

Just Not Us



Wall Street's "Two Cents" on Pay Rule:
Self-Preservation, Not Principle



July 2011

Acknowledgments

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About the Two Cents Series

Public Citizen's "Two Cents" series documents Wall Street's comments (the industry's "two cents") on various rules pertaining to the Dodd-Frank Wall Street Reform and Consumer Protection Act and the lobbying expenditures and campaign contributions (much more than two cents) the industry has used to enhance its clout. This is the second report in the series.

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Introduction

Financial industry comments on a proposal to regulate incentive compensation amount to little more than variations on a single request: “Please leave me out.”

Improper incentives were intrinsic to nearly every facet of the financial crisis, from mortgage originators and mortgage securitizers who were paid on volume without regard for risk, to CEOs who collected kings’ ransoms while countenancing activities that drove their companies over cliffs.

Responding to the role of bad incentives in causing the crash, Congress included language in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 prohibiting any incentive-based compensation arrangement that “encourages inappropriate risks” by certain financial institutions and requiring the institutions to submit annual reports detailing their incentive-based pay arrangements.¹

In April, seven federal agencies issued a proposed rule to carry out that mandate, contained in Section 956 of Dodd-Frank. The proposal covers most financial institutions with \$1 billion or more in assets. It has two prongs, disclosure rules and substantive prohibitions. The disclosure portion requires covered companies to provide regulators with confidential annual reports of their incentive-based compensation arrangements.²

The substantive portion bans “excessive” compensation, defined as compensation that is “unreasonable or disproportionate to the services performed,” and bans compensation that would “encourage inappropriate risks” by the financial institution. It creates two further rules for institutions with \$50 billion or more in assets: For executives at those institutions, at least 50 percent of incentive compensation must be deferred for three years (though the rule permits pro rata distribution over the three years).³ Also, the institution’s board must identify individuals who could expose the institution to sizeable losses and to ensure that those individuals’ pay packages do not incentivize excessive risk-taking.⁴ The proposal identifies multiple possible methods for balancing risks and rewards in incentive pay,⁵ but it does not require the use of any particular method other than the deferred incentive pay for executives at the very largest financial institutions.

¹ See Dodd-Frank § 956.

² See 76 Fed. Reg. 21,170, 21,204 (Apr. 14, 2011). The Federal Register notice of proposed rulemaking under section 956 includes seven versions of the proposed rule, one for each of the regulators involved in the joint rulemaking. There are only minor variations, to conform language to the entities covered by each regulator. This report cites to the first version included, which is that of the Office of the Comptroller of the Currency.

³ The deferral clause is weaker than it sounds because it allows the postponed pay to be awarded pro rata over three years, such that the first third can be released immediately. This reduces the amount of pay that has to be held back at all to just one-third of employee’s incentive-based pay (*i.e.*, two-thirds of one-half equals one-third). The rule does not affect employees’ salaries or other forms of compensation that are not directly tied to performance benchmarks.

⁴ See 76 Fed. Reg. 21,204-05.

⁵ See 76 Fed. Reg. 21,179, 21,205.

Public comments on the proposed rule were due on May 30. This study examines the comments seeking to weaken the proposed rule submitted by 24 financial services industry companies, trade associations, and their allies. It also examines the amounts those organizations have spent on lobbying and campaign contributions, as well as the expenditures of other industry organizations that participated in private meetings with the agencies on the proposed rule but did not submit public comments.

I. Critics of Incentive-Based Compensation Rule Have Enhanced Clout Through Political Contributions, Lobbying.

The organizations covered in this study have sought to enhance their clout through lobbying activities, campaign contributions, or both.

Collectively, the organizations have spent \$242.4 million on lobbying since the beginning of 2010.⁶ They have deployed 712 lobbyists, of whom 387 previously worked for the federal government, either as congressional staffers or in executive branch positions. [See Figure 1, next page]

Although a large share of federal lobbying is typically directed at Congress, these organizations have also made significant investments in lobbying executive branch agencies, including the agencies in charge of writing the incentive-based compensation rule. Of the 712 lobbyists deployed by the organizations included in this study, 454 have reported contacting at least one of the seven regulatory agencies in charge of formulating the incentive-based compensation rule.⁷

Organizations included in this study also have made significant political contributions to members of Congress and other influential political committees. Congress retains an oversight role over the regulatory process. Most dramatically, Congress can reduce agencies' funding or powers. Individual members can hold hearings and investigate agency performance and use their public platforms to level criticism.

For example, Rep. Nan Hayworth (R-N.Y.) has introduced legislation that would repeal Section 953(b) of Dodd-Frank, for which rulemaking also is in process.⁸ Like Section 956, Section 953(b) concerns executive pay. It calls on public companies to publish the ratio between the pay of its CEO and the median income of its employees.

⁶ Calculations from Public Citizen's analysis of data provided pursuant to the Lobbying Disclosure Act and furnished electronically by the Center for Responsive Politics (www.opensecrets.org). The Lobbying Disclosure Act does not require reporting on amounts spent by issue area. The figure cited here represents the organizations' total lobbying expenditures. Each of the organizations included in this report has disclosed lobbying on financial services reform or related issues since 2010. The law does not require disclosure on matters as discrete as the incentive-based compensation rule.

⁷ *Ibid.*

⁸ Press release of Rep. Nan Hayworth (R-N.Y.), "Subcommittee Approves Hayworth's Burdensome Data Collection Relief Act," May 4, 2011.

The political action committees (PACs) of the organizations included in this study made \$15.6 million in contributions during the 2010 election cycle to congressional candidates,

Figure 1: Lobbying by Critics of Incentive-Based Pay Rule Since 2011

Organization	Comment or Meeting on Proposed 956 Rule*	Lobbying Amount Since 2010**	No. of Lobbyists Employed Since 2010	No. of Lobbyists With Past Federal Employment
US Chamber of Commerce	C & M	\$148,790,000	204	93
American Bankers Assn.	C	\$9,930,000	83	34
Financial Services Roundtable	C & M	\$9,920,000	32	19
CUNA Mutual Group.***	C	\$7,872,272	49	19
MetLife Inc	C	\$7,110,000	31	24
Securities Industry & Financial Mkt. Assn.	C	\$6,750,000	58	40
Investment Co Institute	C	\$6,055,051	48	34
Goldman Sachs	M	\$5,930,000	50	45
Independent Community Bankers of America	C	\$5,590,000	28	10
Managed Funds Assn.	C	\$4,670,000	64	51
Nationwide Mutual Insurance	C	\$4,611,590	13	4
Massachusetts Mutual Life Insurance	C	\$4,010,000	22	16
Private Equity Growth Capital Council	C & M	\$2,890,000	28	26
National Assn. of Federal Credit Unions	C	\$2,550,000	13	2
BlackRock	C	\$2,080,000	17	12
Center on Executive Compensation****	C	\$1,930,000	6	3
Capital One Financial	M	\$1,885,000	14	10
US Bancorp	M	\$1,682,073	3	1
American Insurance Assn.	C	\$1,530,000	29	21
State Street Corp.	M	\$1,380,000	14	11
TD Bank	M	\$1,290,000	6	3
Council of Federal Home Loan Banks	C	\$1,071,000	5	2
Mutual of Omaha	C	\$972,000	16	13
Institute of International Bankers	C	\$840,000	10	3
Pentagon Federal Credit Union	C	\$320,000	8	8
Investment Adviser Assn.	C	\$210,000	4	2
First Horizon National	M	\$180,000	4	2
Alternative Investment Management Assn.	C	\$135,000	7	3
Natl. Assn. College/Univ. Business Officers	C	\$132,564	9	7
CA & NV Credit Union Leagues	C	\$80,000	2	2
Totals		\$242,396,550	712	387

Source: Public Citizen's analysis of data filed pursuant to the Lobbying Disclosure Act and provided by the Center for Responsive Politics (www.opensecrets.org)

* Denotes whether organization submitted comments on the incentive-based compensation rule, participated in a meeting with a regulatory agency on the rule, or both.

** Includes lobbying reports filed through the first quarter of 2011.

*** Lobbying figures include reports of the Credit Union National Association.

**** Lobbying figures reflect report of HR Policy Association.

candidates' personal PACs, and party committees.⁹ [See Figure 2] These expenditures do not include at least \$31 million the U.S. Chamber of Commerce independently spent to influence the 2010 elections through its own ads.¹⁰ They also do not include any money that the organizations included in this study secretly funneled to trade associations or front groups to influence the 2010 elections through spending made possible by the Supreme Court's controversial *Citizens United v. FEC* ruling.

Figure 2: Political Contributions by Critics of Incentive-Based Compensation Rule, 2010 Election Cycle

Organization	Comment or Meeting on Proposed Rule*	Contributions**
American Bankers Assn.	C	\$3,585,154.00
CUNA Mutual Group***	C	\$2,785,946.00
Independent Community Bankers of America	C	\$1,312,050.00
Investment Co. Institute	C	\$1,297,750.00
Massachusetts Mutual Life Insurance	C	\$1,283,936.00
Goldman Sachs	M	\$1,026,400.00
MetLife Inc	C	\$851,937.00
Capital One Financial	M	\$645,340.00
Financial Services Roundtable	C & M	\$579,107.00
Securities Industry & Financial Mkt. Assn.	C	\$493,000.00
Managed Funds Assn.	C	\$453,500.00
US Bancorp	M	\$354,039.00
National Assn. of Federal Credit Unions	C	\$302,008.00
Mutual of Omaha	C	\$184,475.00
American Insurance Assn.	C	\$137,000.00
BlackRock	C	\$115,600.00
US Chamber of Commerce	C & M	\$115,000.00
Investment Adviser Assn.	C	\$31,500.00
State Street Corp.	M	\$13,000.00
First Horizon National	M	\$12,000.00
Totals		\$15,578,742

Source: Public Citizen's analysis of data filed pursuant to the Lobbying Disclosure Act and provided by the Center for Responsive Politics (www.opensecrets.org)

* Denotes whether organization submitted comments on the incentive-based compensation rule, participated in a meeting with a regulatory agency on the rule, or both.

** Includes contributions by the organizations' political action committees (PACs) to candidates, candidates' leadership PACs, and party committees.

***Figures include contributions the Credit Union National Assoc.

⁹ Public Citizen's analysis of data filed pursuant to the Lobbying Disclosure Act and provided by the Center for Responsive Politics (www.opensecrets.org).

¹⁰ See, e.g., Public Citizen's Stealth PACs project. Available at <http://www.citizen.org/stealthpacs>.

II. Industry Comments on Proposed Rule Were Heavily Tilted Toward Requests for Exemptions.

This report divides industry comments into eight sections, which roughly fall into two categories: those concerned with avoiding the rule and those involving substantive criticisms.

Of those seeking to avoid the rule, or aspects of it, industry critics devoted much of their attention to seeking exemptions. Most asked for partial or complete exemptions for themselves or their members. Others sought exemptions for types of jobs or types of incentive-based pay. Additionally, many urged the agencies to increase the rule's level of deference to companies, based largely on arguments—implicit or explicit—that the private sector is able to regulate itself. Several asked the agencies to scuttle the proposed rule's deferred compensation clause altogether. A few asked that the entire rule be downgraded to a “guideline.”

Of substantive criticisms, several argued that the rule would hinder companies' ability to attract and retain talent. We grouped other substantive criticisms as a general set of attacks commonly leveled against regulations: that the proposed rule is too “prescriptive,” too “burdensome” or amounts to a “one size fits all” solution.

The following is an enumeration of some of the industry arguments:

1. Just don't include my company. The most common request from industry organizations was for an exemption from the rule. Of the 24 comments reviewed for this study—the comments of industry critics that made lobbying expenditures and campaign contributions—17 asked that they or their members be wholly or partially exempted; that the rule be interpreted in a manner that would effectively grant them exemptions; or that the rule's thresholds be altered in a manner that would exempt the commenter or companies it represents.

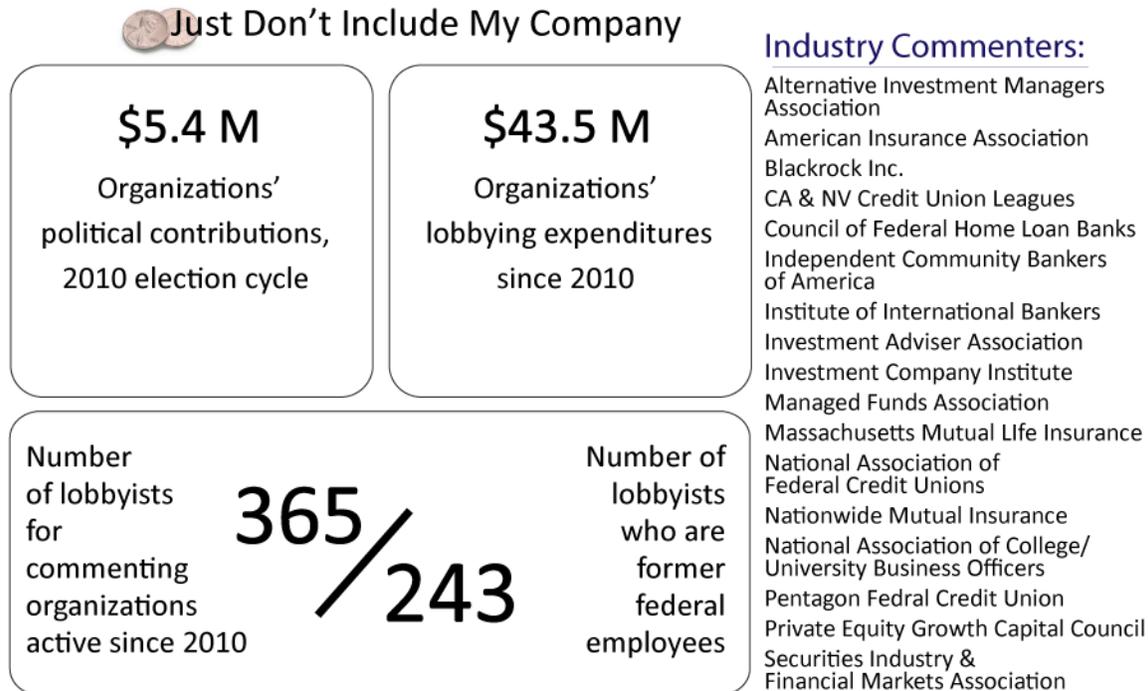
Those seeking to avoid the regulation, or parts of it, included: certain banks; insurance companies; private equity firms; credit unions; investment advisers for colleges; credit unions; and firms from various industries seeking to win exemptions for their subsidiaries.

For example, Nationwide Mutual Insurance Company sought an exclusion from the rule even though it owns a bank that has nearly \$4 billion in assets, well above the \$1 billion threshold for inclusion in the rule.¹¹ “But for ownership of the small thrift [Nationwide Bank], Nationwide Mutual Insurance Company would be excluded from the proposed definitions,” Nationwide Mutual wrote. “We believe the final rule should exclude [Savings and Loan holding companies] with top-tier regulated insurance companies.”¹²

¹¹ Consolidated assets published by FDIC, consolidated statement of condition. Available at http://www2.fdic.gov/IDASP/main_bankfind.asp.

¹² Comments of Nationwide Insurance to the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Office of Thrift Supervision, and Securities and Exchange Commission regarding the proposed rule under Section 956, p. 2.

SIFMA, a trade association of banks and asset managers, argued that executives of financial services companies' subsidiaries should not be covered by the rule. "The provisions of the proposed rule that apply to executive officers should apply only to the executive officers of the holding company and not to the executive officers of each member of the controlled group that is a covered financial institution," SIFMA wrote. "A controlled group's policy decisions are almost always made at the holding company level, even though individuals other than the holding company executives may have some executive authority at the subsidiary level."¹³



Sources: Public Citizen's analysis of public comments on the proposed incentive-based compensation rule relating to Section 956 of the Dodd-Frank Act; lobbying data filed with the secretary of the Senate pursuant to the Lobbying Disclosure Act; and campaign contribution data filed with the Federal Election Commission. The lobbying and campaign contribution data were provided by the Center for Responsive Politics (www.opensecrets.org).

Note: Some organizations' lobbying and campaign contribution numbers are included in multiple categories. Consequently, the numbers in the various categories add up to more than the grand totals.

Response: These requests generally ask the regulators to defy the plain language of Dodd-Frank, which defines a floor of covered institutions. None of the regulators has authority to ignore Congress's direction regarding who is covered by the rule. Moreover, it is generally unwise to leave any sector out of an important rule based on technicalities such as their charters or corporate structures. If regulators leave any significant portion of the financial sector unregulated on an important matter, we can expect history to repeat itself: that sector will balloon and become the locus of another crisis.

Certain requests regarding subsidiaries appear particularly off base. For example, in its request to exempt executives of subsidiaries, SIFMA appears to be asking for an

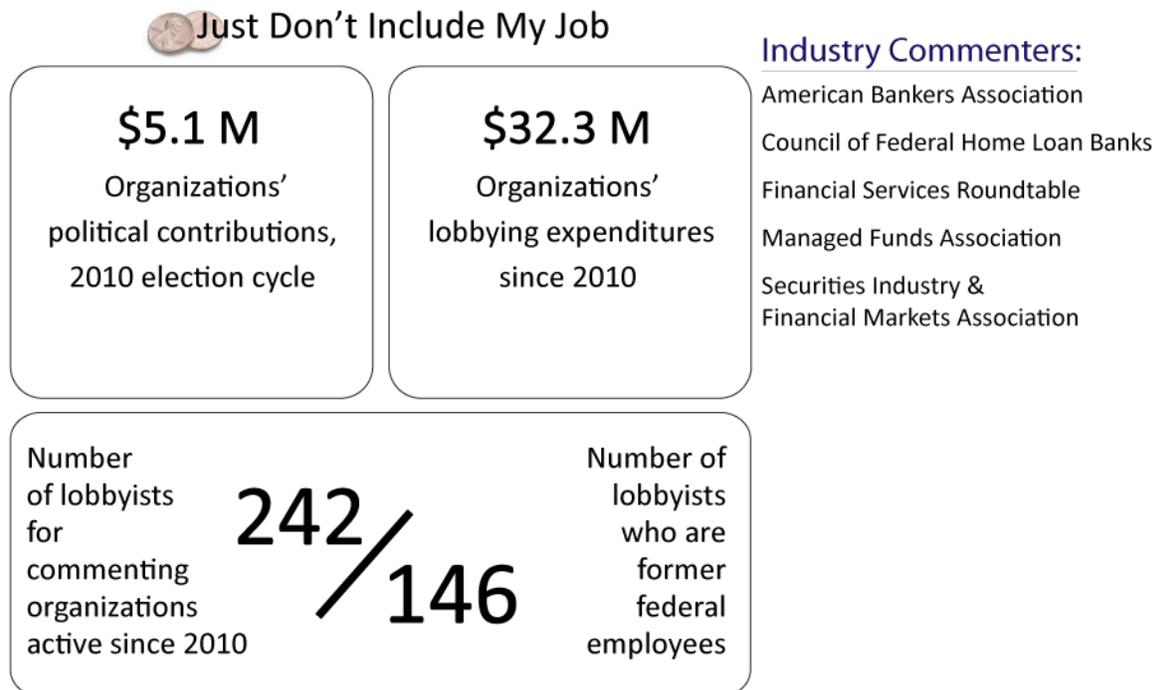
¹³ Comments of SIFMA to the Office of the Comptroller of the Currency regarding the proposed rule under Section 956, May 31, 2011, p. 3.

interpretation that would have left out AIG Financial Products—the subsidiary of American International Group that played a pivotal role in fomenting the financial meltdown.

2. Just don't include my job. At least five of the proposed rule's critics sought interpretations that would reduce the number of employees included in the rule's deferral requirements.

The Financial Services Roundtable, American Bankers Association, SIFMA, and the Council of Federal Home Loan Banks all requested that the definition of "executive officer" mirror that of the Securities Exchange Act of 1934, which defines an executive officer as "president, any vice president of the registrant in charge of a principal business unit, division or function (such as sales, administration or finance), [and] any other officer who performs a policy making function."¹⁴

Additionally, the Financial Services Roundtable wrote: that "other covered employees," defined in the rule as individuals or groups of employees who "may expose the covered



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financial institution to material financial loss" (such as traders with large position limits),¹⁵ "should not be subject to the mandatory deferral requirements."¹⁶

¹⁴ Code of Federal Regulations, Title 17, Section 240.3b-7.

¹⁵ See 76 Fed. Reg. 21,178.

Response: Narrowing the definition of covered executive employees to those few outlined in the 1934 Act (and as the Act is interpreted in current practice) would be completely at odds with Congress’s instruction in Dodd-Frank to capture pay arrangements that “provide[s] an executive officer, employee, director, or principal shareholder of the covered financial institution with excessive compensation, fees, or benefits” or “could lead to material financial loss to the covered financial institution.”¹⁷

Disclosure by publicly traded companies under the 1934 Act plainly falls well short of this definition. Goldman Sachs’ 2010 proxy statement, for instance, disclosed the income of only five employees.¹⁸ The *average* pay for of Goldman Sachs’ roughly 35,000 employees in 2010 was \$430,700.¹⁹ Clearly, a firm such as Goldman Sachs has more than five employees whose executive authority would warrant disclosure under a law intent on capturing potential examples of improper or excessive incentive-based pay. Although Goldman’s board would be obliged to designate non-executives for inclusion, the baseline of included executives should be higher than called for in the 1934 Act.

Requests to exclude non-executive “covered employees” from the rule’s deferral clause also should be rejected. Non-executive traders and mortgage brokers routinely earn millions and make decisions that could put their companies and broader the economy at risk. Their pay is among the most deserving of regulators’ attention.

3. Just don’t include my type of incentive-based compensation. At least three organizations asked that certain types of deferred compensation be exempted.

SIFMA, for instance, stated that in defining “incentive-based compensation” it generally supports a “principles based definition allowing for sufficient flexibility.”²⁰ But in the case of deferred pay for executives at the largest financial institutions, SIFMA sought a broad, rigid loophole: “The Regulators should clarify that this deferral requirement applies only to annual bonuses, and not (unless the covered financial institution elects otherwise) to: multiyear incentive performance arrangements; grants of options; or awards of restricted stock or restricted stock units (“RSUs”) not tied to annual bonuses.”²¹

The Private Equity Growth Capital Council (PEGCC) requested that the agencies “exclude from the definition of incentive-based compensation additional categories of equity interests that provide inherent protection against excessive risk taking . . . such as general partner interests and other interests with unlimited liability.” PEGCC also requested the

¹⁶ Comments of the Financial Services Roundtable to the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Federal Housing Agency, National Credit Union Association, Office of the Comptroller of the Currency, Office of Thrift Supervision, and Securities and Exchange Commission regarding the proposed rule under Section 956, May 31, 2011, p. 9.

¹⁷ See Dodd-Frank § 956.

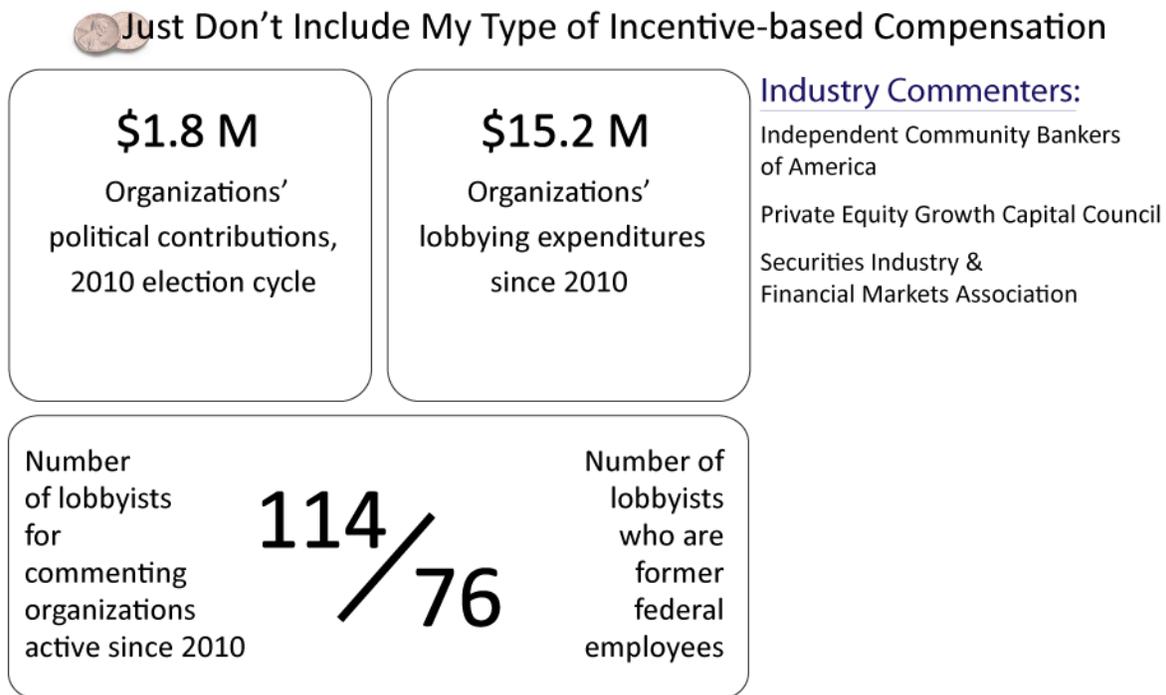
¹⁸ The Goldman Sachs Group Inc. Schedule 14A, April 1, 2011.

¹⁹ “Goldman Employees Earned Average \$430,700 In 2010,” Reuters, Jan. 19, 2011.

²⁰ Comments of SIFMA. to the Office of the Comptroller of the Currency, regarding the proposed rule under Section 956, May 31, 2011, p. 6.

²¹ *Ibid.*

exclusion of private equity firms' "carried interest" arrangements—the primary form of compensation paid to private equity fund managers.²²



Sources: Public Citizen's analysis of public comments on the proposed incentive-based compensation rule relating to Section 956 of the Dodd-Frank Act; lobbying data filed with the secretary of the Senate pursuant to the Lobbying Disclosure Act; and campaign contribution data filed with the Federal Election Commission. The lobbying and campaign contribution data were provided by the Center for Responsive Politics (www.opensecrets.org).

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Response: Limiting the definition of incentive-based compensation to that explicitly labeled an "annual bonus" would provide a license to dodge deferral requirements. Meanwhile, certain requests from the private equity industry appear aimed at winning exemptions for virtually all compensation of private equity fund managers. Regulators should insist on a broad interpretation of the incentive-based pay to reach all pay that is excessive or creates inappropriate risk for individual institutions or the economy.

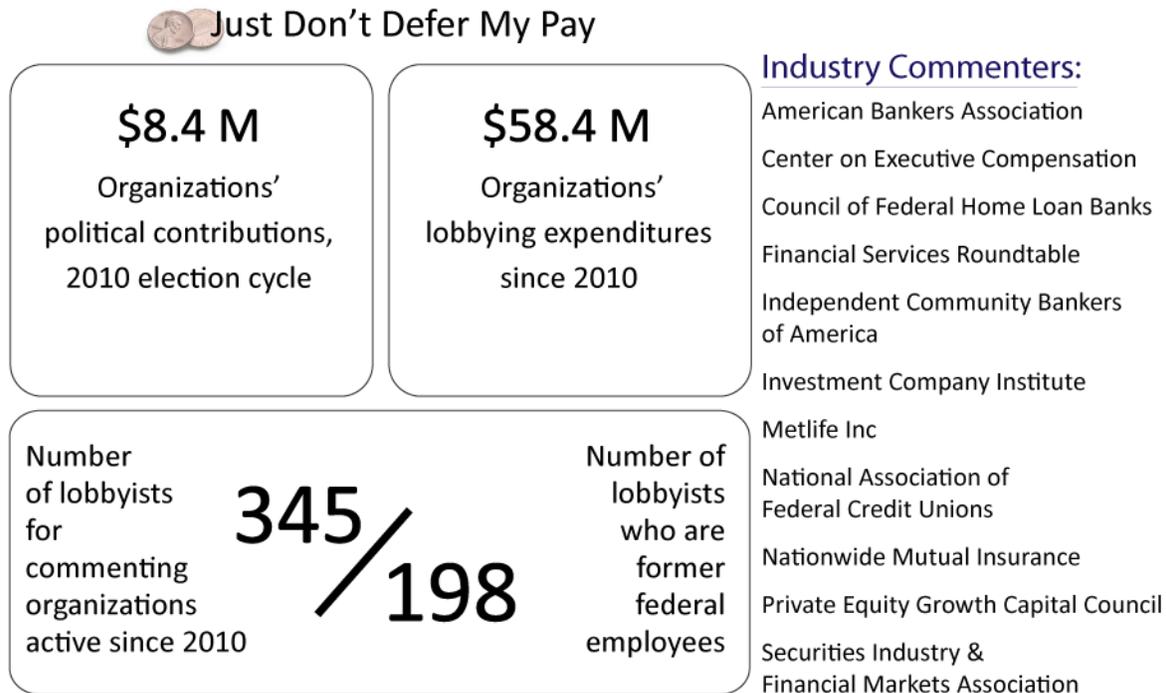
4. Just don't defer my pay. At least 11 commenters asked the agencies to eliminate the portion of the proposed rule calling for deferral of pay for top employees at organizations with more than \$50 billion in assets.

Commenters objecting to this clause painted it as unfairly penalizing big banks. For instance, the Investment Company Institute argued, "Separate standards for 'larger' firms are not warranted at this time. Nothing in Section 956 suggests a different standard for

²² Comments of the Private Equity Growth Capital Council to the Securities and Exchange Commission regarding the proposed rule under Section 956, May 31, 2011, p. 13.

larger firms, and nothing requires the Agencies to propose explicit requirements on the deferral of executive compensation.”²³

The Financial Services Roundtable wrote, “If the Agencies’ final rules require minimum deferral provisions for senior executives at larger financial institutions, larger financial institutions would be unfairly placed at a disadvantage to other institutions.”²⁴



Sources: Public Citizen’s analysis of public comments on the proposed incentive-based compensation rule relating to Section 956 of the Dodd-Frank Act; lobbying data filed with the secretary of the Senate pursuant to the Lobbying Disclosure Act; and campaign contribution data filed with the Federal Election Commission. The lobbying and campaign contribution data were provided by the Center for Responsive Politics (www.opensecrets.org).

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Response: The provision in question is the only aspect of the rule that requires any specific change in actual pay arrangements, and a minor one at that. The deferral rule is weaker than it appears because it allows postponed pay to be awarded pro rata over three years. This dramatically reduces the amount of truly deferred pay: By the third year, for example, only one-sixth of the “deferred” incentive pay will still be deferred. If anything, the provision is far too weak. It specifies too little pay, too few covered individuals, and too short a deferral period.²⁵

²³ Comments of the Investment Company Institute to the Securities and Exchange Commission regarding the proposed rule under Section 956, May 31, 2011, p. 3.

²⁴ Comments of the Financial Services Roundtable to the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Federal Housing Agency, National Credit Union Association, Office of the Comptroller of the Currency, Office of Thrift Supervision, and Securities and Exchange Commission regarding the proposed rule under Section 956, May 31, 2011, p. 15.

²⁵ Comments of the Public Citizen to the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Federal Housing Agency, National Credit Union Association, Office of the Comptroller

5. Just rely on the private sector. At least 13 commenters asked for the rule to give more discretion to companies' boards of directors or even to transfer certain responsibilities from boards to members of companies' management teams.

The comments were largely predicated on the assumption that the system already embeds sufficient safeguards to prevent companies from taking undue risks, or that to the extent any changes in compensation arrangements are needed in the wake of the financial crisis, companies are making them.

The Center on Executive Compensation, for instance, wrote: "Section 956 of the Dodd-Frank Act should be implemented in a Board-centric manner which draws on the informed judgment of the Board."²⁶

The Financial Services Roundtable reported on a survey of its members on strategies to address risk. "Participants mentioned more than 15 different approaches that are currently being analyzed and implemented by either the compensation committee or their human resources departments," the Roundtable wrote. "In fact, the evolution of best practices, policies and procedures is well underway as part of voluntary actions by financial institutions."²⁷

SIFMA, the American Banking Association and the Center on Executive Compensation argued that management, not the board, should choose which non-executive employees are covered by rule.²⁸

The American Banking Association asked for even more deference, requesting "that the covered financial institution may annually *certify* its compliance with the rule" [emphasis added] but not be required to submit a report on the details of its incentive-based pay. The regulator, in turn, would be allowed to "review the material on-site at the financial institution."²⁹

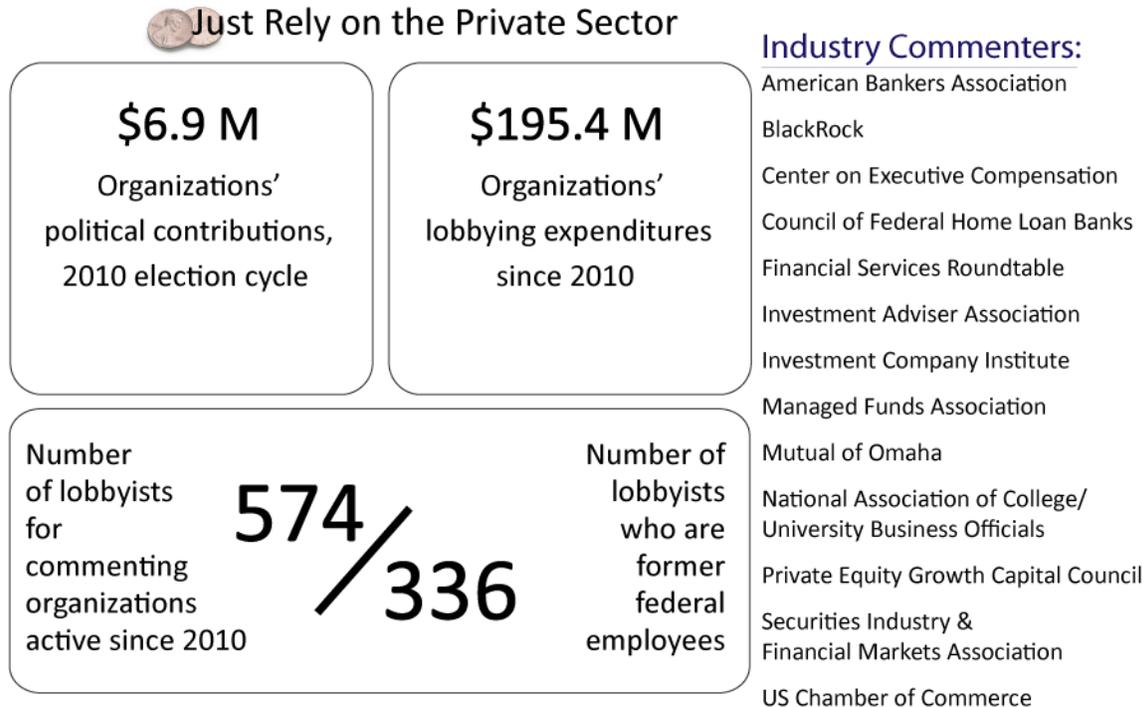
of the Currency, Office of Thrift Supervision, Securities and Exchange Commission, and Treasury Department regarding the proposed rule under Section 956, May 31, 2011, p. 7.

²⁶ Comments of the Center On Executive Compensation to the Securities and Exchange Commission regarding the proposed rule under Section 956, May 31, 2011, p. 2.

²⁷ Comments of the Financial Services Roundtable to the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Federal Housing Agency, National Credit Union Association, Office of the Comptroller of the Currency, Office of Thrift Supervision, and Securities and Exchange Commission regarding the proposed rule under Section 956, May 31, 2011, p. 3, 18.

²⁸ Comments of SIFMA. to the Office of the Comptroller of the Currency, regarding the proposed rule under Section 956, May 31, 2011, p. 6.

²⁹ Comments of the American Bankers Association to the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Office of Thrift Supervision, and Securities and Exchange Commission regarding the proposed rule under Section 956, p. 11.



Sources: Public Citizen’s analysis of public comments on the proposed incentive-based compensation rule relating to Section 956 of the Dodd-Frank Act; lobbying data filed with the secretary of the Senate pursuant to the Lobbying Disclosure Act; and campaign contribution data filed with the Federal Election Commission. The lobbying and campaign contribution data were provided by the Center for Responsive Politics (www.opensecrets.org).

Note: Some organizations’ lobbying and campaign contribution numbers are included in multiple categories. Consequently, the numbers in the various categories add up to more than the grand totals.

Response: As a general matter, these arguments contradict the core intent of Section 956. If Congress thought financial institutions would design sound pay packages on their own, then there would have been no reason for Congress to ask regulators to prohibit inappropriate pay arrangements.

The pleas for greater deference to the private sector, whether to boards or management teams, are rooted in the view that the market knows best, and it ultimately rewards good behavior and punishes bad. This was roundly disproven in the financial crisis, as acknowledged by former Federal Reserve Chairman and free market evangelist Alan Greenspan.

“I made a mistake in presuming that the self-interests of organizations, specifically banks and others, were such that they were best capable of protecting their own shareholders and their equity in the firms,” Greenspan said in October 2008. “Those of us who have looked to the self-interest of lending institutions to protect shareholders’ equity (myself especially) are in a state of shocked disbelief.”³⁰

6. Just make it a guideline, not a regulation. Four commenters asked the agencies to convert the proposed rules for Section 956 of Dodd-Frank to “guidelines.”

³⁰ “Greenspan—I Was Wrong About the Economy. Sort Of,” *The Guardian*, Oct. 24, 2008.

For example, the Center on Executive Compensation wrote, “The proposed rule should be issued as guidelines, rather than rules so that boards will ultimately have the final authority.”³¹

SIFMA wrote, “We believe that the substantive provisions contained in Section 956(b) of the Dodd-Frank Act, which are inherently more vague and require the application of discretion and judgment, should be implemented in the form of guidelines.”³²

And the CFA Institute argued, “What continues to fuel innovation in our increasingly-complex financial markets includes risk-taking and the appropriate rewards that accompany innovative foresight. Instead of adopting regulations, we urge the SEC to meet the Dodd-Frank requirements of section 956 by electing to propose guidelines.”³³



Sources: Public Citizen’s analysis of public comments on the proposed incentive-based compensation rule relating to Section 956 of the Dodd-Frank Act; lobbying data filed with the secretary of the Senate pursuant to the Lobbying Disclosure Act; and campaign contribution data filed with the Federal Election Commission. The lobbying and campaign contribution data were provided by the Center for Responsive Politics (www.opensecrets.org).

Note: Some organizations’ lobbying and campaign contribution numbers are included in multiple categories. Consequently, the numbers in the various categories add up to more than the grand totals.

Response: These requests for mere guidelines rather than rules are essentially a subset of arguments for trusting the private sector on incentive pay. They should be rejected for the same reasons, which are discussed in the previous section this report.

³¹ Comments of the Center On Executive Compensation to the Securities and Exchange Commission regarding the proposed rule under Section 956, May 31, 2011, p. 3-4.

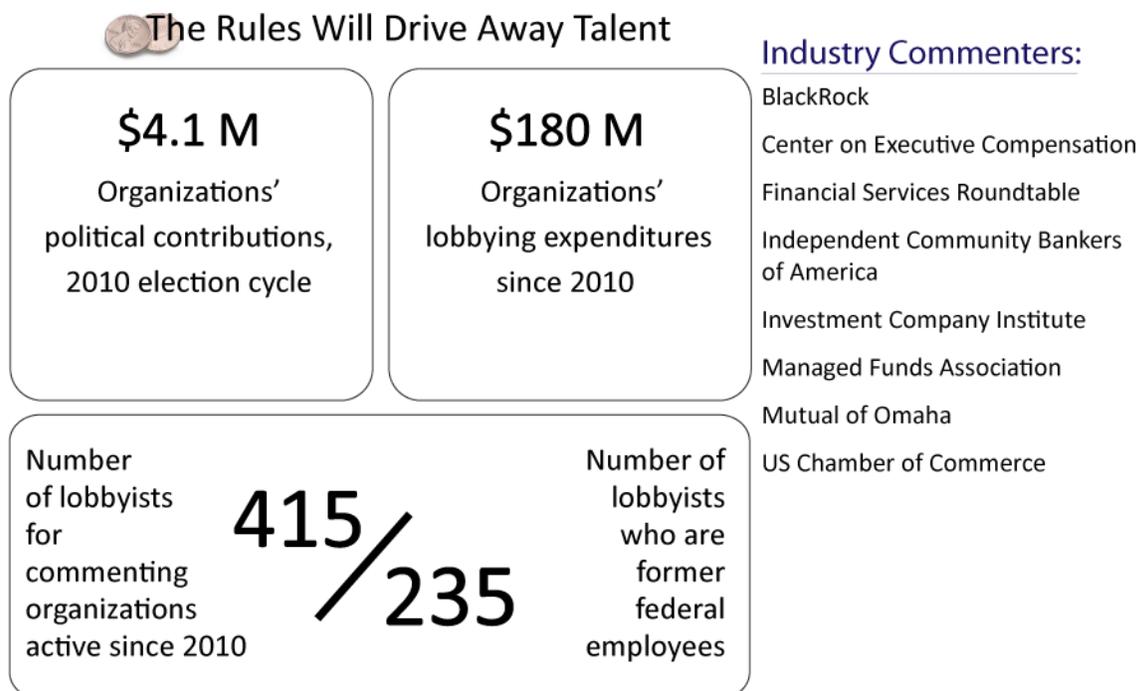
³² Comments of SIFMA to the Office of the Comptroller of the Currency regarding the proposed rule under Section 956, May 31, 2011, p. 13.

³³ Comments of CFA Institute. to the Securities and Exchange Commission regarding the proposed rule under Section 956, May 31, 2011, p. 1.

7. The rules will drive away the talent. At least eight commenters argued that the rule would put financial institutions at a disadvantage, particularly those subject to mandatory deferral for executives, by reducing their ability attract and retain “talent.” Commenters said the most talented individuals would flock to other countries or other industries.

“Employees can be lured away by direct competitors, global firms, or different industries,” the U.S. Chamber of Commerce Center for Capital Markets Competitiveness warned, adding “[a]n exit of talent can be as devastating as excessive risk.”³⁴

“It is likely there will be unintended consequences, such as talent drain from larger covered financial institutions that are required to defer a considerable percentage of an executive’s compensation,” the Center on Executive Compensation wrote.³⁵



Sources: Public Citizen’s analysis of public comments on the proposed incentive-based compensation rule relating to Section 956 of the Dodd-Frank Act; lobbying data filed with the secretary of the Senate pursuant to the Lobbying Disclosure Act; and campaign contribution data filed with the Federal Election Commission. The lobbying and campaign contribution data were provided by the Center for Responsive Politics (www.opensecrets.org).

Note: Some organizations’ lobbying and campaign contribution numbers are included in multiple categories. Consequently, the numbers in the various categories add up to more than the grand totals.

Response: Claims that the 956 rule would harm the public by causing a brain drain from Wall Street are not credible. First, the financial crisis and Great Recession have shown that the financial sectors’ ability to draw “talent” in the 1990s and 2000s, before the passage of Dodd-Frank, hardly served the country well.

³⁴ Comments of the U.S. Chamber of Commerce Center for Capital Markets Competitiveness to the Federal Deposit Insurance Corporation regarding the proposed rule under Section 956, May 31, 2011, p. 4.

³⁵ Comments of the Center On Executive Compensation to the Securities and Exchange Commission regarding the proposed rule under Section 956, May 31, 2011, p. 13.

Moreover, there are few if any industries in which employees or managers could command incomes comparable to those in the financial sector.³⁶

Finally, the proposal under Section 956 specifies that pay will be evaluated for excess through the lens of “comparable compensation practices at comparable institutions.”³⁷ This is hardly a recipe for forcing institutions to pay poorly relative to their peers.

8. It’s “burdensome,” it’s “prescriptive,” it’s “one size fits all.” At least 15 commenters included stereotypical jabs at government regulation, such as criticisms that the rule is “burdensome,” too “prescriptive” or amounts to a “one size fits all” solution.

The Center on Executive Compensation was “concerned with the burden that preparation would impose on a covered financial institution. For example, global companies maintain separate programs all over the world and it would take a considerable amount of time, education and other resources to know the details of every program and when, if any, changes are made to those programs.”³⁸

The Center also said the “proposed rules are so prescriptive that they will effectively undermine the ability of covered financial institutions, especially those that are publicly held companies, to appropriately tailor compensation to performance for executives and other employees.”³⁹

The Chamber of Commerce complained that the “one-size-fits-all approach may emasculate the ability of directors and shareholders to perform their legally obligated management duties.”⁴⁰

And the Investment Company Institute concluded, “We believe that each firm should be afforded the flexibility to determine the best way to utilize its staff to achieve the Agencies’ goals on compensation. The Agencies need not, and should not, micromanage the process to the level suggested in the Release.”⁴¹

³⁶ For example, a Bloomberg study published in January 2011 found that mergers and acquisition bankers, oil traders and bond traders with 10 years of experience earned an average of \$1 million to \$2 million a year, far outpacing the pay of neurosurgeons, law firm partners, aerospace engineers and architects with comparable experience. Danielle Kucera and Christine Harper, “Traders’ Smaller Bonuses Still Top Pay for Brain Surgeons, 4-Star Generals,” Bloomberg, Jan. 13, 2011.

³⁷ See 76 Fed. Reg. 21,207.

³⁸ Comments of the Center On Executive Compensation to the Securities and Exchange Commission regarding the proposed rule under Section 956, May 31, 2011, p. 16.

³⁹ *Ibid.*, p. 3-4.

⁴⁰ Comments of the U.S. Chamber of Commerce Center for Capital Markets Competitiveness to the Federal Deposit Insurance Corporation regarding the proposed rule under Section 956, May 31, 2011, p. 10.

⁴¹ Comments of the Investment Company Institute to the Securities and Exchange Commission regarding the proposed rule under Section 956, May 31, 2011, p. 3.



Burdensome, Prescriptive & One-Size-Fits-All

\$11.7 M
Organizations'
political contributions,
2010 election cycle

\$211 M
Organizations'
lobbying expenditures
since 2010

Number of lobbyists for commenting organizations active since 2010

603 / 314

Number of lobbyists who are former federal employees

Industry Commenters:

American Bankers Association
BlackRock
Center on Executive Compensation
Council of Federal Home Loan Banks
CUNA Mutual Group
Financial Services Roundtable
Independent Community Bankers of America
Investment Advisers Association
Investment Company Institute
Metlife Inc
Mutual of Omaha
National Association of College/ University Business Officials
Natl Assn of Federal Credit Unions
Securities Industry & Financial Markets Association
US Chamber of Commerce

Sources: Public Citizen's analysis of public comments on the proposed incentive-based compensation rule relating to Section 956 of the Dodd-Frank Act; lobbying data filed with the secretary of the Senate pursuant to the Lobbying Disclosure Act; and campaign contribution data filed with the Federal Election Commission. The lobbying and campaign contribution data were provided by the Center for Responsive Politics (www.opensecrets.org).

Note: Some organizations' lobbying and campaign contribution numbers are included in multiple categories. Consequently, the numbers in the various categories add up to more than the grand totals.

Response: In fact, the proposed rule is so flexible—leaving so much discretion to firms themselves—that it truly does fit all. The Chamber of Commerce seemed to acknowledge as much in praising the rule's reporting requirement: "We applaud the Agencies' decision to keep the instructions broad and to clarify that reports should be 'succinct,'" the Chamber wrote. "It is appropriate that the proposed rules seek to elicit such information through broad requirements that enable covered institutions to tailor their reports to their own situations in a succinct manner."⁴²

Other than the weak deferral requirement for executives of those few organizations with more than \$50 billion in assets, the rule contains no specific mandates regarding pay packages. It requires only that incentive pay arrangements not be excessive and that they balance risk and reward properly, and it suggests possible methods for achieving the latter.

Finally, charges that the rule's reporting requirements are "burdensome," as the Center on Executive Compensation alleged, could be true only if companies' awareness of their incentive-based pay arrangements is so dim that compiling a report on them would be onerous. If a firm truly is unable to pull together a report of incentive compensation arrangements without exerting itself, the firm's board of directors should demand that it collect such information at once, regardless of whether a regulatory agency requires it, and likely should discipline the firm's management.

⁴² Comments of the U.S. Chamber of Commerce Center for Capital Markets Competitiveness to the Federal Deposit Insurance Corporation regarding the proposed rule under Section 956, May 31, 2011, p. 9-10.