REGULATING FINANCIAL SECTOR INCENTIVE COMPENSATION A DECADE AFTER DODD-FRANK

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INTRODUCTION

Not surprisingly, the body of scholarly work addressing public corporation executive compensation grew substantially in the wake of the 2008 financial crisis. Already existing, sensible explanations for the large increases in public corporation executive compensation realized during the period between the 1970's and the early 2000's had focused quite sensibly on the pervasive rise of executive stock option compensation, the value of which was compounded by the bull market runs of the same period.[1] Post-2008 analyses of public corporation

1. *See generally* LUCIAN A. BEBCHUK, & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2004); John R. Boatright, *Executive Compensation: Unjust or Just Right?*, OXFORD

executive compensation in the financial sector during the period leading up to the crisis revealed that such compensation was continuing to grow in disparity with worker compensation.[2] Moreover, these analyses revealed that financial sector compensation practices in that early 2000's period were linked to the sector's widespread increased reliance on the use of excessive leverage and enhanced risk-taking (particularly in securitized products and related derivatives) motivated in meaningful part by incentive compensation based upon short-term performance.[3] At least with regard to the post-mortem of the 2008 financial crisis, critics focused great scrutiny on each of these components of growing disparity; excessive leverage, and enhanced risk-taking.[4] That scrutiny led to legislative and regulatory reform via the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act," "Dodd-Frank," or the "Act").[5] Dodd-Frank was itself yet another manifestation of cycles of economic crises followed by regulatory reactions—by then a well-established pattern in twentieth and twenty-first century U.S. economic history.[6]

HANDBOOK OF BUS. ETHICS, Jan. 2, 2010, at 161 (G. Brenkert & T. L. Beauchamp eds., 2010); John Coffee, Jr., *Systemic Risk After Dodd-Frank: Contingent Capital and the Need for Regulatory Strategies Beyond Oversight*, 111 COLUM. L. REV., 795, 798 (2011) (primarily proposing a "bail-in" system of contingent debt capital converting to equity, but recognizing the incentive-based compensation as causal in the 2008 crisis); Michael C. Jensen, Kevin J. Murphy & Erik G. Wruck, *Remuneration: Where We've Been, How We Got to Here, What are the Problems, and How to Fix Them* (Harvard NOM, Working Paper No. 04–28, 2004; ECGI - Finance Working Paper No. 44, 2004). *See also* Sharon Hannes, *Compensating for Executive Compensation: The Case for Gatekeeper Incentive Pay*, 98 CALIF. L. REV. 385, 385–437 (2010) (recognizing the dramatic changes in stock-based compensation leading up to the financial crisis and proposing stock-based incentives to "gatekeepers" or outside auditors to drive prevention of reporting manipulation and wrongdoing).

2. *See* Boatright, *supra* note 1, at 161–201.

3. *See generally* CARMEN M. REINHART & KENNETH S. ROGOFF, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY (2009); RAGHURAM G. RAJAN, FAULT LINES: HOW HIDDEN FRACTURES STILL THREATEN THE WORLD ECONOMY (2010) [hereinafter RAJAN, FAULT LINES]; RAGHURAM G. RAJAN, THE THIRD PILLAR: HOW MARKETS AND THE STATE LEAVE THE COMMUNITY BEHIND (2019) [hereinafter RAJAN, THE THIRD PILLAR].

4. *See* FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES (2011) [hereinafter FCIR].

5. *See generally* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203 (codified as 12 U.S.C. §§ 5301–5641) [hereinafter Dodd-Frank Act].

6. *See generally* REINHART & ROGOFF, *supra* note 3, at 291; RAJAN, FAULT LINES, *supra* note 3, at 153; RAJAN, THE THIRD PILLAR, *supra* note 3, at 374; FCIR,

The United States' federal regulatory response to the 2008 financial crisis embodied in the Dodd-Frank Act consisted chiefly of mandates to be carried out within limited time frames—often of several years—by six federal agencies (the Department of the Treasury (Office of the Comptroller of the Currency and Office of Thrift Supervision), the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Securities and Exchange Commission ("SEC" or "The Commission"), and the Federal Housing Finance Agency) (the "Six Agencies" or the "Agencies").[7] One component of those mandates (embodied in § 956 of the Act) specifically addressed the incentive-based compensation practices of the financial sector, which had become commonplace by the time of the crisis.[8] This, of course, was because analyses of the financial crisis gave rise to a consensus deduction that financial sector incentive compensation policies and practices were in significant part causal in bringing about the crisis.[9]

This work is motivated in large part by the lingering post-financial crisis regulatory milieu in and around financial sector incentive compensation. To date, albeit more than ten years since the passage of Dodd-Frank, the Six Agencies tasked with promulgating regulation of financial sector incentive compensation pursuant to § 956 of the Act still have not accomplished the task.[10] Though the agencies together proposed responsive rules in 2011[11]—and restated a modified version of the 2011 proposals again to no effect in 2016[12]—they still have promulgated no incentive compensation regulations. At the time of this article's publication, the SEC's regulatory agenda lists

supra note 4, at xx (giving attention to the seemingly continual cyclical pattern of financial crisis and regulatory response).

7. *See generally* Dodd-Frank Act (codified as 12 U.S.C. §§ 5301–5641).

8. *See* Dodd-Frank Act § 956 (codified as 12 U.S.C. § 5641).

9. *See* RAJAN, FAULT LINES, *supra* note 3, at 154; MICHAEL A. SANTORO & RONALD J. STRAUSS, WALL STREET VALUES: BUSINESS ETHICS AND THE GLOBAL FINANCIAL CRISIS (2013); FCIR, *supra* note 4, at xix (each offering broadly common conclusions as to causation of the 2008 financial crisis).

10. *See* Dodd-Frank Act § 956 (codified as 12 U.S.C. § 5641).

11. *See* Incentive-Based Compensation Arrangements, Exchange Act Release No. 34-64140, 76 Fed. Reg. 21170 (proposed April 14, 2011) (to be codified as 12 C.F.R. §§ 42, 236, 372, 563h, 741, 751).

12. *See* Incentive-Based Compensation Arrangements, Exchange Act Release No. 34-77776, 81 Fed. Reg. 37670 (proposed June 10, 2016) (to be codified as 12 C.F.R. §§ 42, 236, 372, 303, 741, 751, 1232) [hereinafter, SEC Release No. 34-77776].

the priority of incentive compensation regulation as "Substantive, Nonsignificant."[13]

Incentive compensation is a major component of the more general issue of executive compensation, some of which *has* been addressed via regulation promulgated by one or more of the Six Agencies so tasked by Dodd-Frank.[14] An aspect of compensation regulation that one or more of the Agencies *have* implemented under the Act is the disclosure of public corporation pay ratios via SEC filings.[15] The discrepancies revealed by the now required public corporation pay ratio filings include ratios of 144:1 in the financial sector with a general average of at least 300:1 for non-financial sector-specific public corporation Chief Executive Officer (CEO) compensation to average employee compensation.[16] In fact, filings made with the SEC since the post-January 1, 2017 fiscal year pay ratio disclosure requirement went effective, generally show still increasingly extreme disparity between executive pay and median worker pay (though complex variation in filing calculations is permitted under the regulations, resulting in a lack of uniform comparisons).[17] Note that the disparity of executive compensation compared to average worker compensation appearing less extreme in the financial sector is immaterial to this article, is potentially misleading, and is generally explained by the higher levels of all worker compensation in the financial sector compared to, for instance, toy manufacturing in which many workers are located in developing countries and are paid relatively de minimis wages.[18] To set that possible misperception straight, note that "[t]he financial sector's share of the very richest Americans has grown roughly tenfold since the 1970s, and the sector now accounts for nearly a quarter of the fifty richest Americans. About a fifth of all billionaires now work in finance, as do two-fifths of the 40,000 Americans with investable assets of more than $30 million."[19]

13. *Incentive-Based Compensation Arrangements*, OFF. OF INFO. & REGUL. AFF. (last visited Nov. 28, 2022), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=3235-AL06.

14. *See, e.g.*, Dodd-Frank Act § 954 (codified as 15 U.S.C. § 78j-4).

15. *See* Dodd-Frank Act § 953(b) (codified as 15 U.S.C. § 78l).

16. Susan Eichen, Carol Silverman, Amy Knieriem, Aaron Pedowitz, and Cara Yarbrough, *CEO Pay Driven by Company Size, Industry*, MERCER ADVISORY (June 8, 2018).

17. *See* PEARL MEYER, THE CEO PAY RATIO: DATA AND PERSPECTIVES FROM THE 2018 PROXY SEASON 13 (2018).

18. *See id.* at 14.

19. DANIEL MARKOVITS, THE MERITOCRACY TRAP 164 (2019).

Again, incentive compensation (cash and equity) is a meaningful driver of this at the executive level, but also at the risk-taking decision-making level below the C-suite.[20]

In delving further into this discussion, we must first make clear that the concept of a risk-taking decision-maker is based upon the definition of "significant risk-taker" proposed by the Commission, which includes two qualifying tests: the first test, the "relative compensation test," which is based upon the "amounts of annual base salary and incentive-based compensation" of a person relative to others working for a subject organization to include persons among the top five percent (for Level One covered institutions) or top two percent (for Level Two covered institutions) of those highest compensated covered persons in the organization.[21] The second test, the "exposure test," is based on whether a person has authority to "commit or expose" 0.5 percent or more of the capital of the organization.[22] Comments to the proposals have included expanding the definition to include those persons compensated at more than a certain fixed amount.[23] This is unnecessary. The intent of the rule is to prevent undue risk taking and the exposure test addresses this. The relative compensation test is really needed in addition only to capture executives who may not be actively committing capital but are incented to drive profit in a manner that might induce short term risk taking that would promote market volatility.[24]

Regulations mandated pursuant to §§ 951-955 of Dodd-Frank are in various states of implementation and address related compensation concepts; including, certain clawbacks of remuneration earned as a

20. *See* SEC Release No. 34-77776, *supra* note 12, at 37679 (defining "significant risk-taker" which is the basis of the concept of risk-taking decision maker as used herein).

21. *Id.* at 37692.

22. *Id*.

23. *See* Letter from Dennis M. Kelleher, President & Chief Executive Officer, Better Markets, to the Six Agencies (July 22, 2016) [hereinafter *Better Markets Letter*]; Letter from Robert McCormick, Chief Policy Officer, Glass Lewis, to the Six Agencies (July 25, 2016), https://www.sec.gov/comments/s7-07-16/s70716-62.pdf [hereinafter *Glass Lewis Letter*]; Akshat Tewary, Occupy the SEC, to the Six Agencies (July 22, 2016), https://www.sec.gov/comments/s7-07-16/s70716-60.pdf [hereinafter *Occupy the SEC Letter*].

24. *See generally* FIN. SERVS. AUTH., REVISING THE REMUNERATION CODE: FEEDBACK ON CP10/19 AND FINAL RULES (2010); FIN. CONDUCT AUTH., UPDATING THE DUAL-REGULATED FIRMS REMUNERATION CODE TO REFLECT CRD V: FEEDBACK TO CP20/14 AND FINAL RULES (2020) (addressing changes to the definition of material risk takers as defined in the related UK regulations based on the European Union Capital Requirements Directive V (PS29/20)).

result of other regulatory violations, pay for performance, and say on pay (previously addressed in part by the Sarbanes-Oxley Act of 2002 (SOX)).[25] Though, indeed, all of these angles on compensation regulation are important to the subject of this article, this article is specifically attending to financial sector incentive compensation and the failure of its regulation.

The Six Agencies' failure to promulgate incentive compensation regulations under § 956(b) of the Act, together with the disclosure of increasingly disparate executive compensation compared to median worker compensation, raises normative issues important to the structure and stability of both the U.S. domestic and global financial systems. In work addressing compensation practices leading up to the crisis, and in later work assessing the crisis, scholars have argued about a number of compensation problems. Some have asserted that CEOs' fiduciary duties include an obligation not to compensate themselves in such extremely disparate fashion[26] or that existing pay disparity is distributively unfair both on its face and comparatively.[27] Others have proffered, or critiqued, claims that such high executive pay (and/or low average worker pay) is justified by the agency problem,[28] the proliferation and normalization of stock options and other stock based compensation,[29] necessary performance incentives and market competition for talent,[30] and negotiation power

25. *See* Dodd-Frank §§ 951–55 (codified as 15 U.S.C. § 78n-1); Sarbanes-Oxley Act of 2002, Pub. L. 107–204 (codified as 15 U.S.C. § 7243).

26. *See* Jeffrey Moriarty, *How to (try to) Justify CEO Pay, in* THE ETHICS OF EXECUTIVE COMPENSATION, 154–71 (Robert W. Kolb, ed., 2006); Jeffrey Moriarty, *How Much Compensation Can CEOs Permissibly Accept?*, 19 BUS. ETHICS Q. 235, 235–36 (2009).

27. *See* Jared D. Harris, *How Much Is Too Much? A Theoretical Analysis of Executive Compensation from the Standpoint of Distributive Justice, in* THE ETHICS OF EXECUTIVE COMPENSATION, 67–84 (Robert W. Kolb, ed., 2006) (albeit focused on pre-crisis compensation); Waymond Rodgers & Susana Gago, *A Model Capturing Ethics and Executive Compensation*, 48 J. BUS. ETHICS 189, 189–91 (2003) (again addressing the phenomenon substantially prior to the 2008 crisis).

28. *See* Michael C. Jensen & Kevin J. Murphy, *CEO Incentives—It's Not How Much You Pay, But How*, HARV. BUS. REV., 138 (1990), https://hbr.org/1990/05/ceo-incentives-its-not-how-much-you-pay-but-how; Jensen et al., *supra* note 1, at 50–77; Martin J. Conyon, *Executive Compensation and Incentives*, 20 ACAD. MGMT. PERSP. 25, 25–26 (2006).

29. *See* James J. Angel & Douglas M. McCabe, *The Ethics of Managerial Compensation: The Case of Executive Stock Option*, 78 J. BUS. ETHICS 225, 229–30 (2008).

30. *See* Michel Magnon & Dominic Martin, *Executive Compensation and Employee Remuneration: The Flexible Principles of Justice in Pay*, 160 J. BUS. ETHICS 89, 89–91, 102 (2018).

difference,[31] the perverse impact of taxes,[32] or other distributive or relational causes.[33] Still others have commented on the ineffective and even counter-productive nature of regulations requiring both enhanced compensation disclosure[34] and enhanced shareholder control of executive compensation,[35] and how these ineffective approaches are now driving the need for alternative approaches to regulation.[36]

This work ushers a new normative discussion connecting moral reasoning directly to financial sector incentive compensation practices and regulation applying to the sector's financial institutions, their executives, and risk-taking decision-making capable employees (herein referred to as "Covered Institutions," "Covered People," or together, "Covered Institutions and People" or "CIP[s]").[37] In Part I, this work discusses the normative underpinnings of the concepts of reciprocity and restitution embodied in dominant understandings of justice. In Part II, the article builds three related normative claims about financial sector incentive compensation and regulation derived from those concepts of reciprocity and restitution. In Part III, the article discusses the implications of these claims. In Part IV, this work connects those claims to arguments for promulgating certain regulations responsive to Dodd-Frank § 956. In doing so, this article fills a gap in existing literature concerned generally with justifications of executive compensation and literature specifically concerned with

31. *See generally* Boatright, *supra* note 1.

32. *See generally* Steven A. Bank & George S. Georgiev, *Paying High for Low Performance*, 100 MINN. L. REV. 14 (2016).

33. *See* ROBERT W. KOLB, TOO MUCH IS NOT ENOUGH: INCENTIVES IN EXECUTIVE COMPENSATION 157 (2012).

34. *See* Jared D. Harris, *What's Wrong with Executive Compensation?*, 85 J. BUS. ETHICS 147, 153 (2009) [hereinafter Harris, *What's Wrong with Executive Compensation*]; Ozge Uygar, *Income Inequality in S&P Companies*, 72 Q. REV. ECON. & FIN. 52, 63 (2019); Steven A. Bank & George S. Georgiev, *Securities Disclosure as Soundbite: The Case of CEO Pay Ratios*, 60 B.C. L. REV. 1123, 1191 (2019); Coffee, Jr., *supra* note 1.

35. *See* Lucian A. Bebchuk & Holger Spamann, *Regulating Bankers' Pay*, 98 GEO. L. J. 247, 252 (2010); Coffee Jr., *supra* note 1.

36. *See* Simone M. Sepe & Charles K. Whitehead, *Paying for Risk: Bankers, Compensation, and Competition*, 100 CORNELL L. REV. 655, 655 (2014) (attending chiefly to modifying regulation to better address the market competition for talent).

37. *See* FICR, *supra* note 4 and SEC Release No. 34-77776, *supra* note 12 for specific definitions, which for the purposes of this article are adopted as a general, aggregate concept. Note that Covered Persons generally includes "risk takers" in "Covered Financial Institutions" who can put at risk 2% or 5% or more of capital of the 3 levels of financial institutions set out in the 2016 version of the rules proposed by the Agencies under Dodd-Frank §956.

financial sector public corporation incentive compensation practices tied to the 2008 financial crisis.

I. NORMATIVE UNDERPINNINGS

A. "Oughts" Generally

This work ushers a normative argument concerning CIP compensation practices and regulation embodied in three claims. Before delving into those claims, however, the normative grounding on which the three claims of moral obligation herein rest demands attention. Of course, how one frames considerations of financial sector moral culpability may shape conclusions. Moral judgment is not about what *is*—it is not descriptive. Moral judgment concerns *action*—it is the deliberation of what we *ought to do* or *not do*. It is prescriptive. A moral judgment's rightness or wrongness can be assessed in multiple ways—concern for an act itself, concern for the outcome caused by an act, consistency of an act with good character or virtue, and so forth. While practical reasoning focuses on how to achieve an intended end, moral judgment more broadly determines whether and how to act. This moral judgment is the essence of normative deliberation. Here, we can get at the "ought" through illuminating components of the concept of justice which embodies the dual concerns of what is moral and what is good.[38]

Though this article certainly does not undertake to resolve the origins of moral judgment nor to offer a definitive account of what justifies a moral "ought" claim, it does assert that there are definite "oughts" to be found in the normative consideration of financial sector incentive compensation practices and regulation. These "oughts" may derive from multiple sources, realized or unrealized by any one reader. Deontologists, utilitarians, intuitionists, virtue ethicists, Rawlsians, or others may each reasonably determine the "oughts" comprising the herein asserted moral obligations to be defensible on differing accounts. Considerations of the inherent goodness or rightness of an act; the goodness of a result or consequence of an act, good character, obligation to treat all fairly, obligation to treat others as one wishes to be treated—these considerations all lead us to "oughts," or principles about how we should act toward others. Each of these considerations may reasonably provide a grounding to justify the claims made below.

38. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971) [hereainfter RAWLS, A THEORY OF JUSTICE]; JOHN RAWLS, POLITICAL LIBERALISM (1993) [hereinafter RAWLS, POLITICAL LIBERALISM].

This account is principally informed by components of John Rawls' understanding of justice, primarily reciprocity, but also the closely linked concept of restitution.[39]

B. Reciprocity & Restitution

Rawls, and those who informed him, offer a moral underpinning of the following "ought" claims that are grounded in the reciprocity component of justice. Rawls' relatively recent and prominent contractarian approach to justice attests to the powerful role of reciprocity in building a coherent civil society.[40] Such concepts were considered long prior to Rawls and much earlier thinkers directly inform Rawls' approach. Most notably, conceptions offered from the varied sources of Aristotle, David Hume, and Immanuel Kant inform Rawls's work and appear compatible with a helpfully distilled discussion on reciprocity and restitution from Lawrence Becker.[41]

For Aristotle,[42] the concept of reciprocity in the polis applies to both distributive justice (which is exchange based) and rectificatory justice (which is to correct wrongs), as well as an independent notion of reciprocal justice which is grounded in proportional value as opposed to merit.[43] Reciprocity, for Aristotle, is central to the coherence of the polis, or civil society.[44] Reciprocity maintains order and commitment to stability, through just or fair mutual treatment.[45]

Hume, in his non-contractarian discussion of justice, sees reciprocity as a source of the mutual advantage rationale for establishing and maintaining justice in civil society.[46] Hume assessed the reciprocal nature of justice as bringing "utility" to man's "condition", where man can modify his situation between extremes to

39. *See id.*

40. *See* RAWLS, POLITICAL LIBERALISM, *supra* note 38.

41. *See* LAWRENCE C. BECKER, RECIPROCITY 130–33 (Routledge ed., 2014).

42. ARISTOTLE, NICOMACHEAN ETHICS, BOOK V, 442–49 (Richard McKeon ed., W.D. Ross trans., Univ. Chicago Press 2d ed. 1973) (384 B.C.E.), http://classics.mit.edu/Aristotle/nicomachaen.5.v.html.

43. *See* Theodore Scaltsas, *Reciprocal Justice in Aristotle's Nicomachean Ethics*, 77 ARCHIV FÜR GESCHICHTE DER PHILOSOPHIE [ARCHIV F. GESH. D. PHILOSOPHIE] 248, 257 (1995) (Ger.).

44. *See* ARISTOTLE, *supra* note 42, at 446.

45. *See id.* at 442–49.

46. DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS 187, 190, 195 (The Project Gutenberg EBook 1995) (1777), https://www.gutenberg.org/files/4320/4320-h/4320-h.htm.

better the condition for all.[47] For Hume, reciprocity-based cooperation in the form of laws, or rules of equity, foster mutually advantageous cooperation in the civil society of a state, and internationally among nation states.[48]

Kant's contractarian discussion of justice in civil society is similarly based on human rationality.[49] Grounded in the primary concern of freedom, cooperation in civil society for Kant derives from his conceptions of equal ends in themselves rationally agreeing to cooperate in mutual interest.[50]

Clearly, Kant's notions of respect and reasonable agreement hold powerful sway over Rawls' attention to reciprocity in his construction of justice.[51] Rawls' two principles and his notion of reflexive equilibrium, together with his explicit discussion of reciprocity in A THEORY OF JUSTICE, then developed still more explicitly in POLITICAL LIBERALISM, propounds the centrality of reciprocity not for simple mutual advantage, but for the very relations essential to a well-ordered civil society.[52] For Rawls, reciprocity is the balm for the festering "strains of commitment" that run counter to coherence in civil society.[53] Rawls is explicit in stating that his understanding of reciprocity is derivative of the combination and intersection of impartiality, altruism, and mutual advantage.[54] He develops this understanding of reciprocity in a more staged fashion than did Hume or Kant, as his conception is but a component driving the principles by which a just society can properly be built.[55]

Reciprocity, then, is a legitimate core of a broadly accepted understanding of justice and it is elucidating in assessing the present concern of financial sector incentive compensation. As a helpful heuristic, we might also consider reciprocity to be a "hypernorm" as the concept is presented by Thomas Donaldson and Thomas Dunfee

47. *Id.* at 188; MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 45–48 (2006).

48. *See* HUME, *supra* note 46, at 188.

49. *See* IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 30–38 (John Ladd trans., 2d. ed. 1999), https://www.gutenberg.org/files/5684/5684-h/5684-h.htm; NUSSBAUM, *supra* note 47, at 146.

50. *See generally* KANT, *supra* note 49.

51. *See id.*

52. *See* RAWLS, A THEORY OF JUSTICE, *supra* note 38, at 14, 102; RAWLS, POLITICAL LIBERALISM, *supra* note 38, at 16–17.

53. *See* RAWLS, POLITICAL LIBERALISM, *supra* note 38, at 17.

54. *See id.* at 16.

55. *See id.*

in their "Integrative Social Contracts Theory."[56] Certainly Donaldson and Dunfee's explicit incorporation of Rawls' conception of justice grounding a social efficiency hypernorm would cohere with this.[57]

Attending to these thinkers and others, Becker helps us clarify our conception of reciprocity, defining it as the obligation to return good for good received, yet not to return evil for evil.[58] The obligation may be personal and direct, or impersonal and indirect (as in his case of intergenerational transfer).[59] Becker propounds a rebuttable presumption tied to his virtue-derived duty of reciprocity that we ought to obey law because doing so is a fitting and proportional return for the good we have received through others complying with law—a public good.[60] Together with this, Becker adds a duty of restitution that wrongdoers owe to make right the harm they have done to others.[61] So, in addition to the reciprocal return of good for the conferring of benefit or the undertaking of sacrifice by others, we can add to reciprocity the closely allied component of justice, restitution, in fitting and proportional response to make right the knowing and willful wrong done to others. This is consistent with the role of reciprocity for Aristotle, Hume, and Kant, and for Rawls. It is perhaps best aligned with the components of Aristotle's tripartite conception of justice.[62]

The public good of reciprocity and the commensurate correction with restitution when it has gone awry and caused harm are long-standing, fundamental components of a cohesive and just civil society. These concepts are at the heart of the "oughts" that drive the three forthcoming CIP related claims. CIPs willfully or recklessly did harm to others. CIPs benefited from others. That is, even after willfully or recklessly doing this harm to the detriment of many in the marketplace, they benefited from the U.S. government and its citizen/taxpayers.[63] Certain CIPs were bailed out directly or indirectly with citizen money. Some via the Emergency Economic Stabilization

56. THOMAS DONALDSON & THOMAS W. DUNFEE, TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS 49–81 (1999).

57. *See id.* at 120, 125.

58. *See* BECKER, *supra* note 41, at 73–144.

59. *See id.*

60. *See id.*

61. *See id.*

62. *See* ARISTOTLE, *supra* note 42, at 442–49.

63. I refer to citizen/taxpayers to signify that citizens both fund and elect the U.S. government, but subsequently refer simply to citizens generally while meaning to include taxpayers.

Act of 2008 (TARP).[64] CIPs consequently have a duty of reciprocity to return good for the good they received. CIPs have a duty to obey law as they have benefited by others obeying law. Moreover, CIPs have a duty to make right their wrongs, or to confer restitution on those they willfully or recklessly harmed, directly or indirectly.

The restitution component of justice is integral to reciprocity for it is the "payback", if you will, owed for harm caused in the reciprocal relationship. Restitution is at the heart of conceptions of tort and criminal law.[65] It is in large part their very rationale.[66] Restitution is concerned, of course, with making right what was made wrong. It is linked with reciprocity at the core of justice. Of course, restitution is similarly looked to as a remedy for wrong (breach) in contract law.[67] Where courts are unable to ascertain expectation interest, and where reliance interest is not appropriate, courts will look to the cost suffered by a non-breaching party to determine damages owed by the breaching party to the non-breaching party.[68] So it may also be plausible to consider restitution for harm, even together with the general reciprocity obligation of returning good for good, as a remedy actually based in general social contract theory. Social contract literature from the ancients to Rawls is expansive and raises various challenges to implied or tacit consent that would be too involved a diversion to pursue here. Whether arising from contractarian theory or not, the obligation of restitution for harm is consistent with the general reciprocity obligation of returning good for good, even though it is based on a moral actor's causation, not simply a moral actor's passive receipt of good. It is a key component of justice.

C. The U.S. Federal Government and the Citizens

Note that since the U.S. federal government (including the Six Agencies) is a representative democracy, the federal government acts, in theory and, albeit imperfectly, in practice, on behalf of American

64. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3766 (codified as 12 U.S.C. § 5201) [hereinafter TARP].

65. *See* RESTATEMENT (SECOND) OF TORTS § 901 (AM. L. INST. 1974); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 (AM. L. INST. 2011); Cortney E. Lollar, *What is Criminal Restitution?*, 100 IOWA L. REV. 93, 122 (2014).

66. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT, *supra* note 65, at § 1.

67. *See* JOSEPH M. PERILLO, CONTRACTS, § 15.3–4 (7th ed.); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT, *supra* note 65, at § 1.

68. *See* PERILLO, *supra* note 67, at §15.3–4.

citizens. Thus, for each of the three claims, we must accept the premise that the U.S. federal government, via executive office holders and congressional legislators as well as via its administrative regulatory bodies of the Six Agencies, acts on behalf of the American citizen. This representative relationship is manifested by way of direct election of executive office holders as well as legislators in the House and Senate and by way of any such officials controlling the appointment and hiring of directors and staff in the Six Agencies. Moreover, funding of the Six Agencies, their directors, and staffs, is at least in part sourced from citizen derived revenue and is ultimately overseen by elected officials in either or both of the federal legislative and executive branches.[69]

II. THE THREE CLAIMS

This work makes three normative claims of moral obligation derived from a broadly shared conception primarily of reciprocity but also the closely allied restitution component of justice. Two claims rest with CIPs, one claim rests with the regulators of the CIPs in the Six Agencies. First, this article asserts that CIPs, whose actions are broadly thought to be causal in the 2008 financial crisis, have a moral obligation to U.S. citizens (who bailed them out) to cease detrimental compensation practices. Second, it proffers that CIPs have a moral obligation to U.S. citizens (who bailed them out) not to lobby or otherwise influence financial regulators in the Six Agencies to delay or refrain from implementing reasonable regulations to curtail incentive compensation practices broadly understood to have previously destabilized the market. Third, it contends that the publicly employed regulators of the financial sector (in the Six Agencies) have a moral obligation to citizens to implement reasonable regulations of CIPs pursuant to Dodd-Frank in a reasonable time frame (which for § 956, in addressing incentive compensation, has long since passed).[70]

*A. CIPs Have a Moral Obligation to U.S. Citizens to Cease Detrimental Compensation Practices. (**The CIP Bailout Obligation**.)*

1. Financial Sector Incentive Pay Policies and Practices Were

69. *See* BUDGET OF THE U.S. GOV'T, https://www.usa.gov/budget, (last visited Nov. 28, 2022).

70. *See* Dodd-Frank Act § 956 (codified as 12 U.S.C. § 5641). A legal obligation also exists here, and though bound up with the moral argument, I will not focus on the legal aspect.

at Least Substantially Causal of the 2008 Financial Crisis.

Even among financial sector executives themselves, there is little dispute that their incentive pay policies and practices were at least substantially causal in bringing about the 2008 financial crisis.[71] This premise has been established or recognized by a host of scholars, government officials, and professionals, not least in the ensuing primary federal investigative report on the crisis (FCIR).[72] Of course, this premise is recognized by the Dodd-Frank Act itself.[73] § 956 of the Act explicitly addresses "excessive compensation, fees, or benefits . . . of an . . . executive officer, employee, director, or principal shareholder," including compensation policies "that could lead to material financial loss to the covered financial institution."[74] Moreover, § 956(b) of the Act specifically employs the term "incentive-based payment arrangement."[75] Indeed, the very legislating of the Act is in large part a redress of the deduction that incentive-based compensation practices led to high-risk management and investment decisions which were in part causal in bringing about the 2008 financial crisis.

That market destabilizing risk-taking behavior was exacerbated by incentive compensation policies for Covered Persons is a stand-alone legitimate imperative for CIPs to alter such incentive compensation practices (and for better regulation of the same).

2. Financial Sector Justification for Incentive Compensation

A primary justification for financial sector incentive compensation practices is that such compensation practices are necessary both to motivate executives and decision-making employees to achieve high returns and to align managerial and shareholder interests to resolve the ubiquitous agency problem.[76] That is, defenders argue that certain incentive compensation is the best

71. *See* INST. OF INT'L FIN., COMPENSATION IN FINANCIAL SERVICES: INDUSTRY PROGRESS AND THE AGENDA FOR CHANGE (2009) (financial sector industry publication accepting and acknowledging financial sector incentive compensation as a cause of the 2008 financial crisis).

72. *See* FCIR, *supra* note 4; RAJAN, FAULT LINES, *supra* note 3; Richard Posner, *Are American CEOs Overpaid, and, If So, What If Anything Should be Done About It?*, 58 DUKE L. J. 1013, 1040–41 (2009); Coffee, Jr., *supra* note 1, at 798, 809–10.

73. Dodd-Frank Act § 956 (codified as 12 U.S.C. § 5641).

74. *Id.*

75. *Id.*

76. *See* Georges Enderle, *Corporate Responsibility for Less Income Inequality*, 76 REV. SOC. ECON. 399, 411–12 (2018).

means to rationally incent executives and risk-capable decision-making employees (agents) (i) to achieve high returns, and (ii) to act in the profit interests of shareholders (principals).[77] Yet, the agency alignment rationalization, arguably more akin to a self-serving fallacy, has largely been debunked.[78] Indeed, related research has shown that much incentive compensation correlates with and presumably causes more aggressive earnings management by Chief Financial Officers (CFOs) and that additional factors such as high executive self-confidence contribute to greater risk-taking as a response to available incentive compensation.[79] This research seems to indicate that self-interested manipulation and personality incentivized executive behavior do not necessarily align with shareholder interests.[80]

3. Citizens Regard Financial Sector Executive Compensation as Uncomfortably High and Unequal

Primary problems with incentive compensation in the financial sector are that, (i) focusing on short-term incentives and short-term results holds open detrimental effects on long-term management, contributing to instability, (ii) earning high short-term incentive compensation incents risk to yield immediate high reward and therefore makes the market more volatile and prone to crisis, and (iii) earning a large portion of total compensation via large incentives drives high compensation that exacerbates inequality.[81]

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77. *See id.*

78. *See* BEBCHUK & FRIED, *supra* note 1, at 205–06; Harris, *What's Wrong with Executive Compensation*, *supra* note 34; K.J. Martijn Cremers, Saura Masconale & Simone M. Sepe, *CEO Pay Redux*, 96 TEX. L. REV. 205, 215–17 (2017).

79. *See* Cathy A. Beaudoin, Anna M. Cianci, George T. Tsakumis, *The Impact of CFOs' Incentives and Earnings Management on Their Financial Reporting Decisions: The Mediating Role of Moral Disengagement*, 128 J. BUS. ETHICS 505, 513–15 (2015); Daniel Han Ming Chng et al., *When Does Incentive Compensation Motivate Managerial Behaviors? An Experimental Investigation of the Fit Between Incentive Compensation, Executive Core Self-Evaluation, and Firm Performance*, 33 STRATEGIC MGMT. J. 1343, 1343 (2012); Jared Harris & Philip Bromiley, *Incentives to Cheat: The Influence of Executive Compensation and Firm Performance on Financial Misrepresentation*, 18 ORG. SCI. 350, 353 (2007).

80. *See* Chng et al., *supra* note 79, at 1344–45.

81. *See generally* JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE (2012). Because of the focus on incentive-based compensation, this discussion refers to inequality in terms of income only, though the author recognizes that wealth or asset inequality is perhaps even more concerning on a broader view of inequality generally.

For the general citizenry, the preceding chiefly builds upon the general premise that part of why financial sector incentive compensation practices have been detrimental (in addition to leading to greater risk taking and contributing to the cause of the 2008 financial crisis) is that they led to high levels of compensation that increased already pronounced income disparity in the sector.[82] As a consequence, American citizens find current levels of CIP compensation to be both uncomfortably high and unjustifiably disproportionate to worker compensation.[83] This is notwithstanding the recognition that much of the rise in U.S. executive pay since the 1970s was due to the advent and proliferation of stock based compensation.[84] Recent work has shown French citizens similarly disdain compensation inequality primarily for reasons grounded in distributive justice more than for reasons grounded in retributive, procedural, or restorative justice.[85] This view matters even if most citizens are ignorant of financial sector incentive compensation practices because this judgment itself has and does still contribute to further destabilizing the American and global financial systems by eroding confidence in the system and making radical alternatives to it more attractive (a la Occupy Wall Street).[86]

Indeed, this effect holds sway whether executive compensation has increased markedly due to fair market pressure and quality negotiating skills or due to managerial strong arming of weak, complicit boards.[87] There can be no doubt that largely incentive-based total executive compensation in the financial sector rose to unprecedented levels through the 1990s and early 2000s. That its

82. *See generally* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2013) (documenting a broad trend of late capitalism in the west generally toward increasing wealth and income inequality).

83. *See* John J. McCall, *Executive Compensation, in* FINANCE ETHICS: CRITICAL ISSUES IN THEORY AND PRACTICE (John R. Boatright ed., 2010).

84. *See* John R. Boatright, *From Hired Hands to Co-Owners: Compensation, Team Production, and the Role of the CEO*, 19 BUS. ETHICS Q. 471, 475–76 (2009); Jeffrey Moriarty, *Do CEOs Get Paid Too Much?*, 15 BUS. ETHICS Q. 257, 257 (2005).

85. *See* Marco Heimann, Étienne Mullet & Jean-François Bonnefon, *Peoples' Views About the Acceptability of Executive Bonuses and Compensation Policies*, 127 J. BUS. ETHICS 661, 668 (2015).

86. *See* RAJAN, THE THIRD PILLAR, *supra* note 3, at 243. *See generally* STIGLITZ, *supra* note 81.

87. *See generally* BEBCHUK AND FRIED, *supra* note 1.

structure was causal in the 2008 financial crisis is broadly accepted as fact.[88]

Much of this rise occurred not just at the top executive level, but at the level of risk-taking decision-makers subordinate to, but tied to, the executive level. That risk-taking decision level compensation rise is explained by incentive compensation in the form of short-term performance bonuses granted for generating derivative contracts, selling credit default obligations and credit default swaps, and generally arranging and structuring high risk new mortgage backed securities deals—with little regard for the long-term outcome of such contracts or Collateralized Debt Obligation (CDO), Credit Default Swap (CDS), or Mortgage-Backed Security (MBS) deals.[89] The earnings these CIP compensation practices led to are part and parcel with the phenomenon of the so-called "meritocratic elitism" alleged to be at the heart of "unprecedented inequality" in American incomes.[90] The risks associated with these compensation practices were known.[91] Most extremely, later in the game, they were willfully minimized to investors whose interests were in turn willfully or recklessly subordinated to the immediate profit-making interests of the CIPs who sold toxic MBSs to investors and made markets in those toxic MBSs.[92] It would seem the financially innovative CIPs felt entitled to pursue their profit-making innovations even in the face of apparent, if not acknowledged, great risk to counterparties, clients, and the market generally.[93]

The high risk-taking decision making *and* the exacerbating incentive compensation structure in the form of bonuses incenting highly asymmetrically risky short-term goals constitute the willful or reckless wrong-doing of CIPs. In making moral choices to profit at enhanced risk, these moral actors willfully or recklessly endangered, and ultimately harmed, U.S. citizens. Thus, the CIPs incurred a moral obligation beyond the basic reciprocity of returning good for good. In willfully or recklessly causing harm through their enhanced risk taking, they incurred the linked restitution obligation to redress the harm they caused to the U.S. citizens.

88. *See* INST. OF INT'L FIN., *supra* note 71, at 7.

89. *See* FCIR, *supra* note 4, *at* xviii–xxiv

90. Markovits, *supra* note 19, at 12–13.

91. *See* RAJAN, FAULT LINES, *supra* note 3, at 148.

92. *See id.* at 148–49; Thomas Donaldson, *Three Ethical Roots of the Economic Crisis*, 106 J. BUS. ETHICS 5, 6 (2012).

93. *See* RAJAN, FAULT LINES, *supra* note 3, at 144–46.

4. Many CIPs Accepted Citizen Funded Bailouts

The CIPs accepted large scale bailouts of billions of dollars from American citizens via the federal government and its Agencies in the midst of the 2008 financial crisis.[94] To name a few; AIG, Goldman Sachs (via AIG), JP Morgan, and many recipients of TARP funds were rescued by American citizens, even while Lehman, Bear Stearn, and others went down in bankruptcy or fire sales.[95]

5. CIPs Are Moral Actors

Here lies the heart of the reciprocity argument. Generally, when a moral actor relies upon, or willfully accepts good (here, in the form of financial help or rescue) from another (here, the U.S citizen by way of the federal government and its agencies), that actor feels a sense of obligation, and legitimately acquires an obligation, to reciprocate; to express gratitude to the helper/rescuer and to compensate, to pay back, or make restitution, to those the actor willfully or recklessly harmed. Both components of justice apply here, the general good for good reciprocity premise and the restitution for knowing or reckless harm done.

The complication of Covered Institutions being corporations or other legal fictions does not interfere with the obligation. While corporate agency and corporate moral agency are hardly concepts of broadly settled agreement, for the purposes of this discussion and mindful of its constraints, we must accept that CIPs are moral actors. That is, even if they are institutions, they have the constructive cognizance and ability to morally deliberate and act on moral choices at least through their executive and risk-taking employee-agents. Moreover, it is well established that the financial sector bears unique moral responsibility in light of both (i) its foundational and facilitating role in a market economy, and (ii) its commensurate benefits received via the legal fictions through which its institutions are organized and by way of the related laws that support, enforce, and often insure them. Again, the principal-agent problem arises here and can be given any manner of credence.[96] Yet, the legal fiction of a corporation or similar entity, though a creature of state law treated in part as a "person,"

94. *See* RAJAN, FAULT LINES, *supra* note 3, at 149.

95. *See id.*

96. *See* Boatright, *supra* note 1, at 161. *See generally* Bebchuk & Spamann, *supra* note 35 (discussing three contributions to understanding how banks' compensation structures have produced incentives for excessive risk-taking and how such structures should be reformed).

operates through principals and agents ultimately at the direction of principals. Even in the age of advancing artificial intelligence (AI), human beings as principals have the power to direct the moral deliberation of institutions, if only on behalf of those institutions and implemented via those institutions' executives and employee-agents. The principals and executives and employee-agents with decision-making power within the institutions that comprise the financial sectors' CIPs, and/or those organizations themselves, we must regard as moral actors.

6. The CIP Bailout Obligation

If CIPs are moral actors, then they have the ability to be aware of an obligation and they have legitimately acquired an obligation to express gratitude to, to reciprocate to, and to provide restitution to, the American citizen directly and/or via the U.S. federal government. CIPs are thus morally beholden to American citizens. This claim includes the notion that CIPs owe restitution for the knowing or reckless causing of harm to citizens (and the market more generally) brought about in part by their incentive compensation policies and practices and the ensuing bailout. Call this ***the CIP bailout obligation***. At the very least, as a direct manifestation of the CIP bailout obligation, CIPs should cease detrimental incentive compensation practices.

To date, CIPs have not only failed to live up to the CIP bailout obligation, they have actively fought against it and stymied the U.S. federal government in carrying out the mandates of Dodd-Frank. CIPs must cease detrimental incentive compensation practices.

*B. CIPs Have a Moral Obligation to U.S. Citizens Not to Influence Regulators in the Six Agencies to Delay or Refrain From Implementing Reasonable Regulations to Curtail Financial Sector Incentive Compensation Practices (**The CIP Non-Obstruction Obligation**.)*

1. Lobbying is the Chief Means of Impeding the Six Agency Regulators.

The U.S. federal government allows for and regulates lobbying on the theory that lobbyists inform the legislative and regulatory processes and legitimately represent viewpoints of affected constituents, balancing out competing interests in the process. The non-ideal version of lobbying, however, is a troubling reality that the interested with the greatest resources have a skewed ability to influence legislation and regulation to their benefit. Regulation of lobbying is principally addressed via two means. First, regulation exists by way of requiring lobbyists to make disclosures through publicly available registration, reporting of their clients, and reporting of their fees all done in the interest of making known who is working to assert whose interests.[97] Second, regulation of lobbying exists by proscribing wrongful behavior such as lying, spending to influence legislators or regulators with gifts and entertainment in a manner more or less akin to bribery, and placing time limits (cooling off periods) on revolving door moves of personnel between government and industry (including lobbying) positions leading to mixed or conflicting loyalties and incentives.[98] The second sort of lobbying regulation is generally addressed through ethics rules for particular public offices. A third means is by way of criminal law and civil tort law.[99] Thus, there is a legitimately accepted role for lobbying, that is, for better or worse, well established in our federal legislative and regulatory processes.[100] Some regulation of lobbying, however effective, does exist.

Further justification of clients engaging lobbyists is grounded principally in the First Amendment right of free speech.[101] Generally, in reliance on First Amendment rights, any affected party interested in the outcome of legislative and regulatory proposals would be entitled to assert its interests in a manner compliant with applicable rules and laws. However, under the CIP non-obstruction obligation, CIPs should not be so broadly entitled.

The place and effect of lobbying in the particular instance of the Dodd-Frank mandated regulation to be carried out by the Six Agencies cannot be overestimated. In the first five years following passage of

97. *See* 2 U.S.C. §§ 261–262 (repealed 1995); 2 U.S.C. § 1601 (2019); 2 U.S.C. §§ 1603–1604 (2019).

98. *See, e.g.*, N.Y. LEGIS. LAW § 1-m (McKinney 2022); N.Y. LEGIS. LAW § 1-a (McKinney 2022); N.Y. COMP. CODES R. & REGS. tit. 19, § 934.3 (2014); N.Y. COMP. CODES R. & REGS. tit. 19, § 943.10 (2014); N.Y. PUB. OFF. LAW § 73 (McKinney 2022).

99. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 21, § 250.2 (2005).

100. *See generally* Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CALIF. L. REV. 327 (2013) (discussing the change from a model of independent financial regulation to political domination and coordination of financial regulation). *See also* Lisa S. Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND L. REV. 599, 637–47 (2010) (further fleshing out changes in securities regulation in the face of the 2008 financial crisis).

101. *See* U.S. CONST. amend. I.

the Act, financial sector lobbyists who teamed together and developed tasked groups to assert industry interests in each facet of the Agencies' mandates spent an estimated $2 billion, well outnumbering consumer interest lobbyists by twenty to one.[102] Their tactics included substantial focus on the economic analysis of proposed regulations, by way both of proposing enhanced cost-benefit analysis of proposed rules and by initiating litigation challenging whether proposed rules met existing economic analysis standards, particularly at the SEC.[103] Even if such tactics were to produce no ultimate change in regulation, the processes of the challenges were themselves strategic delays of promulgation and implementation. But the tactics were indeed effective. Several critics have pointed to *Business Roundtable v. SEC*, wherein the D.C. Circuit Court found SEC rule 14a-11 regarding enhanced proxy disclosures promulgated pursuant to Dodd-Frank to be arbitrary and capricious under the standards of the Administrative Procedures Act, to be the quintessence of this tactic.[104] This finding was based on the Commission's deemed failure to fully assess the economic effect of following the modified rule 14a-11.[105] Moreover, litigation against the Financial Stability Oversight Council yielded further success in redefining SIFI designations, such that no non-bank financial institutions now meet the definition and remain subject to its capital requirements and related regulation.[106] Of course, another tactic in opposition to the Agencies' tasked promulgation included multiple and still ongoing attempts at passing federal legislation weakening or reversing provisions of Dodd-Frank.[107] In the case of the

102. Eric J. Spitler, *The Long Game: The Decade-Long Effort to Dismantle the Dodd-Frank Act*, 24 N.C. BANKING INST. 1, 9 (2020).

103. *See* Bus. Roundtable v. Sec. & Exch. Comm'n, 647 F.3d 1144, 1148 (D.C. Cir. 2011).

104. *See* Spitler, *supra* note 103, at 16; James D. Cox & Randall S. Thomas, *Revolving Elites: The Unexplored Risk of Capturing the SEC*, 107 GEO. L. J. 845, 893 (2019).

105. *See* Bus. Roundtable, 647 F.3d at 1150.

106. *See* MetLife, Inc. v. Fin. Stability Oversight Council, No. 15-45, 2018 U.S. Dist. LEXIS 165999, at * 4 (U.S. D.D.C. Sep. 18, 2018). *See generally* Jeremy C. Kress, *Solving Banking's "Too Big to Manage" Problem*, 104 MINN. L. REV. 171 (2019) (offering a comprehensive analysis of the unresolved too big to manage ("TBTM") problem).

107. *See* Erica Werner & Renae Merle, *Congress Approves Plan to Roll Back Post-Financial-Crisis Rules for Banks*, THE WASHINGTON POST (May 22, 2018), https://www.washingtonpost.com/business/economy/divided-house-passes-major-bank-deregulation-bill-sends-to-trump/2018/05/22/6f3bb562-5dd2-11e8-a4a4-c070ef53f315_story.html.

Volcker rule, such legislation was entirely successful.[108] This is to say nothing of the still more overtly political battles over the Consumer Finance Protection Bureau. Surely CIPs have systematically impeded the regulatory process.[109]

2. The Premises Giving Rise to the CIP Bailout Obligation Apply to the CIP Non-Obstruction Obligation

For the same reasons that their moral culpability gives rise to the CIP bailout obligation, CIPs have a parallel moral obligation not to engage in lobbying that impedes the Six Agencies from regulating incentive pay under § 956 of Dodd-Frank. CIPs are morally obligated to comply with the regulatory process required under Dodd-Frank and not to stymie it. This in addition to independently ceasing detrimental incentive compensation practices. Call this the ***CIP non-obstruction obligation***.

Though it might not necessarily be a direct conflict, it certainly would be inconsistent for CIPs to adhere to the CIP bailout obligation, yet not adhere to the CIP non-obstruction obligation. (Though, perhaps, not vice versa.) The two obligations go hand in hand. Indeed, there would be no logic to interfering with regulation to curtail a compensation practice that a CIP is already obliged to cease.

Here, again, the reciprocity concept can help. CIPs benefited from U.S. citizens via the bailout from the federal government and its Agencies.[110] Therefore, CIPs have a fitting and proper reciprocal obligation to support and not stymie the regulatory processes of the federal government and the Agencies as this regulatory process is the

108. *See* SEC. & EXCH. COMM'N, PROHIBITIONS AND RESTRICTIONS ON PROPRIETARY TRADING AND CERTAIN INTERESTS IN, AND RELATIONSHIPS WITH, HEDGE FUNDS AND PRIVATE EQUITY FUNDS 11 (2020) (modifications to the Volker Rule accommodating industry pressure).

109. Indeed, there is a long and rich history of financial sector opposition to regulation. Perhaps the most historically significant opposition was that of the Morgan dominated Wall Street banks to the very creation of the SEC in the aftermath of the crash of 1929 in direct battle between Tom Lamont and Jack Morgan against Louis Brandies. *See generally* RON CHERNOW, THE HOUSE OF MORGAN: AN AMERICAN BANKING DYNASTY AND THE RISE OF MODERN FINANCE (1990) (including a discussion of the long history of J.P. Morgan and Morgan Stanley fighting the Glass-Steagall Act separating merchant banking from commercial (deposit) banking).

110. Benjamin M. Blau, *Lobbying, Political Connections and Emergency Lending by the Federal Reserve*, 172 PUB. CHOICE 333, 333–34 (2017) [hereinafter Blau, *Lobbying, Political Connections and Emergency Lending*].

functioning of the rule of law. This, again, is the good for good owed to those obedient to law, the workings of which benefited CIP's. Those who paid their taxes, followed regulations, and remained peaceful during the financial crisis and bailout are owed a reciprocal obligation from the CIPs who benefited from that bailout. Also, again, the obligation of restitution for willfully or recklessly causing harm applies as an indirect obligation to the citizens met through supporting or not stymieing the Six Agencies.

3. The Six Agencies Previously Failed to Regulate Financial Innovation

Because many CIPs were pushing financial innovation for greater profit and that innovation was (and continues to be) at least in part an attempt to escape financial regulation, and because that innovation and the compensation practices that incented that innovation substantially increased risk in the financial market, CIPs should support, not interfere with regulatory promulgation by the Six Agencies.

Particularly in view of the power of the Six Agencies to facilitate and protect the financial sector business of the CIPs, those CIPs have a magnified obligation not to stymie, but to support the Six Agencies' regulatory mandates derived from the very legislative response that saved many such CIPs.

Indeed, much of the work of the Six Agencies is to keep up with financial innovation and mitigate its risk to the market and those affected by it. The lack of regulation promulgated by the Six Agencies to address derivatives in the early 2000s is, perhaps, the most pertinent example of regulatory failure causally involved in the 2008 financial crisis. Most notably, this failure allowed the expansion of asymmetric risk structures whereby CIPs had great short-term personal upside potential in developing and trading in innovative derivative products and much less personal downside risk in the failure of that innovation.[111] This regulatory failure, to a large extent, is likely due to the financial services industry's regulatory influence. People in a position to make or break regulatory response to the financial innovation of derivatives, like Larry Summers, actively worked against such regulation. They willfully or recklessly dismissed concern over expanding market risk, often in the interest of facilitating great asymmetric short term CIP profits and other personal benefits.

111. *See* Bebchuk & Spamann, *supra* note 35, at 283.

4. The CIP Non-Obstruction Obligation

The CIP non-obstruction obligation again derives from the same reciprocity and restitution of willful or reckless harm concepts as does the CIP bailout obligation. The CIP non-obstruction obligation, however, focuses on CIP interaction with the U.S. federal government's role in the rule of law, particularly via the Six Agencies, and their role in indirectly representing or acting on behalf of the interests of the U.S. citizens.

To date, much of the justification for interference in the Six Agencies' promulgation processes lies with the rationalizations of CIPs and their principals (officers, major shareholders) and professional agents (lawyers, accountants, consultants) that new incentive compensation regulations would only increase the cost, time, and hassle of CIPs in meeting anticipated additional disclosure and reporting requirements and yet really help no one. Given the widespread deduction that such incentive compensation practices were a key cause of the 2008 financial crisis, these rationalizations are hard to accept.[112] Moreover, the assumption of cost, based on additional disclosure and reporting, may be misplaced if the Agencies promulgated regulations more in the nature of a simple prohibition of short-term bonus/incentive compensation for developing, selling, and trading high risk products. Regardless, CIPs have failed to meet the non-obstruction obligation.

*C. Regulators in the Six Agencies Have Both a Moral and Legal Obligation to Implement Reasonable Regulations of CIPs in a Reasonable Time Frame (**The Regulatory Obligation**).*

This obligation, unlike the prior two discussed, resides not with CIPS, but with those who regulate them, namely the people running and working in the Six Agencies.

1. The Regulators in the Six Agencies are Employed by the Public in the Public Interest

This obligation owed by regulators to the U.S. citizens may be first a simple moral obligation of obedience to law. It is the obligation that the regulators do the jobs the Six Agencies employ them to do. At the same time, to the extent that those regulators have been wrongfully

112. *See* Steven A. Bank, Brian R. Cheffins & Harwell Wells, *Executive Pay: What Worked?*, 42 J. CORP. L. 59, 66–67 (2016) (including a summary of the rise in executive compensation particularly in the 1990s).

beholden to the interests of those they regulate (the CIPs) instead of the citizens generally, this obligation may again be best characterized as deriving from reciprocity and restitution for harm considerations.

2. The Regulatory Obligation

Regulators owe the citizens who employ them reciprocal good for good in the form of reciprocal legal compliance. Regulators should carry out Dodd-Frank mandates. § 956 of the Act is law to be obeyed. In addition, regulator reciprocity may also exist in the very nature of the regulators' performance of employment duties in consideration for compensation from the public by way of the federal government. This work performance obligation is perhaps heightened because it is undertaken in the acceptance of public trust.

Still further, a restitution for harm-based obligation may reside with the regulators in the Six Agencies deriving from the failure of their oversight to prevent the 2008 financial crisis, or even to curtail the extreme risk-taking that in part caused the crisis. Such risk-taking and its ramifications were clearly within the Six Agencies' regulatory purview.

One might object that this harm-based restitution grounding of the regulatory obligation is too attenuated. It may unrealistically ascribe too much foreseeability to the regulators. Yet, this objection seems weak in the face of other explanations. If we accept this premise, we have further grounding of the regulatory obligation in restitution owed by the regulators to the U.S. citizens at the very least to be paid by way of carrying out the Six Agencies' mandates under Dodd-Frank. Again, this has not been completed in the more than ten years since passage of the Act. With roots in both reciprocity and restitution for harm, ***call this the regulatory obligation***.

If there is an excuse for the Six Agencies' regulatory failure, any such explanation would seem to lie in external forces on the Agencies. From a business perspective where firms seek to achieve competitive advantage over rivals, it may be generally strategically advisable for firms to involve themselves in the regulatory processes conducted by the Agencies if those firms do business within the Agencies' regulatory purview.[113] It is rational for firms to influence regulation to favor their business, if not disfavor their competition.[114] This activity

113. *See* Thomas M. Madden, *Law and Strategy* and Ethics?, 32 GEO. J. LEGAL ETHICS 181, 192 (2019) (discussing law and strategy literature including the concept of business involvement in the regulatory process).

114. *See id.* at 209.

would motivate external pressure on the regulators in the form of lobbying and regulatory capture. Though certainly not justifying or excusing the Six Agencies' regulatory failure, these forces may explain in part why the Six Agencies have failed to meet their mandate under Dodd-Frank § 956.

3. Regulatory Capture

Still more credibly, a plausible explanation, though not an excuse, for the Six Agencies' failure to successfully complete their regulatory mandate under Dodd-Frank § 956 is the role of regulatory capture. The specter of regulatory capture looms large over the financial sector.[115] Though this article does not purport to offer an extensive survey of the political economy literature addressing the field of public choice, it does recognize several empirical studies examining financial regulation and regulatory capture.[116] Work focused on regulatory response to the 2008 financial crisis has found that firms that actively lobbied their regulators in the midst of the triage of that crisis were more likely to escape investigation, more likely to receive TARP funds, and more likely to receive emergency loans from the Fed.[117] (Note that lobbying, albeit from the perspective of the financial sector asserting its interests on and through the regulators is discussed herein.[118] Below, lobbying is included as an element of regulatory capture.)

The regulatory capture lens has also revealed a link between that capture and compensation inequality.[119] This research shows, perhaps

115. *See* G. P. Manish & Colin O'Reilly, *Banking Regulation, Regulatory Capture and Inequality*, 180 PUB. CHOICE 145, 146 (2019); Benjamin M. Blau, Tyler J. Brough & Diana W. Thomas, *Corporate Lobbying, Political Connections, and the Bailout of Banks*, 37 J. BANKING & FIN. 3007, 3007 (2013) (discussing the importance of different types of political involvement for firms seeking favorable regulatory conditions); Blau, *Lobbying, Political Connections and Emergency Lending, supra* note 110, at 333–34 (discussing whether the political connections of banks were important in explaining participation in the Federal Reserve's emergency lending programs during the recent financial crisis). *See generally* Thomas Lambert, *Lobbying on Regulatory Enforcement Actions*, 65 MGMT. SCI. 2545, 2545 (2019).

116. *See, e.g.,* Manish & O'Reilly, *supra* note 115, at 153.

117. *See* Blau, Brough & Thomas, *supra* note 115, at 3008; Blau, *Lobbying, Political Connections and Emergency Lending*, *supra* note 110, at 333.

118. *See* discussion *supra,* Section II.B.1.

119. *See* Thomas Philippon & Ariell Reshef, *Wages and Human Capital in the U.S. Finance Industry: 1909-2006*, 127 Q. J. ECONS. 1551, 1555, 1588 (2012); Manish & Reilly, *supra* note 115, at 146.

ironically, that in the banking industry, more regulation produces more inequality in compensation.[120] The regulators themselves exhibit rent seeking, self-serving behavior that permits or drives increased high level compensation. This may be brought about by direct industry lobbying influence, by implicit or explicit political pressure, but, also, by cognitive and cultural capture.[121] Cognitive and cultural capture describes the inculcation of regulators into the shared terminology, values, and perspectives of industry, thereby altering the regulators' objectivity to favor the interests of the regulated.[122]

James Cox and Randall Thomas have authored a thorough and well-informed general look at the SEC as an example of regulatory capture, focusing on both cognitive and cultural capture.[123] While Cox and Thomas' assessment of the rank and file staff of the SEC left them unconvinced of broad agency staff cultural capture, their assessment of division heads with agenda setting control raised a red flag.[124] As Cox and Thomas assessed the ubiquitous public-private sector revolving door operating broadly at the SEC, they were most troubled by the shift to hiring outside industry lawyers as division heads, altering the long-standing prior agency norm of promoting internal staff to these top positions.[125] This change, they found, was coupled with a decidedly partisan political shift initiated with Reagan's deregulation policy, which partisanship was only to intensify. [126] Thus, since the 1980's, the prior culture at the division head level of the SEC characterized by the long-term civil service of industry watchdogs, like Stanley Sporkin, shifted to outsider-come-insider control and led to massive budgetary and staff reductions in the enforcement division and other vital areas at the agency.[127]

> [R]esorting to the private sector to staff the directorships of the SEC was not only in response to the Special Study [of 1963], which found that the SEC needed individuals with a deep understanding of contemporary markets to carry out its mission . . . [but] was also in response to a political desire to [employ] . . . individuals whose allegiance to the [politically appointed] Chair [of the Commission] was not adversely

120. *See* Manish & Reilly, *supra* note 115, at 146.
121. *See* Cox & Thomas, *supra* note 104, at 883–85.
122. *See id.* at 883.
123. *See id.* at 885.
124. *See id.* at 886–87.
125. *See id.* at 889.
126. *See* Cox & Thomas, *supra* note 104, at 889.
127. *See id.* at 878.

impacted by the protections afforded career employees through the independence provided by civil service.[128]

Indeed, Cox and Thomas' work convinces us that the effect of division head cognitive or cultural capture is likely magnified at the SEC because of the agencies' collaborative culture whereby staff must obtain approval from division heads up the chain in order to undertake most significant agency actions.

In addition, Cox and Thomas exposed decidedly asymmetrical checks on SEC regulation. That is, they found that regulation promulgated by the Commission that was deemed by industry to be overreaching or too restrictive was frequently challenged in court and scaled back, whereas trifling regulation was virtually never challenged as being too weak.[129] This phenomenon was exacerbated in the instance of congressionally mandated regulation (via SOX and Dodd-Frank), where the SEC dragged its feet, and/or ultimately promulgated minimal regulation to meet the mandates.[130] This is the very heart of the problem this article seeks to elucidate.

With a view toward reform of the Commission's regulatory capture problem, Cox and Thomas support and advocate for the Dodd-Frank created Investor Advocate Committee, Office of Investor Advocate, and ombudsman (appointed by the Investor Advocate); and for internal deputy directors tempering directors brought in from industry.[131] Clearly, these authors have exposed a central problem that goes a long way toward explaining the Agency's regulatory failure under § 956 of the Act.

4. Reasonable Regulation

Notwithstanding the explanation of regulatory capture, the regulatory obligation remains unfulfilled. The regulators must reasonably regulate. At a minimum, reasonable regulation in this instance must mean regulation that meets the requirements of the Dodd-Frank mandate, specific to section 956, "(1) [to] prohibit[] incentive-based payment arrangements that the Agencies determine encourage inappropriate risks by certain financial institutions by providing excessive compensation or that could lead to material financial loss; and (2) [to] requir[e] those financial institutions to disclose information concerning incentive-based compensation

128. *Id.* at 880.
129. *See id.* at 889, 892–94.
130. *See id.* at 894–95.
131. *See* Cox & Thomas, *supra* note 104, at 896–97.

arrangements to the appropriate Federal regulator."[132] This reasonableness standard is akin to good for good obedience to law and is owed by the regulators to and for the same reasons discussed in the CIP bailout obligation and the CIP non-obstruction obligation.

The Six Agencies' 2011 attempt at reasonable regulatory promulgation included three express principles to meet the Dodd-Frank § 956 mandate; "(i) …incentive-based compensation arrangements should appropriately balance risk and financial rewards, (ii) be compatible with effective risk management and controls, and (iii) be supported by strong corporate governance."[133] Further, after identifying three tiers of Covered Institutions, the 2011 rule…

> …would have required…larger financial institutions to defer 50 percent of the incentive-based compensation for executive officers for a period of at least three years. The second would have required the board of directors (or a committee thereof) to identify and approve the incentive-based compensation for those covered persons who individually have the ability to expose the institution to possible losses that are substantial in relation to the institution's size, capital, or overall risk tolerance, such as traders with large position limits and other individuals who have the authority to place at risk a substantial part of the capital of the covered institution.[134]

This seems reasonable on its face. Yet, the Six Agencies received over 10,000 comments of varying content on this proposal.[135] Many of those comments focused either on requiring a five-year deferral for bonus compensation or on leveling (or weakening) the treatment of the largest capital (too big to fail) category of Covered Institutions with the smaller capital categories.[136]

Under their 2016 rule re-proposal, the Six Agencies added the provision that:

> …an incentive-based compensation arrangement would not be considered to appropriately balance risk and reward unless it: includes financial and non-financial measures of performance, is designed to allow non-financial measures of performance to

132. SEC Release No. 34-77776, *supra* note 12, at 37670.
133. *Id.* at 37677.
134. *Id.*
135. *See id.*
136. *See* Alan Avery et al., *Dodd-Frank Incentive Compensation Requirements for Financial Institutions: Six Agencies Jointly Issue Proposed Rules*, 29 J. TAX'N. & REGUL. FIN. INSTS. 18, 18 (2016); SEC Release No. 34-77776, *supra* note 12, at 37677.

> 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. [137]

(Corporate governance requiring board oversight and approval, and record keeping and annual reporting requirements were not significantly altered from 2011 to 2016.[138]) This added detail in the 2016 re-proposal is, again, reasonable on its face in light of the law that is § 956 of the Act.

It would seem, then, that now ten years after passage of Dodd-Frank, the regulators have failed to meet their clear moral (and legal) obligations under § 956. The Six Agencies have simply not met their regulatory obligation.

III. IMPLICATIONS

It is hard to imagine that the obligations of the CIPs and regulators discussed here are genuinely controversial. It appears that on a normative basis grounded in the justice components of reciprocity and restitution for harm consistent with Rawls and his informing predecessors, we have good reason to hold CIPs and regulators to the obligations discussed above: (i) the CIP bailout obligation, (ii) the CIP non-obstruction obligation, and (iii) the regulatory obligation. If these three obligations are justified, the failure of CIPs and regulators to meet them ten years hence surely is not. The central moral failure of both the CIPs and the regulators appears to lie in financial sector self-interest asserted through the workings of lobbying and regulatory capture. Of course, these phenomena do not excuse the failure.

If neither the CIP bailout obligation, the CIP non-obstruction obligation, nor the regulatory obligation have been met, where are we left? It would be incomplete to ascribe blame to the CIPs and regulators for their moral failure to meet the three obligations without recognizing how interdependent the CIPs, the regulators, and the U.S. citizens are. However, this interdependence would seem only to heighten the obligations. We must insist that CIPs and regulators meet their obligations.

The financial sector is at the dynamic heart of the functioning U.S. domestic and global market economies. Our market economy depends upon innovating, profit-seeking CIPs, together with

137. SEC Release No. 34-77776, *supra* note 12, at 37679–80.
138. *See id.* at 37713.

regulators who set and maintain boundaries which ideally create general predictability and market stability, serving the interests of all involved, albeit to varying degrees.

The most direct implication of accepting these three claims must be to insist that CIPs stop their detrimental practices and that the Six Agencies complete the mandate of Dodd-Frank § 956 to better regulate financial sector incentive compensation practices. Scholars and the public holding CIPs and regulators to these moral obligations can make this happen. Beyond that, the consequences of effective regulation on incentive compensation should include reduced market destabilizing risk-taking, moderation of starkly unequal incomes, and a halt to further injustice to U.S. citizens.

Ultimately, meeting the three obligations is in the common interest, inclusive of CIPs. It is long overdue.

IV. REGULATORY PROMULGATION

If CIPs and regulators are to live up to their obligations, we must take the next step of discussing how the regulators should best constrain the CIPs. Several existing ideas for regulatory promulgation addressing financial sector incentive compensation were proposed by the Commission in 2011 in SEC Release 34-64140.[139] These were then revised and re-proposed in 2016 in SEC Release 34-77776.[140] These proposals have been attacked, supported, or addressed with alternatives in comment letters to the 2011 and 2016 proposed rules, as well as in academic debate.[141] This article supports the following distillation of those proposals into three central imperatives driven by the three moral claims: (i) altered mandatory nonfinancial metrics for the award of incentive compensation to executives and risk-taking decision makers, (ii) extended holding periods for awarded performance compensation, and (iii) uniform terms for the mandatory clawback of awarded compensation. These three prongs of regulatory promulgation connect to the three moral claims of (i) the CIP bailout obligation, (ii) the CIP non-obstruction obligation, and (iii) the regulatory obligation. Prior to elucidating the regulatory imperatives, we would do well to look at current financial sector practices.

A. Recent Compensation Policies and Practices at Three Leading

139. *See id.* at 37677.
140. *See id.* at 37673.
141. *See id.* at 37677.

Investment Banks

The industry counterpoint to the three normative claims is that the industry has adequately improved its compensation practices of its own volition to reduce risk-taking and resultant market volatility.[142] More to the point, the industry claim is that financial services firms of their own accord have altered their policies and practices such that they now substantially meet the terms of the regulatory proposals made in the re-proposal.[143]

The author has reviewed the 2021 Annual Meeting proxy solicitation disclosures of compensation policies and practices for each of J.P. Morgan,[144] Morgan Stanley,[145] and Goldman Sachs,[146] perhaps the three most prominent publicly traded investment banks in the domestic, if not the global, marketplace. Most of this disclosure is, of course, made to meet the requirements of the say on pay regulations actually promulgated by the Commission pursuant to Dodd-Frank.[147]

In the respective proxy solicitations, each of these three firms discloses compensation policies that set out at least general measures for a compensation committee to consider in arriving at compensation for certain executives, executives who generally would meet our earlier definition of a CIP. Compensation components addressed in

142. CONG. RSCH. SERV., THE DODD-FRANK ACT: AN OVERVIEW OF THE 2016 INCENTIVE-BASED COMPENSATION PROPOSAL 5 (2016).

143. *See* SEC Release No. 34-77776, *supra* note 12; CONG. RSCH. SERV., *supra* note 142, at 16 ("[Some economists have argued] 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.").

144. *See* J.P. MORGAN CHASE & CO., ANNUAL MEETING OF SHAREHOLDERS PROXY STATEMENT (2021), https://www.sec.gov/Archives/edgar/data/0000019617/000001961721000275/a2021proxystatement.

htm#ia483d4d264e64a6baa67f4d6af4c82cd_49 [hereinafter J.P. MORGAN PLAN].

145. *See* MORGAN STANLEY, NOTICE OF 2021 ANNUAL MEETING AND PROXY STATEMENT (2021), https://www.morganstanley.com/about-us-2021ams/2021_Proxy_Statement.pdf [hereinafter MORGAN STANLEY PLAN].

146. *See* GOLDMAN SACHS GRP., ANNUAL MEETING OF SHAREHOLDERS PROXY STATEMENT (2021), https://www.sec.gov/Archives/edgar/data/886982/000119312521087020/d88664ddef14a.htm#toc88664_25 [hereinafter GOLDMAN PLAN].

147. *See* Dodd-Frank Act § 956 (codified as 12 U.S.C. § 5641); 17 C.F.R. § 240.14a-101 (2022).

each include: salary, cash bonuses, and stock awards in the form of Restricted Stock Units (RSUs) or Performance Share Units (PSUs) or both, made pursuant to long-term compensation plans.[148] These measures incorporate formal consideration of individual and firm performance.[149] Moreover, each investment bank's compensation practices include provisions stating that no bonuses are guaranteed, that compensation is subject to discretionary clawbacks, and that no golden parachutes are offered.[150] Each firm benchmarks its compensation to peer corporations (both within and without the financial sector) paying similar scale executive compensation.[151] Each firm also prohibits any hedging or pledging of awarded stock.[152] Each requires a three year vesting period for stock awards, subject to two additional years for redemption.[153] Finally, each firm asserts that its compensation policies are designed to prevent excessive risk-taking.[154]

J.P. Morgan uses a formula based calculation of Return on Average Tangible Common Shareholders Equity (ROTCE) in awarding PSUs with performance now measured over a period of three years rather than annually.[155] Stock awards are now subject to three year cliff vesting with an additional two year holding period.[156] However, executives based in the UK are subject to seven year

148. *See supra* notes 144–46.

149. *See supra* notes 144–46.

150. *See supra* notes 144–46.

151. *See supra* notes 144–46.

152. *See supra* notes 144–46; Matt Levine, *Archegos Was Too Busy for Margin Calls*, BL (July 29, 2021, 1:12 PM), https://www.bloomberg.com/opinion/articles/2021-07-29/archegos-was-too-busy-for-margin-calls (illustrating the dangers of large scale hedging in discussing the recent Archegos Swiss Bank example of the "voracious hedging of stocks" motivated by short term profit and causing steep volatility and loss in the market. This volatility and loss can be attributed to the regulatory failure in which Archegos was not required to disclose its positions publicly, and because its swaps were with multiple banks, none of those banks knew how big and concentrated Archegos's aggregate positions were and therefore could not know the massive size of its default).

153. *See generally* J.P. MORGAN PLAN, *supra* note 144, at 61; MORGAN STANLEY PLAN, *supra* note 145, at 72; GOLDMAN PLAN, *supra* note 146, at 63.

154. *See generally* J.P. MORGAN PLAN, *supra* note 144, at 56; MORGAN STANLEY PLAN, *supra* note 145, at 79; GOLDMAN PLAN, *supra* note 146, at 14.

155. *See* J.P. MORGAN PLAN, *supra* note 144, at 62.

156. *See id.* at 63.

calculation periods as a result of post-financial crisis reforms.[157] These policies are explicitly linked to a claim of aligning management interests with shareholder interests.[158] Moreover, the J.P. Morgan approach now includes a list of reasons that compensation will be clawed back, bifurcating vested and unvested stock wards.[159] Unvested stock awards are subject to claw back for a longer list of reasons.[160] Terms triggering compensation clawback of both vested and unvested stock awards include: material restatement of the firm's financial results, conduct detrimental to the firm's financial position or reputation, material misrepresentations made to the firm by the compensated executive (on which compensation was based), failure to identify and raise material risk to the firm, and materially inaccurate performance metrics (on which compensation was based).[161] Reasons to claw back only unvested stock awards are solely performance based.[162] PSU compensation is also subject to downward adjustment if the firm's common equity tier one capital ratio dips below 7.5%.[163] Compensation further includes equity in the form of RSUs.[164] 2020 CEO equity compensation comprised of RSUs and PSUs together totaled over $37 million valued on vesting.[165] J.P. Morgan's disclosed pay ratio for fiscal 2020 was 395 to 1.[166]

Similarly, the Morgan Stanley compensation policy disclosures emphasize principles of fairness and claims of intended alignment of management interests with shareholder interests.[167] Morgan Stanley provides little detail on its clawback policies other than to mention that such decisions are made by its Employee Discipline Oversight Committee.[168] While the CEO's cash base compensation for 2020 was $1.5 million, his equity compensation comprised of Long Term Incentive Program PSUs and RSUs was more than another $20 million

157. *See id.* at 63.
158. *See id.* at 62.
159. *See id.* at 69.
160. *See* J.P. MORGAN PLAN, *supra* note 144, at 69.
161. *See id.* at 69.
162. *See id.* at 69.
163. *See id.* at 63.
164. *See id.* at 61.
165. *See* J.P. MORGAN PLAN, *supra* note 144, at 73.
166. *See id.* at 81.
167. *See* MORGAN STANLEY PLAN, *supra*, note 145, at 24.
168. *See id.* at 67.

for total 2020 compensation of over $29 million.[169] Morgan Stanley's disclosed pay ratio for fiscal 2020 was 234 to 1.[170]

Goldman Sachs' executive compensation program is stated to be based upon measures of financial performance, client perspectives, risk management, leadership, and cultural values.[171] Goldman's CEO compensation for 2020 was set at over $27 million, but reduced to just over $17 million due to a $10 million clawback implemented pursuant to the firm's 1MDB Malaysia scandal and settlement.[172] $10.85 million of this compensation was in the form of PSUs.[173] At Goldman, both RSUs and PSUs are subject to three year vesting with a two year holding period.[174] Moreover, Goldman's CEO must retain 75% of his shares in equity.[175] Goldman's clawback reasons include failure to perform, violations of securities law, criminal charges, impugning the firm reputation, general conduct detrimental to the firm, and violating firm hedging prohibitions.[176] Due to the above referenced clawback, Goldman's disclosed pay ratio for 2020 was reduced to a mere 172 to 1.[177]

As is often typical with large float public companies' annual shareholder meetings, the shareholders of each of J.P. Morgan, Morgan Stanley, and Goldman Sachs, not only voted for each respective management selected director slate, but overwhelmingly approved all executive compensation policies and decisions up for a vote or say on pay resolutions.[178] Shareholder proposals for

169. *See id.* at 72.

170. *See id.* at 81.

171. *See* GOLDMAN PLAN, *supra* note 146, at 41.

172. *See* GOLDMAN PLAN, *supra* note 146, at 5. *See generally* Rozanna Latiff, *Understanding Goldman Sachs' Role in Malaysia's 1MDB Mega Scandal*, REUTERS (Oct. 20, 2020, 11:17 AM), https://www.reuters.com/article/us-goldman-sachs-1mdb-settlement-explain/understanding-goldman-sachs-role-in-malaysias-1mdb-mega-scandal-idUSKBN2772HC (providing context for $10 million clawback implementation against the Goldman CEO).

173. *See* GOLDMAN PLAN, *supra* note 146, at 5.

174. *See id.* at 49–50.

175. *See id.* at 50.

176. *See id.* at 51.

177. *See id.* at 73.

178. *See* Elizabeth Dilts Marshall, *JPMorgan Shareholders Vote to Back Board Members, Executive Compensation*, REUTERS (May 18, 2021, 11:26 AM), https://www.reuters.com/business/jpmorgan-shareholders-vote-back-board-members-executive-compensation-2021-05-18/ [hereinafter *J.P. Morgan Vote Report*]; Elizabeth Dilts Marshall, *Morgan Stanley Investors Back Bank Directors, Executive Pay Packages*, REUTERS/YAHOOSPORTS, (May 20, 2021),

shareholder rights to act by written consent failed at both J.P. Morgan and Goldman Sachs.[179] Similarly, proposals for race audits failed at both J.P. Morgan and Goldman Sachs.[180] Though a few shareholder activist proposals came close, all such proposals failed.[181] Meanwhile, again, all management compensation proposals prevailed at each of the three banks' annual shareholder meetings.[182]

B. Compensation Policies Lacking Necessary Reforms

While the industry has indeed implemented incremental reforms to incentive compensation policies and practices since the 2008 financial crisis, those reforms have not gone far enough. Reforms to date do not meet the moral imperative of the three normative claims. Perhaps the most apparent and compelling take-away from analyzing the 2021 approvals of 2020 executive and board compensation packages at each of J.P. Morgan, Morgan Stanley, and Goldman Sachs is the lack of uniformity and the varied level of detail offered by each in disclosing their compensation policies and practices. This is itself a function of inadequate regulation. While charts, compensation tables, and pay ratios are in part comparably presented, this limited uniformity is largely a function of regulation that actually was successfully promulgated pursuant to Dodd-Frank.[183] The lack of detail and lack of uniformity in further plan details, including in compensation committee criteria for award of RSUs and PSUs, and reasons and procedures for the clawback of executive compensation, is a function of failed regulation under Dodd-Frank § 956(b). This necessary regulation still has not been promulgated pursuant to Dodd-

https://sports.yahoo.com/morgan-stanley-investors-back-bank-143217905.html [hereinafter *Morgan Stanley Investors Back Directors*]; *Highlights*, *The Goldman Sachs 2021 Annual Shareholders' Meeting was Held on Thursday, April 29*, *2021*, GOLDMAN SACHS, https://www.goldmansachs.com/investor-relations/financials/current/proxy-statements/2021-shareholders-meeting-highlights.pdf (last visited Nov. 28, 2022) [hereinafter *Goldman Sachs Highlights*].

179. *See* J.P. MORGAN PLAN, *supra* note 144, at 99; GOLDMAN PLAN, *supra* note 146, at 9, 88–89.

180. *See* J.P. MORGAN PLAN, *supra* note 144, at 1, 101; GOLDMAN PLAN, *supra* note 146, at 9, 97–98; *Goldman Sachs Highlights*, *supra* note 178.

181. *J.P. Morgan Vote Report*, supra note 178.

182. J.P. MORGAN PLAN, *supra* note 144 at 37; *Morgan Stanley Investors Back Directors*, *supra* note 178; *Goldman Sachs Highlights*, *supra* note 178.

183. *See* Dodd-Frank Act §§ 951–955; Sarbanes-Oxley Act of 2002, Pub. L. 107–204 (codified as 15 U.S.C. § 7243).

Frank now more than ten years after the clear legislative mandate for the Six Agencies to do so.

Goldman, ironically the one of the three investment banks examined that did claw back compensation in 2020, gave only general guidance on the firm's clawback policy, mentioning but a few triggers of specific criminal or firm policy violations.[184] J.P. Morgan gave greater detail in a chart, distinguishing reasons for clawbacks by form of compensation affected (RSU or PSU).[185] Morgan Stanley disclosed virtually no parameters for clawback decisions whatsoever.[186]

This lack of detail and lack of uniformity is perhaps at its most concerning in the matter of compensation committee determination of performance based compensation. While significant detail is offered for the general compensation determination process in each of the three investment bank disclosures, the import of non-financial measures of performance in each is difficult to ascertain or verify. This lack of clarity and transparency is a central problem in adequately and meaningfully reforming the regulation of financial sector incentive compensation. It connects to one of the most compelling purposes of this regulation, to relax the linkage between short-term, risk-driving profit seeking and near immediate executive or decision-maker compensation. In turn, it connects directly to concern for the justice-based concepts of reciprocity and restitution that ground this article's three normative claims.

C. Three Regulatory Promulgation Imperatives

Academics and commentators have put forth many worthwhile ideas regarding financial sector incentive compensation regulation. In the early wake of the financial crisis, Lucian Bebchuk and Holger Spamann led the way with calls for the mixture of preferred stock and bonds to be added to common stock awards in compiling financial sector incentive compensation.[187] Sanjai Bhagat and Roberta Romano then called for the reform of holding periods for stock awards to require longer term performance measures.[188] Frederick Tung suggested executive incentive compensation take the form of publicly

184. GOLDMAN PLAN, *supra* note 146, at 60, 69–70.

185. J.P. MORGAN PLAN, *supra* note 144, at 46.

186. MORGAN STANLEY PLAN, *supra* note 145, at 10, 87.

187. Bebchuk & Spamann, *supra* note 35, at 284.

188. Sanjai Bhagat & Roberta Romano, *Reforming Executive Compensation: Focusing and Committing to the Long-Term*, 26 YALE J. ON REGUL. 359, 359, 370–72 (2009).

traded subordinated debt securities.[189] All were intending to reduce the sector's executive or decision maker risk-taking and resultant market volatility which, again, had been broadly deduced to be a major cause of the crisis.

In the present, more than ten years after the original proposal and five years after the Six Agencies' failed re-proposal of regulations to address the aforementioned problems, this article asserts that three imperative reforms of financial sector incentive compensation regulation still remain. They are requiring; (i) that real nonfinancial metrics be weighted heavily in granting incentive compensation, particularly PSUs, (ii) slightly longer mandatory holding periods for both RSUs and PSUs, and perhaps most importantly, (iii) parameters for clawbacks that fully hold risk-taking decision-makers accountable. Of course, other proposed regulations, including additional restrictions on incentive and total compensation,[190] prohibiting stock options altogether,[191] and better definitions of significant risk-takers to be covered by the rules[192] are certainly worthy of implementation as well. However, the three reforms mentioned are paramount as they will have real behavioral impact and are opportune given the financial sector's recent incremental reforms. Focusing on these measures is not meant to disregard additional proposals. Focusing on these measures is meant to apply the three normative claims to drive forward the most plausible reforms with the most direct impact in reducing market volatility resulting from incented short-term profit seeking.

It should be acknowledged that any of these proposed reforms is outside the fundamental, facially massive inequality in executive compensation that in ratio to average worker compensation among the three investment banks averaged 267 to 1 in 2020 (even when the top end of that was reduced by 10% at Goldman due to the aforementioned 1MDB Malaysia scandal).[193] In dollar value, the three CEOs of the three major banks were paid average total 2020 compensation of $27.4 million (and but for the Goldman clawback would have averaged over $30 million).[194] Even if the form of compensation as incentive compensation may be driven in large part by tax code, this cannot

189. Frederick Tung, *Pay for Banker Performance: Structuring Executive Compensation for Risk Regulation*, 105 NW. UNIV. L. REV. 1205, 1206–07 (2011).

190. *See Glass Lewis Letter*, *supra* note 23, at 10.

191. *See Better Markets Letter*, *supra* note 23, at 4.

192. *See Glass Lewis Letter*, *supra* note 23, at 12.

193. *See* Latiff, *supra* note 172, at 2.

194. *See id.*; GOLDMAN PLAN, *supra* note 146, at 61.

explain the massive totals.[195] Indeed, the role of IRC § 162(m) in capping the deduction for typical executive base pay at one million dollars unless incentive based cannot be dismissed as a major force driving the favoring of incentive compensation over base compensation.[196]

The following regulatory measures include variations of some proposed in SEC Release 34-77776, some proposed in comment letters to that release or the original proposal,[197] and some originally proposed or modified here. Again, there are two immediate reasons these particular regulatory reforms are imperative. First, the banks' own compensation reforms are inconsistent and have not gone far enough. Second, furthering the sector's incremental reforms will likely have the most immediate impact on industry behavior. Moreover, the underlying reason for these reforms rests in the reciprocity and restitution elements of justice argued herein.[198] These reforms actualize the normative claims derived herein (i) the CIP bailout obligation, (ii) the CIP noninterference obligation, and (iii) the regulatory obligation.[199]

1. Nonfinancial Measures for Granting PSUs

> To be consistent with safety and soundness, incentive compensation arrangements at a banking organization should: [p]rovide employees incentives that appropriately balance risk and reward; [b]e compatible with effective controls and risk-management; and [b]e supported by strong corporate governance, including active and effective oversight by the organization's board of directors.[200]

The greater challenge with awarding PSUs is incorporating a significant proportion of nonfinancial measures into the granting

195. Compensation exceeding $1 million is non-deductible if it is not performance-based. *See* 26 U.S.C. § 162(m) (2012). *See generally* Bank & Georgiev, *supra* note 32 (discussing the influence of § 162(m) on compensation executive practices); Latiff, *supra* note 174.

196. *See* 26 U.S.C. § 162(m) (2022). *See generally* Bank & Georgiev, *supra* note 32.

197. *See generally Better Markets Letter*, *supra*, note 23; *Glass Lewis Letter, supra* note 23; *Occupy the SEC Letter*, *supra* note 23.

198. *See* discussion *supra* Section II.

199. *See* discussion *supra* Section II.

200. Guidance on Sound Incentive Compensation Policies, *75 Fed. Reg. 36395, 36405 (June 25, 2010). See also* SEC Release No. 34-77776, *supra* note 12.

calculation in a manner that is objective, verifiable, and mandatory.[201] Among the three banks, the current nonfinancial measures considered in granting decisions are named as cultural and leadership considerations, team player qualities, and especially client attentiveness and satisfaction.[202] Nonfinancial measures should not be limited to these, nor even to successful risk assessment or firm risk mitigation, but should include adherence to firm compliance policies generally, as well as worthy ethical evaluation and commitment to an authentic firm ethical culture. Indeed, this ethical component is not easily quantified, but firms can, and should be required to, produce and follow such nonfinancial evaluative policies in the same vain that they created ethics and compliance policies in response to the Federal Sentencing Guidelines for Organizations.[203] A risk-taking decision maker's record showing no compliance or legal violations is not enough. Assessment by a 360-degree cohort of colleagues could go a long way to changing the culture in a firm's c-suite from one of reckless risk-taking in pursuit of immediate profit to one of commitment to long-term stability and long-term profitability. Such evaluative policies would go beyond the re-proposal's call for consideration of "assessments of compliance with the covered institution's policies and procedures, adherence to the covered institution's risk framework and conduct standards, or compliance with applicable laws."[204]

The portion of the overall granting formula or policy that a compensation committee would be obliged to follow, document, and disclose, should be at least sixty percent in relation to financial performance measures so that the practice will truly counter the

201. *See* SEC Release No. 34-77776, *supra* note 12, at 362.

202. *See* GOLDMAN PLAN, *supra* note 146, at 38, 42, 96; J.P. MORGAN PLAN, *supra* note 144, at 13, 17, 33, 35, 49, 77, 84, 132.

203. *See* 28 U.S.C. § 994(a) (2022) (directing promulgation of sentencing guidelines); 28 U.S.C. § 994(p) (2022) (regarding amendments to the FSGO). For a full history of the United States Sentencing Commission, *see* Mistretta v. United States, 488 U.S. 361, 362–70 (1988). For an overview of the FSGO, *see generally* U.S. SENT'G COMM'N, *An Overview of the Federal Sentencing Guidelines*, https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf.

204. Incentive-Based Compensation Arrangements Supplementary Information, Exchange Act Release No. 34-77776 (proposed June 10, 2016) 175–77.

propensity to focus too dominantly on immediate monetary measures.[205]

In addition, PSU grants should be based on performance over a period of at least three years. J.P. Morgan's practice of grants based upon three-year periods should be mandatory.[206] This is a direct carry through addressing the problem of short-termism. Granting awards based on minimum three-year periods forces a mindset past a culture of quarterly earnings reports and annual PSU grants.[207]

Reports of the terms of these policies should be mandatorily disclosed in all proxy solicitations and SEC filings relating to or including executive compensation matters. Moreover, these policies and practices should be subject to mandatory external audits which existing public accounting firms would be well-positioned to develop and conduct.[208] Downward adjustment in granted compensation should again be formulaic and may be considered in part overlapping with clawback provisions discussed herein.[209] Note the integral concept of mandatory escrowing of incentive compensation, including PSUs and encompassing former employees, so that clawbacks can actually be implemented.[210]

Such promulgation would comply with each of (i) the CIP bailout obligation, (ii) the CIP noninterference obligation, and (iii) the regulatory obligation. It would offer an alteration in financial sector practices that reciprocates for the bailouts the industry received. It would offer cooperation with the Six Agencies in going further in reform than the industry has on its own, rather than perpetuating opposition to regulation. It would be a successful promulgation of reasonable regulation by the regulators tasked to regulate financial sector incentive compensation by Dodd-Frank more than ten years ago.

2. Longer Holding Periods for Awarded Stock

While industry practice has improved, the prevailing three years to vest and subsequent two year holding period formula is slightly shy of typical business cycles and two years shy of the seven year UK

205. *See id.*
206. *See* J.P. MORGAN PLAN, *supra* note 144, at 62–64, 66, 70, 114, 146.
207. *See Glass Lewis Letter*, *supra* note 23, at 5, 11.
208. *See Occupy the SEC Letter*, *supra* note 23, at 4–5.
209. *See* discussion *infra* Section IV.C.3.
210. *See* discussion *infra* Section IV.C.3.

requirements implemented as a post-financial crisis reform.[211] The holding period should be a mandatory six years for both PSUs and RSUs.[212] This would align with typical business cycle timelines and obviously further advance the long term nature of compensation to drive long term oriented decision making by risk-taking capable decision makers and executives.[213]

The rationale for this, consistent with current claims in disclosed compensation policies among the three leading investment banks, is to better align executive/risk-taking decision-maker interests with shareholder interests.[214] If these aligned interests are real, they must err toward the long term to continue to counter the industry's cultural earnings pressure for high short-term profits regardless of risk and resultant market volatility.

This lengthening of PSU and RSU holding periods would comply with each of (i) the CIP bailout obligation, (ii) the CIP noninterference obligation, and (iii) the regulatory obligation. Like the nonfinancial measures for awarding PSUs, it would offer an alteration in financial sector practices that reciprocates for the bailout the industry received. It would offer cooperation with the Six Agencies in going further in reform than the industry has on its own, rather than perpetuating opposition to regulation. It would be a successful promulgation of reasonable regulation by the regulators tasked to regulate financial sector incentive compensation by Dodd-Frank more than ten years ago.

211. *See* SERVS. AUTH., REVISING THE REMUNERATION CODE: FEEDBACK ON CP10/19 AND FINAL RULES 19 (2010).

See generally Anya Kleymenova & Irem Tuna, *Regulation of Compensation and Systemic Risk: Evidence from the UK*, 59 J. OF ACCT. RSCH. 1123, 1164 (2021) (noting that one of the aims of the UK Remuneration Code was to curb banks' risk-taking behavior, which was perceived to be suboptimal from the social point of view and finding that the changes required by the Remuneration Code in compensation practices played an incremental role in reducing systemic risk).

212. *See Occupy the SEC Letter*, *supra* note 23, at 7; *Better Markets Letter*, *supra* note 23, at 8.

213. *See Occupy the SEC Letter*, *supra* note 23, at 7; *Better Markets Letter*, *supra* note 23, at 8.

214. *See Glass Lewis Letter*, *supra* note 23, at 7.

3. Mandatory Clawback Parameters

First and foremost, clawbacks must not be discretionary.[215] They must be mandatory and for clear and uniform reasons.[216] While certain reasons set out in the Goldman and J.P. Morgan disclosures go part way toward meeting acceptable standards, they are not there yet. Most importantly, implementing clawbacks remains a discretionary action of a firm's compensation committee or other special committee tasked with making such decisions. This is inadequate. Clawbacks again must be mandatory and for uniform reasons. Those reasons must include the obvious triggers of direct legal violations, compliance violations, termination for cause, negligence in exposing the firm to risk, but must also include the softer measure of inadequate ethical evaluation assessments resulting from the policies discussed.[217]

Moreover, clawback regulation should provide that at least thirty-five percent of compensation awarded to c-suite executives and risk-taking decision makers must be held in escrow for a period of at least three years while an additional thirty-five percent must be held in escrow for a period of six years (aligning with the business cycle motive discussed herein) in order to insure that compensation that should be clawed back *can* be clawed back.[218] The remaining thirty percent would simply be subject to six year cliff vesting.

Clawback policies should be mandatorily disclosed annually and subject to external auditing in the operations of the committees that oversee and implement them.

The problem of discretionary, opaque, and varied clawback policies is illustrated by the recent 2020 Goldman clawback.[219] Goldman explained its decision to clawback ten percent of its top three c-suite executives as though it were some magnanimous gesture that the board arrived at even though there was really no need. Goldman told its shareholders the clawback was instituted, "in light of the findings of the government and regulatory investigations and the magnitude of the firm's settlement of government and regulatory

215. *See Better Markets Letter*, *supra* note 23, at 6.

216. *Id.*

217. *See* discussion *supra* Section IV.C.1.

218. *See Better Markets Letter*, *supra* note 23, at 8 (these clawback proposals are specific to regulations required under § 956 of Dodd-Frank, not those required under § 954 of the Act).

219. *See* GOLDMAN PLAN, *supra* note 146, at 51; Latiff, *supra* note 172 (reporting the clawback in the context of the 1MDB scandal).

matters relating to 1MDB"[220] Goldman went on to dissociate the three executives from the wrongdoing, "none of the past or current senior management were involved in, or aware of the firm's participation in, any illicit activity at the time the firm arranged the 1MDB bond transactions."[221] It did, however, deem the scandal an "institutional failure."[222] This illustrates entirely inadequate industry accountability.

Goldman's 1MDB related clawback disclosure shows a lack of transparency and lack of regard for self-accountability in holding part or all of a firm responsible for its own toxic ethical culture or, at the very least, its own serious ethical wrongdoing. The point of ethical assessment policies and procedures is to eradicate cultures that enable just this sort of occurrence. Clearly disclosed and audited risk-taking decision-maker ethical assessment policies and practices would go a long way toward preventing this wrongdoing. Such policies and procedures linked to clawbacks would go a long way toward countering the industry culture emphasizing earning large scale immediate profits at all costs.

Promulgation of enhanced mandatory clawbacks would comply with each of (i) the CIP bailout obligation, (ii) the CIP noninterference obligation, and (iii) the regulatory obligation. It, like strong nonfinancial measures for PSU grants and longer holding periods for stock awards, would offer an alteration in financial sector practices that reciprocates for the bailout the industry received. It would offer cooperation with the Six Agencies in going further in reform than the industry has on its own, rather than perpetuating opposition to regulation. It would be a successful promulgation of reasonable regulation by the regulators tasked to regulate financial sector incentive compensation by Dodd-Frank more than ten years ago.

CONCLUSION

Thus, again, on a normative basis grounded in the justice components of reciprocity and restitution for harm consistent with Rawls and his predecessors, we have good reason to hold CIPs and regulators to the obligations asserted here. Those obligations are: (i) the CIP bailout obligation, (ii) the CIP non-obstruction obligation, and (iii) the regulatory obligation. These three obligations are derived from the Six Agencies' failure to promulgate incentive compensation regulations under section 956 (b) of Dodd-Frank, together with the

220. *See* GOLDMAN PLAN, *supra* note 146, at iv; Latiff, *supra* note 172.
221. *See* GOLDMAN PLAN, *supra* note 146, at iv; Latiff, *supra* note 172.
222. *See* GOLDMAN PLAN, *supra* note 146, at iv.

disclosure of increasingly disparate executive compensation compared to median worker compensation.

The three normative claims require that the Six Agencies complete the regulatory obligations they were tasked with over ten years ago now. Moreover, they require that financial sector CIPs stop stymieing the promulgation and cooperate with it. This, then leads us to the most important reforms to be accomplished with the mandated regulation. Those reforms are: (i) the imperative of robust nonfinancial metrics measured in granting incentive compensation, particularly PSUs, (ii) a slightly longer mandatory holding period for both RSUs and PSUs, and perhaps most importantly, (iii) the formulation and logistics of mandatory clawbacks that truly hold risk-taking decision-makers accountable.

Though the industry has reformed its most extreme practices without the completion of regulatory promulgation, it has not gone far enough. It is most unlikely that the industry will go far enough in further reform without enforced regulation of the nature proposed here. This regulation is imperative if practices that are known to have brought about then unprecedented global economic catastrophe are to be sufficiently curtailed. Though it is a near certainty that cycles of economic crisis and regulatory reform will continue, to let Dodd-Frank § 956 go unheeded is to leave a known major cause of an unprecedented financial crisis to continue to exacerbate increasingly toxic income and wealth inequality and to rear its ruinous head again.