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Investing in Integration? A Fair Housing Review of the Multi-Billion Dollar Bank Settlements

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I. Introduction

This policy brief examines the three recent multi-billion dollar settlements reached by the U.S. government with J.P. Morgan, Citibank, and Bank of America in the context of the government's duty, under the Fair Housing Act, to promote residential integration in its housing programs and investments. This legal duty to "affirmatively further fair housing" applies to all of the government entities involved in the bank settlements, including the Treasury Department, the Department of Housing & Urban Development (HUD), the Department of Justice (DOJ), and the seven state parties to the settlements.

This fair housing impact analysis of the multi-billion dollar settlements was prompted by the unique incentive provision built into the Citibank and Bank of America settlements, encouraging the banks to invest heavily in affordable rental housing in "areas of opportunity" – the types of communities that have traditionally excluded housing for low-income families:[3]

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3 *See, e.g.* Jenny Schuetz, Joint Center for Housing Studies, Harvard University, Guarding the Town Walls: Mechanisms and Motives for Restricting Multifamily Housing in Massachusetts (2006), *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w06-3_schuetz.pdf.

Each bank will receive $3.75 of settlement credit for every $1.00 **loss in financing the "construction, rehabilitation, or preservation of Critical Need Family Housing developments"**[4] **within Small Area Difficult Development Areas**[5] **or State-Defined High-Opportunity/Low-Poverty Areas,** provided that none of the development units have age restrictions for any of the occupants.[6]

Each bank will receive $3.75 of settlement credit for every $1.00 loss in multi-family housing financing.

As will be described below, this is the strongest incentive provision in both settlement agreements, measured in "settlement credit" per dollar of loss,[7] and it has the capacity to lead to the investment of as much as $3.34 billion dollars in desegregated housing opportunities for low-income families.[8]

The presence of this settlement provision, clearly intended to "affirmatively further fair housing," raises the question of how the remainder of these massive settlements affect fair

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4 Under the settlement terms, "Critical Need Family Housing developments" are "developments that are equivalent to affordable housing developed through [the low-income Housing Tax Credit]." ("For example, developments eligible for Credits (i) must have at least 20% of the residential units affordable up to 50% AMI or at least 40% of the units affordable up to 60% AMI, (ii) must have a Land Use Restriction Agreement for at least 30 years, and (iii) must agree to accept Housing Choice vouchers. Other features also must be equivalent to affordable housing developed through LIHTC.") Bank of America Settlement Agreement, Annex 2: Consumer Relief at 8 (Aug. 20, 2014), *available at* http://www.justice.gov/iso/opa/resources/8492014829141239967961.pdf [hereinafter Bank of America Annex 2]; Citigroup Settlement Agreement, Annex 2: Consumer Relief at 13 (July 14, 2014), *available at* http://www.justice.gov/iso/opa/resources/649201471413721380969.pdf [hereinafter Citigroup Annex 2].

5 Jim Kroger & Phil Wang, *Difficult Development Area Changes in 2015*, Novogradac J. of Tax Credits, Dec. 2014, http://www.novoco.com/journal/2014/12/news_lihtc_201412.php.

6 Bank of America Annex 2, *supra* note 4, at 8; Citigroup Settlement Annex 2, *supra* note 4, at 13. As will be discussed, a related provision in these settlements providing $3.25 settlement credit dollars for other multi-family developments could affirmatively further fair housing or exacerbate housing segregation, depending on the geographic location of these potential properties.

7 However, the Bank of America settlement, like the J.P. Morgan settlement, provides a lump sum "settlement credit" of $10,000 under the "Low to Moderate Income and Other Lending" provision regardless of the amount of the loan (the J.P. Morgan settlement mandates that the loan be for a minimum value of not less than $1,500) and absent the requirement that either bank lose money on the transaction. Thus, Bank of America could hypothetically make a loan of $1,000 to a qualified borrower under the settlement criteria and receive a $10,000 "settlement credit," which amounts to a 10 to 1 settlement credit. But for Bank of America to receive this degree of settlement credit per dollar of credit actually extended, it would have to originate purchase money loans for a portion of $10,000 to borrowers who meet the criteria. Purchase money loans above $10,000 would still only qualify for a $10,000 lump sum settlement credit, meaning that Bank of America would receive less than $1 of "settlement credit" per actual dollar of financing extended. Thus, the $3.75 "settlement credit" dollars per $1.00 of financing loss for multi-family developments – which does not have any cap in credit per transaction or in aggregate under the settlement – is the strongest incentive in the "Consumer Relief" portions of the Bank of America and Citigroup settlements for "settlement credit" per actual dollar extended by the banks. Bank of America Annex 2, *supra* note 4, at 6; J.P. Morgan Settlement Agreement, Annex 2: Consumer Relief at 4 (Nov. 19, 2013), available at http://www.justice.gov/iso/opa/resources/64420131119164759163425.pdf [hereinafter J.P. Morgan Annex 2]; *see also* Citigroup Settlement Annex 2, *supra* note 4, at 10.

8 The figure of approximately $3,344,695,562.18 is based on the minimum settlement allocation mandates in each settlement, the presumption that each bank will seek to maximize the settlement credit value of

housing goals overall. This Policy Brief will examine both the overall structure and specific provisions of the multi-billion dollar settlements from the perspective of their potential to reduce racial and economic segregation and improve conditions and access to community assets in racially-concentrated areas. *However, much of the future impact of the settlements depends upon how the banks exercise their discretion under the more open-ended sections of the agreements and how successful the states and community-based housing organizations are at partnering with the banks to steer the funds towards developments and initiatives that affirmatively further fair housing.*

Much of the future impact of the settlements depends upon how the banks exercise their discretion.

Ensuring that these settlements adhere to the federal government's obligation to affirmatively further fair housing is significant from both a legal and policy viewpoint, because while the primary claims in the settlements were over alleged fraud and materially misleading statements and representations in the securitization of Residential Mortgage-Backed Securities (RMBS) and collateralized debt obligations (CDOs), there were also significant violations related to both the banks' direct and third-party due diligence of the mortgage origination and underwriting practices of the loans.[9] Thus, the banks – or entities that they acquired – deviated from their internal mortgage origination and underwriting practices by making loans that the homeowners could not afford, which were then securitized.[10] In addition to these direct violations, the banks also failed to meet their third-party due diligence and disclosure obligations to investors through a pattern of disregarding or concealing non-conforming loans purchased from other banks and brokers to securitize.[11]

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each dollar, and the settlement credit values assigned to each element provision of the settlement. This approximate figure could be considerably less if the banks only satisfy their minimum required investment in multi-family housing. For instance, J.P. Morgan has not spent any of its settlement credit dollars on multi-family developments, according to the most recent report of the settlement monitor. Joseph A. Smith, Jr., Chase RMBS Settlement: Consumer Relief Update 3 (2014), *available at* https://www.jasmithmonitoring.com/chase/wp-content/uploads/sites/3/2014/12/Chase-RMBS-Progress-Report-12_15.pdf [hereinafter Chase RMBS Settlement: Consumer Relief Update 3]. Unlike Bank of America and Citigroup, J.P. Morgan does not have any minimum settlement requirement for these developments. See the Appendix for a more detailed explanation of the calculation.

9 Bank of America Settlement Agreement, Annex 1: Statement of Facts at 1-2 (Aug. 20, 2014), *available at* http://www.justice.gov/iso/opa/resources/4312014829141220799708.pdf [hereinafter Bank of America Settlement Statement of Facts]; Citigroup Settlement Agreement, Statement of Facts at 1-2 (July 14, 2014), *available at* http://www.justice.gov/iso/opa/resources/558201471413645397758.pdf [hereinafter Citigroup Settlement Statement of Facts]; J.P. Morgan Settlement Agreement, Annex 1: Statement of Facts at 1-7 (Nov. 19, 2013), *available at* http://www.justice.gov/iso/opa/resources/9432013111915103199O622.pdf [hereinafter J.P. Morgan Settlement Statement of Facts].

10 All three banks were implicated in direct mortgage origination or underwriting violations, in which the bank, or an entity it acquired, was the principal financial entity originating non-conforming loans. Bank of America Settlement Statement of Facts, *supra* note 9, at 2, 6, 17; Citigroup Settlement Statement of Facts, *supra* note 9, at 1; J.P. Morgan Settlement Statement of Facts, *supra* note 9, at 10.

11 Bank of America Settlement Statement of Facts, *supra* note 9, at 1-2; Citigroup Settlement Statement of Facts, *supra* note 9, at 1-5; J.P. Morgan Settlement Statement of Facts, *supra* note 9, at 1-7.

Part of the structural policy change necessary to avert another housing and financial crisis is achievement of housing integration.

There is also a direct connection between the securities and banking law violations and violations of the fair lending laws.[12] A disproportionate share of impacted consumers were racial and ethnic minorities in residentially segregated neighborhoods, where they were especially vulnerable to predatory lending both because they were historically underserved by traditional financial institutions and spatially concentrated.[13] Thus, part of the structural policy change necessary to avert another housing and financial crisis is achievement of housing integration through the full realization of the government's obligation to affirmatively further fair housing and full compliance with anti-discrimination laws in housing and lending.[14]

12 *See, generally* Kathleen C. Engel & Patricia A. McCoy, *The Subprime Virus: Reckless Credit, Regulatory Failure, and Next Steps* (2011); *U.S. Fin. Crisis Inquiry Comm'n, Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* 389 (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf.

13 As the housing boom increased, subprime loans rapidly went from comprising 1 in 10 mortgages in 1998 to almost 1 in 4 in 2006, because subprime loans were more profitable to securitize. *Subprime Mortgage Origination Indicators*, Inside B&C Lending, Nov. 10, 2006. Based on an analysis by the Wall Street Journal, a majority of subprime borrowers – 6 out of every 10 – were eligible to receive prime loan rates based on their credit score. Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy: As Housing Boomed, Industry Pushed Loans to a Broader Market*, Wall St. J., Dec. 3, 2007, at A1. African American borrowers were statistically more likely to receive these subprime loans than white borrowers with comparable credit qualifications, down payment ratios, and residential property locations. Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, *75 Am. Soc. Rev. 629, 632-33* (2010), *available at* http://blogs.reuters.com/felix-salmon/files/2010/10/10ASR10_629-651_massey-2.pdf. An analysis of data reported under the Home Mortgage Disclosure Act determined that while prime loans comprise 70 percent of all mortgage loans, and 57 percent of such lending in lower-income census tracts, the proportion of prime loans going to African Americans in predominantly African American neighborhoods is only 27.7 percent. *William C. Apgar & Allegra Calder, The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending 110-11, in The Geography of Opportunity: Race & Housing Choice in Metropolitan America* (Xavier de Souza Briggs ed., 2005). In addition to being more likely to receive a subprime loan than similarly situated white borrowers, minority borrowers are also more likely to receive loans with adverse features like prepayment penalties and balloon payments. A HUD study of loans underwritten by the Federal Housing Administration found that African American and Latino borrowers paid on average more in loan fees ($414 and $365, respectively) than white borrowers with similar credit qualifications and home property values. *Susan E. Woodward, U.S. Dep't of Housing & Urban Dev., Off. of Policy Dev. & Res., A Study of Closing Costs for FHA Mortgages* 46, 2008.

14 Any potential claims under the Fair Housing Act and the Equal Credit Opportunity Act were preserved by the three settlements. Bank of America entered into a settlement with the Department of Justice in 2011 on behalf of Countrywide Financial, an entity it acquired in 2008, over Countrywide's discrimination in mortgage lending on the basis of race, ethnicity, and marital status. *See* Press Release, Dep't of Justice, Justice Department Reaches $335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation, http://www.justice.gov/usao/cac/countrywide.html.

Key Findings:

- Several provisions in the "Consumer Relief" portion of each settlement have the potential to affirmatively further fair housing through strategic resource investments in low-opportunity areas or increasing integration through multi-family housing units or other developments in high-opportunity areas. However, the ultimate fair housing impact of these settlements is highly contingent on adherence to best practices on AFFH and avoiding policies and practices that maintain or increase housing segregation.
- Two of the three settlements – Bank of America and Citigroup – contain provisions in the "Consumer Relief" portion that provide especially strong incentives for the bank to invest in affordable multi-family rental housing developments in high-opportunity areas, enabling the potential investment of approximately $3 billion dollars over the course of the settlement.
- Bank of America, Citigroup, and J.P. Morgan may spend, forgive, or write-down a much smaller portion of money than the nominal value assigned to the "Consumer Relief" portions of the settlements.
- The expenditure of approximately one-third (Bank of America) to one-half (Citigroup and J.P. Morgan) of the "Consumer Relief" portion of each settlement is determined by the settlement terms, and those provisions primarily mandate consumer relief through principal and rate reductions, forbearance, and forgiveness.
- The banks, with the approval of their Settlement Monitors, have the discretion to determine between two-thirds (Bank of America) and one-half (Citigroup and J.P. Morgan) of the Consumer Relief portion of the settlements.

II. The Obligation to Affirmatively Further Fair Housing

a. Legal Basis of the Obligation to Affirmatively Further Fair Housing

When the Fair Housing Act was originally enacted as Title VIII of the Civil Rights Act of 1968, Congress sought not only to prohibit discrimination in housing, but also to require the government to actively promote integration and dismantle the vestiges of segregation. During the decades prior to the Fair Housing Act, the government perpetuated segregation, in part, through federal agencies that discouraged mortgage lending in predominantly minority neighborhoods. This practice became known as "redlining," since the federal Home Owners' Loan Corporation and other agencies made tiered credit determinations based on the geographic location of the property.[15] Predominant minority neighborhoods were outlined in red ink, and deemed to be uncreditworthy across the board. These policies created a self-

15 The Home Owners' Loan Corporation was created in the 1930s by the federal government to help stabilize neighborhoods battered by the Depression through the refinancing of mortgages and granting of new mortgage to individuals who had lost their homes. In order to assess the riskiness of loans made by location, the agency developed a rating system for neighborhoods: the top category included neighborhoods

fulfilling cycle, as the lack of access to credit by residents of segregated neighborhoods tended to dampen property values and discourage homeownership and asset-building. It also disincentivized private and public investments in these neighborhoods, such as small businesses, public transit systems, and public infrastructure, like parks, hospitals, and government offices.

The Fair Housing Act of 1968 was intended to create a definitive break with these harmful – and illegal – past practices. The "Affirmatively Furthering Fair Housing" provision of the Fair Housing Act requires **all federal agencies engaged in housing and community development activities** to take affirmative steps to promote residential housing integration and avoid segregation:[16]

> § 3608(d) – *"All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter* and shall cooperate with the Secretary to further such purposes.
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> . . .
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> § 3608 (e) "The Secretary of Housing and Urban Development shall- (5) *administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter;…"*

Congress explicitly recognized the connection between residential segregation and lack of access to necessary resources, that "where a family lives, where it is allowed to live, is inextricably bound up with better education, better jobs, economic motivation, and good living conditions."[17] The multi-billion dollar bank settlements, which directly affect investment in the housing market, fall under this provision because they were negotiated on behalf of the U.S. government and must comply with federal law.

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15 continued
that were "new, homogenous, and in demand in good times and bad," the second category largely resembled the first, but the real estate values had peaked, the third category of neighborhoods were in proximity to minority neighborhoods "within such a low price or rent range as to attract an undesirable element," and, finally, black neighborhoods constituted the lowest rated category (as actually indicated in red ink on maps). *Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of an Underclass* 51-52 (1993).
See also *Stephen L. Ross & John Yinger, The Color of Credit: Mortgage Discrimination, Research Methodology, & Fair Lending Enforcement* 228 (2002) ("[T]here are two different definitions of redlining. The first definition, which focuses on the loan denial process, is that redlining exists when otherwise comparable loans are more likely to be denied when they apply to housing in a minority rather than a white neighborhood. Redlining by this definition is illegal according to [the Equal Credit Opportunity Act]. The second definition, which focuses on lending outcomes, is that redlining exists when minority neighborhoods receive a smaller flow of mortgage loans than comparable white neighborhoods. Redlining by this definition is illegal according to the [Community Reinvestment Act].").

16 42 U.S.C. § 3608

17 114 Cong. Rec. 2276-2707 (1968).

The obligation to affirmatively further fair housing also extends to States, localities, and Public Housing Authorities (PHAs) receiving any federal funds related to housing and urban development, whether from HUD or another federal agency.[18]

The multi-billion dollar bank settlements, which directly affect investment in the housing market, fall under the AFFH provision because they were negotiated on behalf of the U.S. government.

However, both the Government Accountability Office (GAO) and HUD determined that many jurisdictions and federal program participants had disregarded their AFFH obligation, in part by failing to adequately plan to affirmatively further fair housing in their area.[19] Thus, in HUD's Notice of Proposed Rulemaking on Affirmatively Furthering Fair Housing, it proposed several reforms to the AFFH process,[20] including a detailed assessment of segregation and integration within the region and within specific housing programs, identification of "Racially and Ethnically Concentrated Areas of Poverty" in the jurisdiction and region, "Neighborhood Disparities in Access to Community Assets" and disparities in "Housing Needs Across Protected Groups." The analytic principles from the proposed rule provide helpful guidance in assessing the overall impact of the multi-billion dollar bank settlements.

b. Government Implementation of the Obligation to Affirmatively Further Fair Housing

There are two primary methods for the federal government to fulfill its obligation to affirmatively further fair housing: (1) facilitating the movement of residents from segregated, low-opportunity neighborhoods to integrated, high-opportunity neighborhoods, and (2) enhancing community assets and promoting the integration of segregated, low-opportunity neighborhoods.

Promoting Residential Mobility and Integration in "Areas of Opportunity"

There are multiple ways in which the government can facilitate the voluntary movement of residents from segregated, low-opportunity neighborhoods to integrated, high-opportunity

18 States, localities, and PHAs are currently required to research and write an "Analysis of Impediments" for their jurisdiction. In the Analysis of Impediments, each jurisdiction must assess and describe all barriers to housing integration, including those imposed by laws, regulations, and government programs. The jurisdiction must also certify annually to HUD that it is fulfilling its obligation to affirmatively further fair housing by maintaining an up-to-date Analysis of Impediments that details plans to dismantle its identified barriers to integration, with specific benchmarks and timeframes for completion. *See, generally* Exec. Order No. 12,892, Sec. 4, *available at* http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/FHLaws/EXO12892.

19 *U.S. Gov't Accountability Office, Housing and Community Grants: HUD Needs to Enhance Its Requirements and oversight of Jurisdictions' Fair Housing Plans* 21 (2010) ("In sum, our findings that many AIs are outdated, may not be prepared as required, or lack time frames and signatures, together with the findings of HUD's study, raise significant questions as to whether the AI is effectively serving as a tool to help ensure that all grantees are committed to identifying and overcoming potential impediments to fair housing choice as required by statutes governing the CDBG and HOME programs and HUD regulations."); *U.S. Dep't of Housing & Urban Dev., Policy Dev. Div., Off. of Policy Dev. & Res., Analysis of Impediments Study*, 2009.

20 *See* Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43710, 43,714-43,716 (proposed July 19, 2013).

neighborhoods. First, the government can increase the availability and accessibility of housing units in integrated neighborhoods through direct funding and tax incentives for developers to build affordable housing units, preserve existing units, or make more units financially and physically accessible to all individuals and families. Second, the government can make sure that most federal benefits, like housing vouchers, are fully portable outside of the resident's present neighborhood, ensuring that there is not a gap in services or financial transfers due to a move. Third, the government can provide housing mobility counseling to individuals living in segregated, low-opportunity neighborhoods to ensure that they are informed of all their housing options. Access to housing mobility counseling could be provided directly by the government, or indirectly through the government's support of private organizations that provide this service.

Enhancing Community Assets and Promoting Integration of Racially and Economically Concentrated Areas

The practical application of promoting integration in government programs and spending often takes the form of directing assets and resources towards segregated communities. These assets and resources could include public transportation, schools, public parks and community centers, hospitals, and government offices. All of these government-funded or managed assets tend to improve the quality of life for residents, and to increase property values. This form of government action serves to remedy the disinvestment in segregated communities that harms current residents. It may also attract new residents to the communities, and increase integration. However, this process of reinvestment in neighborhoods must occur with some government oversight or public-private partnerships to avoid the displacement of current residents. For instance, if an area experiences rapidly rising rents due to government or private investments, then the supply of affordable housing should be preserved or expanded to maintain affordability.

The process of reinvestment in neighborhoods must occur with some government oversight or public-private partnerships to avoid the displacement of current residents.

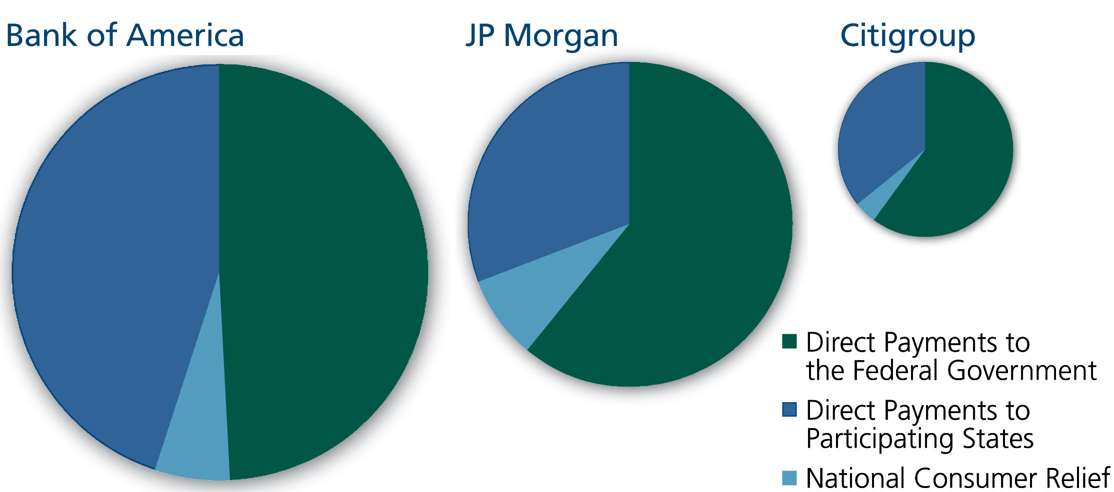
The corollary to promoting integration through strategic site selection for government building projects and investments is ensuring that segregated, low-opportunity neighborhoods do not receive a disproportionate number of negative government or private investments. Potential examples of negative government investments include waste disposal sites and other pollutants, which may pose environmental risks to residents of local communities. These types of government facilities also reduce residential property values, and deter potential private investments and employers from locating in the vicinity.

III. The Government's Multi-Billion Dollar Settlements

a. Settlement Design and Credit Calculations

The Financial Fraud Enforcement Task Force and its Residential Mortgage-Backed Securities (RMBS) Working Group[21] served as the chief negotiator with the banks for these settlements, bringing together attorneys and investigators from the Department of Justice, HUD, the Treasury Department, various U.S. Attorney offices, certain State Attorneys General with pre-existing or ongoing investigations, and other federal agencies, to reach these settlements with the banks. These settlements encompassed fraud and other violations of federal banking and securities laws in all aspects of the securitization, including the packaging of loans, their marketing and sale, the arrangement and structuring of the securities and their issuance. Since the RMBS Working Group negotiated on behalf of the government with all three banks, there are several similarities in the settlements.

One element of commonality across the three settlements is that each requires the bank to make a certain number of fixed payments to both the federal government and the States participating in the settlement. In each settlement the federal government received a civil monetary fine under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA)[22] payable directly to the U.S. Treasury, as well as smaller sums to settle potential or pending claims for federal and common law violations. The funds payable directly to the States are noted in Table 1. The "Consumer Relief" portion of the settlements are administered directly by the banks in the form of credit for specified types of activity, including principal and mortgage rate reductions, forgiveness, and forbearance, certain new loan originations or financing, and donations to qualified organizations (as discussed below). The following charts summarizes the proportion of federal payments, state payments, and consumer relief contained in each of the three multi-billion dollar settlements.



21 Financial Fraud Enforcement Task Force, http://www.stopfraud.gov/ (last visited Feb. 20, 2015).

22 12 U.S.C. § 1833a.

Table 1: Individual Bank Settlement Distributions

Bank of America Settlement Distribution

Payment Description	Amount	Nominal Percentage of Settlement
Direct payments to the Federal Government	$8,216,840,000.00	49%
Direct payments to Participating States	$943,000,000.00	6%
National Consumer Relief[23]	$7,490,160,000.00	45%
TOTAL	$16,650,000,000.00	100%

Citigroup Settlement Distribution

Payment Description	Amount	Nominal Percentage of Settlement
Direct payments to the Federal Government	$4,208,250,000.00	60%
Direct payments to Participating States	$291,750,000.00	4%
National Consumer Relief[24]	$2,500,000,000.00	36%
TOTAL	$7,000,000,000.00	100%

J.P. Morgan Settlement Distribution

Payment Description	Amount	Nominal Percentage of Settlement
Direct payments to the Federal Government	$7,932,989,690.73	61%
Direct payments to Participating States	$1,067,010,309.27	8%
National Consumer Relief[25]	$4,000,000,000.00	31%
TOTAL	$13,000,000,000.00	100%

23 This includes both the $7 billion dollars in "Consumer Relief" and the nearly $500 million that Bank of America set aside to assist recipients of the "Consumer Relief" with the tax consequences of their assistance through the settlement. Bank of America Settlement Agreement at 8-9 (Aug. 20, 2014), *available at* http://www.justice.gov/iso/opa/resources/3392014829141150385241.pdf. Note that the $7 billion dollar figure likely overstates the "Consumer Relief" portion of the settlement, since the bank is only required to pay this amount in "Settlement Credit Dollars" which require the expenditure of smaller sums of money.

24 It is likely that this amount overstates the "Consumer Relief" portion of the settlement, since the bank is only required to pay this amount in "Settlement Credit Dollars" which require the expenditure of smaller sums of money.

25 It is likely that this amount overstates the "Consumer Relief" portion of the settlement, since the bank is only required to pay this amount in "Settlement Credit Dollars" which require the expenditure of smaller sums of money.

Payments to the Federal Government

The most significant collective component of the federal government's monetary settlement with the banks is a civil fine under the Financial Institutions Reform, Recovery, and Enforcement Act, which constitutes $5 billion dollars of the Bank of America settlement, $4 billion dollars of the Citigroup Settlement, and $2 billion of the J.P. Morgan settlement.[26] All three of the banks also made a payment to settle claims with the Federal Insurance Deposit Corporation,[27] and both Bank of America and J.P. Morgan settled claims with the Federal Housing Finance Agency based on violations of law related to the origination of FHA-guaranteed loans and the sale of mortgages to Fannie Mae and Freddie Mac.[28] Bank of America's settlement with the federal government also includes payments to Ginnie Mae and the Securities and Exchange Commission to settle claims of those agencies, as well as several payments to settle pending lawsuits brought on behalf of the United States government.[29] J.P. Morgan's settlement exclusively includes a payment to the National Credit Union Administration to settle claims on behalf of its member entities.[30]

The most significant collective component of the federal government's monetary settlement with the banks is a civil fine under the Financial Institutions Reform, Recovery, and Enforcement Act.

While the federal entities receiving monetary settlements varies slightly among the three settlements, they each include the same legal releases from the U.S. government. For the covered conduct of the banks, the U.S. government released its claims under the following:

- Financial Institutions Reform, Recovery, and Enforcement Act, 12 U.S.C. § 1833a;
- False Claims Act, 31 U.S.C. §§ 3729, *et seq*.;
- Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801, *et seq.*;
- Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961, et seq.;
- Injunctions Against Fraud Act, 18 U.S.C. § 1345;
- common law theories of
  - negligence,
  - gross negligence,
  - indemnification,
  - payment by mistake,
  - unjust enrichment,
  - money had and received,

26 Bank of America Settlement, *supra* note 23, at 5; Citigroup Settlement Agreement at 2 (July 14, 2014), *available at* http://www.justice.gov/iso/opa/resources/471201471413656848428.pdf; J.P. Morgan Settlement Agreement at 3 (Nov. 19, 2013), *available at* http://www.justice.gov/iso/opa/resources/69520131119191246941958.pdf.

27 Bank of America Settlement, *supra* note 23, at 7; Citigroup Settlement, *supra* note 26, at 1-2; J.P. Morgan Settlement, *supra* note 26, at 4.

28 Bank of America Settlement, *supra* note 23, at 6; J.P. Morgan Settlement, *supra* note 26, at 4.

29 Bank of America Settlement, *supra* note 23, at 6-7.

30 J.P. Morgan Settlement, *supra* note 26, at 4.

- breach of fiduciary duty,
- breach of contract,
- misrepresentation,
- deceit,
- fraud, and
- aiding and abetting any of the foregoing;

- Any other claim that the Civil Division of the Department of Justice has actual and present authority to enforce under 28 C.F.R. §0.45.[31]

Payments to States

Most of the direct monetary payments to the seven participating states in the three multi-billion dollar settlements were paid to State pension funds at the discretion of the State Attorney General.

Most of the direct monetary payments to the seven participating states in the three multi-billion dollar settlements were paid to State pension funds at the discretion of the State Attorney General. None of the three settlements restricted use of the direct settlement funds; each settlement provided that the direct monetary transfers would be paid according to instructions from the Office of the Attorney General. Three of the seven states – California,[32] Kentucky,[33] and Illinois[34] – announced that all of the direct settlement funds received from the banks would be used to replenish losses in their respective State pension funds. Like California, Kentucky, and Illinois, the State of Maryland announced that some of the direct settlement funds would go to the state pension funds and a portion would be allocated to state agencies.[35] The other three states

31 Bank of America Settlement, *supra* note 23, at 13-14; Citigroup Settlement, *supra* note 26, at 1-2; J.P. Morgan Settlement, *supra* note 26, at 7-8.

32 Press Release, State of Cal. Dep't of Justice, Office of the Attorney Gen., Attorney General Kamala D. Harris Announces Over Half Billion Dollar Settlement with Bank of America (Aug. 21, 2014), http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-over-half-billion-dollar-settlement ("California will recover $300 million in damages, which will reimburse the state's pension funds, CalPERS and CalSTRS, for losses on investments in mortgage-backed securities of Bank of America and its affiliates. . . In July 2014, Attorney General Harris announced a settlement with Citigroup Inc. of nearly $200 million over its misrepresentations in residential mortgage-backed securities sold to CalPERS and CalSTRS. In November of last year, a settlement with J.P. Morgan Chase & Co. recovered $300 million for CalPERS and CalSTRS.").

33 Press Release, Office of the Attorney Gen., Attorney General Conway Announces $16 Billion Settlement with Bank of America (Aug. 21, 2014) http://kentucky.gov/Pages/Activity-Stream.aspx?viewMode=ViewDetailInNewPage&eventID={2356E04E-1807-4625-8E69-5AD9C953002F}&activityType=PressRelease.

34 Press Release, Ill. Attorney Gen., Madigan Announces Record $300 Million for Illinois' Pension Systems, Consumers in Bank of America Settlement (Aug. 21, 2014), *available at* http://www.illinoisattorneygeneral.gov/pressroom/2014_08/20140821.html; Press Release, Ill. Attorney Gen., Madigan: JPMorgan Chase to Pay $100 Million to Illinois' Pension Systems (Nov 19, 2013), *available at* http://www.illinoisattorneygeneral.gov/pressroom/2013_11/20131119b.html; Press Release, Ill. Attorney Gen., Madigan Recovers $84 Million for Illinois' Pension Systems, Consumers in Citigroup Settlement (July 14, 2014), *available at* http://www.illinoisattorneygeneral.gov/pressroom/2014_07/20140714.html.

35 Katie Lange, *Maryland to get $75M from Bank of America settlement*, *WBAL-TV*, Aug. 21, 2014, *available at* http://www.wbaltv.com/money/md-to-get-75m-from-bank-of-america-settlement/27659820 ("Gansler

participating in the settlement agreements – Delaware,[36] Massachusetts,[37] and New York[38] – provided that the direct settlement funds would be used for consumer relief, as well as replenishing state pension funds and providing additional funding for state agencies. Each of these States is not only under an obligation to enforce the anti-discrimination provisions of the Fair Housing Act and the Equal Credit Opportunity Act against private individuals and entities, but also to affirmatively further fair housing in the administration of their programs and activities relating to housing and urban development. Accordingly, states must design and apply their legislative, regulatory, enforcement, and other policies so as to satisfy this obligation.

Delaware, Massachusetts, and New York provided that the direct settlement funds would be used for consumer relief, as well as replenishing state pension funds and providing additional funding for state agencies.

35 continued

on Thursday said several of the state's government entities and its pension program will get to split the $75 million share from the settlement with Bank of America and its acquisitions, Merrill Lynch and Countrywide Financial Corporation.").

36 Press Release, State of Del., Biden Secures Millions More For Delaware (July 14, 2014), *available at* http://news.delaware.gov/2014/07/14/biden-secures-millions-more-for-delaware/; Press Release, State of Del., Biden's insistence on accountability for mortgage crisis leads to $45 million for Delaware, millions more in financial benefits for Delawareans from Bank of America (Aug. 21, 2014), *available at* http://news.delaware.gov/2014/08/21/bidens-insistence-on-accountability-for-mortgage-crisis-leads-to-45-million-for-delaware-millions-more-in-financial-benefits-for-delawareans-from-bank-of-america/; Press Release, State of Del., Applications Now Being Accepted for Statewide Grant program Aimed At Revitalizing Neighborhoods (Dec. 11, 2014), *available at* http://news.delaware.gov/2014/12/11/applications-now-being-accepted-for-statewide-grant-program-aimed-at-revitalizing-neighborhoods/.

37 Press Release, Attorney Gen. of Mass., JPMorgan to Pay $13 Billion in Federal-State Deal Over Mortgage Backed Securities (Nov. 19, 2013), *available at* http://www.mass.gov/ago/news-and-updates/press-releases/2013/2013-11-19-jpmorgan-settlement.html; Press Release, Attorney Gen. of Mass., CitiGroup to Pay $7 Billion in Federal-State Deal Over Mortgage Backed Securities (July 14, 2014), *available at* http://www.mass.gov/ago/news-and-updates/press-releases/2014/2014-07-14-citigroup-settlement.html.

38 Press Release, N.Y. State Off. of the Attorney Gen., A.G. Schneiderman-Led State & Federal Working Group Announces Record-Breaking $16.65 Billion Settlement With Bank Of America (Aug. 21, 2014); Press Release, N.Y. State Off. of the Attorney Gen., A.G. Schneiderman Announces $182 Million For New Yorkers As Part Of $7 Billion Citigroup Settlement (July 14, 2014), *available at* http://www.ag.ny.gov/press-release/ag-schneiderman-announces-182-million-new-yorkers-part-7-billion-citigroup-settlement; Press Release, N.Y. State Off. of the Attorney Gen., A.G. Schneiderman-led State & Federal Working Group Announces $13 Billion Settlement With JPMorgan Chase (Nov. 19, 2013), *available at* http://www.ag.ny.gov/press-release/ag-schneiderman-led-state-federal-working-group-announces-13-billion-settlement.

Table 2: States Receiving Direct Settlement Funds[39]

State	Bank of America Settlement State-Specific Amount	Citigroup Settlement State-Specific Settlement Amount	J.P. Morgan Settlement State-Specific Settlement Amount	Total Direct Settlement Payments to the State
California	$300,000,000.00	$102,700,000.00	$298,973,005.98	$701,673,005.98
Delaware	$45,000,000.00	$7,350,000.00	$19,725,255.40	$72,075,255.40
Illinois	$200,000,000.00	$44,000,000.00	$100,911,813.41	$344,911,813.41
Kentucky	$23,000,000.00	NA	NA	$23,000,000.00
Maryland	$75,000,000.00	NA	NA	$75,000,000.00
Massachusetts	NA	$45,700,000.00	$34,400,000.00	$80,100,000.00
New York	$300,000,000.00	$92,000,000.00	$613,000,234.48	$1,005,000,234.48
TOTAL All Seven States	$943,000,000.00	$291,750,000.00	$1,067,010,309.27	$2,301,760,309.27

Table 3: Mandatory State-Specific Settlement Credit Dollar Allocations in the "Consumer Relief" Portion of the Bank of America and Citigroup Settlements[40]

State	Bank of America "Consumer Relief" Allocation	Citigroup "Consumer Relief" Allocation	J.P. Morgan "Consumer Relief" Allocation	Total "Consumer Relief" Allocations of Settlements
California	$500,000,000	$90,000,000	NA	$590,000,000
Illinois	$100,000,000	$40,000,000	NA	$140,000,000
Massachusetts	NA	$10,000,000	NA	$10,000,000
New York	$500,000,000	$90,000,000	NA	$590,000,000
Delaware	$150,000,000 split between the three States	$10,000,000	NA	At least $10,000,000, plus a portion of $150,000,000
Maryland		NA	NA	A portion of $150,000,000
Kentucky		NA	NA	A portion of $150,000,000
TOTAL All Seven States	$1,250,000,000	$240,000,000	NA	$1,490,000,000

39 Bank of America Settlement, *supra* note 23, at 7-8; Citigroup Settlement, *supra* note 26, at 3-4; J.P. Morgan Settlement, *supra* note 26, at 4-5.

40 Bank of America Annex 2, *supra* note 4, at 9; Citigroup Settlement Annex 2, *supra* note 4, at 14.

Table 4: Total State-Specific Allocations of Direct Payments and Directed "Consumer Relief" from All Three Settlements[41]

State	Combined Total Direct Settlement Payments to the State	Combined Total "Consumer Relief" Allocations of Settlements	Combined Total of State-Specific Allocations of Direct Payments and "Consumer Relief"	Total % of State-Specific Allocation
New York	$1,005,000,234.48	$590,000,000.00	$1,595,000,234.48	42.06%
California	$702,271,005.98	$590,000,000.00	$1,292,271,005.98	34.08%
Illinois	$344,911,813.41	$140,000,000.00	$484,911,813.41	12.79%
Massachusetts	$80,100,000.00	$10,000,000.00	$90,100,000.00	2.38%
Delaware	$72,075,255.40	At least $10,000,000.00, plus a portion of $150,000,000.00	At least $82,075,255.40, plus a portion of $150,000,000.00	Between 2.16% and 6.12%
Maryland	$75,000,000.00	A portion of $150,000,000.00	At least $75,000,000.00, plus a portion of $150,000,000.00	Between 1.98% and 5.93%
Kentucky	$23,000,000.00	A portion of $150,000,000.00	At least $23,000,000.00, plus a portion of $150,000,000.00	Between 0.61% and 4.56%
All Seven States	$2,301,760,309.27	$1,490,000,000	$3,791,760,309.27	100%

Consumer Relief

Apart from consumer relief provided to residents of those three states, each settlement contains a national "Consumer Relief" section. This "Consumer Relief" provision is in addition to the settlement funds payable directly to certain States participating in one or more of the three settlements.[42] However, unlike the funds payable directly to the States and other components of the settlements, the total amount of "Consumer Relief" that each bank must pay is calculated in settlement credit dollars rather than dollars. In the Bank of America settlement,

Each bank can receive duplicative credit for satisfying multiple elements of the "Consumer Relief" section.

41 Bank of America Settlement, *supra* note 23, at 7-8; Citigroup Settlement, *supra* note 26, at 3-4; J.P. Morgan Settlement, *supra* note 26, at 4-5; Bank of America Annex 2, *supra* note 4, at 9; Citigroup Settlement Annex 2, *supra* note 4, at 14.

42 Note that these three settlements do not contain restrictions on how the funds payable directly to the participating States must be spent, although the States had the discretion to determine how to use the funds prior to finalizing the respective settlements.

for example, the $5 billion dollar FIRREA penalty will require the payment of $5 billion dollar from the Bank of America to the U.S. Treasury. The Bank of America settlement also requires the minimum expenditure of $7 billion dollars in "settlement credit." There are two key differences between the "Consumer Relief" section of these three settlements and the other provisions, including fines, penalties, and settlement amounts directly payable to the federal and State governments.

First, certain elements in the "Consumer Relief" section of each settlement can be satisfied by activities which do not result in a loss to the bank, such as low-to-moderate income lending. While these elements of the "Consumer Relief" section may result in the bank foregoing potentially more lucrative financing or lending opportunities, it does not result in a net loss to the bank – unlike the direct transfer of money from the bank to the U.S. Treasury or the General Fund of a State. Other elements of "Consumer Relief," such as forgiving part of the principal owed on a mortgage to bring the Loan-to-Value (LTV) ratio below 100%, may financially benefit the bank even if they result in a loss on paper.[43]

Second, the "Consumer Relief" section of each settlement only requires the bank to satisfy a certain amount of "settlement credit" dollars. The distinction between monetary dollars and "settlement credit" dollars is that the settlements assign value to each element of potential "Consumer Relief," with the majority of items receiving a higher "settlement credit" than the actual amount expended by the bank.[44] Further, each bank can receive duplicative credit for satisfying multiple elements of the "Consumer Relief" section.

In the Bank of America settlement, for instance, forgiveness of $1 of principal on a loan would be granted $1.75 settlement credit dollars if the loan was insured by the FHA or guaranteed by the Veterans Administration, and that settlement credit would receive a 150% Enhanced Early Incentive Credit if the forgiveness occurred prior to May 31, 2015, and an additional 115% Credit for an incremental LTV reduction between 90% and 100%. Taken together, a single $1 of principal forgiveness would yield $3.01875 settlement credit dollars.[45]

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43 Peter J. Henning, *The True Accountability in the JPMorgan Settlement*, N.Y. Times, Nov. 20, 2013, *available at* http://dealbook.nytimes.com/2013/11/20/the-true-accountability-in-the-jpmorgan-settlement/?_r=0 ("No one should be misled into concluding that JPMorgan will be paying out of its pocket all the money that this part of the settlement requires. Reducing the principal owed on a mortgage or its interest rate affects the value of the loan but does not require an immediate expenditure in most cases. Moreover, the program can actually benefit the bank because keeping a borrower in a house who continues to pay the mortgage, even at a reduced rate, is superior to foreclosing on the property and suffering a far greater loss in most instances.")

44 The exception is loans owned by other investors, rather than the banks themselves, which receive $0.50 in settlement credit dollars per actual dollar of consumer relief, as well as principal forgiveness or extinguishment of junior liens in the Citigroup Settlement. Bank of America Annex 2, *supra* note 4, at 3-5; Citigroup Settlement Annex 2, *supra* note 4, at 2-7; J.P. Morgan Annex 2, *supra* note 7, at 2-3.

45 In numerical format: ($1 of forgiveness) x (1.75) x (1.50) x (1.15) = $3.01875 settlement credit dollars

This distinction between actual dollars and settlement credit dollars extends to the minimums and maximums prescribed for certain elements of the "Consumer Relief" settlement provisions. In the Bank of America settlement, first lien principal relief is mandated at a minimum of $2.15 billion settlement credit dollars. Returning to the previous example, the $1 dollar in principal forgiveness would count as $3.01875 settlement credit dollars towards the $2.15 billion minimum and the total "Consumer Relief" requirement of $7 billion settlement credit dollars. Thus, Bank of America will likely satisfy its $7 billion dollar "Consumer Relief" settlement requirement for a portion of $7 billion dollars.[46]

b. Affirmatively Furthering Fair Housing Analysis

These three settlements must comply with federal law, including the Fair Housing Act and the Equal Credit Opportunity Act. The provisions of the settlements that extend beyond direct consumer relief through loan forgiveness, forbearance, or extinguishment, such as financing multi-family housing developments and donating to community development funds, may trigger the obligation to affirmatively further fair housing. Since the federal government must affirmatively further fair housing under the Fair Housing Act, it mandates that all federal housing and urban development funding recipients and federal program participants annually certify that their State, jurisdiction, Public Housing Authority, or program fully complies with this obligation. Given the breadth of federal housing grants and programs, encompassing the Community Development Block Grants (CDBG), HOME Investment Partnerships (HOME), Emergency Solutions Grants (ESG), and Housing Opportunities for Persons With AIDS (HOPWA), all States, Public Housing Authorities, and many cities, counties, and towns are under an obligation to affirmatively further fair housing.

Thus, even though the banks are private entities, any settlement funds that are administered by a State, PHA, or federally-funded jurisdiction (such as the community development funds), or require the approval or partnership of a State, PHA, or federally-funded jurisdiction (such as the multi-family housing developments), or that overlap with pre-existing programs and public housing in a State (including community redevelopment plans and anti-blight measures), must adhere to the obligation to affirmatively further fair housing. Not only must the administration of these settlement provisions prohibit discrimination, they must also affirmatively further fair housing through the promotion of integration and residential mobility, and the removal of discriminatory barriers to housing choice for protected groups.

46 The Bank of America Monitor, Eric D. Green, acknowledged this in his report. Eric D. Green, Initial Progress Report 15 (2015), *available at* http://bankofamerica.mortgagesettlementmonitor.com/Reports/Initial-Progress-Report-Monitor-2014-Bank-of-America-Mortgage-Settlement....pdf ("Through the use of enhanced Credit, enhanced Credit ratios, Credit minimums, Credit caps, and penalties, the Settlement Agreement gives Bank of America incentives to provide Consumer Relief promptly and to direct it to borrowers in Hardest Hit Areas as identified by HUD. While these provisions of the Settlement Agreement allow Bank of America to earn the entire $7 billion of Credit without actually extending $7 billion, they also encourage Bank of America to offer Consumer Relief to address borrower needs most effectively and as soon as possible for homeowners currently struggling to remain in their homes.").

This affirmatively furthering fair housing analysis of these three settlements accounts for at least four considerations: (1) the structural design of the settlements, (2) the inclusion of specific provisions to promote affirmatively furthering fair housing and, conversely, the exclusion of provisions that perpetuate segregation or barriers to housing choice, (3) the magnitude of the affirmatively furthering fair housing provisions as measured in both fixed dollar amounts and in comparison to other, non-AFFH settlement provisions, and (4) the degree of flexibility to maximize the settlement dollars to affirmatively further fair housing.

i. Structural Design of the Settlements

Analysis of the structural design of the settlements accounts for the design, monitoring, and implementation of the settlements, including the agreed-upon rules for interpreting and executing the settlements as well as the incentives and penalties attached to certain provisions or requirements.

One positive structural component of the settlements is that each specifically states that the Consumer Relief "will not be implemented through any policy that violates the Fair Housing Act or the Equal Credit Opportunity Act."[47] Although it may seem self-evident that these settlements executed with the federal government cannot violate federal law, the specific mention of the Fair Housing Act and the Equal Credit Opportunity Act underscore the connection between violations of those laws and the fraud and misrepresentations in the Residential Mortgage-Backed Securities that prompted the government investigations and eventual settlements. It also reinforces the government's intention that the private banks channel the consumer relief in a non-discriminatory manner and in a way that affirmatively furthers fair housing.

A second positive structural component of one of the settlements – with Bank of America – is that claims under the Fair Housing Act and Equal Credit Opportunity Act are specifically excluded from the terms of the settlement.[48] Since there was a significant degree of overlap between discrimination and fraud in the origination of mortgages and the securitization of those mortgages and subsequent representations and non-disclosures to investors about the underlying mortgages, there may be separate claims for the federal government or other parties to pursue for Fair Housing Act and Equal Credit Opportunity Act violations. There is nothing to bar the pursuit of such claims under the terms of the other two settlements, with J.P. Morgan and Citigroup, particularly since both exclude the origination and servicing of

47 Bank of America Annex 2, *supra* note 4, at 1; Citigroup Settlement Annex 2, *supra* note 4, at 1; J.P. Morgan Annex 2, *supra* note 7, at 1.

48 Bank of America Settlement, *supra* note 23, at 20-23 ("15. Excluded Claims. Notwithstanding the releases in Paragraphs 5-14 of this Agreement, or any other term(s) of this Agreement, the following claims are specifically reserved and not released by this Agreement: O. Any liability arising under: the Fair Housing Act; the Equal Credit Opportunity Act; the Home Mortgage Disclosure Act; or any other statute or law that prohibits discrimination because of race, color, national origin, gender, disability, or any other protected status."

mortgages from the "covered conduct" of the settlement.[49] However, given the substantial resource mismatch between the large banks and most plaintiffs and government entities seeking to enforce both statutes, potential claims are more likely to be pursued if it is clear that they are not barred by a prior settlement.

A third positive structural element across all three settlements is that the liquidated damages provision could provide funding for organizations that directly assist impacted homeowners, if Bank of America, Citigroup, or J.P. Morgan fails to fulfill all of its settlement obligations based on a determination by the respective Settlement Monitor.[50] If such a deficiency is calculated, then the bank will be required to pay it "in cash in an amount equal to the shortfall" as "Liquidated Damages" under the settlement. Both Citigroup and J.P. Morgan would be required to pay 100% of the liquidated damages to NeighborWorks America[51] "to provide housing counseling, neighborhood stabilization, foreclosure prevention or similar programs."[52] These entities have the potential to affirmatively further fair housing in their work, depending on how the settlement funds are prioritized.

If the provision is triggered for Bank of America, it would have to pay 25% of its liquidated damages to NeighborWorks America for the same purposes and 75% to "state-based Interest on Lawyers' Trust Account (IOLTA) organizations (or other statewide bar-association affiliated intermediaries) that provide funds to legal aid organizations, to be used for foreclosure prevention legal assistance and community redevelopment legal assistance."[53] Distribution of the IOLTA funds would be done on a pro-rata basis "among all jurisdictions based on poverty population data, in the manner employed for funding distribution by the Legal Services Corporation based on data collected by the U.S. Census Bureau."[54]

Finally, a fourth positive structural element in two of the settlements – Bank of America and Citigroup – is the mandatory consumer outreach provision. The language in both settlement agreements is nearly identical. Both banks are required to hold a certain number of consumer outreach events annually or until certain settlement expenditures are met on a rotational basis as to location, with priority given to the Hardest Hit Areas and States participating in the

49 J.P. Morgan Settlement, *supra* note 26, at 3; Citigroup Settlement, *supra* note 26, at 4-5 (3. Covered Conduct…Covered Conduct does not include: (i) conduct relating to the origination of residential mortgages, except representations or non-disclosures to investors in the RMBS listed in Annex 3 about origination of, or about information obtained in the course of originating, such loans…[or] the servicing of residential mortgage loans, except representations or non-disclosures to investors in the RMBS listed in Annex 3 about servicing, or information obtained in the course of servicing, such loans.").

50 This provision in the settlements is evaluated as a "structural" component rather than a pro-Affirmatively Furthering Fair Housing provision because it is hypothetical, and unlikely to occur.

51 NeighborWorks America, http://www.neighborworks.org (last visited Feb. 20, 2015).

52 Citigroup Settlement Annex 2, *supra* note 4, at 14-15; J.P. Morgan Annex 2, *supra* note 7, at 5.

53 Bank of America Annex 2, *supra* note 4, at 10.

54 *Id.* at 10, n.27.

settlements (California, Delaware, Illinois, and New York participated in both settlements, with Kentucky and Maryland participating in the Bank of America settlement and Massachusetts participating in the Citigroup settlement).[55]

Perhaps more important than the events themselves is the requirement that the banks "conduct targeted borrower outreach through personalized invitation letters, emails and/or outbound phone calls with eligible customers," and that the banks engage with the "State Attorneys General, State Housing Finance Authorities, and local not-for-profits [on] the schedule of events to build further awareness and encourage increased participation."[56] As part of the requirement that Bank of America and Citigroup engage with local non-profits and other intermediary organizations that provide housing or legal assistance, both banks are also required to create a "short, plain-language document" that is available in multiple languages[57] and accessible online and through third parties, like the local non-profits.[58]

The mandatory consumer outreach provision is not only likely to increase awareness among those individuals eligible for relief under these settlements, but it could also affirmatively further fair housing. Through the engagement of State and local governments and non-profits in the consumer outreach efforts, residents are not only likely to receive information about the settlements, but also information about their civil rights in the housing context, their eligibility for other housing-related programs, and legal and housing counseling-related resources in their local area. Thus, the consumer outreach – if fully and comprehensively implemented by Bank of America and Citigroup – could serve as a catalyst to inform people and connect them with legal aid and housing-related resources.

ii. Analysis of Settlement Provisions

In addition to the positive structural components of the "Consumer Relief" portion of the settlements, each also contains multiple provisions with the potential to positively and negatively impact AFFH-related goals. Unlike the structural components – which govern the terms and administration of the settlement – these provisions govern the use of funds under the settlement. Several of these provisions could promote integration and improve the conditions in low-income, residentially segregated neighborhoods. However, the ultimate fair housing impact of the settlements is highly dependent on how the banks choose to spend the funds, the oversight and monitoring of the settlement by the respective Monitors and the government, and the degree to which subsidiary recipients or beneficiaries of the funds ensure that their programs and policies affirmatively further fair housing.

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55 *Id.* at 9; Citigroup Settlement Annex 2, *supra* note 4, at 14.

56 Bank of America Annex 2, *supra* note 4, at 9; Citigroup Settlement Annex 2, *supra* note 4, at 14.

57 The document is required to be translated into Spanish, Chinese, Tagalog, Vietnamese, and Korean, and "other languages as appropriate on a best effort basis." Bank of America Annex 2, *supra* note 4, at 9; Citigroup Settlement Annex 2, *supra* note 4, at 14.

58 Bank of America Annex 2, *supra* note 4, at 9; Citigroup Settlement Annex 2, *supra* note 4, at 14.

Overall, the three settlements are positive from an affirmatively furthering fair housing viewpoint, with the Bank of America "Consumer Relief" section containing the most provisions with the potential to affirmatively further fair housing and the J.P. Morgan "Consumer Relief" section containing the fewest. Based on both the inclusion of certain provisions and the amount of settlement credit dollars attached to them, it is not only evident that the affirmatively furthering fair housing obligation was taken into account by the government negotiators, but also that the settlements were structured to incentivize the expenditure of funds for potentially pro-AFFH activities.

1. Multi-Family Housing Developments

Both the Bank of America and Citigroup settlements contain a provision to fulfill part of their "Consumer Relief" obligation through **a loss in financing the "construction, rehabilitation, or preservation of Critical Need Family Housing developments" within Small Area Difficult Development Areas or State-Defined High-Opportunity/Low-Poverty Areas**, provided that none of the development units have age restrictions for any of the occupants.[59] Difficult Development Areas are designated by the Department of Housing and Urban Development annually based on a significant gap between the prevailing fair market rent and low-income rents.

Like High-Opportunity/Low-Poverty areas, these neighborhoods tend to offer good schools and job markets, significant transportation infrastructure, parks and other public amenities, as well as access to medical facilities, grocery stores, and other businesses. Thus, the construction or preservation of these developments could provide more affordable housing options outside of segregated, high-poverty neighborhoods, which promotes integration. The provision also includes the rehabilitation of multi-family housing developments, which could enable the financing of retro-fitting and repairs to existing developments to make them accessible to children and adults with disabilities.[60] Both the Bank of America and Citigroup settlements provide $3.75 "settlement credit dollars" for every actual dollar of loss in financing these Small Area DDAs and State-Defined High-Opportunity/Low-Poverty multi-family housing developments, with $3.25 "settlement credit dollars" for other developments – the strongest incentive in the "Consumer Relief" section of both settlements.

Since the "other developments" provision does not limit the financing of multi-family developments to State-Defined High-Opportunity/Low-Poverty or Small Area DDAs, there is a risk that this provision could exacerbate housing segregation by building or maintaining housing in low-opportunity neighborhoods. In order to ensure that those multi-family

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59 Bank of America Annex 2, *supra* note 4, at 8; Citigroup Settlement Annex 2, *supra* note 4, at 13.

60 Like racial and ethnic minorities, people with disabilities have been routinely subject to housing discrimination and segregation. *See, e.g.* Nat'l Council on Disability, The State of Housing in America in the 21st Century: A Disability Perspective (2010), *available at*: www.ncd.gov/rawmedia_repository/cdd1f2d8_ae1e_44ed_b016_938405e73a26?document.pdf.

developments also affirmatively further fair housing, there should be a concerted effort by the respective banks to finance developments in high-opportunity areas.

2. Community Development Funds

Another potentially positive AFFH provision – which is in all three settlements – is that the banks can fulfill part of their settlement obligations through **donations to capitalize community development funds**. Both the Bank of America and Citigroup settlements provide $2.00 of settlement credit for each dollar donated, while the J.P. Morgan settlement provides a one-to-one credit ($1 donated = $1 settlement credit).[61] Community development funds "support infrastructure, economic development projects, installation of public facilities, community centers, housing rehabilitation, public services, clearance/acquisition, microenterprise assistance, code enforcement, homeowner assistance" and other needs identified by State and local governments.[62] Community development can affirmatively further fair housing by enhancing the resources and community assets available in underserved neighborhoods, potentially leading to increased racial and economic integration.

For instance, community development funds may be channeled to increase the resources in segregated, high-poverty areas through the financing of public infrastructure, which facilitates residents' ability to travel to school and work,[63] or the building of large public institutions, like hospitals and community centers. This funding serves both to bridge the substantial resource divide between segregated and integrated neighborhoods, as well as to promote the integration of the segregated neighborhood. Community development can also be utilized to remove housing barriers that perpetuate discrimination. Improvements to housing developments and public infrastructure and transportation can open up new housing opportunities to people with disabilities, thereby reducing their housing segregation.

The Citigroup and Bank of America settlements contain the caveat that these community development funds must be administered by non-profits or local governments, whereas the J.P. Morgan settlement terms could allow for the funding of a for-profit community redevelopment project.[64] Regardless of which entity is administering these funds, they should implement funding guidelines to ensure recipients utilize the funds in a manner that affirmatively furthers

61 Bank of America Annex 2, *supra* note 4, at 7; Citigroup Settlement Annex 2, *supra* note 4, at 11; J.P. Morgan Annex 2, *supra* note 7, at 4.

62 U.S. Dep't of Housing & Urban Dev., Program Offices, Cmty. Planning & Dev., Cmty. Dev., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment (last visited Feb. 20, 2015).

63 *See, e.g.* Paul Duggan, *From Anacostia to Tysons: Many ride Silver Line long and far to jobs in Virginia*, Wash. Post, Nov. 16, 2014, *available at* http://www.washingtonpost.com/local/trafficandcommuting/from-anacostia-to-tysons-many-ride-silver-line-long-and-far-to-jobs-in-virginia/2014/11/16/79932d0c-5f92-11e4-8b9e-2ccdac31a031_story.html.

64 This provision in the J.P. Morgan settlement provides for settlement credit dollars for "Funds donated to capitalize community equity restoration funds or substantially similar community redevelopment activities." J.P. Morgan Annex 2, *supra* note 7, at 4.

fair housing by improving the resources in segregated, low-opportunity neighborhoods or increasing affordable housing stock in high-opportunity neighborhoods. The community development funds should avoid financing multi-family housing in low-opportunity neighborhoods if unaccompanied by a viable revitalization plan, and other projects that maintain or increase housing segregation.

Both settlements also permit the banks to make **donations to capitalize certified Community Development Financial Institutions and land banks subject to state or local regulation.**[65] Community Development Financial Institutions (CDFIs)[66] and land banks, which convert vacant or unused property to productive use,[67] also serve to increase the resources and opportunities available in segregated and economically distressed areas (although, again, there is a possibility that these funds could also be used to exacerbate racial and economic segregation).

3. Donations of Mortgages or REO Properties and Property Demolition

All three settlements also permit the banks to satisfy their "Consumer Relief" settlement obligation through the **donation of mortgages or Real-Estate Owned properties to land banks, municipalities, non-profit organizations, servicemembers with disabilities or the relatives of deceased servicemembers.**[68] Each settlement provides $1.00 in settlement credit for the dollar value of each property.[69] This provision could provide segregated and high-poverty communities with properties or land that can be developed or refurbished to meet the needs of the local community, which could be very positive from a community stabilization perspective. However, if these donations result in a net increase in low-income rental housing in high-poverty neighborhoods (rather than homeownership), the impact could be to increase residential segregation and neighborhood poverty concentration. This provision should also be monitored to ensure that banks donate REO properties held in high-opportunity areas.[70]

65 Bank of America Annex 2, *supra* note 4, at 7; Citigroup Settlement Annex 2, *supra* note 4, at 11.

66 Community Development Financial Institutions were developed to meet the financial needs of under-served communities. Coal. of Cmty. Dev. Fin. Inst., What are CDFIs?, http://www.cdfi.org/about-cdfis/what-are-cdfis/ (last visited Feb. 20, 2015). Eligible CDFIs may also receive funding from the Treasury Department through the CDFI Fund. U.S. Dep't of the Treasury, Cmty. Dev. Fin. Inst. Fund, About the CDFI Fund, http://www.cdfifund.gov/who_we_are/about_us.asp (last visited Feb. 20, 2015).

67 *Dan Kildee & Amy Hovey, Ctr. for Cmty. Progress, Land Banking 101: What is a Land Bank?*, *available at* https://www.hudexchange.info/resources/documents/LandBankingBasics.pdf.

68 Bank of America Annex 2, *supra* note 4, at 6; Citigroup Settlement Annex 2, *supra* note 4, at 11; J.P. Morgan Annex 2, *supra* note 7, at 4.

69 Bank of America Annex 2, *supra* note 4, at 6; Citigroup Settlement Annex 2, *supra* note 4, at 11; J.P. Morgan Annex 2, *supra* note 7, at 4.

70 *See, e.g.* Diane Glauber & Philip Tegeler, *Affirmatively Furthering Fair Housing in REO-to-Rental Programs*, Cmty. Dev. Inv. Rev., Feb. 2014, *available at* http://www.frbsf.org/community-development/files/cdir_vol9issue2_affirmatively_furthering_fair_housing.pdf.

A related provision in all three settlements provides $1.00 in settlement credit for every dollar spent on **property demolition**.[71] However, the Bank of America and Citigroup settlements condition the crediting for demolition (or property remediation) to "abandoned and uninhabitable" – not simply "dilapidated properties."[72] Further, the Bank of America and Citigroup settlements will only credit **demolition or property remediation if it is "part of a comprehensive local strategy to stabilize neighborhoods."**[73] The J.P. Morgan settlement does not contain this restriction. Unlike the Bank of America and Citigroup provision, which requires any property demolition (or remediation) to advance a strategic plan to improve the condition of the neighborhood, the J.P. Morgan provision does not result in an improvement to the local community.[74]

An additional potentially positive provision, exclusive to the Bank of America settlement, provides $2.00 of settlement credit for every dollar donated to **"non-profits to facilitate reduction, rehabilitation, or maintenance of abandoned and uninhabitable residential properties" for demolition or remediation.**[75] This targeted funding for non-profits to assist in the property demolition or remediation facilitates and accelerates the achievement of neighborhood redevelopment goals.

4. Donations to Housing Counseling and Legal Aid Organizations

The Bank of America and Citigroup settlements also contain two potentially positive AFFH provisions that provide donations to organizations that help homeowners avert foreclosure. **Donations to "HUD-approved housing counseling agencies" and "state-based Interest on Lawyers' Trust Account (IOLTA) organizations (or other statewide bar-association affiliated intermediaries) that provide funds to legal aid organizations, to be used for foreclosure prevention legal assistance and community redevelopment legal assistance"** both receive $2.00 of "settlement credit dollars" for every actual dollar donated.[76] Access to housing counseling could affirmatively further fair housing and helps avert foreclosures by educating people about their legal protections as both renters and owners, their eligibility for federal, state, and local housing-related benefits and programs, and assisting them access the housing market in higher opportunity areas.[77] However, housing counselors

71 Bank of America Annex 2, *supra* note 4, at 6; Citigroup Settlement Annex 2, *supra* note 4, at 11; J.P. Morgan Annex 2, *supra* note 7, at 4.

72 Bank of America Annex 2, *supra* note 4, at 6; Citigroup Settlement Annex 2, *supra* note 4, at 11.

73 Bank of America Annex 2, *supra* note 4, at 6; Citigroup Settlement Annex 2, *supra* note 4, at 11.

74 *See* Andrew Jakabovics & Allison Charette, Enter. Cmty. Partners, What the JPMorgan Chase Settlement Means for Consumers: An Analysis of the $4 Billion in Consumer Relief Obligations 6 (2014), *available at* https://s3.amazonaws.com/KSPProd/ERC_Upload/0088413.pdf.

75 Bank of America Annex 2, *supra* note 4, at 7.

76 *Id.*; Citigroup Settlement Annex 2, *supra* note 4, at 12.

77 Note, however, that housing mobility counseling is not currently part of the protocol for most traditional housing counseling agencies.

working with prospective buyers or renters must not place any geographic restrictions on the potential neighborhoods they identify for people to live in, and they must assist people with maintaining any benefits which they are eligible for regardless of where they choose to live. Housing counseling that limits choice or discourages a family from moving out of a low-opportunity neighborhood perpetuates segregated housing and hinders integration.

Similarly, funding to legal aid organizations that provide foreclosure prevention could help affirmatively further fair housing by connecting individuals with attorneys who can assess their specific circumstances, identify any violation of their statutory or Constitutional rights, and raise these claims in a legal proceeding. The funding for legal aid also extends to community redevelopment legal assistance, which enables States, localities, neighborhood associations, and other non-profits to receive legal assistance with the planning and implementation of a community redevelopment plan – which often involves multiple regulatory, code, and permit filings, tax issues, and other legal matters.

5. Consumer Relief for Hardest Hit Areas

Finally, most of the "Consumer Relief" provisions in the three settlements are appropriately focused on direct consumer aid through principal forgiveness, including loan extinguishment, and forbearance. While this direct relief does not, in and of itself, affirmatively further fair housing for the communities impacted, all of the three settlements are structured to mandate or incentivize steering a portion of this relief to the "Hardest Hit Areas." The "Hardest Hit Areas" are calculated at the Census Tract level based on those neighborhoods that experienced the most significant financial hardship due to concentrated foreclosures.

The Bank of America settlement provides the greatest incentive for consumer relief to the Hardest Hit Areas through a **mandate that those neighborhoods receive 50 percent of its direct consumer aid, with every additional dollar of aid beyond the 50 percent minimum earning $1.15 settlement credit dollars.**[78] The Citigroup settlement provides that 50 percent of the direct consumer relief to "CMI borrowers" – CitiMortgage, Inc. borrowers – **"must be from HHA areas."**[79] Finally, the J.P. Morgan settlement contains no minimum or maximum applicable to consumer relief in the Hardest Hit Areas, but it does provide **$1.25 settlement credit dollars for every dollar of consumer relief in those neighborhoods.**[80]

78 Bank of America Annex 2, *supra* note 4, at 3-6.

79 Citigroup Settlement Annex 2, *supra* note 4, at 7.

80 J.P. Morgan Annex 2, *supra* note 7, at 2 n.4. A national map indicating the locations of the Census Tracts eligible for Hardest Hit Area crediting under the J.P. Morgan settlement may be accessed at http://www.arcgis.com/home/webmap/viewer.html?webmap=25932a2506d745329087f40b28529958.

IV. Recommendations for the Banks and Settlement Monitor

- Monitor the banks' activity under the "Consumer Relief" portion of the settlement to ensure full compliance with the Fair Housing Act and the Equal Credit Opportunity Act, as well as state and federal consumer protection laws.
- Ensure that there is significant and ongoing outreach to eligible consumers across the country, particularly in Hardest Hit Areas. Further, seek to engage all potential government and non-profit partners in publicizing the settlement terms.
- After the settlement minimums for direct consumer relief have been met, steer any remaining relief to the Hardest Hit Areas, particularly in States that did not receive any set-aside amounts in the settlements.
- To the degree that there is flexibility in meeting the settlement terms, ensure that settlement provisions that affirmatively further fair housing are prioritized.
- Ensure that there is timely compliance with the settlement terms, and that the "Liquidated Damages" provision is strictly enforced.

V. Policy Recommendations for the Government in Designing and Negotiating Future Settlements and Consent Agreements

- Include more retrospective relief for consumers who already lost their home through foreclosure to the bank, perhaps targeted to the Hardest Hit Areas.
- Expand the affirmatively furthering fair housing options in the settlement agreements, such as the option to channel settlement dollars to the book loss of funds through the financing of large public infrastructure investments in segregated/low-opportunity neighborhoods.
- Seek more concrete consumer relief and AFFH commitments from the States receiving exclusive financial benefits from the settlement.
- Mandate that the bank and the Settlement Monitor consult with and document recommendations regarding the settlement administration from the local community and fair housing/lending advocates.
- Rather than providing several options for the bank to multiply the settlement dollar crediting of each dollar expended for certain settlement provisions, create more of a one-to-one dollar

credit for the settlement so that consumers and the public is provided with a more realistic accounting of the monetary value of the settlement. For settlement expenditures that are highly valued by the government and produce significant public benefits, like multi-family housing developments in high-opportunity areas, the government should mandate higher minimums under the one-to-one dollar crediting system.

- Implement higher minimum requirements for potentially pro-AFFH items in the settlement.

VI. Policy Recommendations for the States

- All States should inform their residents and state-based non-profits about their eligibility to receive funds or relief from the settlements through an ADA-accessible website and toll-free telephone line, in addition to sending targeting mailings and hosting community events.
- All States should develop a strategic plan to affirmatively further fair housing with input from local governments, community organizations, and housing non-profits (as required under HUD's Proposed Rule on AFFH) and coordinate applications to the respective banks for funding under the three settlements. Where possible, funding requests under these settlements should be coordinated with existing federal and state programs to revitalize low-opportunity neighborhoods, assist financially struggling homeowners in the Hardest Hit Areas, and expand housing opportunities for homeowners and renters living in low-opportunity neighborhoods.
- The States participating in the settlements should use some of their direct settlement funds to affirmatively further fair housing, as well as reimbursing State pension funds and agencies, since the claims settled encompassed violations of law in the origination of mortgages as well as the securitization of mortgages.
- The States participating in the settlements administering housing or consumer-related relief programs or providing grants (Delaware, Massachusetts and New York) should assess each program or potential grantee for the degree to which it will advance fair housing goals, including affirmatively furthering fair housing.

VII. Conclusion

Overall, the three multi-billion dollar settlements between the government and Bank of America, Citigroup, and J.P. Morgan for materially misleading statements and representations in the securitization of RMBS and CDOs and violations of law related to the banks' mortgage origination and underwriting practices are positive from an affirmatively furthering fair housing perspective. The settlements all implicitly recognize the connection between the disproportionate predatory lending in residentially segregated communities during the lead-up to the housing bust, and the misrepresentations and omissions about those underlying mortgages when they were securitized and traded on the secondary mortgage market. However, there are improvements that the government can adopt when negotiating future settlements in order to more fully steer financial funds towards affirmatively furthering fair housing. While one-time fines may temporarily create more accountability for violations, dismantling the nation's residential segregation will help avert a future housing crisis and the ensuing financial crisis in the markets.

VIII. Appendix – Calculation of the Magnitude and Potential Flexibility of the Affirmatively Furthering Fair Housing Expenditures

Since there are multiple contingencies in the structure of the "Consumer Relief" section of each of the three settlements and the banks retain some discretion in satisfying these requirements, it is impossible to calculate with exact precision how much of each settlement will affirmatively further fair housing. However, it is possible to approximate this statistic based on the settlement minimum/maximum requirements and certain presumptions. One basic presumption in these calculations is that the bank will seek to satisfy its settlement requirements through the expenditure, forgiveness, or extension of the least amount of money possible. Since the banks are profit-maximizing institutions accountable to their shareholders, rather than the public or consumers, this is a rational presumption.

Second, a related presumption is that each bank will seek to maximize the settlement credit of each dollar by fulfilling as many elements as possible. Each of the settlements describe the credits for each dollar as "cumulative,"[81] but they are actually multiplicative. For instance, the Bank of America settlement states that, "Early Incentive Credit and other Credits are

81 Bank of America Annex 2, *supra* note 4, at 3 n.10 ("Early Incentive Credit and other Credits are cumulative (e.g., $1.00 of principal forgiveness as part of a modification resulting in an LTV of 75% completed prior to August 31, 2015 in a Participating State (as described below under "State-Specific Consumer Relief") where Bank of America has already met its state-specific minimum in an amount beyond that state-specific minimum would receive $1.653125 Credit."); Citigroup Settlement Annex 2, *supra* note 4, at 2 n.7 ("Early Incentive Credit and other credits are cumulative (e.g., $1.00 of principal forgiveness in an amount below 100% LTV completed prior to 10/1/2015 in a Participating State (as described below under "State-Specific Minimums") where Citi has already met its state-specific minimum in an amount beyond that state-specific

cumulative (e.g., $1.00 of principal forgiveness as part of a modification resulting in an LTV of 75% completed prior to August 31, 2015 in a Participating State (as described below under 'State-Specific Consumer Relief') where Bank of America has already met its state-specific minimum in an amount beyond that state-specific minimum would receive $1.653125 Credit). (emphasis added)."[82]

In a formula, this calculation is:

> **($1 of principal forgiveness) x (modification resulting in an LTV of 75%) x (early incentive credit – completed prior to August 31, 2015) x (credit for State-Specific Consumer Relief/Hardest Hit areas) = Settlement Credit**

Or, in numerical format:

> **($1) x (1.25) x (1.15) x (1.15) = $1.653125 Credit**

Note that these settlement credits are not just cumulative, or additive, but that they actually exponentially increase the settlement credit dollars for each element that the bank can satisfy. If the settlement credit calculations were only cumulative, the formula would result in a smaller settlement credit for the Bank of America.

In numerical format:

> **($1) + (0.25 x $1) + (0.15 x $1) + (0.15 x $1) = $1.55 Credit**

The only provisions of the three settlement that are mutually exclusive are the scaled settlement credits, like the loan-to-value reduction incentives or the early settlement payment incentives. In the Bank of America settlement, for example, the credit for loan-to-value (LTV) reduction begins at 115% for a reduction between 90% and 100% of the property value, increases to a 120% credit for an LTV reduction between 76% and 90%, and tops off at a 125% credit of the principal forgiven for a post-modification LTV equal to or less than 75%.[83] Further, certain settlement credits can only be earned after a condition is satisfied. In the Bank of America settlement, the 115% additional settlement dollar credit for consumer relief in the Hardest Hit Areas can only be earned after the bank has satisfied the minimum 50 percent of consumer relief in those areas.[84]

An alternative approach to projecting the way that each of the banks will seek to satisfy their settlement obligations would account for all of the external constraints on the bank, like the current book of loans that would be eligible for relief under the settlement provisions, the current capacity of the bank to extend financing for new loans, the stock and geographic

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81 continued

minimum would receive $1.520875 Credit."); J.P. Morgan Annex 2, *supra* note 7, at 2 n.4 ("Early Incentive Credit and other credits (including Hardest Hit) are cumulative (e.g., $1.00 of principal forgiveness in a hardest hit area on a portfolio loan completed prior to 12/31/2014 would receive $1.4375 Credit). Early incentive applies to all consumer relief activity offered or completed by 10/1/2014.").

82 Bank of America Annex 2, *supra* note 4, at 3 n.10.

83 *Id*. at 3.

84 *Id*.

location of REO properties, and the existing commitments of the bank for multi-family housing developments and anti-blight measures.[85] Even this type of calculation relies on some presumptions about the bank that cannot be known in advance, such as their lending activity over the next two to three years, as well as presumptions about how the banks will approach their settlement obligations. External constraints on the banks is beyond the scope of this analysis, which is focused on calculating the hypothetical capacity of the settlements to fund multi-family housing developments based on the internal constraints of the settlement terms and holding all other factors constant (*ceteris paribus*).

Another possible approach to analyzing these settlements is to project their net economic impact. This calculation would deduct for financial activity that the banks would engage in without the settlement obligation (e.g. the banks would engage in some low-to-moderate income lending even without the settlement), and it would add the aggregate carry-on financial activity resulting from fulfillment of the settlement obligations (e.g. the banks might engage in more multi-family housing financing after establishing partnerships with State and local governments under their settlement obligations). The net economic impact of each bank settlement could be less than or greater than the dollar value attached to the "Consumer Relief" section, depending on the particular circumstances of the bank, the settlement provisions, and the external conditions impacting the bank and the larger economy. While this analysis focuses on the potential dollar expenditures of the bank to satisfy their "settlement dollar credit" requirements, rather than the net economic impact, at least one of the Settlement Monitors is weighing this question. In the first report of the Citigroup Settlement Monitor, Thomas J. Perrelli wrote, "One question frequently asked is whether the relief provided to borrowers and for which Citi has received credit would have been provided in any event (e.g., is this really additional?)."[86] The report described the answer as "mixed," since Citigroup would likely have written off many of its non-performing loans anyway, but the settlement provided the additional impetus to release the property liens (which is required to receive settlement credit under the Citigroup agreement).[87]

Finally, the analysis of each settlement will account for the flexibility available to affirmatively further fair housing nationally and whether there are any geographic limitations or incentives. California, Delaware, Illinois, and New York participated in all three settlements, with an additional three states – Kentucky, Maryland, and Massachusetts – participating in one or two. All of these participating states received direct payments from the respective banks, in addition to set aside "Consumer Relief" sums in the Bank of America and Citigroup settlements.

85 *See, e.g.* Jakabovics & Charette, *supra* note 74.

86 Thomas J. Perrelli, Citi Monitorship First Report 17 (2015), *available at* http://www.citigroupmonitorship.com/uploads/3/5/1/9/3519321/citi_monitorship_initial_report_2015-01-21.pdf.

87 *Id.*

1. Bank of America Settlement Allocations

The Bank of America settlement mandates the expenditure of $7 billion in "settlement credit" dollars for the "Consumer Relief" section.[88] Of this amount, $2.352 billion "settlement credit" dollars are earmarked for certain items, including a minimum:

- $2.15 billion settlement credit dollars for first lien principal forgiveness[89] (with $60 million mandated for first lien forgiveness in New York and $380 mandated for both first lien and principal forgiveness of forbearance in California),[90]
- $20 million settlement credit dollars for mortgages or REO properties "donated to accepting municipalities, land banks, or non-profits or to servicemembers with disabilities or relatives of deceased servicemembers" in New York,[91]
- $50 million settlement credit dollars for donations to capitalize certain small or community-based financial institutions[92] (with a minimum of $8.1 million set aside for New York),[93]
- $30 million settlement credit dollars for donations to IOLTA or similar organizations,[94]

88 Bank of America Annex 2, *supra* note 4, at 8.

89 *Id*. at 2. Presuming that Bank of America seeks to maximize credit towards the settlement, each dollar will result in $3.28125 settlement credit dollars until the 50% Hardest Hit Area Minimum is met [($1) x (1.75 for Forgiveness on FHA-insured or VA-guaranteed loans) x (1.50 for Enhanced Early Incentive Credit) x (1.25 for a post-modification LTV equal to or less than 75%) = $3.28125]. Bank of America will have to apply at least $1.075 billion settlement credit dollars to the Hardest Hit Areas, which would require the expenditure of $327,619,047.62 dollars under this calculation.
After the 50% minimum of "Consumer Relief" to the Hardest Hit Areas is satisfied, Bank of America will receive an additional 115% settlement credit for additional consumer relief to those areas. Again, presuming that Bank of America seeks to maximize its settlement credit dollars, the remainder of the direct consumer relief funds will also be directed to the Hardest Hit Areas and will qualify for the additional 115% settlement credit. So, each of the remaining dollars spent to satisfy the settlement minimum will yield $3.77344 settlement credit dollars [($1) x (1.75 for Forgiveness on FHA-insured or VA-guaranteed loans) x (1.50 for Enhanced Early Incentive Credit) x (1.25 for a post-modification LTV equal to or less than 75%) x (1.15 Credit for Incremental Relief in HHA beyond the Minimum of Deriving 50% of Menu Item 1 Credit from HHA) = $3.77344] Thus, Bank of America would have to grant $284,885,939.62 in relief to satisfy the remaining $1.075 billion settlement credit under these presumptions.

90 *Id*. at 9 n.25-26.

91 *Id*. at 9 n.26 ("Within New York, the following minimums also apply (which shall be referred to as the "New York-Specific Minimum Amounts"): . . . Menu Item 3.C Credit Minimum = $20 Million (provided that to be creditable for purposes of this Menu 3.C Credit Minimum, any donation must be accompanied by a donation under Menu Item 3.D)"). Since these donations are credited dollar for dollar, Bank of America will have to donate $20 million dollars to meet this obligation under the settlement.

92 *Id*. at 7. If Bank of America seeks to maximize credit towards the settlement, each dollar will result in $2.30 settlement credit dollars [($1) x (2) x (1.15) = $2.30], so the donation of $21,739,130.43 will satisfy the $50,000,000 settlement credit minimum.

93 *Id*. at 9 n.26.

94 *Id*. at 7. Again, presuming that Bank of America seeks to maximize credit towards the settlement, each dollar will result in $2.30 settlement credit dollars [($1) x (2) x (1.15) = $2.30], so the donation of $13,043,478.26 will satisfy the $30,000,000 settlement credit minimum.

- $20 million settlement credit for donations to housing counseling agencies[95] (with a minimum of $8.1 million earmarked for New York),[96] and
- **A minimum $100 million settlement credit loss for affordable rental housing developments**[97] (with a mandatory $35.7 million loss in New York).[98]

In addition to the mandatory "Consumer Relief" for California and New York specific to particular settlement items, Bank of America is required to channel at least $500 million in total to California, $500 million to New York, $100 million to Illinois, and $150 million to be split between Delaware, Maryland, and Kentucky.[99]

Based on the presumption that Bank of America will seek to maximize the settlement credit for each dollar it forgives, donates, or marks as a book loss to meet these settlement minimums, it will expend a total of $699,171,653.90 to meet the settlement credit amount of $2.352 billion. The expenditure of two-thirds of the Bank of America settlement credit dollars ($4.648 billion dollars or 66.4 percent) are left to the discretion of the bank, as approved by the Settlement Monitor. This flexibility in the settlement credits is beneficial from an AFFH perspective, because it allows the bank – as supervised by the Settlement Monitor – to apportion a significant amount of the settlement towards financial activities that affirmatively further fair housing.

Another positive AFFH component of the Bank of America settlement is that at least 50 percent of the "Consumer Relief" is apportioned for the Hardest Hit Areas. A potential drawback to the Bank of America settlement is that there is an incentive – in the form of 115% additional settlement credit dollars – to steer additional settlement funds to the States participating in the settlement after the minimum requirement are met, despite the fact that this is a national settlement and several States not involved in the settlement have a greater concentration of Hardest Hit Areas.[100]

However, if the bank sought to affirmatively further fair housing in a geographically diverse manner through the remaining $4.648 billion dollars in settlement credit, it could do so

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95 *Id.* at 7. If Bank of America seeks to maximize credit towards the settlement, each dollar will result in $2.30 settlement credit dollars [($1) x (2) x (1.15) = $2.30], so the donation of $8,695,652.17 will satisfy the $20,000,000 settlement credit minimum.

96 *Id.* at 9 n.26.

97 Presuming that Bank of America seeks to maximize credit towards the settlement, each dollar of loss will result in $4.3125 settlement credit dollars [($1) x (3.75) x (1.15) = $4.3125], so the book loss of $23,188,405.80 will satisfy the $100,000,000 settlement credit minimum.

98 Bank of America Annex 2, *supra* note 4, at 9 n.26.

99 *Id.* at 9.

100 *Id.*

through the book loss of $1.077 billion dollars in multi-family housing development financing in States not participating in the settlement.[101]

2. Citigroup Settlement Allocations

The Citigroup settlement provides for the expenditure of $2.5 billion in "settlement credit" dollars for "Consumer Relief."[102] More than half of the "Consumer Relief" credit – $1.349 billion settlement credit dollars – is directed to certain expenditures, including a minimum:

- $820 million settlement credit dollars for all forms of direct consumer relief – first, second and junior lien principal forgiveness (including principal forgiveness of forbearance), forbearance, and assistance with refinancing with another bank – and "forgiveness of principal associated with a property where foreclosure is not pursued and liens are released,"[103]
- $299 million settlement credit dollars for rate reductions,[104]
- $25 million settlement credit dollars for donations to capitalize certain small or community-based financial institutions,[105]
- $15 million settlement credit dollars for donations to IOLTA or similar organizations,[106]
- $10 million settlement credit dollars for donations to housing counseling agencies,[107]
- **Loss of $180 million in settlement credit dollars for affordable housing developments.**[108]

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101 Each dollar of loss for a Critical Need Family Housing development meeting the Early Incentive Credit will result in $4.3125 settlement credit dollars [($1) x ($3.75 for Critical Need Family Housing) x (1.15 Early Incentive Credit) = $4.3125], so the loss of $1,077,797,101.45 will satisfy the remaining $4,648,000,000 settlement credit.

102 Citigroup Settlement, *supra* note 26, at 4 ("2. Consumer Relief. In addition, Citigroup shall provide $2.5 billion worth of consumer relief as set forth in Annex 2, attached and hereby incorporated as a term of this Agreement. The value of consumer relief provided shall be calculated and enforced pursuant to the terms of Annex 2.").

103 Citigroup Settlement Annex 2, *supra* note 4, at 7. If Citigroup seeks to maximize credit towards the settlement, each dollar will result in $1.3225 settlement credit dollars [($1) x (1.15 Early Incentive Credit) x (1.15 Credit for Incremental LTV reduction below 100% = $1.3225], so the expenditure of $620,037,807.18 will satisfy the $820,000,000 settlement credit minimum.

104 *Id.* If Citigroup seeks to maximize credit towards the settlement, each dollar of rate reduction will result in $1.3225 settlement credit dollars [($1 Rate Reduction Credit) x (1.15 Early Incentive Credit) x (1.15 Credit for Incremental LTV reduction below 100% = $1.3225], so the expenditure of $226,086,956.52 will satisfy the $299,000,000 settlement credit minimum.

105 *Id.* at 8. Since Citigroup receives $2.00 settlement credit dollars for every dollar donated for this item, it will only spend $12.5 million to satisfy this minimum requirement.

106 *Id.* at 12. Since Citigroup receives $2.00 settlement credit dollars for every dollar donated for this item, it will only spend $7.5 million to satisfy this minimum requirement.

107 *Id.* Since Citigroup receives $2.00 settlement credit dollars for every dollar donated for this item, it will only spend $5 million to satisfy this minimum requirement.

108 *Id.* at 13. If Citigroup seeks to maximize credit towards the settlement, each dollar will result in $4.3125 settlement credit dollars [($1) x (3.75 Critical Need Family Housing) x (1.15 Early Incentive Credit) = $4.3125], so the loss of $41,739,130.43 will satisfy the $180,000,000 settlement credit minimum.

In addition, Citigroup must meet certain State-specific minimum amounts through any part of the "Consumer Relief" section, including $90 million for California, $90 million for New York, $40 million for Illinois, $10 million for Massachusetts, and $10 million for Delaware.[109]

Based on the presumption that Citigroup will seek to maximize the settlement credit for each dollar it forgives, donates, or marks as a book loss to meet these settlement minimums, it will expend a total of $912,863,894.13 to meet the settlement credit amount of $1.349 billion. Slightly less than half of the Citigroup settlement credit dollars ($1.151 billion dollars or 46.04 percent) are left to the discretion of the bank, as approved by the Settlement Monitor. While this is proportionally the least flexible of the three settlements, it still allows for the potential allocation of nearly half of the settlement funds towards activities that affirmatively further fair housing.

Similar to the Bank of America settlement, the Citigroup settlement includes a positive AFFH provision to steer 50 percent of the direct consumer relief to the Hardest Hit Areas. However, the Citigroup provision only applies to relief granted to Citigroup Mortgage customers, rather than all potential consumer recipients (as in the Bank of America settlement).[110] The Citigroup settlement also contains the same incentive – 115% additional settlement credit dollars – to direct additional settlement funds to the States participating in the settlement after the minimum requirement are met, despite the fact that this is a national settlement and several States not involved in the settlement have a greater concentration of Hardest Hit Areas.[111]

If Citigroup sought to affirmatively further fair housing in a geographically diverse manner through the remaining $1.151 billion dollars in settlement credit, it could do so through the book loss of $266,898,550.73 in multi-family housing development financing in States not participating in the settlement.[112]

3. J.P. Morgan Settlement Allocations[113]

The J.P. Morgan settlement provides for the expenditure of $4 billion in "settlement credit" dollars for "Consumer Relief."[114] At least half of the funds – $2 billion in settlement credit dollars – must provide direct consumer relief, including first and second lien principal

109 *Id.* at 14.

110 *Id.* at 7.

111 *Id.* at 14.

112 Each dollar of loss for a Critical Need Family Housing development meeting the Early Incentive Credit will result in $4.3125 settlement credit dollars [($1) x ($3.75 for Critical Need Family Housing) x (1.15 Early Incentive Credit) = $4.3125], so the loss of $266,898,550.73 will satisfy the remaining $1,151,000,000 settlement credit.

113 *See also* Jakabovics & Charette, *supra* note 74.

114 J.P. Morgan Annex 2, *supra* note 7, at 4.

forgiveness (including principal forgiveness of forbearance) and first lien forbearance.[115] In addition, the following restrictions apply to the $2 billion settlement credit dollar allotment:

- A minimum of $1.2 billion settlement credit dollars must be spent on *both* first lien principal forgiveness *and* principal forgiveness of forbearance (*with no more than* $300 million spent on principal forgiveness of forbearance).[116]
- A maximum of $300 million settlement credit dollars may be spent on first lien forbearance.[117]

Based on the presumption that J.P. Morgan will seek to maximize the settlement credit for each dollar it forgives, donates, or marks as a book loss to meet these settlement minimums, it will expend a total of $1,391,304,347.83 to satisfy the entire $2 billion dollar settlement credit for direct consumer relief.[118] Half of the settlement value, or $2 billion settlement credit dollars, could potentially be allocated to activities that affirmatively further fair housing. However, J.P. Morgan is highly unlikely to allocate the settlement credit dollars towards AFFH, because it will only receive a one-to-one credit.[119] Thus, not only does the J.P. Morgan settlement contain the fewest number of pro-AFFH activities, it also lacks any minimum expenditures for pro-AFFH activities, and provides the bank with less of an incentive to apply the settlement credit dollars towards these options. Indeed, J.P. Morgan has thus far elected to concentrate its "Consumer Relief" activities on initiating new loans for low and moderate income borrowers, and it has not claimed any credit for pro-AFFH activities like financing multi-family housing developments.[120]

115 *Id.* at 3.

116 *Id.* at 2. If J.P. Morgan seeks to maximize credit towards the settlement, each dollar will result in $1.4375 settlement credit dollars [($1) x (1.25 Credit for Hardest Hit Areas) x (1.15 Early Incentive Credit) = $1.4375], so the expenditure of $834,782,608.70 will satisfy the $1.2 billion settlement credit minimum. Under the same presumption, it will cost J.P. Morgan $1,391,304,347.83 to satisfy the entire $2 billion dollar settlement credit for direct consumer relief.

117 *Id.*

118 *Id.* If J.P. Morgan seeks to maximize credit towards the settlement, each dollar will result in $1.4375 settlement credit dollars [($1) x (1.25 Credit for Hardest Hit Areas) x (1.15 Early Incentive Credit) = $1.4375], so the expenditure of $834,782,608.70 will satisfy the $1.2 billion settlement credit minimum. Under the same presumption, it will cost J.P. Morgan $1,391,304,347.83 to satisfy the entire $2 billion dollar settlement credit for direct consumer relief.

119 *Id.* at 4.

120 *Chase RMBS Settlement: Consumer Relief Update* 3, *supra* note 8, at 7.

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