The Honorable Gary Gensler, Chair
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

The Honorable Jerome H. Powell, Chair
Board of Governors, Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

The Honorable J. Martin Gruenberg, Chair
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

The Honorable Sandra L. Thompson, Director
Federal Housing Finance Agency
400 7th Street SW
Washington, DC 20219

The Honorable Todd M. Harper, Chair
National Credit Union Administration
1775 Duke Street
Alexandria, Virginia 22314-3428

Michael J. Hsu, Acting Comptroller
Office of the Comptroller of the Currency
400 7th Street SW
Washington, DC 20219

April 11, 2023

Re: Notice of Proposed Rulemaking on Incentive Based Compensation Arrangements

Dear Chairs Powell, Gruenberg, Gensler, and Harper; Acting Comptroller Hsu; and Director Thompson:

The undersigned organizations write to encourage you to finalize a rule under Section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (DFA)[1] immediately, using your agencies' 2016 proposal[2] as its basis and with targeted changes to expand its coverage and strengthen its provisions.[3]

Over the weekend of March 10th, Silicon Valley Bank (SVB) and Signature Bank—the nation's 17th and 32nd largest banks—were put into receivership by the Federal Deposit Insurance Corporation (FDIC).[4] Although a full account of the banks' collapses is still being compiled, it is clear that they failed as a result of mismanagement and excessive risk taking.[5] Securities filings show that in the two weeks before SVB's failure, CEO Gregory Becker and CFO Daniel Beck sold more than $3.5 million and $575,000 worth of SVB stock respectively—securities likely acquired through compensation plans.[6]

It is unclear, however, whether the FDIC will be able to claw back these gains or any ill-gotten compensation from executives of these two banks, or whether the Securities and Exchange Commission (SEC) will be able to prosecute securities law violations. Indeed, President Biden has called for Congress to enact legislation that would "[e]xpand the FDIC's authority to claw back compensation—including gains from stock sales—from executives at failed banks" and its "authority to bring fines against executives of failed banks."[7]

[1] Pub. L. No. 111-203 § 956, 124 Stat. 1905 (2010) (henceforth, *DFA*).

[2] Incentive-Based Compensation Arrangements, 81 Fed. Reg. 37669 (June 10, 2016) (henceforth, *2016 Proposal*).

[3] As described below, we also recommend re-opening a brief comment period before promulgating a final rule. *See* infra at 11–12.

[4] *Joint Statement by the Department of the Treasury, Federal Reserve, and FDIC* (Mar. 12, 2023), https://www.fdic.gov/news/press-releases/2023/pr23017.html.

[5] Greg Feldberg, *Lessons from Applying the Liquidity Coverage Ratio to Silicon Valley Bank*, Yale School of Mgmt. (Mar. 27, 2023), https://som.yale.edu/story/2023/lessons-applying-liquidity-coverage-ratio-silicon-valley-bank.

[6] Matt Stieb, *Silicon Valley Bank Execs Investigated for Selling Stock Before Collapse*, NY Mag (Mar. 14, 2023), https://nymag.com/intelligencer/2023/03/svb-execs-under-investigation-for-recent-stock-sales-report.html.

[7] *FACT SHEET: President Biden Urges Congressional Action to Strengthen Accountability for Senior Bank Executives*, The White House (Mar. 17, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/17/fact-sheet-president-biden-urges-congressional-action-to-strengthen-accountability-for-senior-bank-executives/.

The fact that there is any doubt as to the ability of the FDIC to claw back compensation from executives at these two banks—particularly given that it "steps into the shoes' of the failed [bank], … obtaining the rights 'of the insured depository institution' that existed prior to receivership"[8]—is disappointing. In the aftermath of the 2008 financial crisis, Congress included seven provisions in the DFA requiring regulators to align incentive compensation practices with long-term corporate performance goals for situations like this.[9] While regulators have finalized rules under six provisions, they have not finalized those under the seventh and most important provision, which would curb reckless incentive compensation practices that reward short-term profits over long-term growth and stability at large financial institutions. Section 956 of the DFA required your agencies to finalize regulations prohibiting executives and other high-level officials at financial institutions with more than $1 billion in assets ("covered institutions") from structuring incentive-based compensation arrangements in ways that could lead to material financial losses and cause financial instability at their institutions by April 2011.[10] Indeed, had it been finalized, a 2016 rulemaking proposal issued pursuant to section 956 would have required institutions—including the FDIC when acting as receiver—to include clawback and deferral provisions in incentive-based compensation packages.

More than a decade after the DFA's 2011 deadline, and after several failed starts—the most recent of which was the 2016 proposal—your agencies have yet to finalize a rule under section 956, leaving the financial system at risk. Without it, covered institutions are subject to different requirements depending on their primary regulator, leading to regulatory arbitrage. And without having finalized a regulation, your agencies have potentially opened themselves up to litigation.

It is imperative that your agencies quickly finalize a strong rule under section 956.

I. Justification

Misaligned Incentives

Compensation practices at large financial institutions, and the incentives they created, were key contributing factors to the 2008 financial crisis.[11] Prior to the crisis, bonuses were often tied strictly to short-term shareholder interests with little or no regard for future failures.[12] Compensation plans offered large bonuses for completing deals regardless of whether those deals would be harmful to customers or the banks in the future. Fees garnered would be immediate, whereas insurance payouts would be delayed, and financial institutions "provid[ed] aggressive incentives, often tied to the price of their shares and often with accelerated payouts" to incentivize these immediate fees.[13] Furthermore, payoffs to financial executives were frequently shielded from the consequences that losses could impose on parties other than shareholders, such as bondholders, depositors, or the taxpayer.[14] This focus on shareholder interests led executives to pay

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[8] O'Melveny & Myers v. FDIC, 512 U.S. 79, 86 (1994) (internal citation omitted).

[9] *See* DFA §§ 951–956; 972, codified throughout Titles 12 and 15 of the U.S.C.

[10] *See* DFA § 956, codified at 12 U.S.C. § 5641 (requiring action by the Federal Reserve Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Securities and Exchange Commission, and the Federal Housing Finance Agency).

[11] *See* THE FINANCIAL CRISIS INQUIRY REPORT 279 (2011) ("The Commission concludes that some large investment banks, bank holding companies, and insurance companies, including Merrill Lynch, Citigroup, and AIG, experienced massive losses related to the subprime mortgage market because of significant failures of corporate governance, including risk management. Executive and employee compensation systems at these institutions disproportionally rewarded short-term risk taking.").

[12] *See generally* Lucian A. Bebchuk, Testimony before the Subcommittee on Financial Institutions and Consumer Protection of the Committee on Banking, Housing and Urban Affairs Committee, United States Senate (Feb. 15, 2010).

[13] THE FINANCIAL CRISIS INQUIRY REPORT 62 (2011).

[14] *See* Lucian Bebchuk, How to Fix Bankers' Pay, Harvard Law School John M. Olin Center Discussion Paper No. 677 (Sept. 2010) available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1673250.

insufficient attention to the possibility of large losses sustained beyond equity capital, incentivizing additional risk taking.

A wealth of research shows that the practices were fueled by misguided competitiveness and greed, and that they incentivized corporate leaders at large financial institutions to chase short-term profit and lucrative bonuses over not only long-term stability and growth, but also the interests of other contributors of capital.[15] This misguided focus presented a classic moral hazard problem in the case of banks: bank failures that result from excessive risk taken as a gamble to increase stock price are internalized not by the shareholders and executives, but by the taxpayer, financial system, and broader economy.[16]

Legal Mandate

In the aftermath of the crisis, Congress enacted the Dodd-Frank Act, which included seven provisions requiring the Federal Reserve Board (Fed), Federal Deposit Insurance Corporation (FDIC), Federal Housing Finance Agency (FHFA), National Credit Union Administration (NCUA), Office of the Comptroller of the Currency (OCC), and Securities and Exchange Commission (SEC) (collectively, "the agencies") to promulgate a series of regulations designed to align executive compensation with long-term corporate performance and limit the excessive use of short-term stock price movements to measure compensation.[17] Today, regulations under six provisions have been finalized.

The seventh, section 956, contains the most expansive pay-related provisions in Dodd-Frank.[18] Subsection 956(b) obliges the agencies to jointly prescribe a rule to require financial institutions with more than $1 billion in assets to prohibit any types of bonus arrangement that gives bankers "excessive" pay or could lead to "material financial loss":

> "[T]he appropriate Federal regulators shall jointly prescribe regulations or guidelines that prohibit any types of incentive-based payment arrangement, or any feature of any such arrangement, that the regulators determine encourages inappropriate risks by covered financial institutions—(1) by providing an executive officer, employee, director, or principal shareholder of the covered financial institution with excessive compensation, fees, or benefits; or (2) that could lead to material financial loss to the covered financial institution."[19]

Subsection 956(a) obliges regulators to require that covered institutions disclose the structures of relevant bonus arrangements:

> "[T]he appropriate Federal regulators jointly shall prescribe regulations or guidelines to require each covered financial institution to disclose to the appropriate Federal regulator the structures of all incentive-based compensation arrangements offered by such covered financial institutions sufficient to determine whether the compensation structure—(A) provides an executive officer, employee, director,

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[15] *See, e.g.,* Lucian A. Bebchuk & Holger Spamann, *Regulating Bankers' Pay*, 98 GEO. L. J. 247 (2010) available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1410072; Lucian Bebchuk & Yaniv Grinstein, The Growth of Executive Pay, Harvard John M. Olin Center for Law, Economics, and Business, Discussion Paper No. 518 (2005) available at: http://www.law.harvard.edu/programs/olin_center/papers/pdf/Bebchuk_et%20al_510.pdf; Robert A. Giacalone & Donald T. Wargo, *The Roots of the Global Financial Crisis Are in Our Business Schools*, 6 J. OF BUS. ETHICS EDUCATION 1 (2009); Donald T. Wargo, Norman Baglini, & Kate Nelson, *The Global Financial Crisis—caused by Greed, Moral Meltdown and Public Policy Disasters*, FORUM ON PUBLIC POLICY (2009); Steve Suranovic, *Greed, Capitalism and the Financial Crisis*, Working Papers 2010-22, The George Washington University, Institute for International Economic Policy (2009).

[16] *See* Lucian A. Bebchuk, Testimony before the Subcommittee on Financial Institutions and Consumer Protection of the Committee on Banking, Housing and Urban Affairs Committee, United States Senate (Feb. 15, 2010) ("When a bank takes risks, shareholders can expect to capture the full upside, but part of the downside may be borne by the government as guarantor of deposits") available at: https://www.banking.senate.gov/imo/media/doc/BebchukTestimony21512.pdf.

[17] *See* DFA §§ 951–956, codified throughout Titles 12 and 15 of the U.S.C.

[18] *See* DFA § 956.

[19] *See id.* § 956(b).

or principal shareholder of the covered financial institution with excessive compensation, fees, or benefits; or (B) could lead to material financial loss to the covered financial institution."[20]

Section 956 required the agencies to complete this rulemaking by April 2011.

Insufficient Substitutes

In addition to those completed rules under six provisions required by the Dodd-Frank Act, several regulators have implemented incentive compensation limits for firms under their jurisdictions.[21] Yet these existing rules serve distinct purposes from those envisioned by section 956, and are insufficient substitutes for the latter.

- **Section 956 covers all types of financial institutions, not just publicly traded institutions.** Section 956 applies to *all* covered financial institutions, whereas the other Dodd-Frank Act compensation provisions apply only to public companies[22] or to public companies and securities brokers.[23] These rules exclude private companies that would be covered under a section 956 regulation , such as USAA, the 20th largest financial holding company in the United States with more than $200 billion in consolidated assets, and Navy Federal Credit Union, with $160 billion in consolidated assets. Further, some of these rules excluded some public companies too. For example, four rules were written to exclude foreign companies that list their shares on U.S. securities exchanges.[24] Firms excluded from these provisions include the TD Group U.S. Holdings and HSBC North America, the 11th and 15th largest financial holding companies in the U.S. with more than $500 billion and $230 billion in consolidated assets respectively.[25]

- **Section 956 requires strict compensation limits, not just compensation disclosures.** Whereas section 956 requires a regulation that sets into law limitations on compensation, several of the other DFA provisions only require *public disclosure* of compensation information.[26] Disclosure requirements certainly should not be discounted, as "naming and shaming" can be effective at getting corporations to change behavior. However, disclosure is no substitute for regulatory mandates; markets are concerned about short- and medium-term profits, whereas regulators are (or should be) concerned about systemic risk. Another DFA provision requires the creation of independent compensation committees within companies.[27] Independent compensation committees are also a step in the right direction, but, again, they are no substitute for substantive regulation. The final DFA provision, which requires public companies and securities broker-dealers to claw back unwarranted compensation,[28] is also no substitute for a strong section 956 rule, as the regulation implementing that provision is unnecessarily weak.[29]

- **Section 956 requires unified compensation limits, not agency-specific limits.** Although each of the agencies can act separately to institute compensation limitations—as the three banking agencies

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20 *See id.* § 956(a).

21 *See* Guidance on Sound Incentive Compensation Policies, 75 Fed. Reg. 36395 (June 25, 2010); Executive Compensation, 79 Fed. Reg. 4389 (Jan. 28, 2014).

22 *See* DFA §§ 951-943; 955; 972.

23 *See* DFA § 594.

24 *See* Shareholder Approval of Executive Compensation and Golden Parachute Compensation, 76 Fed. Reg. 6009 (Feb. 2, 2011); Pay Ratio Disclosure, 80 Fed. Reg. 50103 (Aug. 18, 2015); Disclosure of Hedging by Employees, Officers and Directors, 84 Fed. Reg. 2402 (Feb. 6, 2019); Pay Versus Performance, 87 Fed. Reg. 55134 (Sept. 8, 2022).

25 Large Holding Companies, National Information Center (Reporting Date Dec. 31, 2022), https://www.ffiec.gov/npw/Institution/TopHoldings.

26 *See* DFA §§ 951; 953; 955; 952(a).

27 *See* DFA § 952.

28 *See* DFA § 954.

29 *See* Listing Standards for Recovery of Erroneously Awarded Compensation, 87 Fed. Reg. 73076 (Nov. 28, 2022) (applying only when public companies restate their financials, and only restatements going back three years; only to executive officers and not all risk-taking employees; and allowing covered employees to protect themselves against clawbacks by entering into swaps).

and the FHFA have done through their *Guidance on Sound Incentive Compensation Policies*[30] and executive compensation rule,[31] respectively—doing so is not the same as having a unified section 956 rule. Congress intended for uniform rules governing all covered entities—including banks, bank holding companies, credit unions, broker-dealers, investment advisers, and Fannie Mae and Freddie Mac—and agency-by-agency action is unlikely to achieve unanimity.

- **Section 956 requires public comment, not permitting ad hoc changes.** Five of the six regulators subject to section 956 engage in prudential supervision and may impose compensation restrictions through guidance and examinations. Imposing compensation restrictions through guidance means that the public may not have an opportunity to provide input through a public notice and comment period. For example, because the three banking agencies' *Guidance on Sound Incentive Compensation Policies* was only preceded by a request for comment by the Fed and not the other agencies, OCC- and FDIC-regulated institutions were not given the opportunity to comment on policies to which they would be subject.[32] Accordingly, even if one set of executive compensation guidance is appropriate and strong, the lack of a notice and comment process allows guidance to be easily changed by new administrations. Further, because guidance may lack bright-line rules, the decision about what is permitted or prohibited is decided on a case-by-case basis by examiners. In these instances—as is the case with the banking agencies' *Guidance*—decisions to approve or deny compensation are made behind closed doors.

Further evidence of the need for section 956 rulemaking is found in the fact that Wall Street remains scandal plagued, and existing incentive compensation requirements have proved insufficient to disincentive financial frauds from being committed. Since April 2011—the date by which Congress required the section 956 rule to be completed—a number of the largest banks have had scandals costing them upwards of billions of dollars in penalties, including the following:

- **JPMorgan Chase:** Over the course of several months at the end of 2011 and beginning of 2012, one JPMorgan trader, given the moniker London Whale, lost nearly $6 billion in a trading scandal that resulted in over $920 million in regulatory fines.[33] JPMorgan's inadequate incentive compensation rules allowed the bank to clawback only two years of the trader's incentive compensation.[34]

- **Wells Fargo:** In order to sell more products, Wells Fargo's management implemented compensation plans that promoted cross-selling and unintentionally incentivized bank employees to open "as many as 1.5 million checking and savings accounts, and more than 500,000 credit cards, without customers' authorization,"[35] costing the bank more than $3 billion in penalties.[36] Despite these significant

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[30] Guidance on Sound Incentive Compensation Policies, 75 Fed. Reg. 36395 (June 25, 2010).

[31] Executive Compensation, 79 Fed. Reg. 4389 (Jan. 28, 2014).

[32] *See* Proposed Guidance on Sound Incentive Compensation Policies, 74 Fed. Reg. 55227 (October 27, 2009). The final guidance was preceded by a Federal Reserve request for comment but was finalized by the OCC and FDIC as well.

[33] *See* Chris Isidore and James O'Toole, *JPMorgan fined $920 million in 'London Whale' trading loss*, CNN (Sept. 19, 2013), https://money.cnn.com/2013/09/19/investing/jpmorgan-london-whale-fine/index.html.

[34] *See* Dan Fitzpatrick, *J.P. Morgan: 'Whale' Clawbacks About Two Years of Compensation*, WALL STREET J. (July 13, 2012), https://www.wsj.com/articles/SB10001424052702303740704577524730994899406.

[35] Rules amendments effective in December; Wells Fargo under fire for sales practices. (2016). American Bankruptcy Institute Journal, 35(10), 8-9.

[36] *Wells Fargo Agrees to Pay $3 Billion to Resolve Criminal and Civil Investigations into Sales Practices Involving the Opening of Millions of Accounts without Customer Authorization*, Department of Justice (Feb. 21, 2020), https://www.justice.gov/opa/pr/wells-fargo-agrees-pay-3-billion-resolve-criminal-and-civil-investigations-sales-practices; *Consumer Financial Protection Bureau Fines Wells Fargo $100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts*, Consumer Financial Protection Bureau (Sept. 8, 2016), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/.

penalties, Wells Fargo was able to clawback only slightly more than $180 million from senior executives.[37]

- **Goldman Sachs:** Hired to underwrite bonds for 1Malaysia Development Bhd. (1MDB), Goldman Sachs bankers diverted more than $4.5 billion in a bribery and embezzlement conspiracy that resulted in the bank paying $2.9 billion to the U.S. Department of Justice[38] and a $3.9 billion settlement with the Malaysian government.[39] The bank announced it would use clawbacks, forfeitures, and compensation reductions to recuperate $174 million as a result of the scandal,[40] but it was unable to use clawbacks effectively: former Goldman Sachs president Gary Cohn refused to return $10 million in pay.[41]

- **Credit Suisse:** On behalf of the government of Mozambique, Credit Suisse's bankers raised more than $1 billion, which the SEC charged "were used to perpetrate a hidden debt scheme, pay kickbacks to now-indicted former Credit Suisse investment bankers along with their intermediaries, and bribe corrupt Mozambique government officials."[42] As a result, the bank paid $475 million in fines.

These institutions were operating under the Fed's compensation rule at the time, demonstrating its insufficiency.

II. Current State

In 2011, the agencies jointly proposed a rule to implement section 956,[43] but received significant criticism that their proposal was too weak.[44] Five years later, they re-proposed the rule in 2016.[45] As re-proposed, the incentive compensation rule included the following:

- A three-tiered approach that increases requirements' stringency with the size of the covered institution (Level 1: ≥ $250 billion; Level 2: ≥ $50 billion and less than $250 billion; Level 3: ≥ $1 billion and less than $50 billion).

- Restrictions to incentive compensation for senior executive officers and employees who are considered significant risk takers at Level 1 and Level 2 institutions. Significant risk-takers are defined

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[37] Bill Chappell, *Wells Fargo Claws Back $75 Million More From 2 Executives Over Fake Accounts*, NPR (Apr. 10, 2017), https://www.npr.org/sections/thetwo-way/2017/04/10/523254069/wells-fargo-claws-back-75-million-more-from-2-executives-over-fake-accounts ("With the new clawbacks, Wells Fargo's board says, the bank has now recovered more than $180 million in executive compensation over the scandal.").

[38] *Goldman Sachs Charged in Foreign Bribery Case and Agrees to Pay Over $2.9 Billion*, Department of Justice (Oct. 22, 2020), https://www.justice.gov/opa/pr/goldman-sachs-charged-foreign-bribery-case-and-agrees-pay-over-29-billion.

[39] Rozanna Latiff, Joseph Sipalan, and Elizabeth Dilts Marshall, *Goldman to pay Malaysia $3.9 billion over 1MBD scandal, U.S. settlement seen close*, REUTERS (July 24, 2020), https://www.reuters.com/article/us-malaysia-politics-1mdb-goldmansachs-idUSKCN24P14L.

[40] *Goldman Sachs' Statements Relating to 1MDB Government and Regulatory Settlements*, Goldman Sachs (Oct. 22, 2020), https://www.goldmansachs.com/media-relations/press-releases/current/goldman-sachs-2020-10-22.html.

[41] Sridhar Natarajan, *Gary Cohn Plays Hardball With Goldman to Defend Millions in Pay Over 1MDB Scandal*, BLOOMBERG (Dec. 2, 2020), https://www.bloomberg.com/news/articles/2020-12-02/gary-cohn-plays-hardball-with-goldman-to-defend-millions-in-pay.

[42] *Credit Suisse to Pay Nearly $475 Million to U.S. and U.K. Authorities to Resolve Charges in Connection with Mozambican Bond Offerings*, Securities and Exchange Commission (Oct. 19, 2021), https://www.sec.gov/news/press-release/2021-213.

[43] Incentive-Based Compensation Arrangements, 76 Fed. Reg. 21169 (Apr. 14, 2011).

[44] *See, e.g.*, Americans for Financial Reform, Comment Letter Re: RIN 3064-AD56, Incentive-Based Compensation Arrangement, https://ourfinancialsecurity.org/wp-content/uploads/2014/09/AFR-956-Comment-Letter-9.18.14.pdf.

[45] *2016 Proposal.*

as the top-5 percent (for Level 1 institutions) or top-2 percent (for Level 2 institutions) highest compensated executive officers, employees, directors, or principal shareholders who receive incentive-based compensation.

- Deferral requirements for senior executive officers and significant risk-takers of 40, 50, or 60 percent deferral, depending on the size of the covered institution and position of the covered person.
- Deferral period between 1 and 4 years with pro rata vesting, with shorter deferral periods for incentive-based compensation awarded under long-term incentive plans.
- Clawback provisions permitting recovery of incentive-based compensation from a current or former senior executive officer or significant risk-taker for seven years following the date on which such compensation vests, if the covered 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 institution, fraud, or intentional misrepresentation of information used to determine the senior executive officer or significant risk-taker's incentive-based compensation.

▪ All institutions would be subject to general prohibitions on incentive-based compensation arrangements that could encourage inappropriate risk taking by providing excessive compensation, or that could lead to a material financial loss. Prohibitions include limiting options to no more than 15 percent of incentive compensation plans.

▪ All institutions would be required to annually document the structure of incentive-based compensation arrangements, and boards of directors would be required to conduct oversight of the arrangements.

▪ Regulators would enforce compensation restrictions through traditional regulatory and civil enforcement authorities.[46]

In the nearly seven years following the 2016 re-proposal, the agencies have failed to act further. Under the Obama administration, regulators expected to finalize the rule in 2017.[47] But during the Trump Administration, the agencies' planned to reverse course and propose a different compensation rule.[48] However, the agencies never got further than placing the revised proposal on a rulemaking agenda; they never issued a new Notice of Proposed Rulemaking, nor did they formally withdraw the 2016 proposal.

III. Proposed Action

Although the 2016 incentive compensation proposal improved on the original 2011 proposal, it falls short of what is necessary to protect the financial system and the public. The agencies, therefore, have two options for

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[46] *See* 15 U.S.C. § 6805.

[47] *See, e.g.*, FDIC, Fall 2016: "Final Rule" expected in 2017, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201610&RIN=3064-AD86.

[48] *See, e.g.*, FDIC, Fall 2019: "Third NPRM" in 2019, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=3064-AD86; OCC, Fall 2019: "NPRM" in 2019, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=1557-AD39. The Administration appears to have dropped this plan for re-proposal when COVID hit in 2020. See, e.g., OCC, Spring 2020: "Next Action Undetermined" with date "To Be Determined", https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202004&RIN=1557-AD39.

satisfying the rulemaking requirements of section 956: issuing a new proposal or finalizing the rule under the 2016 proposal with changes. Because we think a strong rule can be finalized from the 2016 proposal without any logical outgrowth problems, and because any final rule may face a Congressional Review Act challenge if finalized in the second half of 2024, we recommend the agencies finalize the 2016 proposed rule with targeted changes by mid-2024 (*see* Part V, *infra*). However, as explained in the following section, we first recommend that the agencies re-open a brief comment period.[49]

When finalizing the rule, the agencies should keep the following principles in mind:

- **Coverage of all employees taking significant risks.** Limiting the rule to only the top 5 percent most highly compensated covered persons at large financial institutions, as the 2016 rule proposed, would permit employees who are significant risk-takers but below that 5 percent threshold to escape coverage under the rule. To ensure adequate coverage of risk takers, this provision should cover a larger portion of such compensated employees, and preferably cover all significant risk-takers.

- **Detailed reporting of quantitative data.** Section 956 requires "enhanced disclosure and reporting of compensation" at covered institutions, including disclosure on the "structures of all incentive-based compensation arrangements."[50] A final rule should require financial institutions to provide the agencies with quantitative detail on the percentages of compensation deferred and paid in equity instruments for all employees—beyond just executive officers—who take significant risk on behalf of the institution.[51] And, consistent with financial economics research on the relationship between pay and performance, the reports should include quantitative data on the amount of equity in the firm owned by these employees.[52]

- **100 percent deferral amounts.** As proposed, the rule includes a mandatory deferral of incentive compensation that varies based on the size of the institution and type of employee. Level 1 institutions, for example, would have to defer 50-60 percent of senior executive officers' compensation and 40-50 percent of significant risk-takers' compensation. The deferral amounts and periods would decrease for Level 2 institutions and are nonexistent for Level 3 institutions. To maximize the rule's coverage, the required deferral amounts for incentive-based compensation should be 100 percent for both senior executives and significant risk takers at all covered institutions.

- **Ten-year deferral periods.** The 2016 proposal requires that deferred compensation be held for between 1 and 4 years (depending on institution's level, whether the employee serves as a senior executive or significant risk-taker, and the performance period). Given that the statute of limitations for financial crimes is 10 years,[53] deferral periods should also be set at ten years for both senior executives and significant risk takers at all covered institutions, as other advocates have recently recommended.[54]

- **No vesting during the deferral period.** The purpose of deferred compensation is to make clawbacks easier in the case of malfeasance. However, the proposed rule permits pro rata vesting on an annual basis starting on the first anniversary of the end of the performance period, which

49 *See* infra at 11–12.

50 *See* DFA § 956.

51 *See* Robert J. Jackson, Jr., Commentary on Regulation of Incentives at Financial Institutions, Federal Reserve Board (May 31, 2011) available at: https://www.sec.gov/comments/s7-12-11/s71211-718.pdf.

52 This literature shows that equity ownership in the firm provides a far stronger pay-performance link than standard incentive payments such as bonuses. *See, e.g.*, Michael C. Jensen & Kevin J. Murphy, *Performance Pay and Top-Management Incentives*, 98 J. POL. ECON. 225, 226 (1990).

53 *See* 18 U.S.C. § 3293.

54 *See* Coalition Letter, "Re: Silicon Valley Bank Failure Demonstrates the Need to Implement Key Executive Pay Rule, Dodd-Frank Section 956," (March 27, 2023) available at: https://ourfinancialsecurity.org/wp-content/uploads/2023/03/956-coalition-letter-3-1.pdf.

diminishes clawbacks' effectiveness. Vesting for both senior executives and significant risk takers at all covered institutions should occur all at once at the end of the deferral period. If the agencies permit pro rata vesting, the rule should require equity-like instruments to be vested last, to prevent covered employees from selling vested equity or exercising options (to then sell) early in the deferral period.

- **Ban options as a part of incentive-based compensation.** The agencies noted in the proposal that options "could have negative effects on the financial health of a covered institution due to options' emphasis on upside gains and possible lack of responsiveness to downside risks."[55] For that reason, they limited options to no more than 15 percent of incentive-based compensation plans. Because options make risk-takers less attuned to downside risk, stock options should be banned as a form of incentive compensation for both senior executives and significant risk-takers.

- **No hedging by *any* covered institutions or individuals.** The proposed rule restricts Level 1 and Level 2 covered institutions from purchasing hedges or offsets for covered employees—essentially, prohibiting these institutions from insuring employees against having their deferred compensation clawed back. The final rule should prohibit all covered institutions, including Level 3 institutions, from offering (not just purchasing) hedges or offsets against clawbacks.

  The agencies should also prohibit incentive-based compensation packages that allow senior executives and significant risk takers at covered institutions to purchase their own hedges or offsets,[56] lest those individuals seek to exploit the same loophole. Section 956(b) allots the agencies ample authority to take this additional step. It directs regulators to prohibit "any types of incentive-based payment arrangement, or any feature of any such arrangement" that "encourages inappropriate risks by covered financial institutions." Note here that the direct objects of regulation, per the statute, are not covered financial institutions, but rather incentive-based pay arrangements (and features thereof). If a feature — here, the absence of restrictions on individual hedging — of an incentive-based package "encourages inappropriate risks by covered financial institutions," the statute anticipates prohibition. The absence of restrictions on individual hedging would appear to easily meet those statutory criteria, as access to such instruments would allow individuals to effectively evade the clawback mechanism that lies at the heart of the regulatory scheme.

IV. Risk Analysis

The agencies face three risks related to the section 956 rulemaking. They are not fatal, but collectively warrant all deliberate speed in finalizing a regulation.

Congressional Review Act

If the agencies are to complete the section 956 rulemaking during President Biden's first term, they should endeavor to finalize the rule before the middle of 2024 to avoid having the rule be overturned by the Congressional Review Act ("CRA").[57]

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[55] Incentive-Based Compensation Arrangements, 81 Fed. Reg. 37669, 37727 (June 10, 2016).

[56] Importantly, because the 2016 proposal made no mention of prohibiting individuals from purchasing hedges or offsets, the agencies would need to specifically seek comment on this initiative in a re-opened comment period (*see* infra at 12).

[57] Pub. L. No. 104–121 § 251 (1996), codified at 5 U.S.C. § 801 et seq.

The CRA provides an expeditious way for Congress and a President to overturn an agency rulemaking. Under the CRA, Congress may enact a "joint resolution of disapproval" to disapprove a rule within 60 legislative days of the rule's enactment without the resolution being subject to filibuster in the Senate.[58] If the President does not veto the resolution, the rule "shall not take effect" and "a new rule that is substantially the same [as a disapproved rule] may not be issued."[59] Importantly, if the rule was enacted within 60 legislative days of the end of a session of Congress, that clock does not begin to toll until the beginning of the new session, allowing a President to sign joint resolutions that their predecessor would have vetoed.[60]

Given the makeup of the Senate today, it is unlikely to pass a joint resolution overturning a section 956 rule finalized by agencies headed by appointees of President Biden. And even if both chambers of Congress did pass a joint resolution, President Biden could veto that resolution and Congress likely would not override his veto. However, the 2024 election could usher in a new President, Senate, and House, allowing them to overturn rules finalized by the Biden regulatory agencies within 60 legislative days of Congress's adjournment in December. This special lookback period has traditionally begun running somewhere between May and September.[61]

Rulemaking Delay and the Logical Outgrowth Test

Regardless of whether the agencies finalize the 2016 proposal or issue a new proposal under section 956, they face the prospect of litigation, as powerful groups, such as the Chamber of Commerce and Business Roundtable, have shown a willingness to sue agencies like the SEC over rulemaking activities.[62] However, the procedural decision to use the 2016 proposal as the basis for finalizing a section 956 rule, as we recommend here, should not itself pose meaningful litigation risk.

First, the time that has lapsed since the 2016 NPRM should not pose a risk under the Administrative Procedure Act (APA)—especially if, as we recommend, the agency re-opens a brief comment period before finalizing any rule. When asked whether an agency has delayed too long between when a rule was proposed and when it was finalized, courts have noted that, although the APA "does not establish a 'useful life' for a notice and comment record, clearly the life of such a record is not infinite."[63] To be sure, agencies are given deference to the "timing and priorities of [their] regulatory agenda"[64] and "the timetable of a rulemaking proceeding,"[65] and "[i]f the original record is still fresh, a new round of notice and comment might be unnecessary."[66] But if an agency finalizes a rule when the original record is not "still fresh," that could result in a court deciding that the process has denied the public a fair opportunity to comment.

There is an argument that the 2016 rulemaking record is still fresh, even after seven years; after all, the basic dynamics of inappropriate financial incentives do not change. However, to better protect the rule from challenge under the APA, the agencies should reopen the 2016 NPRM comment period for a 30- or 60-day period, and then publish the final rule with the benefit of more recent input from stakeholders. This would allow the agencies to update the rulemaking record accordingly, or defend a finding that "[n]ew information

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[58] 5 U.S.C. § 801.

[59] *Id.*

[60] *See id.*

[61] *See* Daniel R. Pérez, *Upcoming CRA Deadline has Implications for Regulatory Oversight by Congress*, Regulatory Studies Center (Dec. 11, 2019), https://regulatorystudies.columbian.gwu.edu/upcoming-cra-deadline-has-implications-regulatory-oversight-congress.

[62] *See, e.g.*, Business Roundtable v. SEC, 905 F. 2d 406 (D.C. Cir. 1990); Chamber of Commerce of US v. SEC, 443 F. 3d 890 (D.C. Cir. 2006); Business Roundtable v. SEC, 647 F. 3d 1144 (D.C. Cir. 2011); National Ass'n of Mfrs. v. SEC, 748 F. 3d 359 (D.C. Cir. 2014).

[63] Action on Smoking & Health v. C.A.B., 713 F.2d 795, 800 (D.C. Cir. 1983). *But see* Sanofi Aventis v. HHS, 58 F.4th 696 (3d Cir. 2023) (finding that HHS permissibly finalized a rule four years after it had originally been proposed and after the agency had deemed the rule "withdrawn" in the Unified Agenda as "that did not negate that HHS had taken the required steps: the public knew about the proposed rule and had a chance to comment on it, and the agency considered those comments. … No more was needed.").

[64] WildEarth Guardians v. EPA, 751 F.3d 649, 651 (D.C. Cir. 2014).

[65] Sierra Club v. Gorsuch, 715 F.2d 653, 658 (D.C. Cir. 1983).

[66] Mobil Oil Corp. v. U.S. E.P.A., 35 F.3d 579, 584–85 (D.C. Cir. 1994).

relevant to the agency's decisionmaking [did not] come to light after the original notice and comment proceedings."[67]

Second, a rule finalized from the 2016 proposal should not pose a "logical outgrowth" problem under the APA. As the Supreme Court has explained, "[t]he object [of the APA's notice-and-comment requirement] is one of fair notice."[68] When faced with questions of whether an agency's notice-and-comment process was fair, "'[judges] ask [themselves], would a reasonable member of the regulated class ... anticipate' the general aspects of the rule."[69] The "logical outgrowth test" therefore requires that "an agency's final rule must be a logical outgrowth of the version set forth in its notice of proposed rulemaking"[70] such that commenters may "anticipat[e] the agency's final course in light of the initial notice"[71] and comment accordingly.

We believe that our proposed enhancements track the 2016 proposed rule sufficiently closely that no logical outgrowth problem should arise. The below chart demonstrates how the 2016 proposal offered stakeholders fair notice that a final rule might develop in a manner consistent with our proposed improvements. Regardless, re-opening a comment period should similarly obviate any potential logical outgrowth problems. And as noted above, should the agencies — as we encourage — seek to prohibit covered individuals, in addition to institutions, from purchasing their own hedges or offsets against clawbacks,[72] the re-opened comment announcement should flag that issue specifically.

Our Proposal	**Language from 2016 Proposal**
Rule limitations should cover a larger portion of employees receiving incentive-based compensation.	"The Agencies specifically invite comment on the percentages of employees proposed to be covered under the relative compensation test. Are 5 percent and 2 percent reasonable levels? Why or why not? Would 5 percent and 2 percent include all of the significant risk-takers or include too many covered persons who are not significant risk-takers?"[73]
Require covered institutions to disclose percentages of compensation deferred and paid in equity instruments for all senior executives and significant risk-takers.	"[R]equire all covered institutions to create annually and maintain for a period of at least seven years records that document the structure of all its incentive-based compensation arrangements and demonstrate compliance with this part."[74] "Would covered institutions find a more specific list of topics and quantitative information for the content of required records helpful?"[75]
Require deferral amounts of 100 percent of incentive-based compensation for both senior executives and significant risk-takers at all covered institutions.	"Are minimum required deferral periods and percentages appropriate? If not, why not? Should Level 1 and Level 2 covered institutions be subject to different deferral requirements, as in the proposed rule, or should they be treated more similarly for this purpose and why? Should the

[67] Mobil Oil Corp. v. U.S. E.P.A., 35 F.3d 579, 584–85 (D.C. Cir. 1994).

[68] Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007).

[69] Telesat Canada v. Fed. Commc'ns Comm'n, 999 F.3d 707, 713 (D.C. Cir. 2021), quoting Allina Health Servs. v. Sebelius, 746 F.3d 1102, 1109 (D.C. Cir. 2014).

[70] Brennan v. Dickson, 45 F.4th 48, 68–69 (D.C. Cir. 2022).

[71] Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin., 494 F.3d 188, 209 (D.C. Cir. 2007) (internal quotes omitted).

[72] *See* supra at 10.

[73] *2016 Proposal* at 37689.

[74] *2016 Proposal* at 37752.

[75] *2016 Proposal* at 37713.

Require deferral periods of ten years for both senior executives and significant risk-takers at all covered institutions. Vesting for both senior executives and significant risk takers at all covered institutions should occur all at once at the end of the deferral period.	minimum required deferral period be extended to, for example, five years or longer in certain cases and why?"[76]
Stock options should be banned as a form of incentive compensation for both senior executives and significant risk-takers at all covered institutions.	"The Agencies invite comment on the restrictions on the use of options in incentive-based compensation in the proposed rule. Should the [15] percent limit be higher or lower and if so, why? Should options be permitted to be used to meet the deferral requirements of the rule? Why or why not? Does the use of options by covered institutions create, reduce, or have no effect on the institution's risk of material financial loss?"[77]
Rule should prohibit all covered institutions, including Level 3 institutions, from offering (not just purchasing) hedges or offsets against clawbacks.	"Should the proposed rule include a prohibition on the purchase of a hedging instrument or similar instrument on behalf of covered persons at Level 3 institutions?"[78]

Litigation Risk for Failing to Act

The April 2011 statutory deadline to complete the rulemaking required by section 956 means that the agencies could face litigation if they fail to finalize a rule: the APA provides a cause of action; competitors to institutions who would be subject to the rule have standing to sue; and those competitors would be likely to prevail. Recognizing that "excessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decisionmaking into future plans,"[79] the APA requires courts "to compel agency action unlawfully withheld or unreasonably delayed."[80] The Supreme Court has held that this authority extends to instances in which an "agency is compelled by law to act within a certain time period."[81] Because there is no exception to the APA for section 956 rulemaking, the APA's provisions govern.

[76] *2016 Proposal* at 37724.

[77] *2016 Proposal* at 37728.

[78] *2016 Proposal* at 37734.

[79] Potomac Electric Power Co. v. ICC, 702 F.2d 1026, 1034 (D.C. Cir. 1983).

[80] 5 U.S.C. § 706(1).

[81] Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 65 (2004).

V. Conclusion

We urge your agencies to expeditiously finalize an improved section 956 rulemaking, as mandated by statute, using the 2016 NPRM.

Sincerely,

Governing for Impact
Americans for Financial Reform Education Fund
Center for LGBTQ Advancement & Research
Public Citizen
The Revolving Door Project