*, *Scheduled Airlines Traffic Offices, Inc. v. Dep’t of Def.*, 87 F.3d 1356, 1362 (D.C. Cir. 1996), the GAO, *see, e.g.*, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2–6 (3d ed. 2006), and academics alike, *see, e.g.*, Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 B.Y.U. L. REV. 327, 340 (2009).

however obtained . . . —are public monies, subject to public control and accountability.”<sup>11</sup>

Second, she identifies “the Principle of Appropriations Control: All expenditures from the public fisc must be made pursuant to a constitutional ‘Appropriation[ ] made by Law.’”<sup>12</sup> Together, then, Congress exercises complete control over all funds, both as they come in and as they go out. Statutorily, these two principles are implemented through the Miscellaneous Receipts Statute and the Antideficiency Act, respectively. Both will be discussed in greater detail below.

### **Legislative Framework**

As powerful as Congress’s power of the purse may be, it is not self-executing. As the D.C. Circuit observed in *Harington v. Bush*, “[the Appropriations Clause] is not self-defining and Congress has plenary power to give meaning to the provision [which] . . . is to be found in various statutory provisions.”<sup>13</sup> Two such provisions are especially foundational.

First, the Miscellaneous Receipts Statute (“MRS”)<sup>14</sup> (and related statutes<sup>15</sup>) prohibits federal agencies from “augment[ing] its appropriations from outside sources without specific statutory authority.”<sup>16</sup> The statutory penalty for violating the MRS includes possible removal of the offender from office.<sup>17</sup> The Government Accountability Office (“GAO”) explains that “the objective of [this rule] is to prevent a government agency from undercutting the congressional power of the purse by circuitously exceeding the amount Congress has appropriated for that

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<sup>11</sup> Stith, *Congress Power of the Purse* at 1356.

<sup>12</sup> *Id.* at 1356–57.

<sup>13</sup> 553 F.2d 190, 194–95 (D.C. Cir. 1977).

<sup>14</sup> Act of Mar. 3, 1849, ch. 110, 9 Stat. 398 (codified as amended at 31 U.S.C. § 3302(b) (1982)). As codified, MRS currently required that, unless an exception applies, “an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.”

<sup>15</sup> 31 U.S.C. § 1301(a); 18 U.S.C. § 209.

<sup>16</sup> PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2–6 (3d ed. 2006).

<sup>17</sup> *See* 31 U.S.C. § 3302(d).

activity.”<sup>18</sup> And it requires that, by default, money an agency collects be deposited into the pot of funds generally available to fund the federal government:

Simply stated, any money an agency receives for the government from a source outside of the agency must be deposited into the Treasury. This means deposited into the general fund (“miscellaneous receipts”) of the Treasury, not into the agency’s own appropriations, even though the agency’s appropriations may be technically still “in the Treasury” until the agency actually spends them.<sup>19</sup>

Additionally, the GAO has emphasized that the substance, not the form, governs whether the government has “received” the funds for the purposes of the MRS.<sup>20</sup> And, in the penalty context, the GAO observed that donations do not necessarily avoid the MRS merely because the government has not formally received the funds:

For example, the Nuclear Regulatory Commission could not circumvent the miscellaneous receipts statute by allowing violators to fund nuclear safety research projects in lieu of paying civil penalties. . . . Similarly the Commodity Futures Trading Commission (CFTC) lacked authority to accept a charged party’s donation to an educational institution as part of a settlement agreement because the donation was a money penalty that the CFTC was required to collect and deposit into the Treasury under the miscellaneous receipts statute.<sup>21</sup>

Thus, the MRS has been interpreted broadly to cover situations in which an agency may not have actual possession of funds. As Professor Stith explains, the MRS both “articulates and enforces the Principle of the Public Fisc;”<sup>22</sup> it helps prevent the Executive Branch from “avoid[ing]

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (citations omitted).

<sup>20</sup> *See, e.g.*, U.S. GOV’T ACCOUNTABILITY OFF., B-303413, WHETHER THE FEDERAL COMMUNICATIONS COMMISSION’S ORDER ON IMPROVING PUBLIC SAFETY COMMUNICATIONS IN THE 800 MHZ BAND VIOLATES THE ANTIDEFICIENCY ACT OR THE MISCELLANEOUS RECEIPTS STATUTE at 2, 13–14 (Nov. 8, 2004) (“Court cases and decisions of this Office make clear that an agency cannot avoid the miscellaneous receipts statute simply by changing the form of its transactions to avoid the receipt of money otherwise owed to it. . . . The heart of the matter in many miscellaneous receipts cases is whether money not received by a government agency nevertheless constitutes money owed to the government for its use that must be deposited into the Treasury. We also have found violations of the miscellaneous receipts statute when a government agency assesses a fine, penalty, fee, or similar monetary assessment and then, without statutory authority, provides for its payment to other than the government.”).

<sup>21</sup> *Id.* at 14 (citations omitted).

<sup>22</sup> Stith, *Congress’ Power of the Purse* at 1365.



limitations imposed by Congress in appropriations legislation . . . by independently financing its activities with private funds.”<sup>23</sup>

Second, the Antideficiency Act (“ADA”)<sup>24</sup> broadly prohibits federal agencies from “spend[ing], or commit[ing] themselves to spend, in advance of or in excess of appropriations,”<sup>25</sup> or accepting donations or voluntary services not authorized by statute.<sup>26</sup> As Stith observes, the ADA “articulates the Principle of Appropriations Control, prohibiting any expenditure beyond the amounts appropriated, even when the unauthorized expenditures do not require supplemental appropriations.”<sup>27</sup> Together, these two provisions—and the principles they embody—form the rook and bishop of appropriations law: they prevent the executive from operating beyond the boundary of what congress has statutorily authorized.

### **Baseline Appropriations Process**

A very brief overview of the normal appropriations process will help illustrate how practices can diverge in the context of financial enforcement actions.<sup>28</sup> The current process was established by the Budget and Accounting Act of 1921.<sup>29</sup> In a pure baseline case, each agency works with the Office of Management and Budget (“OMB”) “which is charged with broad oversight, supervision, and responsibility for coordinating and formulating a consolidated budget

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<sup>23</sup> *Id.* at 1356.

<sup>24</sup> Act of Mar. 3, 1905, ch. 1484 § 4, 33 Stat. 1214, (codified as amended at 31 U.S.C. §§ 1341–1351 (1982)).

<sup>25</sup> PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1–1 (4th ed. 2016).

<sup>26</sup> *See* 31 U.S.C. § 1342. Stith notes that this second provision actually embodies both the Principle of the Public Fisc and the Principle of Appropriations Control: “By its nature, personal service is simultaneously a ‘receipt’ which is not monetary, much less deposited to the Treasury, and an ‘expenditure’ which is not appropriated by Congress. The prohibition on voluntary service would appear to prohibit unauthorized receipt and expenditure of donated personal service.” Stith, *Congress’ Power of the Purse* at 1375.

<sup>27</sup> Stith, *Congress’ Power of the Purse* at 1372.

<sup>28</sup> For a more thorough overview of this process, see ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* (3d ed. 2007). *See also* MICHELLE D. CHRISTENSEN, CONG. RESEARCH SERV., R42633, *THE EXECUTIVE BUDGET PROCESS: AN OVERVIEW* (2012).

<sup>29</sup> *See* Pub. L. No. 67-13; 42 Stat. 20-27.

submission.”<sup>30</sup> After considering economic forecasts and anticipated revenue, OMB prepares the president’s official comprehensive budget for submission to Congress.<sup>31</sup> The content and timing of this submission are governed by statute.<sup>32</sup> The action then moves to Congress:

In exercising the broad discretion granted by the Constitution, Congress can approve funding levels contained in the President’s budget request, increase or decrease those levels, eliminate proposals, or add programs not requested by the administration. . . . [A]ppropriations have generally been made in a series of regular appropriation acts plus one or more supplemental appropriation acts. . . . An agency may receive funds under more than one appropriation act. . . . Before considering individual appropriation measures, however, Congress must, under the Congressional Budget Act, first agree on [government-wide] budget totals. . . . Eventually, each subcommittee [of the House Appropriations Committee] reports a single appropriation bill for consideration by the entire committee and then the full House membership. . . . Following either the Senate’s passage of the House version of an appropriation measure, or the approval of a conference report by both bodies, the enrolled bill is then sent to the President for signature or veto.<sup>33</sup>

Unless otherwise specified, appropriations are generally paid out of a Treasury General Fund account.<sup>34</sup> The actual amount appropriated to each agency can vary significantly. For example, in terms of discretionary funding in 2017, the Department of Defense reportedly received \$521.7 billion, the Department of Agriculture reportedly received \$22.6 billion, and the Department of Commerce reportedly received \$9.2 billion.<sup>35</sup> These figures may serve as a useful reference point for comparison throughout this paper.

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<sup>30</sup> PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1–1 (3d ed. 2004). The specific process agencies are to follow when making submissions to OMB is formalized in OMB Circular No. A-11. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR NO. A-11.

<sup>31</sup> *See id.*

<sup>32</sup> *See* 31 U.S.C. §§ 1104–1109.

<sup>33</sup> PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1–1.

<sup>34</sup> *See* PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 3–12 (3d ed. 2008). (“Under the typical or ‘traditional’ funding arrangement, any money an agency receives from any source outside of its congressional appropriations must, unless Congress has provided otherwise, be deposited in the Treasury to the credit of the appropriate general fund receipt account. . . . Absent an appropriation, an agency may not withdraw money from a general fund receipt account. Congress provides the agency’s operating funds by making direct appropriations from the general fund of the Treasury. These are carried on Treasury’s books in the form of general fund expenditure accounts.”). By contrast, a “revolving fund authorizes the agency to retain receipts and deposit them into the fund,” and thus “the [MRS] does not apply. The legislation authorizing a revolving fund is a permanent, indefinite appropriation.” *Id.*

<sup>35</sup> *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, AMERICA FIRST: A BUDGET BLUEPRINT TO MAKE AMERICA GREAT AGAIN 50 (2017).

## FINANCIAL ENFORCEMENT ACTIONS

### Legislative Framework

Whether in the form of a civil penalty,<sup>36</sup> a criminal penalty,<sup>37</sup> a settlement agreement,<sup>38</sup> asset forfeiture, or a provision of a deferred or non-prosecution agreement,<sup>39</sup> funds paid by defendants in financial enforcement actions play a central role in the policing of the private sector. And, if the past is any predictor of the future, monetary penalties are not going to become insignificant anytime soon, especially with respect to financial institutions. In the criminal context, Professor Brandon Garrett found that “[i]n the last decade . . . federal prosecutors have set new records each year in corporate fines, breaking the ones set the previous year.”<sup>40</sup> And, according to Garrett, the lion’s share of the corporate fines in 2015—approximately \$7 billion of an overall \$9 billion—were levied against banks.<sup>41</sup> Both in number of prosecutions and overall size of financial penalty imposed, bank prosecutions have recently taken on a scale not seen in previous decades.<sup>42</sup>

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<sup>36</sup> See Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1436 (1979) (identifying at the time “some 348 statutory civil penalties enforced by 27 federal departments and independent agencies.”).

<sup>37</sup> See Brandon L. Garrett, *The Rise of Bank Prosecutions*, 126 YALE L.J. FORUM 33, 35 (2016).

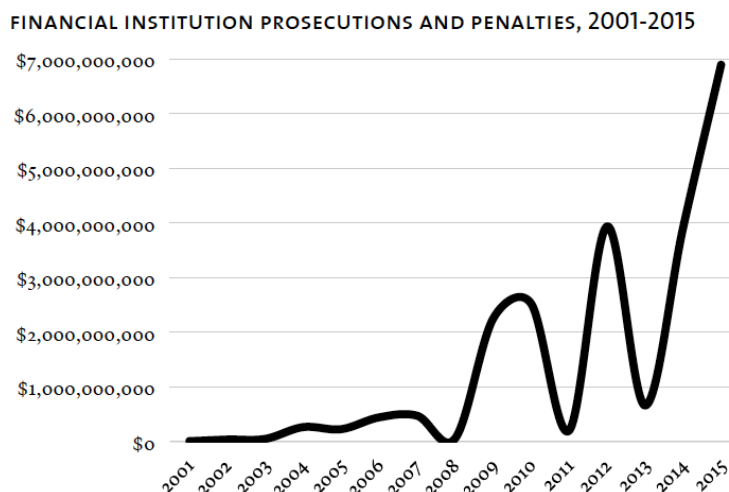
<sup>38</sup> See Michael Patrick Wilt, *Evaluating ‘Consumer Relief’ Payments in Recent Bank Settlement Agreements*, 17 J. BUS. & SEC. L. 2 (2017).

<sup>39</sup> See Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 537 (2015).

<sup>40</sup> Garrett, *The Rise of Bank Prosecutions* at 35.

<sup>41</sup> See *id.* at 36.

<sup>42</sup> See *id.* at 38. (“It is noteworthy how many financial institutions are now being prosecuted—and with some regularity—such that they are no longer functionally immune from criminal prosecution. In contrast to this recent flurry of activity, very few financial institutions had been prosecuted in decades past. It was almost vanishingly rare for banks to be convicted of crimes.”). Garrett also includes in an appendix a chart documenting these bank prosecutions.



Source: Brandon L. Garrett, *The Rise of Bank Prosecutions*, 126 YALE L.J. FORUM 33, 37 (2016).

In the civil context, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”)<sup>43</sup> has been responsible for some of the largest post-financial crisis non-criminal fines against financial institutions. FIRREA’s unique structure allows the Department of Justice (“DOJ”) to seek civil money penalties for violations of certain criminal laws, including numerous fraud offenses.<sup>44</sup> It has been one of the primary statutory tools DOJ has used over the past decade to penalize large financial institutions for their conduct in the years leading up to the

<sup>43</sup> See Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”), Pub. L. 101–73, 103 Stat. 183 (1989).

<sup>44</sup> See 12 U.S.C. § 1833a. See also Nan S. Ellis, Steven B. Dow & David Safavian, *Use of FIRREA to Impose Liability in the Wake of the Global Financial Crisis: A New Weapon in the Arsenal to Prevent Financial Fraud*, 18 U. PA. J. BUS. L. 119, 129–33 (2015) (“FIRREA provides the federal government with a significant amount of flexibility. First, it authorizes the DOJ to seek civil penalties for those who violate one of fourteen specified criminal laws involving financial institutions. Second, because the fines are civil in nature, prosecutors merely have to show by a “preponderance of the evidence” that the elements of the underlying crime were met. . . . [Statutory penalty] caps can be disregarded if any person derives any financial gain from violating any of the predicate offenses, or if a victim suffers a loss from the activities of a violator, which exceeds the . . . caps. The statute also provides that . . . losses include those suffered by the various Federal depository insurance programs. In such a case, the maximum fine levied may be equal to - but no greater than - the amount of gain by the perpetrator(s) or loss by the victim(s). In addition, the statute makes clear that the amount of the fine can be tailored in a way that not only provides adequate deterrence but also avoids harm to innocent parties, like taxpayers and depositors.”).

2008 financial crisis.<sup>45</sup> And, as will be discussed in great detail below, the total penalties to date for pre-financial crisis mortgage origination practices are in the billions.<sup>46</sup>

### **Relevant Justifications**

Before turning to specific financial enforcement practices, it is worth considering several normative and policy justifications that arise in the financial penalty context. Of the three rationales, the first two—disgorgement and remediation—are goals that financial enforcement penalties may seek to further. The last—agency structure/funding decisions—is a feature of agency institutional design that may nevertheless help our understanding of the significance of certain authorities and practices.

#### *Disgorgement*

Disgorgement provides a powerful justification underlying many financial penalty practices, especially asset forfeiture. Though they both have the effect of financially penalizing a violator, disgorgement and monetary penalties are distinct:

While a civil money penalty is a punitive measure aimed at deterring future misconduct, disgorgement is an equitable remedy aimed at preventing a wrongdoer from unjustly enriching himself or herself from his or her wrongs. Specifically, it is a remedy designed to deprive defendants of their ill-gotten gains derived from their illegal activities.<sup>47</sup>

In the financial regulatory context, the animating concern is that an individual or institution should not be allowed to retain profits that were gained through violative practices. By denying a

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<sup>45</sup> See, e.g., Ellis, *Use of FIRREA to Impose Liability* at 143.

<sup>46</sup> See *id.*

<sup>47</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-551, CONSUMER FINANCIAL PROTECTION BUREAU: OPPORTUNITY EXISTS TO TRANSPARENCY OF CIVIL PENALTY FUND ACTIVITIES at 17, n.31 (June 2014). Professor Andrew Kull explains that “[w]henver the law gives a remedy measured by the defendant’s gain rather than plaintiff’s loss, a duty to disgorge unjust enrichment will explain the defendant’s liability more readily (and at any rate more completely) than will a duty merely to refrain from injuring others.” Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1193 (1995).

defendant the profits of the crime, disgorgement advances both deterrent and equitable objectives.<sup>48</sup> As Judge Friendly observed, “the primary purpose of disgorgement is not to compensate investors. Unlike damages, it is a method of forcing a defendant to give up the amount by which he was unjustly enriched.”<sup>49</sup> And asset forfeiture laws are firmly built on this idea:

No general forfeiture law exists. Each federal crime must have its own forfeiture provision written into the law. Today, there are more than 200 federal statutes which authorize a forfeiture sanction. . . . Asset forfeitures, by way of background, are deeply rooted in American history. The government’s seizure of property used in, or derived from, a crime dates back to the Crown. Its use was based on the theory that a breach of common law, an offense to the King’s peace, should deprive the transgressor of the right to own property. . . . One of the early acts of the First U.S. Congress following the ratification of the Constitution, in fact, was its enactment of forfeiture statutes for vessels and cargo involved in customs violations. . . . Asset forfeiture also is authorized in money laundering cases. . . . More recently, Congress employed the asset forfeiture sanction in response to the wave of insider trading scandals that marred Wall Street during the 1980s, as well as the savings and loan debacle of the 1980s and 90s. . . . Congress adopted [FIRREA] in an effort to combat future savings and loan scandals.<sup>50</sup>

The recent BNP Paribas case (discussed in greater detail below) provides a useful example of disgorgement. In announcing a 2014 plea agreement with BNP, a French financial institution, the Chief of the Internal Revenue Service Criminal Investigation

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<sup>48</sup> See, e.g., Wendy S. Walker, Alan S. Maza, David Eskew, Michael E. Wiles, *At the Crossroads: The Intersection of the Federal Securities Laws and the Bankruptcy Code*, 63 BUS. LAW. 125, 130 (2007) (noting that, in the securities context, “the SEC maintains that the purpose of disgorgement is not to compensate victims, but rather to deter violations of the Securities Laws and to serve as an equitable remedy preventing unjust enrichment by ‘depriving violators of their ill-gotten gains.’”).

<sup>49</sup> *Sec. & Exch. Comm’n v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 102 (2d Cir. 1978). See also *Sec. & Exch. Comm’n v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996) (“The primary purpose of disgorgement as a remedy for violation of the securities laws is to deprive violators of their ill-gotten gains, thereby effectuating the deterrence objectives of those laws.”); Catherine E. McCaw, *Asset Forfeiture As A Form of Punishment: A Case for Integrating Asset Forfeiture into Criminal Sentencing*, 38 AM. J. CRIM. L. 181, 203 (2011) (“Forfeiture of criminal proceeds forces a defendant to disgorge the profits she has earned from a criminal enterprise. This remedy effectively brings defendants to the same position they would be in had they not committed a crime. This result is similar to the fate that civil defendants suffer.”).

<sup>50</sup> Lisa H. Nicholson, *The Culture of Under-Enforcement: Buried Treasure, Sarbanes-Oxley and the Corporate Pirate*, 5 DEPAUL BUS. & COM. L.J. 321, 348-51 (2007).

Division touched on this theme, noting that “BNP Paribas will forfeit the historic figure of almost \$8.9 [b]illion representing the proceeds of criminal activity.”<sup>51</sup>

### *Remediation*

Many financial penalty practices also endeavor to remediate the harm caused by violative conduct. Though distinct, remediation and disgorgement often go hand-in-hand. For example, when BNP was sentenced in 2015, DOJ announced that it was “exploring ways to use the forfeited funds to compensate individuals who may have been harmed by the sanctioned regimes of Sudan, Iran and Cuba,” and that, “[a]s a preliminary step in this process, the [DOJ] is inviting such individuals or their representatives to provide information describing the nature and value of the harm they suffered.”<sup>52</sup> As Professor Prentiss Cox explains:

Public compensation is part of but complicates the deterrence rationale of public enforcement. Public compensation obviously provides relief to people adversely affected by the violator’s conduct. Courts, however, also stress the deterrence rationale for public compensation because it forces law violators to forego gains and takes away unfair market advantage. Underscoring the deterrence rationale of public compensation is the fluidity between civil penalty and public compensation recovery in some contexts. Penalties collected in enforcement actions usually are paid to the general fund of the government, but some enforcers are authorized to use penalty funds for public compensation.<sup>53</sup>

This fluidity can be observed in the “Fair Fund” provision of the Sarbanes-Oxley Act of 2002.<sup>54</sup> The Fair Fund provision authorizes the SEC to create “a disgorgement fund or other fund established for the benefit of the victims of such violation” whenever a relevant violator is

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<sup>51</sup> *BNP Paribas Agrees to Plead Guilty and to Pay \$8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions*, DEPARTMENT OF JUSTICE (June 30, 2014), <https://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial>.

<sup>52</sup> *BNP Paribas Sentenced for Conspiring to Violate the International Emergency Economic Powers Act and the Trading with the Enemy Act*, DEPARTMENT OF JUSTICE (May 1, 2015).

<sup>53</sup> Prentiss Cox, *Public Enforcement Compensation and Private Rights*, 100 MINN. L. REV. 2313, 2351 (2016)

<sup>54</sup> See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 308, 116 Stat. 745, 784 (codified at 15 U.S.C. § 7246).

subject to both a civil money penalty and disgorgement.<sup>55</sup> According to Professor Barbara Black, the SEC had “viewed disgorgement as an enforcement tool and not as a means to compensate investors.”<sup>56</sup> But the Fair Fund provision opened the door for greater focus on remediation:

Historically, the SEC has not considered collecting damages for injured investors as an important part of its mission. Recovering money for investors’ losses, instead, has been the function of private securities fraud class actions. [The Fair Fund provision], however, gives the SEC a more prominent role in compensating defrauded investors. The statute allows the agency, in some circumstances, to distribute civil penalties for federal securities law violations, ordinarily paid into the U.S. Treasury, to investors who have been harmed by those violations. The SEC embraced [the Fair Fund provision] enthusiastically, stating that it “intends to use [it] whenever reasonably possible, consistent with its mission to protect investors.” It has established Fair Funds in a number of high-profile cases involving financial fraud by corporate defendants, and it has taken pride in the large amounts of money it has obtained for distribution to investors.<sup>57</sup>

As Professor Urska Velikonja notes, thanks to the Fair Funds provision “the SEC has quietly become an important source of compensation for defrauded investors.”<sup>58</sup>

Outside the financial regulatory context, remediation has historically been an objective for the Environmental Protection Agency (“EPA”) in resolving enforcement actions.<sup>59</sup> In particular, the use of Supplemental Environmental Projects (“SEPs”) demonstrates how non-monetary penalty practices have been implemented to advance remedial goals. As Professor Kenneth Kristl explains:

[SEPs] allow a defendant to undertake an environmentally beneficial project that it was not otherwise obligated to do as part of a settlement of an enforcement action. To fit within the statutory framework, SEPs are linked to penalties via a

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<sup>55</sup> *Id.* See also Barbara Black, *Should the SEC Be A Collection Agency for Defrauded Investors?*, 63 *BUS. LAW.* 317, 326 (2008).

<sup>56</sup> Black, *Should the SEC Be A Collection Agency* at 321.

<sup>57</sup> *Id.* at 318–19.

<sup>58</sup> Urska Velikonja, *Public Compensation for Private Harm: Evidence from the Sec's Fair Fund Distributions*, 67 *Stan. L. Rev.* 331, 332–33 (2015) (“Since 2002, the SEC has deposited \$14.46 billion for defrauded investors into [“fair funds”]. . . . To put this figure into context, the aggregate amount distributed through fair funds over the past decade is substantially larger than the SEC's budget over the same period.”).

<sup>59</sup> See Kenneth T. Kristl, *Making A Good Idea Even Better: Rethinking the Limits on Supplemental Environmental Projects*, 31 *VT. L. REV.* 217, 225 (2007).



conceptual trade-off: the defendant agrees to undertake the SEP in exchange for paying a lower penalty.<sup>60</sup>

But the EPA's SEP practices generated controversy. For example, Professor Todd Peterson argues that "[t]hrough the SEP program, the EPA has used settlement agreements with companies accused of violating environmental laws to accomplish a wide range of projects that have environmental or public health benefits."<sup>61</sup> And, according to Professor Peterson, such agreements amount run afoul of both the MRS and Congress's constitutional powers: to an end-run around the MRS:

The potential Augmentation Problem with the SEP program is clear. By requiring a [SEP] as part of a settlement agreement with an environmental defendant, the EPA (and [DOJ] acting as counsel on behalf of the EPA), reduces the amount of fines or penalties that might be paid by the violator in exchange for the agreement to undertake the SEP. Such fines or penalties would otherwise be paid into the general treasury account pursuant to the [MRS] where they would be available for congressional appropriation. Such a policy arguably evades the requirements of the [MRS] and almost certainly raises the possibility of the agency augmenting its appropriations by requiring an environmental defendant to perform projects that might be within the scope of the EPA's duties, thereby leaving more funds available to the EPA for other purposes. The Comptroller General has, at least on one occasion, determined that such a program circumvented Congress's appropriations power.<sup>62</sup>

The EPA responded by implementing a "nexus" requirement.<sup>63</sup> Essentially, any SEP must have a relationship to the violative conduct to avoid MRS or constitutional problems.<sup>64</sup> Thus the nexus requirement, at least in theory, preserves Congress's power over the purse.<sup>65</sup>

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<sup>60</sup> *Id.* at 218.

<sup>61</sup> Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 B.Y.U. L. REV. 327, 352 (2009).

<sup>62</sup> *Id.*

<sup>63</sup> See U.S. ENVTL. PROT. AGENCY, MEMORANDUM FROM WALKER B. SMITH, DIR., OFFICE OF REGULATORY ENFORCEMENT, U.S. ENVTL. PROT. AGENCY, TO REG'L COUNSEL ET AL. (Oct. 31, 2002).

<sup>64</sup> See *id.* ("If there is a relationship between the alleged violation and the SEP, then it is within the Agency's discretion to take the SEP into account . . . when determining the amount of penalty that the Agency will agree to as part of an overall settlement.").

<sup>65</sup> See Peterson, *Protecting the Appropriations Power* at 355 ("The nexus requirement ensures that the EPA and the Department of Justice may not use a potential enforcement action to induce the defendant to engage in remediation activities that have no connection to the underlying violation. As a result, the agency may not trade off funds that might have been extracted in the form of a settlement that would be deposited in the Treasury for a project that they

### *Agency Structure/Funding Decisions*

Although numerous deviations from baseline appropriations practices can be found throughout federal appropriations law,<sup>66</sup> such deviations occur especially among federal financial regulators.<sup>67</sup> Indeed, among federal financial regulatory agencies, exceptions to the normal appropriations process are more frequent than adherence to baseline practices.<sup>68</sup> Only two agencies—the Securities and Exchange Commission (“SEC”) and the Commodity Futures Trading Commission (“CFTC”)—are subject to the regular appropriations process.<sup>69</sup> And of those two, only the CFTC actually receives its funding from a Treasury General Fund account.<sup>70</sup> Though the SEC’s overall budget is set by Congress, actual funds spent are generated by fees that the SEC itself sets “to approximately meet the funding level determined by Congress.”<sup>71</sup> But as the chart below illustrates, the Federal Deposit Insurance Corporation (“FDIC”) is more representative of the funding model for financial regulatory agencies generally. Unlike either the CFTC or the SEC, the FDIC effectively sits outside the congressional appropriations process and

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deemed to be meritorious but, because it has no connection with the underlying violation, is an action that should be funded by Congress.”).

<sup>66</sup> *See, e.g.*, U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-268T, FEDERAL FEES, FINES, AND PENALTIES: OBSERVATIONS ON AGENCY SPENDING AUTHORITIES (Dec. 1, 2016) at 1 (“In many cases, Congress has provided agencies with permanent authority to collect and obligate for specific purposes funds from sources such as fees, fines, and penalties without further congressional action.”).

<sup>67</sup> *See, e.g.*, *See also* HENRY B. HOGUE, MARC LABONTE, AND BAIRD WEBEL, CONG. RESEARCH SERV., R43391, INDEPENDENCE OF FEDERAL FINANCIAL REGULATORS: STRUCTURE, FUNDING, AND OTHER ISSUES (2017) at 25.

<sup>68</sup> *See id.* (“Most, but not all, financial regulators are not subject to the regular congressional appropriation and authorization processes.”).

<sup>69</sup> *See id.*

<sup>70</sup> *See id.*

<sup>71</sup> *See id.*

is instead funded by insurance premiums that it charges regulated banks<sup>72</sup> which are governed by statute and based on a financial institution’s risk profile.<sup>73</sup>

<b>Regulator</b>	<b>Agency Spending (\$mil/yr)</b>	<b>Subject to Annual Appropriations/Periodic Reauthorization</b>	<b>Primary Revenue Source</b>
Commodity Futures Trading Commission	\$250 (FY2016)	Yes/Yes, latest authorization expired Sept. 30, 2013.	Treasury general fund per congressional appropriation.
Consumer Financial Protection Bureau	\$576 (FY2016)	No/No	Transfer from Federal Reserve System limited to 12% of the Fed’s operating expenses. Authorized to request additional appropriations until FY2014, but did not.
Federal Deposit Insurance Corporation	\$1,715 (CY2016)	No/No	Deposit insurance premiums determined by FDIC in order to meet a reserve ratio set by FDIC (with a statutory minimum of 1.35% of insured deposits).
Federal Housing Finance Agency	\$253 (FY2016)	No/No	Fees and assessments on regulated institutions. Amounts determined by FHFA.
Federal Reserve	\$5,410 (CY2016)	No/No	Income on securities and loans held by Fed. The Fed also charges fees to cover the costs of business services it offers.
National Credit Union Administration	\$268 (CY2015)	No/No	Deposit insurance premiums determined by NCUA in order to meet a reserve ratio set by NCUA (with a statutory minimum of 1.2% of insured deposits).
Office of the Comptroller of the Currency	\$1,109 (FY2016)	No/No	Fees on regulated institutions. Amounts determined by OCC.
Securities and Exchange Commission	\$1,736 (FY2016)	Yes, except for \$100 million reserve fund/Yes, latest authorization expired Dec. 31, 2015.	Fees and assessments on regulated entities. Amounts set to meet congressional appropriation.

Source: HENRY B. HOGUE, MARC LABONTE, AND BAIRD WEBEL, CONG. RESEARCH SERV., R43391, INDEPENDENCE OF FEDERAL FINANCIAL REGULATORS: STRUCTURE, FUNDING, AND OTHER ISSUES (2017) at 27.

Exclusion from the appropriations process is considered an important metric of agency independence,<sup>74</sup> which has historically been a high institutional design priority for financial

<sup>72</sup> See *id.* at 26. See also *Who is the FDIC?*, THE FEDERAL DEPOSIT INSURANCE CORPORATION, accessed on May 4, 2017, <https://www.fdic.gov/about/learn/symbol/index.html>; DARRYL E. GETTER, CONG. RESEARCH SERV., R41718, FEDERAL DEPOSIT INSURANCE FOR BANKS AND CREDIT UNIONS (2014).

<sup>73</sup> See *The Deposit Insurance Fund*, THE FEDERAL DEPOSIT INSURANCE CORPORATION, accessed on May 4, 2017, <https://www.fdic.gov/deposit/insurance>.

<sup>74</sup> HOGUE et al., INDEPENDENCE OF FEDERAL FINANCIAL REGULATORS at 26 (noting that congressional “control over funding reduces independence from (and increases accountability to) Congress”). See also Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 611 (2010) (“Several of the financial independent agencies have funding sources, usually from users and industry, which frees them from dependence on congressional appropriations and annual budgets developed by the executive branch.”); Rachel E.

regulators.<sup>75</sup> Indeed, one way to understand the extent of the budgetary autonomy of most financial regulators is that it is the result of efforts to insulate them from the partisan politics that inhere in each political branch:

Agencies that are more independent from the President can sometimes become more congressionally dependent for resources and power. In contrast, where Congress is successful in limiting the President’s authority over an agency, this might indirectly reduce the influence of Members over that agency. Some agency characteristics that more directly shield an agency from congressional control and presidential direction, such as funding the agency outside of the appropriations process, might further insulate the agency from partisan political influence.<sup>76</sup>

### **Baseline Financial Penalty Practices**

As discussed above, the MRS applies by default to financial penalties recovered by the government, including in financial enforcement actions. Accordingly, “[a]s with user fees, unless Congress has provided specific statutory authority for an agency to use fines, penalties, and settlements, those collections are deposited as miscellaneous receipts and are generally not available to the agency.”<sup>77</sup> The GAO provides the following example of how an agency—in this case the Financial Crimes Enforcement Network (“FinCEN”)—normally processes a *civil money penalty* levied against a financial institution for a violation of the Bank Secrecy Act (“BSA”).<sup>78</sup>

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Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 44 (2010) (“With independent funding, the agency is insulated from Congress as well as the President.”).

<sup>75</sup> See, e.g., Gillian E. Metzger, *Through the Looking Glass to A Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, LAW & CONTEMP. PROBS., 2015, at 129, 130–33 (observing that “in the world of financial regulation . . . the defining structural precept is not accountability but independence. The vast majority of financial regulators enjoy protection from removal from office, often coupled with budgetary autonomy from Congress and other indicia of independence, such as exemption from White House regulatory oversight . . . Another divergence exists between banking regulators, like the Fed or Federal Deposit Insurance Corporation (FDIC), and other financial regulators such as the SEC or the Commodities Futures Trading Commission (CFTC), which lack the budgetary autonomy that bank regulators enjoy.”).

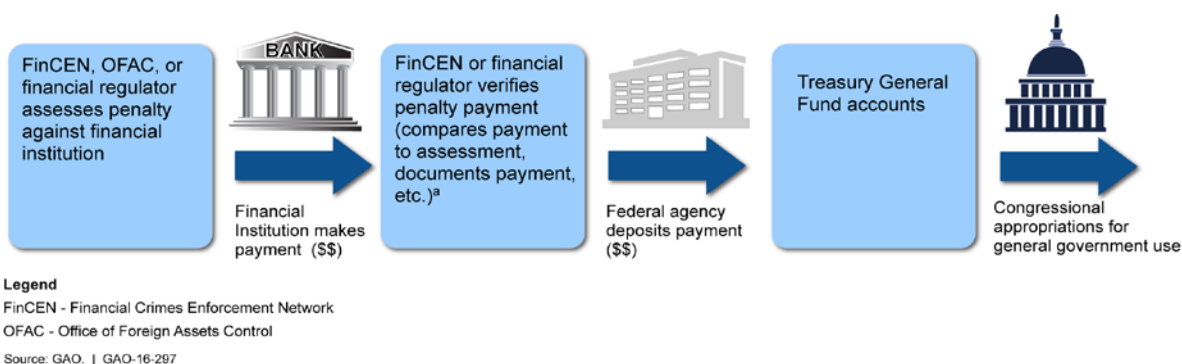
<sup>76</sup> HOGUE et al., INDEPENDENCE OF FEDERAL FINANCIAL REGULATORS at 28.

<sup>77</sup> GAO-17-268T at 3.

<sup>78</sup> See U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-297, FINANCIAL INSTITUTIONS: FINES, PENALTIES, AND FORFEITURES FOR VIOLATIONS OF FINANCIAL CRIMES AND SANCTIONS REQUIREMENTS (Mar. 2016).

As will be discussed below, however, the process can differ significantly for seized or forfeited assets:

First, FinCEN sends financial institutions a signed copy of the final consent order related to the enforcement action it has taken along with instructions on how and when to make the penalty payment. Then, Treasury’s Bureau of Fiscal Service (BFS) collects payments from financial institutions, typically through a wire transfer. . . . FinCEN staff compares their penalty assessments with BFS’s collections in Treasury’s Report on Receivables to determine if a penalty payment has been received or is past due. Once [BFS] receives payments . . . BFS staff deposits the payments into the appropriate Treasury General Fund accounts.<sup>79</sup>



*Source:* U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-297, FINANCIAL INSTITUTIONS: FINES, PENALTIES, AND FORFEITURES FOR VIOLATIONS OF FINANCIAL CRIMES AND SANCTIONS REQUIREMENTS (Mar. 2016).

Though the exact penalty processing procedures may vary between financial regulatory agencies, the ultimate destination for *fin*es is the same: All roads lead to the Treasury General Fund.<sup>80</sup> As the GAO explains, the “Treasury General Fund receipt accounts hold all collections that are not earmarked by law for another account for a specific purpose or presented in the President’s budget as either governmental (budget) or offsetting receipts. It includes taxes, customs duties, and miscellaneous receipts.”<sup>81</sup> And, in line with Stith’s Principle of Appropriations Control,

<sup>79</sup> *Id.*

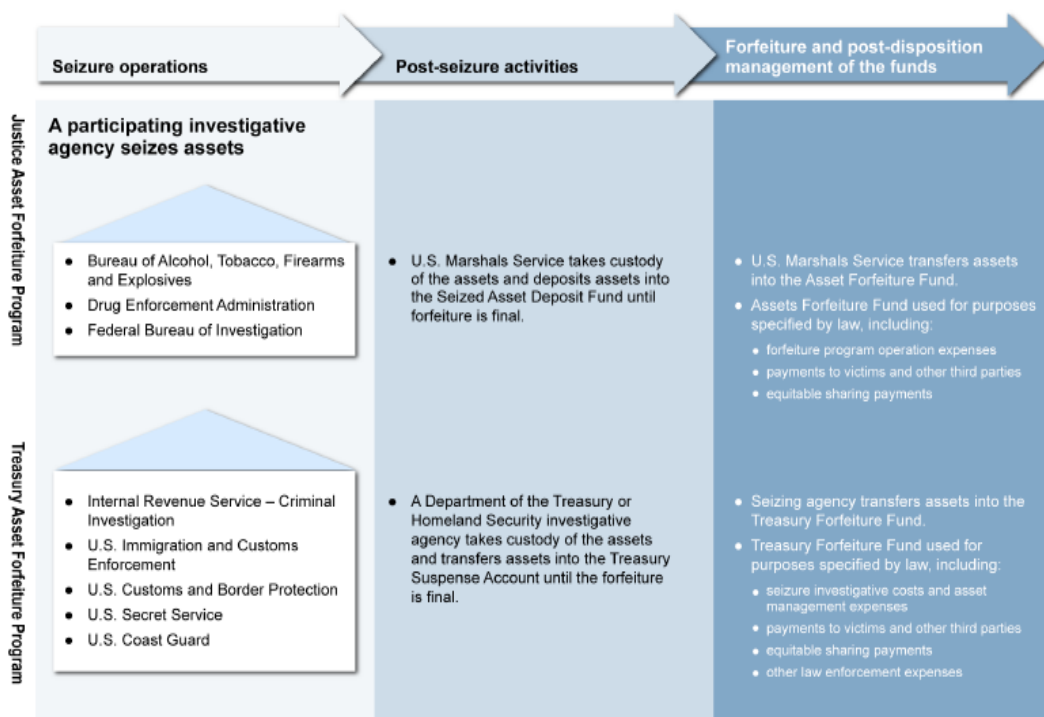
<sup>80</sup> *See id.* at 20–24. The GAO also observed that in cases brought by DOJ, the defendant-financial institution may pay fines either directly to the Treasury General Fund or first to the Clerk of the Courts.

<sup>81</sup> *Id.* at 8–9.

“once a penalty collection is deposited into a receipt account in the Treasury General Fund, only an appropriation by Congress can begin the process of spending these funds.”<sup>82</sup>

### Financial Crime-Related Asset Forfeiture

As mentioned above, practices can vary dramatically depending on specific statutory authorities. And while FinCEN and other financial regulatory agencies remit civil money penalties assess to the Treasury General Fund Accounts, they do not necessarily do so with *forfeited* assets.<sup>83</sup> Rather, forfeited assets may be deposited in one of several separate forfeiture funds, depending on which component of the federal government is the seizing agency.<sup>84</sup>



Source: GAO analysis of Department of Justice and Department of the Treasury documentation. | GAO-16-297

<sup>82</sup> *Id.* at 23.

<sup>83</sup> *See id.* at 2, 9–15. The GAO explains this distinction: “Fines and penalties result from enforcement actions that require financial institutions to pay an amount agreed upon between the financial institution and the enforcing agency, or an amount set by a court or in an administrative proceeding. Forfeitures result from enforcement actions and are the confiscation of money, assets, or property, depending on the violation.”

<sup>84</sup> *See id.*

*Source:* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-297, FINANCIAL INSTITUTIONS: FINES, PENALTIES, AND FORFEITURES FOR VIOLATIONS OF FINANCIAL CRIMES AND SANCTIONS REQUIREMENTS (Mar. 2016).

Financial crime-related forfeited assets are generally deposited into either the Treasury Forfeiture Fund (“TFF”) or DOJ’s Asset Forfeiture Fund (“AFF”).<sup>85</sup> These funds—which are maintained and administered by Treasury and DOJ respectively<sup>86</sup>—were each established by statute<sup>87</sup> and are entirely separate from the Treasury General Fund.<sup>88</sup> Prior to the establishment of these (and several other) forfeiture funds in 1984,<sup>89</sup> forfeited assets were generally treated as any other revenue; they were deposited in the Treasury General Fund and appropriated through the annual appropriations process.<sup>90</sup> Under current practice, however, qualifying forfeited funds are deposited into either the TFF or the AFF where they may then be spent in support of law enforcement efforts:

Funds from the AFF and TFF are primarily used for program expenses, payments to third parties—including the victims of the related crimes—and equitable sharing payments to law enforcement agencies that participated in the efforts resulting in forfeitures. For the cases in our review, as of December 2015, DOJ and Treasury had distributed about \$1.1 billion in payments to law enforcement agencies and approximately \$2 billion is planned to be distributed to victims of crimes. The remaining funds from these cases are subject to general rescissions to the AFF and TFF or may be used for program or other law enforcement expenses.<sup>91</sup>

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<sup>85</sup> *See id.*

<sup>86</sup> *See id.*

<sup>87</sup> The AFF was established by the Comprehensive Crime Control Act of 1984, *see* Pub. L. No. 98-473, tit. II, §§ 310, 2303 (codified as amended at 28 U.S.C. § 524(c)), and the TFF was established by the Treasury Forfeiture Fund Act of 1992, *see* Pub. L. No. 102-393, § 638 (codified as amended at 31 U.S.C. § 9705). *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-972, ASSET FORFEITURE PROGRAMS: JUSTICE AND TREASURY SHOULD DETERMINE COSTS AND BENEFITS OF POTENTIAL CONSOLIDATION (Sept. 12, 2012) available at <http://www.gao.gov/assets/650/648098.pdf> at 2–3.

<sup>88</sup> *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-297, FINANCIAL INSTITUTIONS: FINES, PENALTIES, AND FORFEITURES FOR VIOLATIONS OF FINANCIAL CRIMES AND SANCTIONS REQUIREMENTS (Mar. 2016).

<sup>89</sup> *See* CHARLES DOYLE, CONG. RESEARCH SERV., 97-139, CRIME AND FORFEITURE (2015) at 22 (noting that the TFF used to be known as the Customs Forfeiture Fund).

<sup>90</sup> *See id.*

<sup>91</sup> GAO-16-297 at 19.

Both Treasury and DOJ have offices specifically dedicated to administering their respective forfeiture funds, the balances of which have been used in part to pay for certain law enforcement initiatives.

At Treasury, for example, the TFF is managed by the Treasury Executive Office of Asset Forfeiture (“TEOAF”). Unobligated TFF funds in excess of current and near-term ongoing operations expenses are referred to as a “super surplus” and “can be used for any federal law enforcement purpose;”<sup>92</sup> their dispersal is largely entrusted to the agency’s discretion.<sup>93</sup>

According to TEOAF, “the [s]uper [s]urplus has been used to fund high priority information technology projects, multiyear criminal investigations, pilot programs, and urgent homeland security needs at no cost to taxpayers.”<sup>94</sup> For example, the GAO noted that approximately \$348 million of TFF super surplus funding helped fund a variety of Department of Homeland Security (“DHS”) component projects, including:

\$15 million . . . to support the construction of Border Patrol facilities in southwest border locations and the purchase of equipment for these facilities[;] . . . \$6 million to defray the costs of Title III court-ordered intercepts[;] . . . \$2.5 million to purchase a system to conduct multiple undercover operations online, simultaneously[;] . . . \$11 million for the purchase of equipment and tools to enhance [the Secret Service’s] protection capabilities, including metal detector equipment and X-ray equipment replacement[;] . . . \$6 million to acquire desktop and laptop computers to replace the aging inventory of computers for [Secret Service] task forces[;]” and \$1.5 million to purchase equipment which would allow the Coast Guard “to run fingerprints against other federal law enforcement databases.”<sup>95</sup>

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<sup>92</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-14-318, DHS ASSET FORFEITURE: ADDITIONAL ACTIONS COULD HELP STRENGTHEN CONTROLS OVER EQUITABLE SHARING (Mar. 2014), *See also* U.S. Department of the Treasury, Office of the Inspector General, OIG-16-033, *Financial Management: Audit of the Department of the Treasury’s Forfeiture Fund’s Fiscal Years 2014 and 2015 Financial Statements* (Feb. 1, 2016) at 9.

<sup>93</sup> *See* 31 U.S.C. § 9705(g)(4)(B) (“[A]ny unobligated balances remaining in the Fund on September 30, 1994, and on September 30 of each fiscal year thereafter, shall be available to the Secretary, without fiscal year limitation, for transfers pursuant to subparagraph (A)(ii) and for obligation or expenditure in connection with the law enforcement activities of any Federal agency or of a Department of the Treasury law enforcement organization.”) (footnote omitted).

<sup>94</sup> *Treasury Forfeiture Fund: FY 2017, President’s Budget*, DEPARTMENT OF THE TREASURY, <https://www.treasury.gov/about/budget-performance/CJ17/24.%20TEOAF%20FY%202017%20CJ.PDF> at 5.

<sup>95</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-14-318, DHS ASSET FORFEITURE: ADDITIONAL ACTIONS COULD HELP STRENGTHEN CONTROLS OVER EQUITABLE SHARING (Mar. 2014) at 19–21.



However, beginning in fiscal year 2009, TEOAF has been subject to increasing appropriations rescissions that have limited the availability of unobligated funds.<sup>96</sup> In fiscal year 2015, for the first time since the TFF's establishment, TEOAF was unable to declare a super surplus and did not anticipate being able to in fiscal year 2016, despite reported record forfeitures.<sup>97</sup> The following chart details these rescissions and several changes over time:

Dollars in Thousands

Treasury Forfeiture Fund Budgetary Resources	FY 2015		FY 2016		FY 2017		FY 2016 to FY 2017			
	Actual		Estimated		Estimated		\$ Change		% Change	
	FTE	AMOUNT	FTE	AMOUNT	FTE	AMOUNT	FTE	AMOUNT	FTE	AMOUNT
<b>Revenue/Offsetting Collections</b>										
Interest	0	955	0	1,000	0	1,000	0	0	0	0.00%
Restored Temporary Rescission	0	836,000	0	944,000	0	876,000	0	(68,000)	0	-7.20%
Restored Sequestration	0	124,923	0	399,291	0	97,302	0	(301,989)	0	-75.63%
Forfeiture Revenue	0	4,632,791	0	485,909	0	413,000	0	(72,909)	0	-15.00%
Recovery from Prior Years	0	25,567	0	3,588,568	0	30,000	0	(3,558,568)	0	-99.16%
Unobligated Balances from Prior Years	0	144,147	0	97,184	0	157,131	0	59,947	0	61.68%
<b>Total Revenue/Offsetting Collections</b>		<b>\$5,764,383</b>		<b>\$5,515,952</b>		<b>\$1,574,433</b>		<b>(\$3,941,519)</b>		<b>-71.46%</b>
<b>Expenses/Obligations</b>										
Asset Forfeiture										
Mandatory Obligations <sup>1</sup>	25	4,302,751	25	481,159	25	450,000	0	(31,159)	0	-6.48%
Secretary's Enforcement Fund	0	21,157	0	65,560	0	30,000	0	(35,560)	0	-54.24%
Super Surplus Obligations	0	0	0	0	0	0 <sup>2</sup>	0	0	0	N/A
<b>Total Expenses/Obligations</b>	<b>25</b>	<b>\$4,323,908</b>	<b>25</b>	<b>\$546,719</b>	<b>25</b>	<b>\$480,000</b>	<b>0</b>	<b>(\$66,719)</b>	<b>0</b>	<b>-12.20%</b>
<b>Rescissions/Cancellations</b>										
Sequestration Reduction	0	(399,291)	0	(97,302)	0	0 <sup>3</sup>	0	97,302	0	-100.00%
Temporary Rescission	0	(944,000)	0	(876,000)	0	0	0	876,000	0	-100.00%
Permanent Cancellation	0	0	0	(3,800,000)	0	(657,000)	0	3,143,000	0	-82.71%
Appropriations Precluded from Obligation	0	0	0	(38,800) <sup>4</sup>	0	(38,800)	0	0	0	0.00%
<b>Total Rescissions/Cancellations</b>		<b>(\$1,343,291)</b>		<b>(\$4,812,102)</b>		<b>(\$695,800)</b>		<b>\$4,116,302</b>		<b>-85.54%</b>
<b>Net Results</b>		<b>\$97,184</b>		<b>\$157,131</b>		<b>\$398,633</b>		<b>\$241,502</b>		<b>153.69%</b>

1. The Treasury Forfeiture Fund is staffed by Departmental Offices employees and positions are funded via reimbursable agreement.
2. Treasury is planning for a tentative \$100 million Super Surplus in FY 2017 and will submit a spend plan to Congress once more is known about actual collections and expenses. See pages 6-7 for additional details.
3. Treasury will calculate the FY 2017 sequestration reduction once the OMB Report to Congress on the Joint Committee Sequestration for Fiscal Year 2017 is released.
4. P.L. 114-113 cancelled \$3,800,000,000 of the \$3,838,800,000 forfeited in *United States v. BNPP, No. 14 Cr. 460 (S.D.N.Y.)*. Treasury is unable to obligate the remaining \$38,800,000 due to a provision in section 405, Title IV limiting the use of these funds.

Source: Treasury Forfeiture Fund: FY 2017, President's Budget, DEPARTMENT OF THE TREASURY.

Similarly, DOJ's AFF has not declared a super surplus since fiscal year 2012;<sup>98</sup> and as with the TFF, super surplus funds are largely entrusted to the agency's discretion.<sup>99</sup>

<sup>96</sup> See *id.* at 22.

<sup>97</sup> See OIG-16-033 at 7. See also CONG. RESEARCH SERV., R44649, TREASURY DEPARTMENT APPROPRIATIONS, FY2017 (2016).

<sup>98</sup> See U.S. Department of Justice, Office of the Inspector General, Audit Division 17-06, *Audit of the Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statements Fiscal Year 2016* (Dec. 2016) at 5.

### *Financial Institution Forfeitures*

Forfeiture growth has been fueled in part by settlements with financial institutions for violations of the BSA and U.S. sanctions. From 2009 to 2015, for example, federal financial regulators and DOJ “collected about \$5.1 billion in penalties fines, and forfeitures for various BSA violations.”<sup>100</sup> With respect to DOJ specifically, “[a]lmost all of [the \$3.6 billion collected from financial institutions] resulted from forfeitures, while about \$1 million was from fines.”<sup>101</sup> And in the sanctions context, the majority of the \$5.7 billion collected as of March 2016 came from a single “\$8.8 billion forfeiture and a \$140 million criminal fine” assessed against BNP Paribas.<sup>102</sup>

As discussed above, forfeited funds are treated differently from penalties. While the civil money penalties that the Office of Foreign Assets Control (“OFAC”) and FinCEN collected were deposited in the Treasury General Fund,<sup>103</sup> *forfeited funds*, as authorized by law, were not. For example, with respect to the abovementioned BNP enforcement action, GAO found that TEOAF has collected \$3.8 billion of the forfeited assets.<sup>104</sup> More broadly, from 2009 to 2015 “seven financial intuitions forfeited about \$5.7 billion in funds due to [BSA and sanctions violations],” all of which have been deposited in the TFF.<sup>105</sup> Additionally, over the same time period, “nine financial institutions forfeited about \$3.2 billion in funds through the Justice Asset Forfeiture

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<sup>99</sup> See 28 U.S.C. § 524(c)(8)(E) (“[A]ny excess unobligated balance remaining in the Fund on September 30, 1997 and thereafter shall be available to the Attorney General, without fiscal year limitation, for any Federal law enforcement, litigative/prosecutive, and correctional activities, or any other authorized purpose of the Department of Justice. Any amounts provided pursuant to this subparagraph may be used under authorities available to the organization receiving the funds.”).

<sup>100</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-297, FINANCIAL INSTITUTIONS: FINES, PENALTIES, AND FORFEITURES FOR VIOLATIONS OF FINANCIAL CRIMES AND SANCTIONS REQUIREMENTS (Mar. 2016) at 11.

<sup>101</sup> *Id.* at 14.

<sup>102</sup> *Id.* at 16–17.

<sup>103</sup> See *id.* at 22.

<sup>104</sup> See *id.* at 17.

<sup>105</sup> *Id.* at 28.

Program due to violations of BSA/AML and U.S. sanctions programs requirements.”<sup>106</sup> What is not rescinded is available for expenditure in accordance with law:

As of December 2015, DOJ was considering using approximately \$310 million in TFF forfeitures for victim compensation and, according to Treasury officials, Treasury had made approximately \$484 million in equitable sharing payments and obligated a further \$119 million for additional equitable sharing payments. As with the AFF, after Treasury obligates funds to cover program expenses, any TFF funds remaining at the end of a fiscal year, if not rescinded, may be declared an excess unobligated balance. These funds can be used to support a variety of law enforcement purposes, such as enhancing the quality of investigations.<sup>107</sup>

### *Congressional Reaction*

But, as discussed above, rescissions have limited the availability of such funds. These rescissions may be due, at least in part, to a view amongst legislators that appropriations structures like the TFF undermine Congress’s appropriations control. For example, in its report on H.R. 5485, the 2017 Financial Services and General Government Appropriations Act, the House Committee on Appropriations recommended a rescission of unobligated TFF funds:

The [TFF] can ensure resources are managed efficiently to cover the costs of an effective asset seizure and forfeiture program . . . but it must neither augment agency funding nor circumvent the appropriations process. Reliance on the [TFF] to offset the day-to-day operations, or to pay for new activities, creates an incentive to pursue cases suspected of high valued forfeitures rather than to target individuals or organizations that perpetrate the worst crimes against society.<sup>108</sup>

The concern regarding skewed incentives aligns with broader criticisms surrounding the overall increasing use of civil forfeiture in recent years, beyond just the BSA and sanctions context.<sup>109</sup>

As discussed above, asset forfeiture is hardly a new practice, and its rationale is grounded in a

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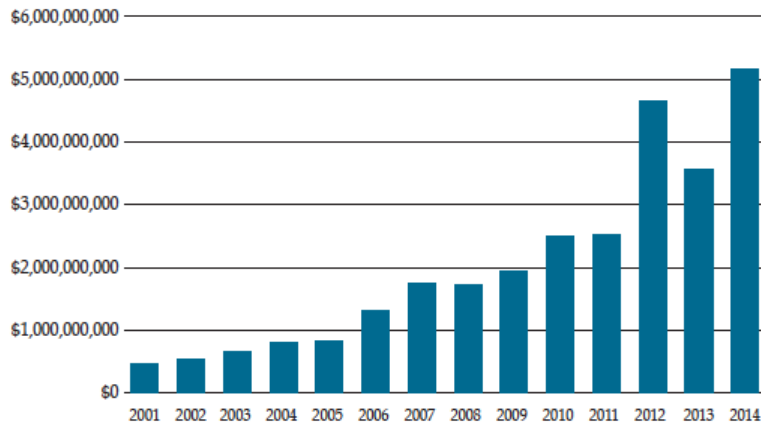
<sup>106</sup> *Id.* at 26.

<sup>107</sup> *Id.* at 29.

<sup>108</sup> H.R. REP. 114-694 (2016) at 19.

<sup>109</sup> See, e.g., Dick M. Carpenter II, Lisa Knepper, Angela C. Erickson, and Jennifer McDonald, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, INSTITUTE FOR JUSTICE (2d ed. 2015). See also John Malcolm, *Civil Asset Forfeiture: Good Intentions Gone Awry and the Need for Reform*, THE HERITAGE FOUNDATION (Apr. 20, 2015).

disgorgement objective.<sup>110</sup> But recent increases in forfeiture activity have generated a great deal of criticism.<sup>111</sup> It is estimated that the combined annual revenue of DOJ’s AFF and the TFF grew 1,000% from 2001 to 2014, totaling nearly \$29 billion over that span of time.<sup>112</sup>



Sources: DOJ Assets Forfeiture Fund Annual Financial Statements; Treasury Forfeiture Fund Accountability Reports.

Source: Dick M. Carpenter II, Lisa Knepper, Angela C. Erickson, and Jennifer McDonald, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, INSTITUTE FOR JUSTICE (2d ed., 2015).

As Darpana Sheth, an attorney for the libertarian public interest law firm Institute for Justice,<sup>113</sup> observed in testimony before the Senate Judiciary Committee:

[F]unding agencies outside the legislative appropriations process violates the separation of powers. The Appropriations Clause of the Constitution assigns to Congress the role of final arbiter of the use of public funds. . . . [C]urrent federal forfeiture law disarms the legislative branch. With forfeiture funds, police departments and prosecutors’ offices—members of the executive branch—become self-financing agencies, unaccountable to members of Congress or the public at large.<sup>114</sup>

<sup>110</sup> See, e.g., Nicholson, *The Culture of Under-Enforcement* at 348-51.

<sup>111</sup> See Carpenter et al., *Policing for Profit* at 10.

<sup>112</sup> See *id.*

<sup>113</sup> See, e.g., *The Need to Reform Asset Forfeiture, Hearing Before the S. Comm. on the Judiciary, 114th Cong.* (2015) (written statement of Darpana M. Sheth), <https://www.judiciary.senate.gov/imo/media/doc/04-15-15%20Sheth%20Testimony.pdf> at 75 (identifying the Institute for Justice as “the nation’s only libertarian public interest law firm”).

<sup>114</sup> *Id.* at 11–12.

Sheth argued that, among other reforms, congress should amend forfeiture laws to require that forfeited assets be deposited in the Treasury General Fund where they would once again be subject to the normal appropriations processes.<sup>115</sup> Such a reform—which would embody Stith’s Principle of Appropriations Control—would also presumably eliminate controversial equitable sharing practices.<sup>116</sup> As one commentary noted, “[h]ad the billions of dollars doled out through the equitable sharing program been subject to the rigorous oversight and review of the Congressional appropriations process, it is unlikely that funds would have been misspent.”<sup>117</sup> To that end, current bipartisan and bicameral legislation has been introduced which—if passed into law—would require all forfeited assets to be deposited into the Treasury General Fund, thus returning to the pre-1984 practice.<sup>118</sup>

### **Post-Financial Crisis Mortgage Settlements**

On December 3, 2015, *Wall Street Journal* columnist Kimberly Strassel reported that DOJ had used mortgage-related settlements to channel money to non-profit organizations, thereby sidestepping the congressional appropriations process. As Strassel explained:

[DOJ] is in the process of funneling more than half-a-billion dollars to liberal activist groups, at least some of which will actively support Democrats in the coming election. It works likes this: [DOJ] prosecutes cases against supposed corporate bad actors. Those companies agree to settlements that include financial penalties. Then [DOJ] mandates that at least some of that penalty money be paid in the form of “donations” to nonprofits that supposedly aid consumers and bolster neighborhoods. . . . To further induce companies to go the donation route,

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<sup>115</sup> *See id.* at 19.

<sup>116</sup> *See id.* at 7, 19 (“[U]nder the federal Equitable Sharing Program, federal authorities work with state or local law-enforcement agencies to seize property for a federal forfeiture action, and then “share” the proceeds”). *See also Enforcement Slush Funds: Funding Federal and State Agencies with Enforcement Proceeds*, U.S. CHAMBER OF COMMERCE, INSTITUTE FOR LEGAL REFORM (Mar. 2015), [http://www.instituteforlegalreform.com/uploads/sites/1/Enforcement\\_Slush\\_Funds\\_web.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/Enforcement_Slush_Funds_web.pdf)

<sup>117</sup> *The Need to Reform Asset Forfeiture* (written statement of Darpana M. Sheth) at 14.

<sup>118</sup> *See* Fifth Amendment Integrity Restoration Act of 2017, H.R. 1555 115th Cong. (2017); Fifth Amendment Integrity Restoration Act of 2017, S. 642 115th Cong. (2017). *See also* Jason Snead, *Rand Paul, Tim Walberg bring forfeiture reform to the 115th Congress*, THE HILL (Mar. 17, 2017).

Justice considers these handouts to be worth “double credit” against penalty obligations. So while direct forms of victim relief are still counted dollar-for-dollar, a \$500,000 donation . . . takes at least \$1 million off the company’s bill.<sup>119</sup>

These practices had been ongoing for several years. In its announcement of a settlement with Bank of America in August 2014, for example, DOJ noted that the settlement included “donations to assist communities in recovering from the financial crisis, and financing for affordable rental housing.”<sup>120</sup> And the House Judiciary Committee was already investigating these practices, observing in 2015 that “it appears that DOJ is systematically subverting Congress’s budget authority by using [mortgage-related] settlements to funnel money to favored activist groups.”<sup>121</sup> Though the overall practice of including in settlement agreements payments to third-parties is not new,<sup>122</sup> the extent and scale of the post-financial crisis provisions have raised fresh concerns (discussed below) regarding the propriety of this practice.

### *Settlement Provisions*

As discussed above, DOJ included donation provisions in post-financial crisis settlement agreements with financial institutions. These provisions—several of which are detailed below—required or allowed defendant financial institutions to make payments to third-party non-profit

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<sup>119</sup> Kimberly A. Strassel, *Justice’s Liberal Slush Fund: Legal Settlements Are Being Used to Funnel Millions to Left-Wing Activists Like La Raza*, WALL ST. J. (Dec. 3, 2015).

<sup>120</sup> *Bank of America to Pay \$16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis*, DEPARTMENT OF JUSTICE (Aug. 21, 2014), <https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading>.

<sup>121</sup> Letter to Attorney General Loretta E. Lynch (May 14, 2015), <https://judiciary.house.gov/wp-content/uploads/2016/02/051415-BG-JH-TM-SD-Letter-to-AG-Lynch.pdf>.

<sup>122</sup> See “*Stop Settlements Slush Funds Act of 2016*,” *Hearing Before the Subcomm. on Regulatory Reforms, Commercial and Antitrust Law, of the H. Comm. on the Judiciary*, 114th Cong. (Apr. 28, 2016) (statement of David M. Uhlmann, Jeffrey F. Liss Professor from Practice, Director, Environmental Law and Policy Program, University of Michigan Law School) (“During my tenure as [the Environmental Crimes Section] Chief, I approved scores of plea agreements that included community service terms, because that was the best way to ensure that the generalized harm that often occurs in environmental crimes was addressed by the defendant.”).

organizations instead of paying additional fines to the Treasury or direct restitution to victims.

The following provisions also illustrate how DOJ's practices evolved over time.

- *JP Morgan Chase*. On November 19, 2013, DOJ announced a \$13 billion settlement agreement between JP Morgan Chase (“JPMC”), DOJ, and numerous state and federal authorities.<sup>123</sup> As DOJ explained, the settlement—which at the time was “the largest settlement with a single entity in American history”—was “to resolve federal and state civil claims arising out of the packaging, marketing, sale and issuance of residential mortgage-backed securities.”<sup>124</sup> The agreement also required JPMC to undertake what DOJ identified as “efforts to reduce blight.”<sup>125</sup> The corresponding settlement provision allowed JPMC to pick one of four ways to satisfy these efforts, including the option to donate funds “to capitalize community equity restoration funds or substantially similar community redevelopment activities.”<sup>126</sup>
- *Citigroup*. On July 14, 2014, DOJ announced a \$7 billion settlement agreement between Citigroup, DOJ, and numerous state and federal authorities.<sup>127</sup> As DOJ explained, the settlement—which included a then-record setting \$4 billion FIRREA penalty—was intended “to resolve federal and state civil claims related to Citigroup’s conduct in the packaging, securitization, marketing, sale and issuance of residential mortgage-backed

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<sup>123</sup> *Justice Department, Federal and State Partners Secure Record \$13 Billion Global Settlement with JPMorgan for Misleading Investors About Securities Containing Toxic Mortgages*, DEPARTMENT OF JUSTICE (Nov. 19, 2013), <https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement>.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Settlement Agreement between DOJ and JP Morgan, Annex 2 (Nov. 19, 2013), Menu Item 4D, <https://www.justice.gov/iso/opa/resources/64420131119164759163425.pdf>.

<sup>127</sup> *Justice Department, Federal and State Partners Secure Record \$7 Billion Global Settlement with Citigroup for Misleading Investors About Securities Containing Toxic Mortgages*, DEPARTMENT OF JUSTICE (July 14, 2014), <https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement>.

securities.”<sup>128</sup> The agreement included relief in the form of “donations to organizations assisting communities in redevelopment.”<sup>129</sup> After accounting for \$2-for-\$1 credit for certain payments, the corresponding settlement provisions required Citigroup to pay at least approximately \$25 million for such efforts.<sup>130</sup> Notably, this included at least approximately \$5 million “to [Department of Housing and Urban Development]-approved housing counseling agencies to provide foreclosure prevention assistance and other housing counseling activities.”<sup>131</sup>

- *Bank of America*. On August 21, 2014, DOJ announced a \$16.65 billion settlement agreement between Bank of America (“BofA”), DOJ, and numerous state and federal authorities.<sup>132</sup> As DOJ explained, the settlement—which supplanted the 2013 *JP Morgan Chase* decision as the largest single-entity civil settlement in U.S. history<sup>133</sup> and included a new record-setting \$5 billion FIRREA penalty—was “to resolve federal and state claims against [BofA] and its former and current subsidiaries, including Countrywide Financial Corporation and Merrill Lynch.”<sup>134</sup> The agreement included relief in the form of “donations to assist communities in recovering from the financial crisis.”<sup>135</sup> After accounting for \$2-for-\$1 credit for certain payments, the corresponding settlement provisions required Citigroup to pay at least approximately \$50 million for such

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Settlement Agreement between DOJ and Citigroup, Annex 2 (July 14, 2014), Menu Items 4D, 4E, 4F, <http://www.justice.gov/iso/opa/resources/649201471413721380969.pdf>.

<sup>131</sup> Settlement Agreement between DOJ and Citigroup, Annex 2 (July 14, 2014), Menu Item 4F, <http://www.justice.gov/iso/opa/resources/649201471413721380969.pdf>.

<sup>132</sup> *Bank of America to Pay \$16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis*, DEPARTMENT OF JUSTICE (Aug. 21, 2014), <https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading>

<sup>133</sup> See Kevin McCoy and Kevin Johnson, *Bank of America agrees to nearly \$17B settlement*, USA TODAY (Aug. 20, 2014).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*



efforts.<sup>136</sup> In line with the Citigroup settlement, the BofA settlement included at least approximately \$10 million “to [Department of Housing and Urban Development (“HUD”)]-approved housing counseling agencies to provide foreclosure prevention assistance and other housing counseling activities.”<sup>137</sup>

Each agreement also included a liquidated damages provision requiring that, if the defendant financial institution “fails to live up to its agreement . . . it must pay liquidated damages in the amount of the shortfall to NeighborWorks America, a non-profit organization and leader in providing affordable housing and facilitating community development.”<sup>138</sup>

### *Congressional Reaction*

DOJ’s use of such donation provisions elicited a strong negative reaction from Congress. As discussed above, the Senate Judiciary Committee investigated the mortgage settlement practices and presented evidence that the donation provisions were initially suggested by several of the potential-recipient non-profits.<sup>139</sup> The Committee Members’ observations suggest that one of their chief concerns was violation of Stith’s Principle of Appropriations Control:

In 2011, Congress specifically cut funding to [HUD] for housing counseling grants that would go to entities like these. It would be deeply troubling if DOJ helped these or any other groups to circumvent Congress’s funding decisions so that money Congress denied would be restored at the unilateral discretion of the

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<sup>136</sup> Settlement Agreement between DOJ and Bank of America, Annex 2 (Aug. 21, 2014), Menu Items 3E, 3F, 3G, <https://www.justice.gov/iso/opa/resources/8492014829141239967961.pdf>.

<sup>137</sup> Settlement Agreement between DOJ and Bank of America, Annex 2 (Aug. 21, 2014), Menu Items 3G, <https://www.justice.gov/iso/opa/resources/8492014829141239967961.pdf>.

<sup>138</sup> See e.g., *Justice Department, Federal and State Partners Secure Record \$7 Billion Global Settlement with Citigroup for Misleading Investors About Securities Containing Toxic Mortgages*, DEPARTMENT OF JUSTICE (July 14, 2014). However, the BofA settlement seems to have required the liquidated damages to be split between NeighborWorks America and “organizations that will use the funds for state-based Interest on Lawyers’ Trust Account (IOLTA) organizations.” See also *Bank of America to Pay \$16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis*, DEPARTMENT OF JUSTICE (Aug. 21, 2014).

<sup>139</sup> See Letter to Attorney General Loretta E. Lynch (May 14, 2015).

Executive, on the advice and to the benefit of activist groups, through settlement agreements demanded from private parties.<sup>140</sup>

Chairman Grassley (R-IA) eventually accused DOJ of directly usurping Congress's appropriations power in violation of both the Principle of Appropriations Control and the Principle of the Public Fisc:

[DOJ] settled in 2013 and 2014 with [BoFA], Citigroup Inc., and [JPMC], for a total of \$36.65 billion. Pursuant to the settlement agreements, at least \$640 million of the penalties will be paid to third-party organizations instead of being deposited into the U.S. Treasury or paid to individuals who suffered harm. By diverting money from the U.S. Treasury, [DOJ] directed government funds absent an appropriation from Congress, thus usurping Congress's spending authority. . . . [DOJ] handpicked the third-party organizations—none of which have suffered harm—that could receive payments. [DOJ] made its selections through a non-public and unaccountable process that is void of any opportunity for oversight from Congress or transparency to the public. Moreover, the list of government-approved recipients includes organizations from which Congress cut funding in 2011, such as . . . NeighborWorks America. The Department has apparently used its settlement agreements to funnel money to left-leaning, politically active organizations, and to effectively restore funding to organizations that Congress deliberately defunded.<sup>141</sup>

And, in Grassley's view, DOJ's settlement practices "created opportunities for misuse of government funds . . . [because they] [did] not provide for any oversight of the third-party recipients' use of the settlement payments."<sup>142</sup> The House Judiciary Committee also reacted strongly, holding a number of hearings alongside the House Financial Services Committee.<sup>143</sup>

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<sup>140</sup> *Id.*

<sup>141</sup> Letter to Attorney General Loretta E. Lynch (Oct. 27, 2016), [https://www.judiciary.senate.gov/imo/media/doc/2016-10-27%20CEG%20to%20DOJ%20Lynch%20\(DOJ%20Mortgage%20Settlements\).pdf](https://www.judiciary.senate.gov/imo/media/doc/2016-10-27%20CEG%20to%20DOJ%20Lynch%20(DOJ%20Mortgage%20Settlements).pdf).

<sup>142</sup> *Id.* See also *Restoring the Power of the Purse: Shining Light on Federal Agencies Billion Dollar Fines Collections*, U.S. House of Representatives Committee on Oversight and Government Reform, Majority Staff Report (Nov. 30, 2016), <https://oversight.house.gov/wp-content/uploads/2016/11/Fines-and-Penalties-Report-11-28-2016-FINAL.pdf> at 8.

<sup>143</sup> See *Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriations Powers?: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 114th Cong. (May 19, 2016); "Stop Settlements Slush Funds Act of 2016:" *Hearing Before the Subcomm. on Regulatory Reforms, Commercial and Antitrust Law, of the H. Comm. on the Judiciary*, 114th Cong. (Apr. 28, 2016); *Consumers Shortchanged? Oversight of the Justice Department's Mortgage Lending Settlements: Hearing Before the Subcomm. on Regulatory Reforms, Commercial and Antitrust Law, of the H. Comm. on the Judiciary*, 114th Cong. (Feb. 12, 2015).

Congress also responded by introducing bipartisan bicameral legislation aimed at restricting DOJ’s ability to include donation provisions in settlements.<sup>144</sup> Specifically, the Stop Settlement Slush Funds Act of 2017 would prohibit the government from entering into or enforcing any settlement agreement including provisions for non-restitutionary payments to third parties.<sup>145</sup> Notably, the bill defines “settlement agreement” to include deferred or non-prosecution agreements.<sup>146</sup> The bill references the MRS, imposing the same penalties for a violation.<sup>147</sup> Additionally, the bill includes a reporting provisions requiring each federal agency to report to the Congressional Budget Office the details of any settlements with non-prohibited restitutionary provisions.<sup>148</sup> It also requires all respective Inspector General offices to alert Congress of any potentially violative settlement agreements.<sup>149</sup> As the House Judiciary Committee noted in its Committee Report accompanying an earlier version of the bill, Congress’s chief concern was enforcing Stith’s twin appropriations principles:

The purpose of DOJ enforcement actions should be punishment and redress to actual victims. Carrying that concept to communities at large or community groups, *however worthy*, is a matter for the Legislative branch and is not to be conducted at the unilateral discretion of the Executive. . . . The Executive Branch negotiates settlements, but Congress gets to decide how to allocate the money recovered. . . . DOJ has the power “to short circuit the [MRS] by agreeing to settlement terms that require the violator of a Federal statute to undertake certain responsibilities or actions that might inure to the benefit of the executive branch.” Thus, [DOJ] could effectively “augment the appropriations of the Executive Branch without running afoul of the technical requirements of the [MRS]—although creating an unconstitutional interference with Congress’ appropriations

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<sup>144</sup> See Stop Settlement Slush Funds Act of 2017, H.R. 732, 115th Cong. (2017); Stop Settlement Slush Funds Act of 2017, S. 333, 115th Cong. (2017).

<sup>145</sup> See *id.* Section 2 of the bill specifies that: “An official or agent of the Federal Government may not enter into or enforce any settlement agreement on behalf of the United States, directing or providing for a payment or loan to any person or entity other than the United States, other than a payment or loan that provides restitution for or otherwise directly remedies actual harm (including to the environment) directly and proximately caused by the party making the payment or loan or constitutes payment for services rendered in connection with the case, or a payment pursuant to section 3663 of title 18, United States Code.”

<sup>146</sup> See *id.*

<sup>147</sup> See *id.* See also 31 U.S.C. § 3302.

<sup>148</sup> See *id.*

<sup>149</sup> See *id.*

power.” That is precisely what has happened. . . . The subversion of Congress’ spending power can take several forms. In some cases, mandatory donation provisions reinstate funding Congress specifically cut. In others, funding is not reinstated, but funding decisions that should properly be made only by an accountable Congress are instead made at the unilateral discretion of the Executive. In both cases, it is not only Congress that is sidestepped, but also the standard grant-oversight process that ensures money is spent as intended. . . . The beneficiaries of mandatory donation provisions may or may not be worthy, non-partisan entities, but that is entirely beside the point. Under our system of government, Congress gets to decide how money is spent, not DOJ. . . . It is not that DOJ officials are necessarily funding bad projects, it is that, outside of securing compensation for actual victims, it is not their decision to make.<sup>150</sup>

To date, neither of the bills has become law. However, as of June 2017, Attorney General Jeff Sessions broadly prohibited DOJ attorneys from entering any agreement “that directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute.”<sup>151</sup>

Defenders of the donation provisions have taken aim at the House Judiciary Committee’s characterization that they represent an unlawful reach of executive power into Congress’s constitutional domain. For example, Professor David K. Min has noted the similarities between the mortgage settlement practices and the EPA’s use of SEPs.<sup>152</sup> Professor Min also argued that there was a clear nexus between the donation provisions—which he identifies as remedial in nature—and the underlying harm that gave rise to the enforcement action:

It is easy to see a clear nexus between the alleged fraud that took place in the sale and marketing of private-label MBS and the remedial goals of preventing foreclosures and/or limiting the destabilizing and wealth-eroding effects of large numbers of defaults. To the extent that some of the potential recipients of these

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<sup>150</sup> H.R. REP. 114–694 at 2–9 (2016).

<sup>151</sup> U.S. Department of Justice, Office of the Attorney General, *Prohibition on Settlement Payments to Third Parties* (June 5, 2017), <https://www.justice.gov/opa/press-release/file/971826/download>.

<sup>152</sup> See *Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriations Powers?: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 114th Cong. (May 19, 2016) (statement of David K. Min, Assistant Professor of Law at University of California Irvine School of Law) (observing that “the federal government has crafted a wide variety of settlements with terms providing for payments to private charitable groups. Indeed, the [EPA] has expressly encouraged the use of such provisions in settlements (which it calls . . . SEPs), stating that enforcement staff should ‘consider every opportunity to include more environmental significant SEPs wherever possible.’”).

donations might be described as ideologically liberal, this seems to be due primarily to the fact that these provisions were focused on foreclosure prevention and neighborhood stabilization. The fact is that the particular charities that have been certified as potential recipients of these donations are the ones that are most effective at delivering information and assistance to the low- and moderate-income homeowners who were hit hardest by the mortgage crisis. . . . The types of services that these organizations offer, including legal aid and housing counseling, have been empirically proven to be among the most effective means of preventing preventable foreclosures.<sup>153</sup>

Opponents of the Stop Settlement Slush Funds Act of 2017 have also noted that the donation provisions “arise from [DOJ’s] statutory enforcement authority under FIRREA and have a substantial prosecutorial nexus to the underlying conduct giving rise to the claim (i.e., foreclosure prevention).”<sup>154</sup> Professor Min has also suggested that DOJ’s broad discretion in how it chooses to settle cases—and the president’s Article II powers—counter arguments that third-party payment provisions are impermissible.<sup>155</sup> Another potential legislative avenue to restrict these settlement provisions can be found in Section 393 of House Financial Services Chairman Jeb Hensarling’s (R-TX) comprehensive financial services reform legislation, the Financial CHOICE Act.<sup>156</sup> To date, however, the bill has only passed in the House of Representatives.<sup>157</sup>

### **Consumer Financial Protection Bureau**

The CFPB was created by Title X the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”).<sup>158</sup> Established in the wake of the 2008 financial crisis, the CFPB is statutorily charged with “seek[ing] to implement and, where applicable, enforc[ing]

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<sup>153</sup> *Id.*

<sup>154</sup> H.R. REP. 114–694 at 27 (2016).

<sup>155</sup> *See id.* *See also* Andrew Brady Spalding, *Restorative Justice for Multinational Corporations*, 76 OHIO ST. L.J. 357, 394–95 (2015) (“The Comptroller General essentially conceded that [using a portion of civil settlements to fund community service projects] could actually fall within the Executive’s legitimate enforcement authority and not run afoul of either Congress’s Article I power of the purse or the [Miscellaneous Receipts statute].”).

<sup>156</sup> *See* Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017).

<sup>157</sup> *See* Steve Eder, Jessica Silver-Greenberg and Stacey Cowley, *Republicans Want to Sideline This Regulator. But It May Be Too Popular*, N.Y. TIMES (Aug. 31, 2017) (“A vote has not been scheduled in the Senate.”).

<sup>158</sup> P.L. 111–203, Title X. 124 Stat. 1955.

Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.”<sup>159</sup> The CFPB possesses numerous characteristics of agency design that make it unusually independent; for example, the CFPB’s funding is not presently subject to the normal appropriations process.<sup>160</sup> And, though it is subject to an overall funding ceiling, the CFPB is effectively self-funded and retains an unusually high degree of independence in formulating its operational budget.<sup>161</sup> Mechanically, the CFPB is funded by transfers it requests from the Federal Reserve:

[T]he CFPB is funded principally by transfers from the Board of Governors of the Federal Reserve System [“Fed”] up to a limit set forth in the statute. The CFPB requests transfers from the [Fed] in amounts that are reasonably necessary to carry out its mission. Funding is capped at a pre-set percentage of the total 2009 operating expenses of the Federal Reserve System, subject to an annual adjustment. . . . *[Dodd-Frank] explicitly provides that Bureau funds obtained by or transferred to the CFPB are not Government funds or appropriated funds.*<sup>162</sup>

As discussed earlier, an agency’s position outside the appropriations process gives it considerable independence from Congress. Thus, as one commentator noted:

Backers of the CFPB deliberately selected self-funding as a tool for reducing congressional influence. It is unsurprising that Congress would create a traditional independent agency, over which it retains relatively more power than the President. In contrast, when Congress also provides an independent agency with self-funding, it opts to reduce its own power. However, the CFPB’s congressional

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<sup>159</sup> Dodd-Frank Act § 1021.

<sup>160</sup> See, e.g., David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446, 1488 (2014) (“Many individual features of the CFPB are not unique. Other regulators with broad powers, such as EPA, are led by a single administrator. For some regulatory bodies headed by one person, the director is appointed to a fixed term and may be removed only for cause. Various financial services regulators also enjoy substantial autonomy from the budgetary appropriation process. However, the combination of protections afforded by Dodd-Frank makes the CFPB unique. The bundle of autonomy mechanisms, along with the independent-agency-within-an-independent-agency structure, gives the CFPB unmatched insulation from the accountability devices that apply to all other federal regulators.”).

<sup>161</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-59, PERMANENT FUNDING AUTHORITIES: SOME SELECTED ENTITIES SHOULD REVIEW FINANCIAL MANAGEMENT, OVERSIGHT, AND TRANSPARENCY POLICIES (Dec. 2016).

<sup>162</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-138R, FINANCIAL AUDIT: BUREAU OF CONSUMER FINANCIAL PROTECTION’S FISCAL YEARS 2016 AND 2015 FINANCIAL STATEMENTS (Nov. 2016) at 60 (emphasis added).

supporters likely chose to reduce their own control because they expected future preference divergence and sought to limit the influence of future Congresses.<sup>163</sup>

For the purposes of this paper, however, the CFPB’s penalty retention authority is particularly relevant and will be discussed further below.

### *Civil Penalty Fund*

Just as the CFPB’s structure possesses unique attributes of independence, so too do its penalty authorities. Dodd-Frank created and empowered the CFPB to administer a Consumer Financial Civil Penalty Fund (“CPF”) funded by fines imposed for violations of relevant requirements.<sup>164</sup> As the CFPB explains:

When a person or company violates a federal consumer financial protection law, [CFPB] can bring an enforcement proceeding against them. If that person or company is found to have violated the law, it may have to pay a civil penalty, also known as a civil money penalty. When [CFPB] collects civil penalties, it deposits them in the Civil Penalty Fund.<sup>165</sup>

Thus, unlike the banking regulators discussed above, the CFPB is statutorily authorized to retain *civil money penalties* which it deposits in the CPF.<sup>166</sup> As Professor Cox noted, “unlike SEC Fair Funds, [the CPF] allows CFPB assessed penalties to be distributed in later cases when the agency is unable to collect ordered public compensation from the enforcement defendant.”<sup>167</sup> According to the GAO, the SEC confirmed that assets in a Fair Fund cannot be used to compensate victims

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<sup>163</sup> *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822, 1841 (2012). See also Charles Kruly, *Self-Funding and Agency Independence*, 81 GEO. WASH. L. REV. 1733, 1736–40 (2013) (“Congress is always free to pass non-appropriations legislation intended to constrain an agency, and members of Congress may also channel their frustrations through oversight hearings or public scrutiny. The process of passing substantive legislation is often more politically difficult, however, than the process of passing appropriations legislation.”).

<sup>164</sup> Dodd-Frank Act § 1021, codified at 12 U.S.C. § 5497(d) and implemented at 12 C.F.R. Part 1075.

<sup>165</sup> *Civil Penalty Funds: Frequently Asked Questions*, CONSUMER FINANCIAL PROTECTION BUREAU (Dec. 7, 2015), [http://files.consumerfinance.gov/f/201512\\_cfpb\\_faqs\\_cpf.pdf](http://files.consumerfinance.gov/f/201512_cfpb_faqs_cpf.pdf) at 1.

<sup>166</sup> See *Financial Report of the Consumer Financial Protection Bureau: Fiscal Year 2016*, CONSUMER FINANCIAL PROTECTION BUREAU (Nov. 15, 2016), [http://files.consumerfinance.gov/f/documents/112016\\_cfpb\\_Final\\_Financial\\_Report\\_FY\\_2016.pdf](http://files.consumerfinance.gov/f/documents/112016_cfpb_Final_Financial_Report_FY_2016.pdf) at 28–29.

<sup>167</sup> Cox, *Public Enforcement Compensation* at n.196.

in an unrelated case.<sup>168</sup> Additionally, though the CPF's primary goal is to financially compensate victims of the activities that were the subject of the relevant enforcement action, the CFPB is statutorily-authorized<sup>169</sup> to spend leftover unobligated funds for educational purposes:

Under the Act, funds in the Civil Penalty Fund may be used for payments to the victims of activities for which civil penalties have been imposed under the Federal consumer financial laws. To the extent that such victims cannot be located or such payments are otherwise not practicable, the Bureau may use funds in the Civil Penalty Fund for the purpose of consumer education and financial literacy programs.<sup>170</sup>

This authority indicates that two rationales may be at work with respect to the CPF. On the one hand, the CPF has a clear remediation objective to compensate victims of violative conduct. On the other hand, the fact that remaining money is available to fund education initiatives—one of the CFPB's main functions<sup>171</sup>—suggests that the CPF also has an agency-funding function.

The CPF's balance is held in an account at the Federal Reserve Bank of New York.<sup>172</sup> According to the GAO, “[t]he administrators of the [CPF] are not involved in CFPB decisions to initiate or settle [enforcement] actions.”<sup>173</sup> As of September 30, 2016, the CPF had received over of \$524 million cash in penalties, and had a balance of \$170 million.<sup>174</sup> As can be seen in the chart below, this balance remains quite small compared to the SEC's FY2016 Fair Funds activities.<sup>175</sup> The CPF total penalty figure almost certainly includes the recent \$100 million

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<sup>168</sup> See GAO-14-551 at 17, n.31 (“The Fair Funds are not used for any other purpose than to compensate harmed investors, and only victims who were harmed by the violators against whom the action was brought may be compensated. SEC staff told us that money from the Fair Funds cannot be pooled to compensate other victims.”).

<sup>169</sup> See 12 U.S.C. § 5497(d)(2).

<sup>170</sup> *Financial Report of the Consumer Financial Protection Bureau: Fiscal Year 2016* at 28.

<sup>171</sup> See 12 U.S.C. § 5511(c)(1). See also *The Bureau*, CONSUMER FINANCIAL PROTECTION BUREAU, accessed on May 4, 2017, <https://www.consumerfinance.gov/about-us/the-bureau>.

<sup>172</sup> See *Audit Report: The CFPB's Civil Penalty Fund Victim Identification Process Is Generally Effective but Can Be Enhanced*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, OFFICE OF THE INSPECTOR GENERAL, 2016-FMIC-C-001 (Jan. 19, 2016), <https://oig.federalreserve.gov/reports/cfpb-civil-penalty-fund-jan2016.pdf> at 1.

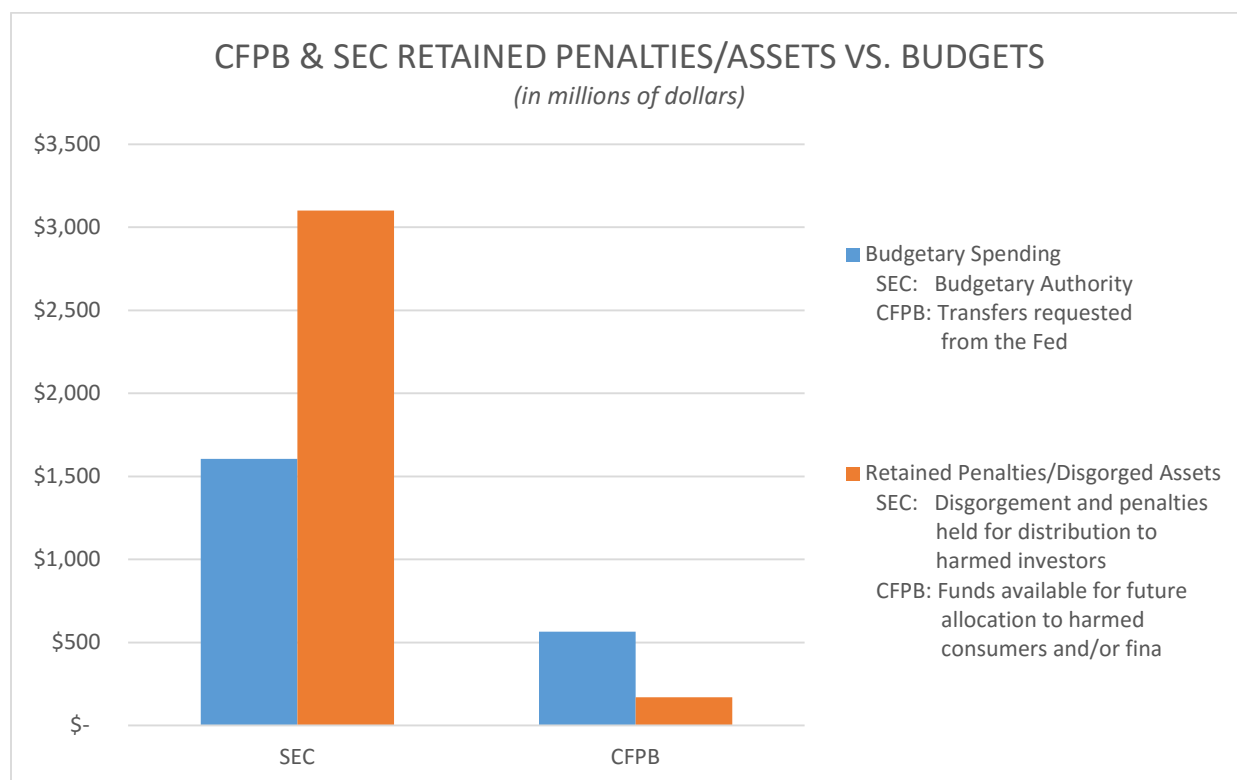
<sup>173</sup> GAO-17-59 at 9.

<sup>174</sup> See *Financial Report of the Consumer Financial Protection Bureau: Fiscal Year 2016* at 29.

<sup>175</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-158R, FINANCIAL AUDIT: SECURITIES AND EXCHANGE COMMISSION'S FISCAL YEARS 2016 AND 2015 FINANCIAL STATEMENTS (Nov. 2016); U.S. GOV'T ACCOUNTABILITY



penalty that CFPB imposed on Wells Fargo for its employees practices of “covertly opening accounts and funding them by transferring funds from consumers’ authorized accounts without their knowledge or consent, often racking up fees or other charges.”<sup>176</sup> Additionally, as of September 30, 2016, over \$320 million had been paid out of the CPF to victims and nearly \$29 million had been spent on consumer education and financial literacy programs.<sup>177</sup> Though information on these programs is limited, the CFPB indicated that its first effort focused on “financial coaching” for veterans and their families as well as “economically vulnerable consumers who want to improve their approach to money management.”<sup>178</sup>



OFF., GAO-17-138R, FINANCIAL AUDIT: BUREAU OF CONSUMER FINANCIAL PROTECTION'S FISCAL YEARS 2016 AND 2015 FINANCIAL STATEMENTS (Nov. 2016).

<sup>176</sup> *Consumer Financial Protection Bureau Fines Wells Fargo \$100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts*, CONSUMER FINANCIAL PROTECTION BUREAU (Sept. 6, 2016), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts>.

<sup>177</sup> See *Financial Report of the Consumer Financial Protection Bureau: Fiscal Year 2016* at 29–30

<sup>178</sup> See *Civil Penalty Fund*, CONSUMER FINANCIAL PROTECTION BUREAU, accessed on Mar. 17, 2017, <https://www.consumerfinance.gov/about-us/payments-harmed-consumers/civil-penalty-fund>.

*Data Sources:* U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-158R, FINANCIAL AUDIT: SECURITIES AND EXCHANGE COMMISSION'S FISCAL YEARS 2016 AND 2015 FINANCIAL STATEMENTS (Nov. 2016); U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-138R, FINANCIAL AUDIT: BUREAU OF CONSUMER FINANCIAL PROTECTION'S FISCAL YEARS 2016 AND 2015 FINANCIAL STATEMENTS (Nov. 2016).

### *Congressional Reaction*

Many lawmakers—especially Republicans—have made efforts to restrict or eliminate the CFPB. For example, in October 2013, then-Representative Shelley Moore Capito (R-WV) introduced the CFPB Slush Fund Elimination Act of 2013 which would have required CFPB to remit all civil money penalties it collected to the Treasury General Fund.<sup>179</sup> At a subcommittee hearing she chaired in 2014, then-Representative Capito observed:

My issue is not that [CFPB] is collecting these fines. My issue is that the taxpayers would be better served if these fines were remitted to the Treasury to pay down the historic national debt. My legislation simply states that funds currently held in the [CPF] should be remitted to the Treasury, and all future fines levied by [CFPB] should be remitted directly to the Treasury. This approach maintains the ability of [CFPB] to fine the bad actors while providing a direct benefit to the taxpayers.<sup>180</sup>

House Financial Services Committee Chairman Jeb Hensarling (R-TX) included a similar provision in his comprehensive financial regulatory reform bill, the Financial CHOICE Act of 2017.<sup>181</sup> Specifically, Section 722 would permit payment from the CPF to specifically-identifiable victims, but would require any remaining funds to be deposited in the Treasury General Fund after two years.<sup>182</sup> However, as noted above, the bill has only passed in the House of Representatives.<sup>183</sup>

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<sup>179</sup> See CFPB Slush Fund Elimination Act of 2013, H.R. 3389, 113th Cong. (2013).

<sup>180</sup> *Legislative Proposals to Improve Transparency and Accountability at the CFPB: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 113th Cong. (May 21, 2014), <http://financialservices.house.gov/uploadedfiles/113-82.pdf> at 2.

<sup>181</sup> See Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017).

<sup>182</sup> See *id.*

<sup>183</sup> See Steve Eder, Jessica Silver-Greenberg and Stacey Cowley, *Republicans Want to Sideline This Regulator. But It May Be Too Popular*, NY TIMES (Aug. 31, 2017) (“A vote has not been scheduled in the Senate.”).

## CONCLUSION

Recent financial enforcement actions and the funds that are surrendered as a result of them have grown to such a level that they now rival total appropriations for certain federal agencies.<sup>184</sup> And while their scale has drawn attention in the context of regulatory policy, it also implicates federal appropriations law and separation of powers principles. As outlined in this paper, what happens to the attendant funds can vary significantly depending, for example, on what agency brought the action, whether the funds were forfeited assets or were simply fines, and whether the funds were ever even in the government's possession because they were the result of a third-party payment settlement provisions. Though this paper does not take a policy position for or against such practices, the steady centrality that enforcement penalties have played for decades<sup>185</sup> suggests that these issues will remain of considerable interest and warrant attention.

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<sup>184</sup> See OFFICE OF MGMT. & BUDGET, AMERICA FIRST at 50.

<sup>185</sup> See, e.g., Diver, *The Assessment and Mitigation of Civil Money Penalties* at 1436. See also Minzner, *Should Agencies Enforce?* at 2113–14.