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The Dodd-Frank Act: An Overview of the 2016 Incentive-Based Compensation Proposal

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Summary

Incentive compensation or incentive-based compensation refers to the portion of an employee's pay that is not fixed in contrast to an annual or monthly salary. Incentive compensation takes the form of variable contingent compensation, particularly cash bonuses, that are based on the attainment of certain firm or employee performance metrics. Such pay has been a significant component of compensation for executives and other key personnel at many firms in the financial sector. Many argue that such compensation contributed to the 2007-2009 financial crisis by incentivizing pivotal financial firm personnel to take excessive, and in retrospect, dangerous risks that were financially problematic for their firms. They argue that such compensation could still potentially pose problems and encourage firm personnel to take excessive risks. As an example, in September 2016, Wells Fargo Bank, N.A. was fined $185 million for illegal sales practices, which might have been motivated by incentive-based compensation arrangements. In addition to the fine, at issue is whether the Wells Fargo incident highlights the potential usefulness of the Dodd-Frank incentive-based compensation clawback provision.

In July 2010, in response to the financial crisis of 2007 to 2009, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act, P.L. 111-203). Section 956 of the law directed financial regulators to adopt new rules that jointly prescribe regulations or guidelines aimed at prohibiting incentive compensation arrangements that might encourage inappropriate risks at financial institutions. These regulators, *the Agencies*, are the National Credit Union Association, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, the Office of the Comptroller of the Currency, and the Securities and Exchange Commission.

In April 2016, after releasing an ultimately unimplemented proposal in 2011, the Agencies proposed new rules to implement Section 956. The proposal has a three-tiered protocol in which the stringency of incentive compensation limits grow as an entity's consolidated asset total increases: Level 1, $250 billion and up; Level 2, $50 billion to $250 billion; and Level 3, $1 billion to $50 billion. Public comment period for the proposal was through July 22, 2016. The proposal will then require the approval of each agency in order to be finalized and adopted.

Level 1 and Level 2 institutions must comply with enhanced requirements as to the structure of their incentive compensation for senior executive officers (i.e., various top corporate leaders, including the president, the chief executive officer, and the chief operating officer) and significant risk-takers (i.e., top paid non-senior employees). For example, a Level 1 institution would be required to defer at least 60% of a senior executive officer's qualifying incentive-based compensation and 50% of a significant risk-taker's qualifying incentive-based compensation for up to four years. Senior executive officers' and significant risk-takers' incentive-based compensation awarded under the long-term incentive plan would be deferred by 60% and 50%, respectively, for at least two years. A Level 2 institution would be required to defer at least 50% of a senior executive officer's qualifying incentive-based compensation and 40% of a significant risk-taker's qualifying incentive-based compensation for at least three years.

Senior executives and significant risk-takers at Level 1 and 2 institutions would also be subject to reductions in previously earned incentive compensation (i.e., forfeiture and downward adjustment) in the event of certain behaviors, including when (1) deviation from risk parameters causes a firm's poor financial performance, or (2) inappropriate risk-taking occurs regardless of the impact on the firm's financial performance. Those employees could also have their vested incentive compensation clawed back by their employer under conditions determined by the employer, including (1) the existence of significant financial or reputational harm caused by the

employee's actions; (2) fraudulent conduct by the employee; or (3) intentional misrepresentations on the part of the employee.

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Introduction

Section 956 of Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) requires financial regulators to adopt new rules placing certain limitations on the use of incentive or incentive-based compensation at financial firms.[1] Section 956 was a response to the widely held but contested notion that incentive-based compensation (i.e., variable performance-based compensation) at financial firms, including commercial and investment banking firms,[2] helped encourage executives and various operatives to take excessive risks that ultimately contributed to financial setbacks at individual firms, which contributed to the 2007-2009 financial crisis and since. As an example, in September 2016, Wells Fargo Bank, N.A. was fined $185 million for illegal sales practices, which might have been motivated by incentive-based compensation arrangements. In addition to the fine, at issue is whether the Wells Fargo incident highlights the potential usefulness of the Dodd-Frank incentive-based compensation clawback provision.

An initial 2011[3] proposal to implement Section 956 was issued by financial regulators (collectively, *the Agencies*): the National Credit Union Association (NCUA), the Board of Governors of the Federal Reserve System (Fed), the Federal Deposit Insurance Corporation (FDIC), the Federal Housing Finance Agency (FHFA), the Office of the Comptroller of the Currency (OCC), the Securities and Exchange Commission (SEC), and the Office of Thrift Supervision (OTS, later disbanded and merged into the OCC).

The 2011 proposal, which was not adopted, met with substantial criticism from both investor interests and entities connected to the financial industry. Five years later, in April 2016, the Agencies issued a new proposal (also known as the re-proposal) for implementing Section 956.[4]

This report provides an overview of the 2016 incentive compensation proposal. It (1) explains incentive compensation; (2) discusses the two key opposing views on the role that incentive compensation may or may not have played in the financial crisis; (3) examines the Section 956 incentive compensation mandate in the Dodd-Frank Act and briefly describes the earlier 2011 proposal; (4) describes key elements of the 2016 proposal; and (5) highlights some of the early comments on the 2016 proposal's perceived impact.

[1] P.L. 111-203, for more information, see CRS Report R41350, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Background and Summary*, coordinated by Baird Webel.

[2] Hedge funds are investment entities that employ pooled funds, which may use a number of different strategies to produce positive investment returns for their investors. They are led by principal investors called general partners and also have passive investors called limited partners. Private equity funds are investment entities that employ pooled funds to make investments directly into private companies or to conduct buyouts of public companies that become private firms. They are led by principal investors called general partners and have passive investors called limited partners. A commercial bank is a financial institution that provides services, such as accepting deposits, giving business loans and personal loans, mortgage lending, and basic investment products like savings accounts and certificates of deposit. An investment bank is an institution that raises capital for clients by helping them issue securities, trades in securities and financial instruments for clients and on its own account, and advises on corporate mergers and acquisitions, among other activities.

[3] The Office of the Comptroller of the Currency (OCC) et al., "Incentive-Based Compensation Arrangements," 76 *Federal Register*, April 14, 2011.

[4] OCC et al., "Incentive-Based Compensation Arrangements," 81 *Federal Register*, June 10, 2016.

Incentive Compensation and the Financial Crisis

Incentive compensation or incentive-based compensation refers to the portion of an employee's pay that is not guaranteed (as is the salary). Incentive compensation takes the form of variable compensation that is contingent on the performance of designated metrics with respect to the employing firm, the employee's departmental unit, the employee, or some combination of these.

The role that incentive compensation arrangements played in contributing to the financial crisis of 2007 to 2009 has been highly scrutinized by financial regulators, financial-sector practitioners, and academics. Some have found little evidence that the compensation structures directly affected financial firms' performance during the crisis.[5]

For example, Martin Conyon, a senior fellow at the Center for Human Resources at the University of Pennsylvania's Wharton School of Business, observed,

> There's been plenty of consultant research and academic research that has looked at the structure of incentives, in banking in particular, and whether there was a cause or link between those incentives and the subsequent financial crisis. And it's not clear—it hasn't been demonstrated in ways that pass muster.[6]

If structured properly, incentive compensation arrangements, often in the form of bonuses, stocks, or stock options, can serve as an employee recruitment, retention, and performance motivational tool while also helping to align a company's goals with those of its executives, employees, and shareholders. Moreover, after surveying research on the role of financial-sector compensation structures on the financial crisis, the SEC staff observed,

> [T]here are also studies that argue that compensation structures were not responsible for the differential risk-taking and performance of financial institutions during crises. In particular, a study argues that the differential risk culture across banks determines the differential performance of these institutions. For example, banks that performed poorly during the 1998 crisis were also found to perform poorly, and had higher failure rates, during the recent financial crisis. Another recent study argues that, prior to 2008, risk-taking was inherently different across financial institutions and the fact that high-risk financial institutions paid high amounts of compensation to their executives was not an indicator of excessive compensation practices but represented compensation for the additional risk to which executives' wealth was exposed.
>
> The presence of a number of mitigating factors may explain why evidence is inconclusive on the effects of incentive-based compensation on inappropriate risk-taking. One such factor is corporate governance and, more specifically, the board of directors oversight over executive compensation.[7]

Others, however, have found a causal connection and concluded that the prevalence of poorly structured incentive-based compensation arrangements at various financial institutions

[5] For example, see the dissenting perspective in The Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report: National Commission on the Causes of the Economic Crisis in the United States*, February 25, 2011, pp. 413-437, at https://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf. (Hereinafter, *The Financial Crisis Inquiry Report*.)

[6] "Can Bonus Clawback Rules Fix Finance Industry Incentives?," *Knowledge at Wharton*, May 4, 2016, at http://knowledge.wharton.upenn.edu/article/can-bonus-clawback-rules-fix-finance-industry-incentives/.

[7] OCC et al., "Incentive-Based Compensation Arrangements," 81 *Federal Register*, June 10, 2016.

encouraged excessively risky behavior that contributed to financial firms' problems, which ultimately helped lead to the crisis.[8]

For example, during the crisis, Sheila Bair, then chair of the Federal Deposit Insurance Corporation, observed,

> The crisis has shown that most financial-institution compensation systems were not properly linked to risk management. Formula-driven compensation allows high short-term profits to be translated into generous bonus payments, without regard to any longer-term risks…. A similar dynamic was at work in the mortgage markets. Mortgage brokers and bankers went into the subprime and other risky markets because these markets generated high returns not just for investors but also for the originators themselves. The standard compensation practice of mortgage brokers and bankers was based on the volume of loans originated rather than the performance and quality of the loans made…."[9]

The Financial Crisis Inquiry Commission was a congressionally created panel charged with examining the causes of the financial crisis.[10] Among other things, the majority view on the panel's 2011 study concluded that "compensation structures were skewed all along the mortgage securitization chain, from people who originated mortgages to people on Wall Street who packaged them into securities."[11]

Others have made similar observations:

> Non-executive [pay] incentives …. significantly affected bank risk-taking prior to the 2007 financial crisis; and the structure, as well as the level of those incentives, was determined largely by the market's demand for talent…. Among banks, however, combining performance-based pay with competition, where employees can move from one employer to the next, has had perverse results. Greater risk-taking can increase short-term bank profits and, in turn, the amount a non-executive is paid, potentially at the expense of long-term bank value.[12]

In greater detail, various financial regulators collectively spoke of a nexus between incentive compensation and potential financial loss:

> Some compensation arrangements rewarded employees—including non-executive personnel like traders with large position limits, underwriters, and loan officers—for

[8] For example, see the majority view in *The Financial Crisis Inquiry Report*, p. 64; Anat Admati and Martin Hellwig, *The Bankers' New Clothes: What's Wrong with Banking and What to Do about It* (Princeton, New Jersey: Princeton University Press, 2013); Ronald Hartz and Gabriele Fassauer, "Performance Principle and Organizational Compensation Practice in the Context of the Global Financial Crisis: A Discourse-Analytical Study," *Management Revue*, January 1, 2013; Jonas Prager, "The Financial Crisis of 2007/8: Misaligned Incentives, Bank Mismanagement, and Troubling Policy Implications," *Economics, Management and Financial Markets*, June 2013. There is, however, a debate over whether incentive-based compensation, including stocks and stock options, awarded to bank senior executives, as opposed to bank operatives, had a contributory role in the problems at various financial institutions, which in turn helped fuel the financial crisis. An example of research that questions the implication of senior executive incentive-based pay is Simone Sepe and Charles K Whitehead, *Paying for Risk: Bankers, Compensation, and Competition*, Cornell Law Faculty Working Papers, February 17, 2014, pp. 3-4, at http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1117&context=clsops_papers. (Hereinafter, Sepe and Whitehead, *Paying for Risk: Bankers, Compensation, and Competition*.)

[9] Statement of Sheila C. Bair, chairman, Federal Deposit Insurance Corporation, on the Causes and Current State of the Financial Crisis before the Financial Crisis Inquiry Commission, January 14, 2010, at https://www.fdic.gov/news/news/speeches/chairman/spjan1410.html.

[10] The 10-member commission was established as part of the Fraud Enforcement and Recovery Act (P.L. 111-21).

[11] *The Financial Crisis Inquiry Report*, p. 64.

[12] Sepe and Whitehead, *Paying for Risk: Bankers, Compensation, and Competition*, pp. 3-4.

> increasing an institution's revenue or short-term profit without sufficient recognition of the risks the employees' activities posed to the institutions, and therefore potentially to the broader financial system. Traders with large position limits, underwriters, and loan officers are three examples of non-executive personnel who had the ability to expose an institution to material amounts of risk. Significant losses caused by actions of individual traders or trading groups occurred at some of the largest financial institutions during and after the financial crisis.[13]

An attendant observation spoke of the corrosive long-term corporate impact that poorly designed bonus-based incentive compensation schemes were believed to have had on various financial institutions, another observer noted, "[T]he revenues that [often] served as the basis for calculating bonuses were generated immediately, while the risk outcomes might not have been realized for months or years after the transactions were completed."[14]

The Dodd-Frank Act Incentive Compensation Mandate: Section 956

Section 956 of the Dodd-Frank Act represents an attempt to reduce the presence of problematically risky financial-sector incentive-based compensation arrangements. The section requires the Agencies to jointly prescribe regulations or guidelines aimed at prohibiting incentive-based payment arrangements in financial institutions that they determine encourage inappropriate risks by providing excessive compensation or that could lead to a material financial loss.

Those regulations or guidelines must also require the financial institutions to disclose information about the structure of their incentive-based compensation arrangements with enough detail to permit the financial regulators to ascertain whether the arrangements amount to excessive compensation or could result in a material financial loss to a financial institution.

The 2011 Incentive Compensation Proposal

In April 2011, the Agencies issued an initial proposal to implement Section 956 of the Dodd-Frank Act.[15] The proposal would have banned incentive-based compensation plans that encouraged inappropriate risks at a range of financial firms. Financial institutions with $1 billion or more in consolidated assets would have been required to have policies and procedures necessary for ensuring compliance with the proposal. They also would have been prohibited from providing incentive compensation that encouraged inappropriate risk-taking, which could lead to material financial losses to applicable employees, including executive officers and non-executives employees whose activities could expose the firms to material financial loss. In addition, the financial firms would have been required to adopt incentive compensation practices that (1) provided an appropriate balance between risk and financial rewards; (2) were compatible with effective risk management and controls; and (3) were bolstered by a robust corporate governance mechanism.

Also under the proposal, *large financial institutions*, generally defined as firms with $50 billion or more in total consolidated assets, but also including credit unions and all Federal Home Loan banks with total consolidated assets of $1 billion or more, would have been required to adopt

[13] OCC et al., "Incentive-Based Compensation Arrangements," 81 *Federal Register* 37674, June 10, 2016.

[14] OCC et al., "Incentive-Based Compensation Arrangements," 81 *Federal Register*, June 10, 2016.

[15] OCC et al., "Incentive-Based Compensation Arrangements," 76 *Federal Register*, April 14, 2011.

policies that ensured that executive officers and other key employees deferred at least half of their annual incentive compensation awards for at least three years.

In addition, the proposal would have required the large financial institutions to have policies implemented and overseen by a firm's board of directors that identified non-executive employees with the ability to expose the institution to potentially substantial losses relative to its size, including securities traders with relatively large position limits. The large financial institution boards would have also been required to review and approve such non-executive employees' incentive-based compensation.

The 2011 proposal elicited some 10,000 responses, most in the form of a few types of largely identical form letters. According to the Agencies, the respondents included an array of community organizations groups, labor unions, and pension funds that generally advised the Agencies to strengthen the proposal, including increasing the duration of or the amount of incentive pay subject to the mandatory deferral provision.[16]

By contrast, several financial institutions and financial industry trade groups reportedly recommended that the Agencies issue guidelines instead of rules for implementing Section 956. Many financial industry-based commenters also reportedly expressed opposition to the proposal's mandatory deferral provision with several arguing that it would potentially undermine a firm's ability to both attract and retain vital employees.[17] The Agencies did not adopt the 2011 incentive compensation proposal.

The 2016 Incentive Compensation Proposal

In the roughly seven years between the end of the financial crisis in 2009 and 2016, the Agencies report that the entities that they supervise have implemented incentive-based compensation plans that are generally in agreement with guidelines provided by the bank regulators such as the Fed.[18] The regulators, however, also indicated that "[n]ot withstanding the recent progress, incentive-based compensation practices are still in need of improvement."[19]

In an October 2015 overview of the securities industry in New York City, the Office of the New York State Controller (OSC) spoke of changes in Wall Street incentive compensation practices to mitigate excessive risk taking and noted the continued salience of bonus-based incentive compensation payments:

> In recent years, the securities industry has changed its compensation practices in response to new regulations and other compensation reforms designed to discourage excessive risk-taking. Firms have raised base salaries for some employees, and now pay a smaller share of bonuses in the current year while a larger share is deferred to future years (usually for a

[16] OCC et al., "Incentive-Based Compensation Arrangements," 81 *Federal Register*, June 10, 2016.

[17] Ibid.

[18] Ibid., p. 20. For example, in June 2010, the federal banking agencies, the Fed, the OCC, the FIDC, and the OTS adopted interagency incentive compensation guidelines for all of the banking entities that they supervise. The guidelines' linchpins are three guiding principles for banking organizations: (1) They should provide employees incentives that appropriately balance risk and reward; (2) they should provide incentive compensation that is compatible with effective controls and risk management; and (3) they should provide incentive compensation that is supported by strong corporate governance, including active and effective oversight by the organization's board of directors, the interagency guidance. Board of Governors of the Federal Reserve, *Incentive Compensation Practices: A Report on the Horizontal Review of Practices at Large Banking Organizations*, October 2011, p. 1, at http://www.federalreserve.gov/publications/other-reports/files/incentive-compensation-practices-report-201110.pdf.

[19] OCC et al., "Incentive-Based Compensation Arrangements," 81 *Federal Register* 37676, June 10, 2016.

> period of three to five years) in the form of cash, stock options or other types of compensation. Clawback provisions [which authorize firms to confiscate earlier incentive compensation payments] are also more frequently being adopted, and a larger share of bonuses is now being paid outside the traditional bonus period, making it harder to distinguish bonuses from base salaries. Despite these actions, bonuses remain an important part of total compensation packages paid to securities industry employees. In March 2015, OSC estimated that the bonus pool paid to the City's securities industry employees for work performed in 2014, including bonus payments deferred from prior years, reached $28.5 billion …. This was the third-highest level ever and the highest level since the financial crisis.[20]

In April 2016, the Agencies issued a new incentive compensation proposal (or re-proposal) to implement Section 956 of the Dodd-Frank Act.[21] Various reports have indicated that at least part of the regulators' challenge for the Agencies in formulating incentive compensation standards for the 2016 proposal involved the marked differences in compensation arrangements between banks and some of the entities overseen by the SEC, including hedge funds and private equity funds: Bank compensation tends to entail a fixed salary, equity in the company, and bonuses awarded at year's end. Although asset managers at SEC-regulated entities earn salaries, they are also typically paid through fees based on a fund's asset size and its investment performance.[22]

The re-proposal expands the more restrictive incentive compensation requirements in the 2011 proposal for senior employees, including the chief executive officer, to a larger group of financial institutions and to a new group of non-senior executive employees defined as *significant risk-takers*, who are non-senior employees in a position to subject their employer to significant risk or who are among the higher paid firm employees.

The six regulators who comprise the Agencies will receive public comments on the proposal through July 22, 2016. To be finalized and adopted, the proposal will require the approval of each of them. Martin J. Gruenberg, chairman of the FDIC, one of the six regulatory agencies involved in issuing the 2016 proposal, said that it was "perhaps the most important Dodd-Frank rulemaking remaining to be implemented."[23]

Institutions Affected by the Proposal

A financial institution with average total consolidated assets of at least $1 billion that provides incentive-based compensation would be considered a covered financial institution (CFI).[24] In addition to the $1 billion threshold, the Dodd-Frank Act specifically identifies the following types of institutions as CFIs:

[20] Thomas P. DiNapoli and Kenneth Bleiwas, "The Securities Industry in New York City," Office of the State Comptroller, 2016, p. 4, at https://www.osc.state.ny.us/osdc/rpt5-2016.pdf.

[21] OCC et al., "Incentive-Based Compensation Arrangements," 81 *Federal Register*, June 10, 2016.

[22] Jesse Hamilton and Elizabeth Dexheimer, "Executive Compensation Regulators' Proposal Would Restrict Wall Street Bonus Pay," *Wall Street Journal*, April 21 2016, at http://www.wsj.com/articles/new-rules-curbing-wall-street-pay-announced-1461247600.

[23] Statement by FDIC Chairman Martin J. Gruenberg on the Federal Deposit Insurance Corporation Notice of Proposed Rulemaking on Incentive-Based Compensation Arrangements, FDIC, April 26, 2016, at https://www.fdic.gov/news/news/speeches/spapr2616a.html.

[24] 12 U.S.C. §5641.

- a depository institution or depository institution holding company, as defined in Section 3 of the Federal Deposit Insurance Act (FDIA);[25]
- a broker-dealer[26] registered under Section 15 of the Securities Exchange Act of 1934;[27]
- a credit union, as described in Section 19(b)(1)(A)(iv) of the Federal Reserve Act;[28]
- an investment adviser as defined in Section 202(a)(11) of the Investment Advisers Act of 1940;[29]
- the Federal National Mortgage Association (Fannie Mae);
- the Federal Home Loan Mortgage Corporation (Freddie Mac); and
- any other financial institution that the appropriate federal regulators, jointly, by rule, determine should be treated as a CFI.[30]

The reporting requirements and the percentage of incentive compensation that is required to be deferred increase as the average consolidated assets threshold reaches higher limits. Also, the 2016 proposed rule includes more detailed disclosure and record-keeping requirements for larger institutions, Level 1 and Level 2, than did the 2011 proposed rule. The CFIs are grouped into three categories based on average total consolidated assets:

- Level 1—$250 billion or more in consolidated assets;
- Level 2—$50 billion or more and less than $250 billion in consolidated assets; and
- Level 3—$1 billion or more and less than $50 billion in consolidated assets.[31]

Incentive-Based Compensation as Defined in the Proposal

The proposed rule defines *incentive-based compensation* as "any variable compensation, fees, or benefits that serve as an incentive or reward for performance." *Compensation, fees, or benefits* mean "all direct and indirect payments, both cash and non-cash, awarded to, granted to, or earned by or for the benefit of, any covered person in exchange for services rendered to the CFI." The form of payment would not affect whether such payment meets the definition of compensation, fees, or benefits. The forms of payment would include, among other things, payments or benefits based on an employment contract, compensation, pension, or benefit arrangements, fee

[25] 12 U.S.C. §1813.

[26] A broker-dealer is a person or firm involved in buying and selling securities and is generally used to describe a stock brokerage. When a brokerage firm executes orders on behalf of clients, it is acting as a broker. When it trades for its own account, it is acting as a dealer.

[27] 15 U.S.C. §780.

[28] 12 U.S.C. §461(b)(1)(A).

[29] 15 U.S.C. §80b-2. An investment adviser is any person or group that makes investment recommendations or conducts securities analysis in return for a fee via direct management of client assets or via written publications. Investment advisors with a certain amount of assets under their management must register with the SEC as Registered Investment Advisors, RIAs. Some RIAs advise mutual funds, venture capital funds, and private equity funds.

[30] OCC et al., "Incentive-Based Compensation Arrangements," 81 *Federal Register*, June 10, 2016.

[31] Ibid.

arrangements, perquisites, options, post-employment benefits, and other compensatory arrangements.[32]

Compensation that is solely awarded for, and the payment of which is solely tied to, continued employment (e.g., salary or retention award) would not be considered incentive-based compensation. Similarly, signing bonuses or compensation related to professional certification or higher-level educational achievement would not be considered incentive-based compensation. Neither would contributions to retirement plans be considered incentive-based compensation.[33]

In their proposal, the financial regulators appear to have recognized that incentive-based compensation arrangements are critical tools in the management of financial institutions. On the one hand, the regulators argue that incentive-based compensation can promote the health of financial institutions by aligning the interests of executives and employees with those of the institution's shareholders and other stakeholders.

On the other hand, the regulators believe that poorly structured incentive-based compensation can lead executives and employees to take inappropriate risks that adversely affect the financial institutions and the long-term health of the U.S. economy. Larger financial institutions that are interconnected with one another or with many other companies or markets can be negatively affected from inappropriate risk-taking and can have broader consequences.

[32] Ibid.

[33] Ibid.

Key Terms

The explanations of these key terms are based on the 2016 proposal.[34]

The board of directors is the governing body of a covered financial institution that oversees the activities of the covered institution, often referred to as the board of directors or board of managers.

A senior executive officer under the proposal is a covered person who holds the title or, without regard to title, salary, or compensation, performs the function of one or more of the following positions at a covered institution for any period of time in the relevant performance period: president, chief executive officer, executive chairman, chief operating officer, chief financial officer, chief investment officer, chief legal officer, chief lending officer, chief risk officer, chief compliance officer, chief audit executive, chief credit officer, chief accounting officer, or head of a major business line or control function. The definition also includes a covered person who performs the function or a senior executive officer for a covered institution, even if the covered person's formal title does not reflect that role or the covered person is employed by a different entity.

A significant risk-taker under the proposal is an individual who is not a senior executive officer but is in the position to put a Level 1 or Level 2 covered institution at risk of material financial loss so that the proposed rule's requirements and prohibitions on incentive-based compensation arrangements apply to such an individual.

The proposal incorporates two tests for determining whether a covered person is a significant risk-taker. A covered person would be a significant risk-taker if either test is met. The first test is based on annual base salary and incentive-based compensation of a covered person relative to the other covered persons working for the covered institution and its affiliated covered institutions. This test is intended to determine whether in the consolidated organization the individual is among the top 5% (for Level 1 institution) or top 2% (for Level 2 institution) of the highest compensated covered persons.

The second test is based on whether the covered person has authority to commit or expose 0.5% or more of the capital of the covered institution or an affiliate that is itself a covered institution. The definition of significant risk-taker does not apply to senior executive officers.

The significant risk-taker definition under either test is applicable only to covered individuals who receive annual base salary and incentive-based compensation of which at least one-third is incentive-based compensation (one-third threshold), based on the covered person's annual base salary paid and incentive-based compensation awarded during the last calendar year that ended at least 180 days before the beginning of the performance period.

Key Elements of the Proposed Rule

The 2016 proposal would prohibit incentive-based compensation arrangements at CFIs that could encourage inappropriate risks by providing excessive compensation or that could lead to a material financial loss. Compensation, fees, and benefits will be considered excessive when amounts paid are unreasonable or disproportionate to the value of the services performed by a covered person, which take into consideration the following factors:

- the combined value of all compensation, fees, or benefits provided to a covered person;
- the compensation history of the covered person and other individuals with comparable expertise at CFIs;
- the financial condition of the CFI;
- compensation practices at comparable institutions, based upon such factors as asset size, geographic location, and the complexity of the CFIs' operations and assets;
- for post-employment benefits, the projected total cost and benefit to the CFI; and

[34] Ibid.

- any connection between the covered person and any fraudulent act or omission, breach of trust or fiduciary rule, or insider abuse with regard to the CFI.[35]

Further, an incentive-based compensation arrangement would be considered to encourage inappropriate risks that could lead to material financial loss to the CFI, unless the arrangement

- appropriately balances risk and reward;
- is compatible with effective risk management and controls;
- is supported by effective governance;
- includes financial and non-financial measures of performance;
- is designed to allow non-financial measures of performance to override financial measures of performance, when appropriate; and
- is subject to adjustment to reflect actual losses, inappropriate risks taken, compliance deficiencies, or other measures or aspects of financial and non-financial performance.[36]

The 2016 proposed rule also places certain requirements on the CFI's board of directors:

- conduct oversight of the CFI's incentive-based compensation;
- approve incentive-based compensation arrangements for senior executive officers, including amounts of awards and, at the time of vesting, payouts under such arrangements;
- approve material exceptions or adjustments to incentive-based compensation policies or arrangements for senior executive officers; and
- annually create and maintain for at least seven years records that document the structure of incentive-based compensation arrangements and that demonstrate compliance with the proposed rule. The records would be required to be disclosed to the appropriate federal regulator upon request.[37]

Disclosure and Record-Keeping Requirements for Levels 1 and 2 CFIs

The 2016 proposal contains specific disclosure and record-keeping requirements for Level 1 and Level 2 CFIs. All Level 1 and Level 2 institutions are required to create annually and maintain for at least seven years records that would allow for an independent audit of the compensation arrangements, policies, and procedures by federal regulators. There are specific requirements for how the records should be maintained:

- the CFI's senior executive officers and significant risk-takers, listed by legal entity, job function, organizational hierarchy, and line of business;
- the incentive-based compensation arrangements for senior executive officers and significant risk-takers, including information on the percentage of incentive-based compensation deferred and form of award;

[35] OCC et al., "Incentive-Based Compensation Arrangements," 81 *Federal Register* 37679, June 10, 2016.

[36] Ibid.

[37] OCC et al., "Incentive-Based Compensation Arrangements," 81 *Federal Register* 37680, June 10, 2016.

- any forfeiture and downward adjustment or clawback reviews and decisions for senior executive officers and significant risk-takers; and
- any material changes to the CFI's incentive-based compensation arrangements and policies.[38]

Incentive-Compensation Deferral, Clawback, Forfeiture, and Downward Adjustment Requirements for Levels 1 and 2 CFIs

The proposed rule would also require that incentive-based compensation arrangements for senior executives and significant risk-takers at Levels 1 and 2 CFIs include four mechanisms for deferring, withdrawing, or reducing such payments to them when they are associated with certain events or conduct. Those mechanisms are incentive-compensation deferrals, clawbacks, downward adjustments, and forfeitures.

Key Terms

The explanations of these key terms are based on the 2016 proposal.[39]

Vesting signifies the transfer of ownership of compensation to an employee and the fact that the employee's ownership right is no longer based on the occurrence of a previously specified event.

Deferral is the delay of vesting of incentive compensation beyond the date on which the incentive-based compensation is awarded.

Forfeiture refers to a reduction of incentive compensation that has been awarded and deferred but has yet to be vested.

Downward adjustment is a reduction of the amount of an employee's incentive compensation for any performance period that has already started that occurs before the award of the compensation to the employee.

Clawbacks are mechanisms by which a covered financial institution can recover vested incentive compensation from a senior executive officer or a significant risk-taker if certain events occur for seven years following the date on which such compensation vests, if the institution determines that the senior executive officer or significant risk-taker engaged in misconduct that resulted in significant financial or reputational harm to the covered financial institution, fraud, or intentional misrepresentation of information used to determine the incentive-based compensation.

Deferrals

Under the proposed rules, a Level 1 institution would be required to defer at least 60% of a senior executive officer's and 50% of a significant risk-taker's qualifying incentive-based compensation for at least four years. Further, senior executive officers' and significant risk-takers' incentive-based compensation awarded under the long-term incentive plan would be deferred by 60% and 50%, respectively, for at least two years. Deferred compensation may vest no faster than on a pro-rata annual basis, and, for CFIs or their subsidiaries that issue equity, the deferred amount would be required to consist of substantial amounts of both deferred cash and equity-like instruments throughout the deferral period. Options-based compensation may not exceed 15% of the total incentive-based compensation for the performance period.[40]

A Level 2 institution would be required to defer at least 50% of a senior executive officer's and 40% of a significant risk-taker's qualifying incentive-based compensation for at least three years. Further, a senior executive officer's and a significant risk-taker's incentive-based compensation

[38] Ibid.

[39] OCC et al., "Incentive-Based Compensation Arrangements," 81 *Federal Register*, June 10, 2016.

[40] OCC et al., "Incentive-Based Compensation Arrangements," 81 *Federal Register* 37680, June 10, 2016.

awarded under the long-term incentive plan would be deferred by 50% and 40%, respectively, for at least one year. Deferred compensation may vest no faster than on a pro-rata annual basis, and, for CFIs or their subsidiaries that issue equity, the deferred amount would be required to consist of substantial amounts of both deferred cash and equity-like instruments throughout the deferral period. Options-based compensation may not exceed 15% of the total incentive-based compensation for the performance period.[41]

The proposed rule would subject Level 1 and Level 2 CFIs' senior executive officers' and significant risk-takers' deferred but unvested incentive-based compensation to potential forfeiture. Similarly, deferred but unvested incentive-based compensation could also be subject to downward adjustments if any of the following occur:

- poor financial performance attributable to a significant deviation from the covered institution's risk parameters outlined in its policies and procedures;
- inappropriate risk-taking, regardless of the impact on financial performance;
- material risk management or control failures;
- noncompliance with statutory, regulatory, or supervisory standards resulting in an enforcement or legal action by a federal or state regulator or agency, or a requirement that the covered institution restates a financial statement to correct a material error; and
- other aspects of conduct or poor performance as defined by the CFI.

Clawbacks

The Sarbanes-Oxley Act of 2002 (SOX),[42] a wide-ranging public company accounting reform, was enacted in the wake of widespread accounting scandals at companies such as Enron and WorldCom. Section 304 of SOX generally requires chief executive officers and chief financial officers to reimburse their employer for bonuses and other incentive compensation and stock sale profits if the company is required to restate its financial statements, as a result of their misconduct due to material noncompliance with the financial reporting requirements of the federal securities laws.

Section 954 of the Dodd-Frank Act expanded on those SOX clawback provisions. Section 954 required the SEC to adopt rules directing national securities exchanges and associations to proscribe the listing of the security of a public company that is noncompliant with new requirements regarding the recovery of erroneously awarded incentive-based compensation and the disclosure of a company's clawback policy.

In July 2015, the SEC proposed rules to implement Section 954.[43] The proposal, which has yet to be finalized, lays out a public company's obligations regarding recovering incentive compensation awarded to its executive officers (basically the chief executive officer, the principal chief financial officer, and the principal accounting officer or the controller). Specifically, if a company is required to prepare an accounting restatement because of a material noncompliance with the financial reporting requirement under the federal securities laws, it would be required to recover from current or former executive officers awarded incentive-based compensation during the preceding three-year period based on the erroneous accounting data. The amount of that

[41] Ibid.

[42] P.L. 107-204.

[43] SEC, "Listing Standards for Recovery of Erroneously Awarded Compensation," 80 *Federal Register*, July 14, 2015.

compensation would be in excess of what would have been paid to the employees under the restated accounting results. Recovery of the compensation would be required to be on a "no-fault" basis, meaning that it should not be contingent on whether any misconduct occurred or an executive officer's actual responsibility for the financial misstatements.[44]

The 2016 rules proposed to implement Section 956 of the Dodd-Frank Act expand on the aforementioned clawback provisions in the Sarbanes-Oxley Act and the SEC's proposed 2015 rules to implement Section 954 of the Dodd-Frank Act.

Under the proposal, Level 1 and Level 2 CFIs would be required to claw back incentive-based compensation paid to senior executive officers or significant risk-takers that at the minimum provides for recovery of any vested incentive-based compensation from those employees for seven years after the applicable vesting date.[45]

The clawbacks would be triggered in the event that a senior executive officer or a significant risk-taker engages in (1) misconduct that resulted in significant financial or reputational harm to the covered institution; (2) employee fraud; or (3) intentional misrepresentation of information used to determine such individual's incentive-based compensation.

Downward Adjustments and Forfeitures

Under the proposal, Level 1 and Level 2 CFIs would also have to consider adopting corporate protocols that would allow for the downward adjustment[46] and forfeiture[47] of senior executives' and significant risk-takers' incentive compensation when certain events occur, including

- poor financial performance that is attributable to a significant deviation from risk parameters in the CFI's policies and procedures;
- inappropriate risk-taking;
- material risk management or control failures; and
- failure to comply with statutory, regulatory or supervisory standards resulting in an enforcement or legal action or a requirement that the CFI report a financial restatement to correct a material error;
- other trigger events as defined by the CFI.

Additional Requirements for Level 1 and Level 2 Institutions

The proposed rule contains a number of behavioral prohibitions for Level 1 and Level 2 CFIs. These prohibitions would apply to hedging, maximum incentive-based compensation opportunity, relative performance measures, and volume-driven incentive-based compensation.[48]

There are specific requirements for CFIs to have a risk management framework for their incentive-based compensation programs that is independent of any lines of business; includes an

[44] Ibid.

[45] In this context, vesting occurs after incentive compensation has been awarded and it represents a transfer of ownership of such compensation to the covered person wherein that person's right to receive the incentive compensation is no longer contingent on any previously specified event.

[46] Downward adjustment refers to a reduction of the amount of an employee's incentive compensation for any performance period that has already started that occurs before the award of the compensation to the employee.

[47] Forfeiture refers to a reduction of incentive compensation that has been awarded and deferred but has yet to be vested.

[48] OCC et al., "Incentive-Based Compensation Arrangements," 81 *Federal Register*, June 10, 2016.

independent compliance program that provides for internal controls, testing, monitoring, and training with written policies and procedures; and is commensurate with the size and complexity of the CFI's operations.

The proposal also requires Level 1 and Level 2 CFIs to provide individuals in control functions with appropriate authority to influence the risk-taking of the business areas they monitor and ensure covered persons engaged in control functions are compensated independently of the performance of business areas they monitor. The proposal requires independent monitoring of incentive-based compensation. Independent monitoring is expected to identify (1) whether the incentive plans appropriately balance risk and reward; (2) if the events related to forfeiture and downward adjustment and decision of forfeiture and downward adjustment reviews are consistent with the proposed rule; and (3) if the incentive-based compensation program is compliant with the CFI's policies and procedures.

Level 1 and Level 2 CFIs would also be required to establish a compensation committee composed solely of directors, who are not senior executive officers, to assist the board of directors in carrying out its responsibilities under the proposed rule. The compensation committee would be required to obtain input from the CFI's risk and audit committees on the effectiveness of risk measures and adjustments used to balance incentive-based compensation agreements. In addition, management is required to submit to the compensation committee on an annual or more frequent basis a written assessment of the effectiveness of the CFI's incentive-based compensation program and related compliance and control processes in providing risk-taking incentives that are consistent with the CFI's risk profile. The committee would also be required to obtain an independently written assessment from internal audit or risk management function on the effectiveness of the CFI's incentive-based compensation program and related compliance and control processes in providing risk-taking incentives that are consistent with the risk profile of the particular CFI.

Comments on the Potential Impact of the Proposal

The Agencies will accept formal public comments on the perceived impact of the incentive-compensation proposal through July 22, 2016. Pending those completed comments, this section describes some SEC staff observations on the proposal's potential impact on SEC-regulated entities and various observers' media comments on the proposal's potential impact on the banking sector.

The proposal's clawback provision would require public disclosure when a financial institution acts to retrieve employee incentive compensation awards. In 2015, speaking about the value of such a policy change, New York City Comptroller Scott M. Stringer reportedly observed that "while many banks now have strong clawback policies on paper, absent disclosure, it's impossible for investors to know when and how they are being applied."[49]

By contrast, Alan Johnson, head of the compensation consultant firm Johnson Associates, cautioned that the proposal's clawback provision could drive personnel away from segments of the financial sector that would be significantly affected by it to less affected parts of the sector.[50]

[49] Victoria McGrane and Andrew Ackerman, "U.S. Regulators Revive Work on Incentive-Pay Rules Compensation that Rewards Excessive Risk Taking is a Concern," *Wall Street Journal*, February 16, 2015, at http://www.wsj.com/articles/u-s-regulators-revive-work-on-incentive-pay-rules-1424132619.

[50] Donna Borak and Andrew Ackerman, "New Rules Curbing Wall Street Pay Proposed," *Wall Street Journal*, April 22, 2016, at http://www.wsj.com/articles/new-rules-curbing-wall-street-pay-announced-1461247600.

Citing risk-mitigating incentive compensation practices that have been embraced by large numbers of banking institutions, Shearman & Sterling, a corporate law firm, predicted that if adopted, the proposal would likely not lead to "wholesale changes" for senior executive officers at many of the banks categorized as Level 1 institutions. However, in other areas such as the four-year deferral for yearly bonuses, the two-year deferral for long-term incentives, and the seven-year clawback, the law firm indicated that the proposal was "stricter" than are the current mechanisms that are employed by most banks. Shearman also predicted that because of such new risk-taker requirements, many financial institutions would find that "adjustments are necessary to the structure of incentive-based arrangements for a large number of employees, which may affect the fixed costs [such as salaries over a certain period] and governance structures of the organization."[51]

Bloomberg queried a number of executive recruiting firms on the proposal's potential impact. The consensus response to the inquiries was that if the proposal were adopted, the largest domestic banks would likely be providing larger salaries and smaller-sized bonuses for some "senior officials, dealmakers, and traders."[52]

A *Wall Street Journal* article discussed the potential scope of the employee impact at the six largest banks, all presumably Level 1 entities. It calculated that for J.P. Morgan Chase, Bank of America, Wells Fargo, Citigroup, Goldman Sachs, and Morgan Stanley combined, the top earning 5% of employees under that protocol would collectively amount to a little less than 52,000 workers. However, the actual number of subject employees if the proposal is enacted could be less than that because it is unclear what proportion of those workers would meet the other requirement of having at least a third of their total compensation in incentive-based pay.[53]

In addition to the applicable banking institutions, certain SEC-regulated broker-dealers under the Securities Exchange Act of 1934, and investment advisers under the Investment Advisers Act of 1940, are also likely to be under the proposal's regulatory ambit if enacted. The agency estimated that 131 registered broker-dealers and about 669 investment advisers would likely be CFIs under the implemented proposal. It then projected that 49 of those 131 broker-dealers would likely be Level 1 or Level 2 CFIs and 82 would be Level 3. Of the agency's estimated 669 CFI investment advisers under the proposal, 18 were projected to be in Level 1, 21 were projected to be in Level 2, and 630 were projected to be in Level 3.[54] Many of those 18 projected Level 1 investment advisers are reportedly bank-owned entities.[55]

In this context, there are indications that a number of investment advisers to private equity funds or hedge funds who manage asset levels that exceed the Level 1 CFI asset threshold ($250 billion) in the proposal could avoid that more rigorous classification level. This is because under

[51] John J. Cannon III, Kenneth J. Laverriere, and Doreen E. Lilienfeld, et al., *The Re-Proposed Rule in Incentive-Based Compensation at Financial Institutions: Overview and Observations*, Sherman & Sterling, LLP, May 5, 2016, http://www.shearman.com/~/media/Files/NewsInsights/Publications/2016/05/The-Re-Proposed-Rule-on-Incentive-Based-Compensation-at-Financial-Institutions-Overview-and-Observations-CGE-050516.pdf.

[52] Anders Melin and Caleb Melby, "Bank Pay Rules in U.S. Seen Boosting Salaries, Slowing Hires," *Bloomberg*, April 25, 2016, at http://www.bloomberg.com/news/articles/2016-05-17/the-commodity-that-no-one-knows-about-but-everybody-wants-to-buy.

[53] Donna Borak, Andrew Ackerman, and Christina Rexrode, "Tough Rules Threaten Banker Pay," *Wall Street Journal*, April 22, 2016.

[54] OCC et al., "Incentive-Based Compensation Arrangements," 81 *Federal Register*, June 10, 2016.

[55] Jesse Hamilton, "Pay Rule May Give BlackRock a Big Recruiting Boost Over JPMorgan," *Bloomberg*, May 10, 2016, at http://www.bloomberg.com/news/articles/2016-05-18/pay-rule-may-give-blackrock-a-big-recruiting-boost-over-jpmorgan.

the proposal, advisers would be able to exclude "non-proprietary" assets on their balance sheets, including assets that they hold on their clients' behalf. For example, the large private equity, the Blackstone Group, reportedly manages about $350 billion in assets, but only has about $20 billion in proprietary assets. Reports say that this would mean that Blackstone would likely face a considerably less rigorous incentive compensation regulatory regime under an adopted proposal than would likely Level 1 bank-based CFIs such as J.P. Morgan Chase, Bank of America, Wells Fargo, Citigroup, Goldman Sachs, and Morgan Stanley.[56]

Accordingly, some observers say that this regulatory disparity could result in venture capital funds, hedge funds, or private equity firms such as BlackRock, that largely handle other people's money, facing less restrictive limits on their pay practices than large banks. As such, they caution that this could lead to a scenario in which large banks have a competitive disadvantage in the recruitment and retention of senior executives and other key personnel vis-à-vis less affected financial entities like hedge funds, private equity funds, and venture capital funds.[57]

Peter Wallison, an economist at the American Enterprise Institute, has raised concerns over the proposal's potentially negative impact on the overall volume of bank loans. He has argued that if the proposal were adopted, various bank officers would have personal incentives not to take on the risk of approving the loan, noting that "it isn't just the bank's financial health but also the bank officer's—the contemplated new house, the kids' college tuition—on the line." Under such a regulatory regime, Mr. Wallison noted that the bank officer could decide to place his own "financial well-being" over that of his business customers. Ultimately, Mr. Wallison warned that similar behavior by a multitude of loan officers across the nation would translate into a reduction in financial risk-taking and as a result, a large contraction in available credit.[58]

Others, however, question the plausibility of the aforementioned scenarios in which an adopted proposal would result in significant changes at large banks regarding their attractiveness to certain key personnel and the volume of loans that they might make. Instead, they argue that the proposal would probably not have a significant impact because bank compensation practices have been moving steadily in the direction of the proposal's provisions since the end of the financial crisis more than a half decade ago.[59]

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[56] Ibid.

[57] Ibid. Some compensation consultants such as Alan Johnson, head of the compensation consultant firm of Johnson Associates, have said that in the wake of the financial crisis, banks began deferring greater amounts of employee bonus payments over several years, changes that were unmatched in other segments of the financial sector. In this context, Mr. Johnson argued that banks "went way further than anybody else in financial services and that became a competitive disadvantage to get people [and] keep people." Victoria McGrane and Andrew Ackerman, "U.S. Regulators Revive Work on Incentive-Pay Rules Compensation that Rewards Excessive Risk Taking is a Concern," *Wall Street Journal*, February 16, 2015, at http://www.wsj.com/articles/u-s-regulators-revive-work-on-incentive-pay-rules-1424132619.

[58] Peter Wallison, "They're Coming for Your Bonus," *Wall Street Journal*, May 1, 2016, at http://www.wsj.com/articles/theyre-coming-for-your-bonus-1462139151.

[59] For example, see the comments of Bruce Van Saun, chief executive officer of Citizens Financial Group, in Donna Borak, Andrew Ackerman, and Christina Rexrode, "Tough Rules Threaten Banker Pay," *Wall Street Journal*, April 22, 2016, at http://online.wsj.com/public/resources/documents/print/WSJ_-A001-20160422.pdf; and Steven Eckhaus, an expert on executive compensation at Cadwalader, Wickersham & Taft, who predicted that the proposal would not have a "big impact except around the margins," in Nathaniel Popper, "Wall Street Regulators Suggest Stricter Rules for Bankers' Pay," *New York Times*, April 21, 2016, at http://www.nytimes.com/2016/04/22/business/dealbook/wall-st-regulators-propose-stricter-pay-rules-for-bankers.html?_r=1.

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