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CONGRESSIONAL OVERSIGHT PANEL

FEBRUARY OVERSIGHT REPORT *

EXECUTIVE COMPENSATION RESTRICTIONS IN THE TROUBLED ASSET RELIEF PROGRAM

FEBRUARY 10, 2011.—Ordered to be printed

* Submitted under Section 125(b)(1) of Title 1 of the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343

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EXECUTIVE SUMMARY*

Executive compensation has been a subject of controversy and debate since long before the 2008 financial crisis. Academics, shareholders, and other experts have long agreed that an executive's pay should accurately reflect his or her contributions to a business and should avoid creating incentives to pursue excessively risky business strategies. Debates have erupted, however, about what these standards mean in practice and about how to structure executive pay appropriately. For example, should corporations pay their executives primarily in stock in hopes of aligning their interests with those of other shareholders? Or would this approach encourage executives to take wild risks in order to increase the value of their own pay? Fault lines have also emerged over which stakeholders should play a role in determining executive pay, which metrics should be used to gauge an executive's performance, and what timeframe should be used in evaluating an executive's contributions, among many other points of contention.

Congress entered this well-worn debate in dramatic fashion in late 2008 and early 2009, when it enacted the Troubled Asset Relief Program (TARP) and subsequently imposed sweeping restrictions on executive pay at institutions that accepted TARP funds. The restrictions generally reflected the notion that, when a company accepts taxpayer money, its compensation practices must shift to take into account factors beyond the customary elements of executive pay. In particular, compensation should reflect the need for taxpayers to recover their investment, should recognize public frustration about taxpayer funds being paid to executives at bailed-out institutions, and should advance the public goal of stabilizing

*The Panel adopted this report with a 5–0 vote on February 9, 2011.

the financial system. These concerns are especially acute at "too big to fail" firms, which survived due to taxpayers" reluctant intervention rather than the competence of the executives who led their companies astray. In keeping with these considerations, Congress banned TARP recipients from compensating executives in ways that encouraged unnecessary and excessive risks; required "clawback" provisions to allow recovery of compensation paid based on inaccurate metrics; limited bonuses and other incentive compensation to one-third of total pay; and imposed several further restrictions.

To implement this Congressional mandate, Treasury established two new offices: the Office of Internal Review (OIR) within the Office of Financial Stability, which reviews and certifies compliance with executive compensation restrictions by all TARP recipients; and the Office of the Special Master for Executive Compensation, which actively negotiates executive pay for the seven institutions that received "exceptional assistance": AIG, Bank of America, Citigroup, Chrysler, Chrysler Financial, General Motors, and GMAC/Ally Financial.

Of the two offices, the OIR has attracted less public attention because it merely certifies compliance rather than actively setting pay. Even so, OIR has posed particular problems for oversight. Despite its far-reaching jurisdiction, it has not published a single document. Although OIR provided helpful responses to the Panel's questions, the Panel remains troubled that a body with such significant scope has disclosed so little information to the public. The omission is particularly surprising given OIR's determinations that the vast majority of the companies under its jurisdiction have been compliant with executive pay restrictions—information that would be valuable to the public.

The Office of the Special Master has a far more limited jurisdiction, but it plays an active role in setting executive compensation at the institutions within its purview. In general, the Special Master has achieved significant changes in practices at these firms, including an average percentage decrease in overall compensation of 54.8 percent (with a range between 24.2 percent and 85.6 percent) for the 25 highest-paid employees at each company from 2008 to 2009. The Special Master generally limited cash compensation to $500,000 or less and required that, for the 25 highest-paid employees, stock received as salary should be redeemable only over four years. The Special Master also limited incentive payments to one-third of total compensation, as required by Congress, and tied these payments to specific, observable performance metrics. The Special Master accomplished these changes in a complex environment under a constant media spotlight.

A key focus of the Special Master's work was shifting companies away from guaranteed pay and toward stock-based compensation in an effort to better align the interests of executives with the long-term interests of the company. This shift is broadly in line with current academic thinking and corporate best practices for executive pay. Even so, stock-focused pay packages raise their own concerns. The payment of salary in the form of stock may encourage executives to take unnecessary or excessive risks, especially because the very low stock prices of distressed institutions serve to limit downside losses while still allowing tremendous upside gains.

Further, the four-year timeframe for the redemption of certain stock payments may be too short to determine whether an executive's actions have truly created long-term value. Many executives in the early 2000s, for example, gambled on high-risk business strategies that proved unsustainable only when the financial crisis hit in 2008. Even if their firms had followed the pay principles subsequently laid out by the Special Master, these executives would have walked away with dramatically and inappropriately inflated pay packages—precisely the outcome that the Special Master sought to prevent.

Also, pay packages approved by the Special Master have generally been quite uniform despite wide variations in the companies under the office's review. It is unclear whether one size truly fits all and whether the same redemption schedule for salary stock should apply to employees of an automotive company and employees of a large bank. Similarly, a cash salary of $500,000 might have different ramifications for hiring and retention at an institution based in New York compared to one based in Michigan, given the widely varying costs of living.

A separate concern involves the Special Master's "Look Back Review" of payments to executives at TARP recipients prior to February 17, 2009. Congress instructed the Special Master to "seek to negotiate" with TARP recipients for "appropriate reimbursements" of any payments made prior to that date that were "contrary to the public interest." At the conclusion of the review, the Special Master found that no payments had violated the "public interest," and thus he did not attempt to claw back any pay. Even so, he labeled $1.7 billion in payments as "disfavored" and "not necessarily appropriate." The finding that pay was "disfavored" but not "contrary to the public interest" is troublesome for several reasons: it may appear to the public to be excessively legalistic, it may represent an end-run around Congress' determination that the Special Master should make every effort to claw back wrongful payments, and it may give the impression that the government condoned inappropriate compensation to executives whose actions contributed to the financial crisis.

The application of the "public interest" standard throughout the Special Master's other work also raises questions. Treasury initially defined six factors—including risk, taxpayer return, and appropriate allocation of pay between cash and other forms of pay—that should be considered in determining whether a compensation package met the "public interest" standard. Unfortunately, Treasury provided no guidance on how the six factors should be balanced or prioritized when they conflict. Subsequent statements have provided little public explanation of how the Special Master managed contradictions, noting only that the process is a mixture of art and science. As a result, aspects of the Special Master's work are essentially "black boxes" to the public, and it would be very difficult for any outside expert to replicate the Special Master's efforts.

The "black box" approach is especially troubling given the Special Master's aspiration for his determinations to be used as a model for compensation structures. It is impossible for outside actors to replicate a process that they cannot fully understand. Experts have assessed the broader impact of the Special Master's work as modest and have suggested that Wall Street's pay practices have not

changed significantly since the financial crisis. So long as compensation experts on Wall Street and elsewhere lack the information needed to use the Special Master's deliberations as a model, what seemed an opportunity for sweeping reform will be destined to leave a far more modest legacy.

SECTION ONE:

A. Overview

Congress entered the executive compensation debate by including executive compensation restrictions for recipients of funds from the Troubled Asset Relief Program (TARP). The original restrictions were in Section 111 of the TARP's authorizing legislation, the Emergency Economic Stabilization Act of 2008 (EESA).[1] After a series of revelations about bonuses at several major TARP recipients,[2] the American Recovery and Reinvestment Act of 2009 (ARRA) subsequently amended EESA (EESA as amended) and put additional restrictions on pay practices at TARP recipients.[3] In June 2009, Treasury issued the Interim Final Rule on TARP Standards for Compensation and Corporate Governance (IFR), which consolidated and superseded all prior guidance on compensation and corporate governance for TARP recipients. The IFR also created within Treasury an Office of the Special Master, which is charged with overseeing compensation practices at recipients of "exceptional financial assistance" from the TARP in accordance with six prescribed principles.[4]

Since the Office of the Special Master was established in June 2009, it has been the public face of the government's efforts to guide compensation practices at TARP recipients. The Special Master's mandate is at once broad and narrow: to determine the amount and structure of senior executive pay, but only for those firms deemed to be recipients of exceptional assistance. To date, the Special Master has issued 42 determinations setting compensation for 300 employees at the seven exceptional assistance recipients. Treasury's Office of Internal Review (OIR) was responsible for monitoring compliance with, in total and at the peak, compensation rules at the seven exceptional assistance companies and the other 760 TARP recipients that were subject to the compensation rules.[5]

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[1] *Emergency Economic Stabilization Act of 2008,* Pub. L. No. 110–343 (Oct. 3, 2008) (executive compensation and corporate governance restrictions codified as amended at 12 U.S.C. § 5221).

[2] For example, for the 2008 fiscal year, Merrill Lynch paid $3.6 billion in bonuses despite incurring more than $15 billion in losses during the fourth quarter of 2008 and being acquired by Bank of America. *See* Letter from Andrew Cuomo, attorney general, State of New York, to Congressman Barney Frank, chairman, House Committee on Financial Services, M*errill Lynch 2008 Bonuses* (Feb. 10, 2009) (online at www.ag.ny.gov/media_center/2009/feb/merrill%20letter.pdf).

[3] *American Recovery and Reinvestment Act of 2009,* Pub. L. No. 111–5 (Feb. 17, 2009).

[4] 31 CFR § 30. The IFR defined "exceptional financial assistance" as "any financial assistance provided under the TARP programs for Systemically Significant Failing Institutions, the Targeted Investment Program, the Automotive Industry Financing Program, and any new TARP program designated by the Secretary as providing exceptional financial assistance." 31 CFR § 30.16. The Systemically Significant Failing Institutions program is now known as the American International Group, Inc. Investment Program (AIGIP). The seven institutions that participated in the three programs mentioned above were AIG, Bank of America, Citigroup, Chrysler, Chrysler Financial, General Motors, and GMAC/Ally Financial. For purposes of this report, an "exceptional assistance recipient" is any institution that received such assistance.

[5] Letter from Timothy Geithner, Secretary, U.S. Department of the Treasury, to Elizabeth Warren, Chair, Congressional Oversight Panel, *Re: Response to Questions on Executive Compensation* (Feb. 16, 2010) (online at cop.senate.gov/documents/cop-031110-report-correspondence.pdf) (hereinafter "Geithner Response to Questions on Executive Compensation"). This monitoring is performed by the compliance office within the Office of Internal Review, which is itself part of the Treasury's Office of Financial Stability. Treasury conversations with Panel staff (Feb. 7, 2011). As of January 28, 2011, OIR was responsible for monitoring compliance at the four remaining exceptional assistance companies as well as the other 660 remaining TARP recipients. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011* (Feb. 1, 2011) (online at www.treasury.gov/initiatives/finan-

Continued

The Panel has examined executive compensation as it relates to the TARP in past reports, although none of its reports to date have focused exclusively on the issue. In its March 2010 report the Panel stated that the levels of compensation set for GMAC/Ally Financial's CEO "raise significant questions, which the Panel will continue to study."[6] In its June 2010 report, the Panel reiterated its concern that compensation levels "raise significant unanswered questions."[7] Most recently, on October 21, 2010, the Panel held a hearing on executive compensation, which included testimony from the former Special Master, Kenneth Feinberg, among others.[8]

In this report, the Panel focuses on the work of the Office of the Special Master. It also evaluates the separate role of Treasury's Office of Internal Review in monitoring compensation practices at TARP recipients. The Panel describes the legal landscape that provided the foundation for the government's involvement in executive

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cial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/2-1-11%20Transactions%20Report%20as%20of%201-28-11.pdf) (hereinafter "Treasury Transactions Report").

[6] Congressional Oversight Panel, *March Oversight Report: The Unique Treatment of GMAC Under the TARP,* at 57 (Mar. 11, 2010) (online at cop.senate.gov/documents/cop-031110-report.pdf) ("These [significant questions] include whether particular levels of compensation are either necessary or appropriate, the nature of the incentives the compensation creates, and the manner in which Treasury is exercising its authority under the EESA compensation restrictions as amended by the American Recovery and Reinvestment Act of 2009 (ARRA).").

[7] Congressional Oversight Panel, *June Oversight Report: The AIG Rescue, Its Impact on Markets, and the Government's Exit Strategy,* at 229 (June 10, 2010) (online at cop.senate.gov/documents/ cop-061010-report.pdf). In addition to its discussion of executive compensation restrictions for TARP recipients, in its January 2009 report on regulatory reform, the Panel noted that "[e]xecutive pay should be designed, regulated, and taxed to incentivize financial executives to prioritize long-term objectives, and to avoid both undertaking excessive, unnecessary risk and socializing losses with the help of the federal taxpayer." Congressional Oversight Panel, *Special Report on Regulatory Reform: Modernizing the American Financial Regulatory System: Recommendations for Improving Oversight, Protecting Consumers, and Ensuring Stability,* at 38 (Jan. 29, 2009) (online at cop.senate.gov/documents/cop-012909-report-regulatoryreform.pdf) (hereinafter "Special Report: Modernizing the American Financial Regulatory System").

[8] Other witnesses at the Panel's hearing included Kevin Murphy, Kenneth L. Trefftzs Chair in Finance and professor of corporate finance, University of Southern California Marshall School of Business; Fred Tung, Howard Zhang Faculty Research Scholar and professor of law, Boston University School of Law; Rose Marie Orens, senior partner, Compensation Advisory Partners LLC; and Ted White, strategic advisor, Knight Vinke Asset Management. Other oversight bodies have also examined the issue of executive compensation for TARP recipients. The Special Inspector General for TARP (SIGTARP) has issued reports on institutions' efforts to comply with compensation restrictions, compensation at AIG, and Treasury's monitoring of compliance at exceptional assistance firms. Office of the Special Inspector General for the Troubled Asset Relief Program, *Treasury's Monitoring of Compliance with TARP Requirements by Companies Receiving Exceptional Assistance* (June 29, 2010) (online at www.sigtarp.gov/reports/audit/2010/ Treasury's%20Monitoring%20of%20Compliance %20with%20TARP%20 Requirements%20by%20 Companies% 20Receiving%20 Exceptional%20Assistance%206_29_10.pdf) (hereinafter "Treasury's Monitoring of Compliance for Companies Receiving Exceptional Assistance"); Office of the Special Inspector General for the Troubled Asset Relief Program, *Extent of Federal Agencies' Oversight of AIG Compensation Varied, and Important Challenges Remain* (Oct. 14, 2009) (online at www.sigtarp.gov/ reports/audit/2009/ Extent_of_ Federal_Agencies'_ Oversight_of_AIG_ Compensation_Varied_and_ Important_ Challenges_Remain_10_14_09.pdf); Office of the Special Inspector General for the Troubled Asset Relief Program, *Despite Evolving Rules on Executive Compensation, SIGTARP Survey Provides Insights on Compliance* (Aug. 19, 2009) (online at www.sigtarp.gov/ reports/audit/ 2009/Despite%20Evolving%20 Rules%20on%20 Exec%20Comp..._8_19_09.pdf) (hereinafter "SIGTARP Survey Provides Insights on Compliance"). The Government Accountability Office (GAO) has also analyzed compensation issues in several of its reports and in congressional testimony. U.S. Government Accountability Office, *Office of Financial Stability (Troubled Asset Relief Program) Fiscal Years 2010 and 2009 Financial Statements* (Nov. 2010) (GAO–11–174) (online at www.gao.gov/new.items/d11174.pdf); U.S. Government Accountability Office, *Financial Assistance: Ongoing Challenges and Guiding Principles Related to Government Assistance for Private Sector Companies* (Aug. 2010) (GAO–10–719) (online at www.gao.gov/new.items/d10719.pdf); House Oversight and Government Reform, Subcommittee on Domestic Policy, Written Testimony of Orice Williams Brown, director, financial markets and community investment, and A. Nicole Clowers, acting director, physical infrastructure, U.S. Government Accountability Office, *The Government as Dominant Shareholder: How Should the Taxpayers' Ownership Rights Be Exercised? Day 1* (Dec. 16, 209) (online at www.gao.gov/new.items/d10325t.pdf).

compensation, including, but not limited to, the work of the Special Master. It summarizes the Special Master's determinations. The Panel then examines the broader impact of the government's approach to executive compensation at TARP recipients. This topic falls squarely within the Panel's mandate to "review the current state of the financial markets and the regulatory system." The Panel is tasked with reviewing the "use by the Secretary of authority" under EESA, authority that included the development of executive compensation standards.

B. Background

1. Overview

a. Developments in Executive Compensation Prior to and Around the Financial Crisis

Since well before the financial crisis, executive compensation has been a contentious issue. In 1941, an observer wrote that "executives have received compensation so large as to cause dissatisfaction among factory and office workers, and to lead stockholders to feel that they have been unjustly deprived of funds."[9] From the early 1950s through the mid-1970s, executive pay remained at a fairly steady level in terms of real dollars.[10] From the 1980s onward, however, executive compensation has generally increased, often swiftly.[11] For instance, during the 1970s, the average pay for a chief executive officer (CEO) was approximately 30 times the average annual pay of a production worker. By 1991, however, this pay ratio climbed to over 100 to one. Just before the economic crisis in 2007, the average compensation for a CEO was nearly 300 times that of a production worker.[12] The average total compensation for CEOs for some of the largest TARP recipients was approximately $21 million in 2007, prior to the crisis, with a range from $4.4 million to $54 million.[13] At the same time, compensation for employees

[9] George T. Washington, *The Corporation Executive's Living Wage,* Harvard Law Review, Vol. 54, at 733 (1941).

[10] Carola Frydman and Dirk Jenter, *CEO Compensation,* Rock Center for Corporate Governance at Stanford University Working Paper No. 77, at 4 (Nov. 2010) (online at ssrn.com/abstract=1582232) (hereinafter "Frydman & Jenter on CEO Compensation"). The average pay increase for the top three executives during that period was approximately 0.8 percent per year.

[11] *Id.* at 4 ("The increase in compensation was most dramatic in the 1990s, with annual growth rates that reached more than 10% by the end of the decade. CEO pay grew more rapidly than the pay of other top executives during the past 30 years, but not before. The median ratio of CEO compensation to that of the other highest-paid executives was stable at approximately 1.4 prior to 1980 but has since then risen to almost 2.6 by 2000–2005."). On the other hand, it is possible that pay in the beginning of the period was too low, as the pay levels in the early 1990s were just catching up to pre-Great Depression levels. Michael C. Jensen and Kevin J. Murphy, *CEO Incentives: It's Not How Much You Pay, But How,* Harvard Business Review, No. 3, at 2 (May-June 1990) (online at papers.ssrn.com/sol3/papers.cfm?abstract_id=146148&rec=1&srcabs=94009##) (hereinafter "Jensen & Murphy on CEO Incentives").

[12] Economic Policy Institute, *The State of Working America, CEOs See Big Raises: Ratio of Average CEO Average Production Worker to Compensation, 1965–2009* (online at www.stateofworkingamerica.org/charts/view/17) (accessed Feb. 8, 2011).

[13] The following institutions were included in this sample: American Express, BB&T, the Bank of New York Mellon, Capital One Financial, Fifth Third Bancorp, Goldman Sachs, JPMorgan Chase, KeyCorp, Morgan Stanley, PNC Financial Corp., Regions Financial, SunTrust Banks, State Street Corporation, U.S. Bancorp, and Wells Fargo. By 2009, their average total CEO compensation dropped to approximately $9 million, with some CEOs seeing a decrease of more than $40 million in total compensation. Despite the significant decrease in total compensation, base salaries either remained unchanged or increased slightly between 2007 and 2009. Panel calcula-

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in the financial sector increased relative to their peer group in other industries. One study showed that those in the financial sector were paid a premium of about 40 percent compared with those with similar educations and backgrounds in other industries.[14] However, some commentators emphasize that when assessing compensation, it is not the level or amount that should be analyzed but rather the structure of that compensation.[15]

Another factor that has spurred interest in executive compensation has been greater availability of comprehensive data. It is worth noting that compensation is not composed merely of annual salary and performance-based bonuses but also encompasses all benefits that flow to individuals based on their work, including perquisites, tax gross-ups, corporate loans at favorable rates,[16] severance, and retirement benefit accruals. Although extensive data ex-

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tions based on 2007 and 2009 salary data. Salary data accessed through SNL Financial Data Service (Jan. 18, 2011).

[14] Thomas Philippon and Ariell Reshef, *Wages and Human Capital in the U.S. Financial Industry: 1909–2006,* NBER Working Paper No. 14644, at 27, figure 11 (Jan. 2009) (online at pages.stern.nyu.edu/~tphilipp/papers/pr_rev15.pdf). However, though workers in the financial sector are paid more than their counterparts in other sectors, some commentators believe the discrepancy could be due to the demand and scarce resources for their specialized skills. Congressional Oversight Panel, Written Testimony of Kevin J. Murphy, Kenneth L. Trefftzs Chair in Finance, University of Southern California Marshall School of Business, *COP Hearing on the TARP and Executive Compensation Restrictions,* at 14 (Oct. 21, 2010) (online at cop.senate.gov/documents/testimony-102110-murphy.pdf) (hereinafter "Murphy October 2010 Written Testimony") ("The fact that pay is *high* does not, however, imply that pay is excessive in the sense of not being determined by competitive market forces . . . The highest-paid employees in financial services firms typically have scarce and highly specialized skills that are specific to their industry but not necessarily to their employer. As a result, employees in financial services are remarkably mobile both domestically and internationally when compared to employees in virtually any other sector in the economy.").

[15] Squam Lake Working Group on Financial Regulation, *Regulation of Executive Compensation in Financial Services,* at 2 (Feb. 2010) (online at i.cfr.org/content/publications/attachments/Squam_Lake_Working_Paper8.pdf) ("We have seen no convincing evidence that high levels of compensation in financial companies are inherently risky for the companies themselves or the overall economy."). *See also* Jensen & Murphy on CEO Incentives, *supra* note 11, at 1 ("There are serious problems with CEO compensation, but 'excessive' pay is not the biggest issue. The relentless focus on how much CEOs are paid diverts public attention from the real problem—how CEOs are paid.").

[16] These received particular attention in the case of Dennis Kozlowski and Mark Swartz, executives at Tyco, Inc., whom the SEC and the state of New York accused of looting the company in order to enrich themselves. U.S. Securities and Exchange Commission, *TYCO Former Executives L. Dennis Kozlowski, Mark H. Swartz and Mark A. Belnick Sued for Fraud, Accounting and Auditing Enforcement* (Sept. 12, 2002) (Release No. 1627) (online at www.sec.gov/litigation/litreleases/lr17722.htm) ("[Kozlowzki and Swartz] granted themselves hundreds of millions of dollars in secret low interest and interest-free loans from the company that they used for personal expenses. They then covertly caused the company to forgive tens of millions of dollars of those outstanding loans, again without disclosure to investors as required by the federal securities laws. In addition, they engaged in other undisclosed related party transactions that cost shareholders hundreds of thousands, if not millions of dollars . . . . Kozlowski and Swartz enjoyed numerous and extensive undisclosed perquisites that they bestowed upon themselves, all at the expense of Tyco shareholders. For example, Kozlowski lived rent-free in a $31 million Fifth Avenue apartment that Tyco purchased in his name while Swartz lived rent-free in a multi-million dollar apartment Tyco purchased in his name on New York City's Upper East Side. Both used Tyco corporate jets for personal use at little or no cost. Moreover, Kozlowski directed millions of dollars of charitable contributions in his own name using Tyco funds."). After a nearly six-month jury trial in New York state court, on September 19, 2005, Kozlowski and Swartz were convicted of 12 counts of first degree grand larceny, eight counts of first degree falsifying business records, one count of fourth degree conspiracy and one Martin Act count of securities fraud. Kozlowski and Swartz were sentenced to prison terms of 8 and 1/3 to 25 years, and the court ordered joint restitution of $134,351,397 and imposed fines of $35 million and $70 million on Swartz and Kozlowski, respectively. *People v. Kozlowski,* 11 N.Y.3d 223, 230–231, 237 (Oct. 16, 2008). Kozlowski and Swartz have appealed their cases to various courts, and in 2009 the U.S. Supreme Court declined to hear their case. *Kozlowski v. New York,* 129 S. Ct. 2775 (U.S. 2009). On July 14, 2009, Kozlowski and Swartz settled with the SEC, and as part of that final judgment they will be permanently barred from serving as officers or directors of a public company. U.S. Securities and Exchange Commission, *Former TYCO Executives L. Dennis Kozlowski and Mark H. Swartz Settle SEC Fraud Action, Accounting and Auditing Enforcement* (July 14, 2009) (Release No. 3010) (online at www.sec.gov/litigation/litreleases/2009/lr21129.htm).

isted on salary amounts prior to 2006, there was more limited public information regarding perquisites and other personal benefits, including club memberships, housing allowances, and other similar benefits. This caused one commentator to note that "there were substantial opportunities to obfuscate the true cost of compensating executives."[17] A series of disclosure requirements, however, culminating in Securities and Exchange Commission (SEC) regulations, adopted in 2006, requiring more extensive disclosure for perquisites and other personal benefits, made the process much more transparent.[18]

Though a good deal of research has centered on why executive pay has risen over the past three decades, there is still no real consensus. The availability of executive mobility, managerial bargaining power and control over boards of directors, the low values assigned to stock options along with the perception that stock options are a low-cost method to pay employees, the effects of the bull market, and government regulation and deregulation have all been cited as contributing to this phenomenon.[19] In addition, during the period from the mid-1970s to the 1990s, equity-linked compensation not only became more widely used but also represented a larger portion of top executives' total compensation packages.[20] In part as a result of academics' and practitioners' commonly held belief that equity-linked compensation better aligned the interests of managers and shareholders, equity-based remuneration became the single largest component of executive pay.[21] This shift did have

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[17] Ian Dew-Becker, *How Much Sunlight Does it Take to Disinfect a Boardroom? A Short History of Executive Compensation Regulation,* CESifo Working Paper No. 2379, at 5 (Aug. 2008) (online at www.ifo.de/portal/page/portal/DocBase_Content/WP/WP–CESifo_Working_Papers/wp-cesifo-2008/wp-cesifo-2008–08/cesifo1_wp2379.pdf) (hereinafter "Dew-Becker's Short History of Executive Compensation Regulation"). *See also* Raghuram G. Rajan and Julie Wulf, *Are Perks Purely Managerial Excess?,* Journal of Financial Economics, Vol. 79, at 2 (2006) (online at people.hbs.edu/jwulf/Rajan_and_Wulf_2006_JFE.pdf) ("In fact, the leading theory of perks in the corporate finance literature, following Grossman and Hart (1980), Jensen and Meckling (1976), and Jensen (1986), is that they are a way for managers to misappropriate some of the surplus the firm generates.").

[18] *See* U.S. Securities and Exchange Commission, *Final Rule, Amended: Executive Compensation and Related Person Disclosure,* at 71–78 (Sept. 8, 2006) (Release No. 33–8732A; 34–54302A) (online at www.sec.gov/rules/final/2006/33–8732a.pdf); Carola Frydman, *Learning from the Past: Trends in Executive Compensation Over the Twentieth Century,* CESifo Working Paper No. 2460, at 1 (Nov. 2008) (online at www.ifo.de/portal/page/portal/DocBase_Content/WP/WP-CESifo_Working_Papers/wp-cesifo-2008/wp-cesifo-2008–11/cesifo1_wp2460.pdf) (hereinafter "Frydman's Trends in Executive Compensation"); Dew-Becker's Short History of Executive Compensation Regulation, *supra* note 17, at 5.

[19] Kevin J. Murphy, *Explaining Executive Compensation: Managerial Power Versus the Perceived Cost of Stock Options,* University of Chicago Law Review, Vol. 69, at 847, 858–868 (2002) (hereinafter "Explaining Executive Compensation: Managerial Power Versus the Perceived Cost of Stock Options"); Lucian Bebchuk and Yaniv Grinstein, *The Growth of Executive Pay,* Oxford Review of Economic Policy, Vol. 21, No. 2, at 283, 298–302 (2005) (online at www.law.harvard.edu/faculty/bebchuk/pdfs/Bebchuk-Grinstein.Growth-of-Pay.pdf) (hereinafter "Growth of Executive Pay"); Dew-Becker's Short History of Executive Compensation Regulation, *supra* note 17.

[20] Frydman & Jenter on CEO Compensation, *supra* note 10, at 8 ("From the mid-1970s to the end of the 1990s, all compensation components grew dramatically, and differences in pay across executives and firms widened. By far, the largest increase was in the form of stock options, which became the single largest component of CEO pay in the 1990s.").

[21] During the 1980s there was a belief that executive compensation was structured such that CEOs received higher pay for creating larger firms, but not necessarily more profitable ones. Therefore, the trend was to structure compensation packages to include more equity-based compensation with an aim to better align executive compensation with shareholder value. Michael C. Jensen, Kevin J. Murphy and Eric G. Wruck, *Remuneration: Where We've Been, How We Got to Here, What are the Problems, and How to Fix Them,* European Corporate Governance Institute—Finance Working Paper No. 44/2004, at 28 (July 12, 2004) (online at ssrn.com/abstract=561305) ("by the late 1980s, the renewed focus on creating shareholder value endured. It became apparent that traditional management incentives focused on company size, stability,

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some unintended consequences, as commentators across the spectrum agree that changing the structure of pay to include stock-based compensation during a thriving stock market contributed to the dramatic increase in compensation.[22] One commentator noted that payment in stocks and options also allowed for payments that would have been unpalatable to shareholders had they been in cash.[23] For instance, Angelo Mozilo, the former chairman and CEO of Countrywide Financial Corporation, received over half his $48 million in compensation for 2006 through some form of equity.[24]

The recent historical background has informed the debate about what an appropriate approach to executive compensation should be. This debate has typically revolved around two issues: first, the size of compensation, and second, the principal-agent problem that can arise in attempting to align the interests of managers who operate a company and the shareholders who own it.[25] The unique situation of the TARP, where the government invested in and effectively acted as guarantor of several large faltering institutions, also created a new set of issues in the executive compensation debate beyond the traditional shareholder-manager tensions.

b. Corporate Governance Scholarship and Prevailing Theories

The academic debate around the evolution of pay practices has largely concentrated on whether common executive compensation practices sufficiently align the incentives of the executives with the interests of shareholders. Can managers ever be trusted to set their own pay in the interests of shareholders? Is there a form of "capture," whereby compensation committees come to serve executives and not the shareholders to whom they have a duty? Corporate governance scholars analyzing executive compensation generally follow one of two schools of thought in their responses to these questions:

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and accounting profitability destroyed rather than created value. By this time, shareholder activists and academics (including the first two authors of this report) were increasingly demanding that executive pay be tied more closely to company value through increases in share options and other forms of equity-based incentives. [. . .] cash remuneration continued to grow in real terms after the mid-1980s, but became a smaller part of the total compensation package."). *See also* Lucian A. Bebchuk, *How to Fix Bankers' Pay,* at 4 (Fall 2010) (online at papers.ssrn.com/sol3/papers.cfm?abstract_id=1673250) (hereinafter "Bebchuk's Fix Banker's Pay") ("Equity-based compensation is the primary component of modern pay packages.").

[22] Growth of Executive Pay, *supra* note 19, at 283, 298–302; Frydman's Trends in Executive Compensation, *supra* note 18, at 1; Explaining Executive Compensation: Managerial Power Versus the Perceived Cost of Stock Options, *supra* note 19, at 858.

[23] Growth of Executive Pay, *supra* note 19, at 283, 302.

[24] Countrywide Financial Corporation, *Schedule 14A: Definitive Notice & Proxy Statement,* at 35 (Apr. 27, 2007) (online at www.sec.gov/Archives/edgar/data/25191/000119312507093783/ddef14a.htm). At the beginning of 2007, Countrywide Financial's stock price was above $40 per share. The price per share plummeted to approximately $5 prior to Bank of America's acquisition of the firm on January 11, 2008. Market data accessed through Bloomberg Data Service (accessed Jan. 18, 2011); Bank of America Corporation, *Bank of America Agrees to Purchase Countrywide Financial Corp.* (Jan. 11, 2008) (online at mediaroom.bankofamerica.com/phoenix.zhtml?c=234503&p=irol-newsArticle&ID=1389986&highlight=).

[25] *See, e.g.,* Lucian Bebchuk and Jesse Fried, *Pay Without Performance: The Unfulfilled Promise of Executive Compensation* (2004) (hereinafter "Bebchuk & Fried: Pay Without Performance"); Lynn A. Stout, *The Mythical Benefits of Shareholder Control,* UCLA School of Law, Law & Economics Research Paper Series, Research Paper No. 06–19 (2007) (online at papers.ssrn.com/sol3/papers.cfm?abstract_id=929530) (hereinafter "Stout Paper on Shareholder Control"); Stephen M. Bainbridge, *Executive Compensation: Who Decides?,* Texas Law Review, Vol. 83, at 1615 (2005) (online at papers.ssrn.com/sol3/papers.cfm?abstract_id=653383) (hereinafter "Bainbridge:Executive Compensation").

• **The "Optimal Contracting" Camp.** These scholars maintain that compensation practices result from arm's-length negotiations between executives and board members, and serve the interests of shareholders, obviating direct shareholder participation or any government regulation that would make such participation easier; and

• **The "Managerial Power" School.** These scholars maintain that corporate board members are ill-equipped and disinclined to negotiate with managers on behalf of the shareholders because they are appointed by and beholden to management, while shareholders have no meaningful influence on their selection, their pay, or their termination. This means that boards will more often than not go along with compensation arrangements that are disproportionately favorable to executives.

Corporate governance scholars in both camps generally agree that executive compensation should be tied to performance. However, they disagree on the specifics of what the most appropriate metrics for measuring performance are, and who is in the best position to determine these metrics. Those subscribing to the managerial power theory believe that more direct shareholder involvement and effective shareholder control are necessary for effective performance-driven practices.[26] Academics in the optimal contracting camp discount the importance of direct shareholder control and argue that corporate boards are best placed to negotiate executive pay in an efficient manner.[27] Some academics argue that tying executive performance to the performance of the company's debt is preferable because such compensation would create greater incentives for executives to safeguard the company's long-term solvency.[28] Other commentators argue that companies—and especially financial institutions—are best served by compensation practices that are in line with societal interests.[29] The circumstances of the

[26] Bebchuk & Fried: Pay Without Performance, *supra* note 25. Bebchuk and Fried elaborated on conflicts of interest inherent in the way corporate boards and their compensation committees are appointed and argued that increased shareholder control would likely lead to more performance-driven compensation practices.

[27] Professor Stephen M. Bainbridge, who teaches corporate law and finance at UCLA Law School, and Professor Lynn Stout, who teaches corporate and securities law also at UCLA Law School, question both the existence of the problem (i.e., that CEOs are overpaid) and the effectiveness of the proposed remedy (increased shareholder control) and argue that board governance, while worsening agency costs, also promotes efficient and informed decision making, thereby providing net benefits to shareholders. *See* Stout Paper on Shareholder Control, *supra* note 25; Bainbridge:Executive Compensation, *supra* note 25, at 1615. Professor Bainbridge also argues that increased shareholder control would generally disproportionately favor one or two potentially opportunistic large shareholders to the detriment of the rest of the shareholders and therefore federal regulation of corporate governance is inappropriate and likely to misfire. Stephen M. Bainbridge, *Is 'Say on Pay' Justified?,* Regulation, Vol. 32, No. 1, at 42–47 (Spring 2009) (online at SSRN: ssrn.com/abstract=1452761).

[28] Frederick Tung, *Pay for Banker Performance: Structuring Executive Compensation for Risk Regulation,* Boston University School of Law Working Paper No. 10–25, at 8 (Aug. 31, 2010) (online at www.bu.edu/law/faculty/scholarship/workingpapers/documents/TungF083110.pdf) (hereinafter "Tuck: Pay for Banker Performance") ("The flip side of shareholders' preference for risky bets at creditors' expense is creditors' preference for more conservative strategies. Creditors enjoy only a fixed upside—their interest payments and return of principal at a loan's maturity—and they enjoy a priority over equity in terms of repayment: Creditors are repaid before equity receives any return. In practice, this means that a firm must be solvent in order for the firm to make any distribution to equity holders and that upon dissolution, creditors are repaid in full before equity holders receive any distribution. Creditors would therefore rather avoid the higher-risk, potentially higher-return bets that shareholders prefer.").

[29] House Committee on Financial Services, Written Testimony of Joseph E. Stiglitz, University Professor, Columbia Business School, *Compensation in the Financial Industry,* at 2–3 (Jan. 22, 2010) (online at financialservices.house.gov/media/file/hearings/111/stiglitz.pdf) (hereinafter

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TARP have added another layer to the discussion, and some academics and commentators have focused on the additional question of what are appropriate compensation structures for firms that enjoy implicit or explicit government guarantees, or government guarantees of some portion of their debts.[30] The Office of the Special Master informed the Panel that it has not taken a position on whose interests compensation practices should serve because the Office's mandate was narrowly defined by EESA as amended and the IFR.[31]

The choice regarding appropriate performance metrics to a large extent determines how these scholars analyze executive pay structures. The three key issues are the level and composition of compensation, whether the compensation provides recipients with both the opportunity to benefit from upside growth and exposure to downside risk, and the compensation's time horizon. Time horizon, generally, addresses when the executive can walk away with his or her pay: for example, cash provides immediate payment to the executive, while stock-based compensation typically takes some period to vest or become liquid. Academics generally do not propose caps on compensation levels or make concrete recommendations on amounts, although several companies, investors, corporate governance professionals, and other stakeholders signed onto the Aspen Institute's list of principles to foster long-term value creation at corporations. One of the suggestions included on this list was a proposal to keep executive compensation at "fair" and "rational" levels as a general matter.[32] Most scholars in the managerial power camp recommend relatively low levels of cash compensation and higher long-term stock compensation.[33] Members of the optimal con-

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"Stiglitz Written Testimony on Compensation in the Financial Industry") ("[F]inancial markets are a means to an end, not an end in themselves. If they allocate capital and manage risk well, then the economy prospers, and it is appropriate that they should garner for themselves some fraction of the resulting increases in productivity. But it is clear that pay was not connected with social returns—or even long-run profitability of the sector . . . Market economies work to produce growth and efficiency, but only when private rewards and social returns are aligned. Unfortunately, in the financial sector, both individual and institutional incentives were misaligned.").

[30] *See* Lucian A. Bebchuk and Holger Spamann, *Regulating Bankers' Pay,* Georgetown Law Journal, Vol. 98, at 252–253 (Jan. 2010) (online at www.georgetownlawjournal.com/issues/pdf/98–2/Bebchuk%20&%20Spamann.PDF) (hereinafter "Bebchuk & Spamann: Regulating Bankers' Pay").

[31] Treasury conversations with the Panel (Jan. 18, 2011). Separately, and as further described below, the Special Master established rules that would eliminate "excessive" cash payments, among other things.

[32] The Aspen Institute, *Long-Term Value Creation: Guiding Principles for Corporations and Investors,* at 4 (June 2007) (online at www.aspeninstitute.org/sites/default/files/content/docs/pubs/Aspen_Principles_with_signers_April_09.pdf) ("Corporations and society both benefit when the public has a high degree of trust in the fairness and integrity of business. To maintain that trust, the board of directors . . . (a) Ensures that the total value of compensation, including severance payments, is fair, rational and effective given the pay scales within the organization, as well as the firm's size, strategic position, and industry. (b) Remains sensitive to the practical reality that compensation packages can create reputation risk and reduce trust among key constituencies and the investing public."). The list was originally published in June 2007; however, the list of subscribers is current as of April 2009.

[33] *See* House Committee on Financial Services, Written Testimony of Lucian Bebchuk, William J. Friedman and Alicia Townsend Friedman Professor of Law, Economics, and Finance, and director of the program on corporate governance, Harvard Law School, *Compensation in the Financial Industry,* at 2–3 (Jan. 22, 2010) (online at financialservices.house.gov/media/file/hearings/111/bebchuk.pdf) ("To better link equity compensation to performance, it is desirable to separate the time that equity-based compensation can be cashed out from the time in which it vests. [. . .] As soon as an executive has completed an additional year at the firm, the equity incentives promised as compensation for that year's work should vest, and should belong to the executive even if he or she immediately leaves the firm. But the cashing out of these vested equity incentives should be "blocked" for a specified period after vesting—say, five years after the vesting."). For more on the importance of long-term performance-based compensation, *see*

tracting camp tend to agree with the need for long-term performance measures; however, they maintain that excessive restrictions imposed from outside the company and its board, such as regulation, are unnecessary.[34] Academics and commentators differ in their interpretation of what "long-term" should mean. As discussed below in more detail, the Office of the Special Master told the Panel that they determined that a three-year period qualifies as "long-term," while some academics argue that a five-year vesting period would be more appropriate.[35] According to one official at the Federal Reserve, in some cases even multi-year vesting periods for stock compensation or other forms of significantly deferred compensation will not address all the risks certain important employees may be able to expose their companies to, and therefore compensation schemes should be tailored to companies and individuals.[36]

The Special Master consulted with academics from each camp in making determinations about executive compensation at exceptional assistance recipients: Lucian Bebchuk, William J. Friedman and Alicia Townsend Friedman Professor of Law, Economics, and Finance, and director of the program on corporate governance, Harvard Law School, who espouses the "managerial power" theory,[37]

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also House Committee on Financial Services, Written Testimony of Nell Minow, editor, The Corporate Library, *Compensation in the Financial Industry,* at 5 (Jan. 22, 2010) (online at financialservices.house.gov/media/file/hearings/111/minow.pdf) ("Long-term performance-based compensation should always make up the majority of total realizable compensation for the most senior executives at the company. We like to see non-performance-based compensation play a fairly small role in total compensation. Many of the companies that do best for long-term investors pay executives below-median base salaries. And they are careful about what their performance goals are. It works well to base performance pay on some form of return on capital measure—often a better measure of value growth than earnings—and, in many cases, these return measures also take into account the cost of capital, rendering the metric an even more efficient measure of value growth. There is no one best practice for the form of long-term incentive practice. Some companies opt solely for stock options, some for time and/or performance-restricted stock, and some for other performance-related long-term incentives.").

[34] House Committee on Financial Services, Written Testimony of Kevin J. Murphy, Kenneth L. Trefftzs Chair in Finance, University of Southern California Marshall School of Business, *Compensation Structure and Systemic Risk,* at 7 (June 11, 2009) (online at financialservices.house.gov/media/file/hearings/111/kevin_murphy.pdf) (hereinafter "Murphy Written Testimony on Compensation Structure and Systemic Risk"). ("Bonus plans in financial services can also be improved by ensuring that bonuses are based on value creation rather than on the volume of transactions without regard to the quality of transactions. Measuring value creation is inherently subjective, and such plans will necessarily involve discretionary payments based on subjective assessments of performance . . . it is highly unlikely that compensation practices can be improved through increased government rules and regulations.")

[35] *See* note 33, *supra,* for Lucian Bebchuk's testimony detailing the benefits of a five-year deferral period for the vesting of stock compensation. *See also* Treasury conversations with the Panel (Jan. 18, 2011).

[36] House Committee on Financial Services, Written Testimony of Scott G. Alvarez, General Counsel, Board of Governors of the Federal Reserve System, *Compensation in the Financial Industry—Government Perspectives,* at 7 (Feb. 25, 2010) (online at financialservices.house.gov/media/file/hearings/111/2–25–2010_alvarez_statement_-_-_incentive_compensation_-_-_hfsc.pdf) ("For example, incentive compensation arrangements for senior executives at large, complex organizations are likely to be better balanced if they involve deferral of a substantial portion of the executives' incentive compensation over a multiyear period, with payment made in the form of stock or other equity-based instruments and with the number of instruments ultimately received dependent on the performance of the firm during the deferral period. Deferral, however, may not be effective in constraining the incentives of employees who may have the ability to expose the firm to long-term or "bad tail" risks, as these risks are unlikely to be realized during a reasonable deferral period.").

[37] Professor Bebchuk is a noted corporate finance and governance expert at Harvard Law School and the author of *Pay Without Performance,* an extensive overview and critique of prevailing executive compensation practices. In *Pay Without Performance,* Mr. Bebchuk and his coauthor, Jesse Fried, argued that executive pay has become economically meaningful as a share of public companies' earnings over the previous decade and that this pay growth cannot be adequately explained by changes in firm size, performance, or industry mix. *See* Bebchuk & Fried: Pay Without Performance, *supra* note 25.

and Kevin Murphy, Kenneth L. Trefftzs chair in finance and professor of corporate finance, University of Southern California Marshall School of Business, who argues that the "optimal contracting" theory is appropriate.[38] That said, although the Special Master consulted with academics who ascribe to both theories, the Office of the Special Master stated that its mandate derived from EESA and ARRA, as interpreted by the IFR, and according to the Office, any approach to executive compensation had to be consistent with those sources. In response to a question about the appropriate weight to give the various considerations that animate the optimal contracting and managerial power camps, such as whether executive compensation should be structured with an eye to shareholder value, company solvency, return to creditors, or the public interest, the Office of the Special Master responded that they acted within statutory and regulatory limits, which did not address these particular concepts. Rather, according to the Office of the Special Master, they were required to maximize overall returns to taxpayers and market stability and to minimize market disruption, as required by EESA and ARRA, and to make their determinations in accordance with the "public interest standard" established by the principles in Treasury's IFR. Accordingly, the considerations that animate regular participants in executive compensation debates are not necessarily identical to those that the Special Master used, although there is overlap—such as evaluating the links between compensation and excessive risk—between the two.

Since the onset of the financial crisis, much attention has focused on how executive compensation practices contributed to corporate risk-taking. Some have argued that compensation packages created incentives for executives to focus on short-term results, even at the cost of taking excessively large risks of later catastrophe.[39] Many commentators have a particular interest in the effect of mismatches between executive compensation and the time horizon for assessments of risk. Chairman of the Board of Governors of the Federal Reserve System Ben Bernanke stated that compensation practices "led to misaligned incentives and excessive risk taking, contributing to bank losses and financial instability."[40] On the other hand, this link between compensation and risk taking has been contested by some scholars who note that the value of executives' stock holdings fell precipitously during the crisis. Given this potential for loss, they argue, there is no reason compensation

[38] Professor Murphy is a widely published expert on executive compensation. He argues that compensation levels—especially equity-based compensation—were inefficiently low in the beginning of the 1990s, and shareholders would have been better served by higher levels of equity compensation that would have provided important incentives for executives to increase value. Equity-based compensation packages typically have a high payoff in the event of success. Thus, he argues that shareholders were better served as such pay became increasingly more accepted during the economic boom of the 1990s.

[39] *See, e.g.,* Lucian A. Bebchuk, Alma Cohen, and Holger Spamann, *The Wages of Failure: Executive Compensation at Bear Stearns and Lehman 2000–2008,* John M. Olin Center for Law, Economics, and Business, Harvard Law School, Discussion Paper No. 657 (Feb. 2010) (online at papers.ssrn.com/sol3/papers.cfm?abstract_id=1513522). The Panel discussed the role of misaligned incentives on risk-taking in its Special Report on Regulatory Reform. *See* Special Report: Modernizing the American Financial Regulatory System, *supra* note 7, at 37–40.

[40] Board of Governors of the Federal Reserve System, *Press Release* (Oct. 22, 2009) (online at www.federalreserve.gov/newsevents/press/bcreg/20091022a.htm) (hereinafter "Federal Reserve Press Release on Compensation").

structures would lead to excessive risk taking.[41] Some commentators note, however, that stock options in particular do not necessarily create an exposure to losses for executives symmetric with that of ordinary shareholders. As one of these commentators puts it, "stock options—where executives only participate in the gains, but not the losses—and even more so, analogous bonus schemes prevalent in financial markets, provide strong incentives for excessive risk taking."[42] Although there is no academic consensus on the relationship between compensation practices and risk, or whether compensation practices contributed to the financial crisis,[43] Treasury's view is that compensation practices did in fact contribute to the crisis. Treasury Secretary Timothy Geithner has stated that executive compensation played a "material role" in causing the crisis because it encouraged excessive risk taking.[44]

In the aftermath of the financial crisis and the large-scale government intervention, academics and others have examined the impact of government support for banks—ranging from deposit insurance to an implicit "too big to fail" guarantee—on compensation. As a result of providing a "too-big-to-fail" backstop, the government may have eliminated certain disincentives for pay arrangements that encourage excessive risk taking. Too-big-to-fail status permits shareholders and executives to accept substantial amounts of risk, since they can reap the benefits but will not suffer the consequences if the gambles are unsuccessful. Accordingly, some commentators have speculated that government guarantees could spur higher wages for bank employees, as guarantees may have the effect of minimizing the costs to bank shareholders and bondholders of awarding higher compensation to employees, which in turn could skew incentives for executives toward projects that are riskier and produce higher expected returns even if the associated risks ultimately turn out to be excessive.[45] The idea that government in-

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[41] Murphy Written Testimony on Compensation Structure and Systemic Risk, *supra* note 34, at 6.

[42] Joseph E. Stiglitz, *The Financial Crisis of 2007/2008 and its Macroeconomic Consequences,* at 1 (online at unpan1.un.org/intradoc/groups/public/documents/apcity/unpan033508.pdf) (accessed Feb. 8, 2011). *See also* Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States,* at 63 (Jan. 2011) (online at www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf) ("Stock options had potentially unlimited upside, while the downside was simply to receive nothing if the stock didn't rise to the predetermined price. The same applied to plans that tied pay to return on equity: they meant that executives could win more than they could lose. These pay structures had the unintended consequence of creating incentives to increase both risk and leverage, which could lead to larger jumps in a company's stock price."). These distortions can be further magnified for "too-big-to-fail" entities, as further discussed below.

[43] House Committee on Financial Services, Testimony of Lucian Bebchuk, professor of law, economics, and finance, and director of the program on corporate governance, Harvard Law School, *Compensation Structure and Systemic Risk,* at 56 (June 11, 2009) (online at financialservices.house.gov/Media/file/hearings/111/Printed%20Hearings/111-42.pdf).

[44] Congressional Oversight Panel, Testimony of Timothy F. Geithner, secretary, U.S. Department of the Treasury, *Transcript: COP Hearing with Treasury Secretary Timothy Geithner* (Dec. 16, 2010) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-121610-geithner.cfm) (hereinafter "Geithner Oral Testimony before the Panel").

[45] Christopher Phelan and Douglas Clement, *Incentive Compensation in the Banking Industry: Insights from Economic Theory,* Economic Policy Paper 09–1, Federal Reserve Bank of Minneapolis, at 8–9 (Dec. 2009) (www.minneapolisfed.org/publications_papers/pub_display.cfm?id=4344) (hereinafter "Incentive Compensation in the Banking Industry") ("[P]romises to pay the employee in the event of default are a way of shifting the bank's wage bill onto the government. Government guarantees of financial institution debt may perversely encourage dangerous levels of risk taking and the offloading of employee compensation to the government."). *See also* Stiglitz Written Testimony on Compensation in the Financial Industry, *supra* note 29, at 7 ("But in some critical ways, incentives are actually worse now than they

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volvement in an entity can further distort executive compensation practices has led some lawmakers to argue that recipients of TARP funds should not be held to ordinary standards.[46] In response to these concerns, some academics have argued that for systemically significant financial institutions "[r]ather than tying executive pay to a specified percentage of the value of the common shares of the bank holding company, compensation could be tied to a specified percentage of the aggregate value of the common shares, the preferred shares, and the bonds issued by either the bank holding company or the bank."[47] According to these commentators, such measures could encourage the executive to take into account the effects of their decisions on a broad group of stakeholders, including the government as a deposit guarantor.[48] In 2009, the Federal Reserve conducted two supervisory initiatives to review compensation practices: one for large, complex banking organizations and a separate one for smaller institutions.[49] Under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (signed into law on July 21, 2010) (Dodd-Frank), agencies are required to adopt regulations on executive compensation. Furthermore, Dodd-Frank created a new resolution authority for the FDIC, which is aimed at the orderly liquidation of failed systemically important companies or in other words was designed to mitigate, if not eliminate, "too big to fail."[50] Since most of the future regulations of executive compensation to be enacted pursuant to Dodd-Frank have yet to be finalized,[51] it is it is difficult to assess whether such rules will take

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were before the crisis. The way the bank bailout was managed—with money flowing to the big banks while the smaller banks were allowed to fail (140 failed in 2009 alone)—has led to a more concentrated banking system. Incentives have been worsened too by the exacerbation of the problem of moral hazard. A new concept—with little basis in economic theory or historical experience—was introduced: the largest financial institutions were judged to be too big to be resolved.").

[46] *See, e.g.,* Justin Rood, *Don't Call it a Bonus: Bailout Banks Still Generous to Execs,* ABC News (Jan. 13, 2008) (online at abcnews.go.com/Blotter/Economy/story?id=6631288&page=1) (hereinafter "Don't Call it a Bonus") (Congressman Elijah Cummings of Maryland stating "When folks come to the government for money, I want them understanding they have to live by new rules, or don't come at all. This is a time when all of America must come together to sacrifice . . . Everybody, all of us, needs to be a part of that sacrifice."); Office of Congressman Sam Johnson, *Sam Johnson Livid at AIG Bonus News* (Mar. 17, 2009) (online at www.samjohnson.house.gov/news/DocumentSingle.aspx?DocumentID=114841) (hereinafter "Sam Johnson Livid at AIG Bonus") ("AIG asserts it can not risk a lawsuit if the company demands the money back. Johnson vehemently disagrees and believes that once the taxpayers own 80% of a company, the company no longer has the right to offer multi-million dollar bonuses to employees, especially those who sparked such extreme economic turmoil.").

[47] Bebchuk & Spamann: Regulating Bankers' Pay, *supra* note 30, at 253.

[48] Bebchuk & Spamann: Regulating Bankers' Pay, *supra* note 30, at 253. ("[T]o the extent that executives receive bonus compensation based on accounting measures, such bonuses could be based not on metrics that exclusively reflect the interests of common shareholders, such as earnings per share, but rather on broader metrics that also reflect the interests of preferred shareholders, bondholders, and the government as guarantor of deposits. Such changes in compensation structures would induce executives to take into account the effects of their decisions on preferred shareholders, bondholders, depositors, and taxpayers, and consequently, would curtail incentives to take excessive risks.").

[49] Federal Reserve Press Release, *supra* note 40 ("[S]upervisors will review compensation practices at regional, community, and other banking organizations not classified as large and complex as part of the regular, risk-focused examination process. These reviews will be tailored to take account of the size, complexity, and other characteristics of the banking organization."). In response to the release, Federal Reserve Governor Daniel Tarullo added, "In customizing the implementation of our compensation principles to the specific activities and risks of banking organizations, we advance our goal of an effective, efficient regulatory system." *Id.*

[50] 12 U.S.C. § 5381 *et seq.*

[51] See Section B.2.c.ii, *infra,* regarding the SEC's "say on pay" regulations. On February 4, 2011, the OCC, Federal Reserve, FDIC, OTS, National Credit Union Administration, SEC, and the Federal Housing Finance Authority proposed rules implementing Section 956 of Dodd-Frank. The proposed rule would: prohibit incentive-based compensation arrangements at covered institutions that encourage various employees, executives, and directors (covered persons)

into account these concerns. In addition, Dodd-Frank, which establishes a bankruptcy-like system for resolving large financial companies, intends to help eliminate or diminish "too big to fail," but that resolution authority remains untested.[52]

c. Passage of Legislation and the Interim Final Rule

Congress included executive compensation restrictions in the TARP's authorizing legislation, the Emergency Economic Stabilization Act of 2008 (EESA), signed on October 3, 2008. On October 20, 2008, Treasury issued an interim final rule implementing these standards for participants in the TARP's Capital Purchase Program. On February 4, 2009, President Obama announced revised Treasury guidelines that set forth additional corporate governance requirements and restrictions.[53]

On February 17, 2009, however, before Treasury had implemented these guidelines, Congress passed the American Recovery and Reinvestment Act of 2009 (ARRA), which amended EESA and added additional, more stringent restrictions on pay practices at TARP recipients. These included a prohibition on the payment or accrual of any bonus or retention award to certain highly compensated employees, a requirement that firms establish compensation committees composed entirely of independent directors, and an annual, non-binding "say on pay" shareholder vote on executive compensation packages.[54]

In accordance with ARRA's requirement that the Secretary of the Treasury issue implementing regulations, on June 10, 2009, Treasury released the IFR.[55] The IFR became effective on June 15, 2009. It established a distinction between exceptional assistance companies and other TARP recipients that had not been required by ARRA. In addition, the IFR created the Office of the Special Master

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to expose the institution to excessive risks by providing covered persons with excessive compensation; prohibit incentive-based compensation that would encourage inappropriate risks that could lead to a material financial loss; require deferral of a portion of incentive-based compensation for executive officers of larger covered financial institutions (what constitutes a "larger financial institution" depends on the type of institution); require the board of directors of a larger covered financial institution to identify covered persons that have the ability to expose the institution to substantial possible losses and would require the board to approve such compensation and document such approval; require covered financial institutions to maintain relevant policies and procedures; and provide information regarding incentive compensation to their regulator(s). *See* Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of Thrift Supervision, National Credit Union Administration, U.S. Securities and Exchange Commission, and the Federal Housing Finance Authority, *Proposed Rule re: Incentive-Based Compensation Arrangements* (Feb. 4, 2011) (online at www.fdic.gov/news/board/2011rule2.pdf). Because the rule will be subject to public comment, its final form may differ from the proposal.

[52] 12 U.S.C. § 5381 *et seq.*

[53] U.S. Department of the Treasury, *Treasury Announces New Restrictions on Executive Compensation* (Feb. 4, 2009) (available at www.treasury.gov/press-center/press-releases/Pages/tg15.aspx) (mandating, among other things, that senior executives at exceptional financial recovery assistance firms limit senior executives to $500,000 in annual compensation, aside from restricted stock, which was not capped).

[54] For a more complete discussion of ARRA's requirements, see Section B.1.b, *supra.*

[55] Office of the Special Master for TARP Executive Compensation, *Final Report of Special Master Kenneth R. Feinberg,* at 2 (Sept. 10, 2010) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/Final Report of Kenneth Feinberg-FINAL.PDF) (hereinafter "Final Report from Special Master Kenneth R. Feinberg"); U.S. Department of the Treasury, *Interim Final Rule on TARP Standards for Compensation and Corporate Governance* (June 10, 2009) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/Interim%20Final%20Rule%20on%20Compensation%20and%20Corporate%20Governance.pdf) (hereinafter "Interim Final Rule on TARP Standards for Compensation and Corporate Governance"); U.S. Department of the Treasury, *Statement by Secretary Tim Geithner on Compensation* (June 10, 2009) (online at www.treasury.gov/press-center/press-releases/Pages/tg163.aspx).

and mandated a number of specific restrictions, such as prohibiting companies from paying tax "gross-ups" to the 25 highest-paid executives.[56]

d. Brief Overview of the Office of the Special Master

As discussed in more detail below, in Section B.2.b, the IFR charged the Special Master with setting compensation for the 25 highest-paid employees, and the compensation structures, rather than the actual amounts, for the 26th–100th highest-paid employees at the exceptional assistance recipients.[57] In addition, the Special Master was required by the IFR to conduct a review of bonuses, retention awards, and other compensation paid to each TARP recipient's 25 highest-paid employees before February 17, 2009, the date of ARRA's passage, to determine whether any of the payments were contrary to the public interest or were inconsistent with the purposes of EESA or the TARP.[58]

On June 15, 2009, Secretary Geithner appointed Kenneth Feinberg to be the Special Master.[59] Mr. Feinberg served as Special Master until September 10, 2010, when Patricia Geoghegan replaced him.[60]

2. The Statutes and Regulations that Govern Compensation Paid by TARP Recipients

There are two relevant legal frameworks that govern executive compensation paid by TARP recipients: Section 111 of EESA as amended and the IFR, which implemented Section 111. The IFR created two sets of restrictions, one governing all TARP recipients and another for exceptional assistance recipients.[61]

a. EESA and ARRA

Section 111 of EESA as amended requires Treasury to issue regulations applying the following compensation standards to all TARP recipients:

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[56] Gross-ups are arrangements in which an institution reimburses an individual for a tax he or she owes on compensation received from the institution. Under the IFR, tax "gross-ups" are defined as "any reimbursement of taxes owed with respect to any compensation, provided that a gross-up does not include a payment under a tax equalization agreement." 31 CFR § 30.1. Final Report from Special Master Kenneth R. Feinberg, *supra* note 55, at 2–3.

[57] 31 CFR § 30.16. *See also* Murphy October 2010 Written Testimony, *supra* note 14, at 8–9.

[58] Final Report from Special Master Kenneth R. Feinberg, *supra* note 55, at 2; 31 CFR § 30.16; 12 U.S.C. § 5221(f)(1).

[59] Interim Final Rule on TARP Standards for Compensation and Corporate Governance, *supra* note 55; Final Report from Special Master Kenneth R. Feinberg, *supra* note 55, at iv.

[60] Final Report from Special Master Kenneth R. Feinberg, *supra* note 55, at iv; Congressional Oversight Panel, Written Testimony of Kenneth R. Feinberg, former special master for TARP executive compensation, *COP Hearing on the TARP and Executive Compensation Restrictions,* at 1 (Oct. 21, 2010) (online at cop.senate.gov/documents/testimony-102110-feinberg.pdf) (hereinafter "Feinberg October 2010 Written Testimony").

[61] A "TARP recipient" is "any entity that has received or will receive financial assistance under the financial assistance provided under the TARP." 12 U.S.C. § 5221(a)(3). TARP recipients include Bank of America, Goldman Sachs, and JPMorgan Chase. A complete list of all TARP recipients can be found on Treasury's weekly transactions reports. Treasury Transactions Report, *supra* note 5.

- Limitations on compensation that creates incentives for "senior executive officers"[62] and other employees to take unnecessary and excessive risks;[63]
- "Clawback" provisions, which permit recovery of bonus amounts paid on account of earnings or other metrics that are later found to be materially inaccurate;[64]
- Prohibitions on golden parachute payments and other forms of individualized deferred compensation;[65]
- Limitations on bonuses, incentive compensation, and retention awards (paid under post-February 11, 2009 agreements)[66] to one-third of total compensation, paid only in stock that cannot immediately vest or be sold ("restricted stock");[67]
- Prohibitions on compensation plans that would encourage manipulation of reported earnings;[68]
- Establishment of independent board compensation committees that meet at least semiannually to review employee compensation plans;[69]
- Adoption of compensation committee-approved policies against "excessive or luxury expenditures;"[70] and
- Establishment of non-binding "say-on-pay" shareholder votes on compensation of executives.[71]

These standards apply to all institutions that received TARP assistance until that assistance is repaid.[72] The number of executives subject to the standards depends on the particular restriction and the amount of TARP funds an institution received.[73] To demonstrate compliance, each TARP recipient must provide a written certification to Treasury or the SEC stating that it has abided by the provisions.[74]

The statute also required Treasury to conduct a review of payments (Look Back Review) to executives of TARP recipients made before February 17, 2009, to determine whether the payments were

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[62] A senior executive officer is defined as "an individual who is 1 of the top 5 most highly paid executives of a public company, whose compensation is required to be disclosed pursuant to the Securities Exchange Act of 1934, and any regulations issued thereunder, and non-public company counterparts." 12 U.S.C. § 5221(a)(1).

[63] 12 U.S.C. § 5221(b)(3)(A).

[64] 12 U.S.C. § 5221(b)(3)(B). In general, a "clawback" provision in an employment contract is a provision that allows a company to recoup performance-based compensation, if such compensation is later determined to be excessive in accordance with the terms of the employment contract.

[65] 12 U.S.C. § 5221(b)(3)(C).

[66] February 11, 2009 was the day after the Senate originally voted for the passage of ARRA. U.S. Senate, Roll Call Vote on Agreeing to H.R. 1 (Feb. 10, 2009) (61 yeas, 0 nays) (online at www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00061).

[67] 12 U.S.C. § 5221(b)(3)(D).

[68] 12 U.S.C. § 5221(b)(3)(E).

[69] Companies that are not registered with the Securities and Exchange Commission and received less than $25 million of TARP assistance have less stringent requirements. 12 U.S.C. § 5221(b)(3)(F) and 12 U.S.C. § 5221(c).

[70] 12 U.S.C. § 5221(d).

[71] 12 U.S.C. § 5221(e).

[72] If the government holds only warrants to purchase common stock of the entity, that entity is no longer subject to the compensation provisions of EESA as amended. 12 U.S.C. § 5221(a)(5).

[73] The number of employees covered by these limitations ranges from one to 25 or more depending on the amount of TARP assistance received. For example, for a financial institution receiving less than $25 million in assistance, the prohibition applies to only the most highly compensated employee. On the opposite end of the scale, for a financial institution receiving more than $500 million, the prohibition applies to the senior executive officers and the 20 next most highly compensated employees, or such other number as determined by Treasury. 12 U.S.C. § 5221(b)(3)(D)(ii).

[74] 12 U.S.C. § 5221(b)(4).

inconsistent with the purposes of EESA as amended, or otherwise contrary to the public interest. In the event that a payment was found to be inconsistent with the public interest, Treasury was authorized to negotiate with the TARP recipient and the relevant employee for appropriate reimbursement.[75]

b. The Interim Final Rule and the Creation of the Office of the Special Master

On June 15, 2009, Treasury issued the IFR. Written in the form of questions and answers, the IFR was created to both supplement and explain the employee compensation statutes of EESA as amended.[76] The IFR also created an additional set of rules for exceptional assistance recipients.[77] Not only did exceptional assistance recipients have to comply with the compensation restrictions contained in EESA as amended, but they were also subjected to the oversight of the Special Master.[78]

i. Provisions Applicable to All TARP Recipients

In addition to the requirements of EESA as amended, the IFR required all TARP recipients to meet the following standards:

- Prohibition on paying tax gross-ups to senior executive officers and the 20 next most highly compensated employees;[79]
- Disclosure of perquisites that exceed $25,000 for relevant executives;[80]
- Disclosure of whether the company or its compensation committee engaged a compensation consultant;[81]
- Semiannual discussions, evaluations, and reviews of any risks that could threaten the TARP recipient's value;[82] and
- Disclosure on compensation plans, including a description of how these plans are structured to avoid creating incentives for "excessive" risk taking.[83]

Each TARP recipient must file an annual written certification, indicating that it is in compliance with the TARP's executive com-

[75] 12 U.S.C. § 5221(f)(1).

[76] In addition to providing additional guidance on the compensation requirements, the IFR clarified the definition of "TARP recipient." Under the revised definition, third parties, such as TARP contractors or financial agents that benefited from the TARP but did not receive the funds as prescribed under the regulation, are not TARP recipients and are therefore not subject to the compensation restrictions. Under the regulation, TARP recipients are entities that directly received funds from Treasury or certain related entities of TARP recipients (including parents and subsidiaries of TARP recipients that meet certain thresholds). 31 CFR § 30.1 (defining the term "TARP recipient").

[77] As discussed in Section A, *supra,* exceptional assistance recipients include any participants in the Targeted Investment Program, the Automotive Industry Financing Program, and the American International Group, Inc. Investment Program.

[78] In a memorandum provided by the Department of Justice to Treasury, the Office of Legal Counsel concluded that the Special Master is not a principal officer under the appointments clause and therefore does not need to be confirmed by the Senate. Furthermore, the memo opined that though the Special Master is given the ability to make "final and binding" determinations, those decisions can still be reviewed and reversed by Treasury. Office of the Special Inspector General for the Troubled Asset Relief Program, *Quarterly Report to Congress,* at 309–316 (Jan. 26, 2011) (online at www.sigtarp.gov/reports/congress/2011/January2011_Quarterly_Report_to_Congress.pdf).

[79] 31 CFR § 30.4–30.7. See footnote 56, *supra,* for the definition of gross-ups.

[80] Perquisites are benefits with a personal aspect, such as company-provided vehicles (aircraft, cars, etc.), travel accommodations, or office furniture that is not generally available to all employees. Companies are required to provide a narrative description of the amount and nature of the perquisite, the recipient(s), and the justification for providing the perquisite. 31 CFR § 30.11(b).

[81] 31 CFR § 30.11(c).

[82] 31 CFR § 30.4(a)(4).

[83] 31 CFR § 30.4(a)(4).

pensation standards.[84] In addition, the independent board compensation committee of each TARP recipient must file an annual report attesting that the recipient is in compliance.[85] Treasury's Office of Internal Review is responsible for ensuring that the information in these reports is accurate and that the reports are filed in a timely manner.[86] According to Treasury, some of the smaller TARP institutions have failed to meet their reporting deadlines or to provide complete information in their annual reports. In such an event, it is the responsibility of the Office of Internal Review to work with these recipients to ensure that these reports are eventually filed and that all information is accurate.[87]

ii. Provisions Applicable to Exceptional Assistance Recipients

In addition to the provisions applicable to all TARP recipients, exceptional assistance recipients were made subject to the jurisdiction of the Special Master, a position created by the IFR.[88] As noted above, exceptional assistance recipients were the seven institutions that received money under any one of the three enumerated TARP programs.[89] Those recipients were AIG, Bank of America, Citigroup, Chrysler, Chrysler Financial, General Motors, and GMAC/Ally Financial. Those recipients were required to obtain the approval of the Special Master for: (1) any payment of compensation to the five senior executive officers and the 20 next most highly paid employees;[90] and (2) the structure of compensation for all senior executive officers, as well as the 100 most highly compensated employees.[91]

The IFR required the Special Master to determine whether a payment or compensation structure could "result in payments that are inconsistent with the purposes of Section 111 of EESA or the TARP, or are otherwise contrary to the public interest."[92] EESA and ARRA do not set forth a specific definition of the "public interest," and the text of ARRA leaves the determination to the discretion of the Secretary of the Treasury. In floor debate prior to the passage of ARRA, Senator Christopher Dodd (D–CT) stated that strong and certain regulation of executive compensation was a key

[84] The next round of CEO and CFO annual certifications are due to Treasury on March 31, 2011. Treasury conversations with Panel staff (Oct. 6, 2010).

[85] The independent board compensation committee reports for 2010 are due on April 30, 2011. Treasury conversations with Panel staff (Oct. 6, 2010).

[86] Treasury conversations with the Panel (Jan. 21, 2011).

[87] Treasury conversations with Panel staff (Oct. 6, 2010).

[88] 31 CFR § 30.16.

[89] 31 CFR § 30.16. The exceptional assistance recipients were not classified according to the size of their institution or the amount of TARP money they received. Instead they were classified based on whether they participated in any of the following three programs: the American International Group, Inc. Investment Program, the Targeted Investment Program, or the Automotive Industry Financing Program. See note 4, *supra,* for the definition of exceptional assistance recipients.

[90] 31 CFR § 30.11(a).

[91] 31 CFR § 30.11(a). Under the Rule, a "compensation structure" is generally the combination of the amount and characteristics of the various forms of compensation an individual may receive and their respective relationship to each other and to the total amount of the individual's compensation. The Rule provides examples of the characteristics that can make up a compensation structure; those include the nature of the compensation (salary or short- or long-term incentive compensation), cash or equity compensation, and current or deferred compensation. 74 FR 28405 § 30.1.

[92] 31 CFR § 30.16(a)(3).

component of the public interest standard.[93] Similarly, Representative Darrell Issa (R–CA), questioning Mr. Feinberg in a subsequent congressional hearing, asked whether it would be appropriate to hold "a vote of the stockholders or some kind of affirmation by the long-term stockholders of these companies that in fact they agree with the pay packages we are setting as in the best interest."[94]

The IFR stipulated six principles that the Special Master must apply to each decision in order to enforce this "public interest" standard:

- *Risk:* compensation should avoid incentives that reward employees for taking unnecessary or excessive risks, including those that create short-term or temporary increases in value that may not ultimately result in an increase in the long-term value of the TARP recipient;
- *Taxpayer Return:* compensation should reflect the need for the TARP recipient to remain a competitive enterprise and ultimately repay TARP obligations;
- *Appropriate Allocation:* compensation should be appropriately allocated among each element of pay (for example, salary, short- and long-term incentive pay, and current and deferred compensation or retirement pay);
- *Performance-based Compensation:* an appropriate portion of the compensation should be performance-based, and determined through tailored metrics that encompass individual performance and/or the performance of the TARP recipient or relevant business unit;
- *Comparable Payments:* compensation should be consistent with, and not excessive in comparison to, pay for those in similar roles at similar entities; and
- *Employee Contribution:* compensation should reflect the current or prospective contributions of the employee of the TARP recipient.[95]

The IFR did not specify how to resolve conflicts between the principles when they arose. Instead, it granted to the Special Master the "discretion to determine the appropriate weight or relevance of a particular principle depending on the facts and circumstances surrounding the compensation structure or payment under consideration."[96] As discussed in more detail below, however, the Special Master employed the six principles as the basis of his determination for what constituted the public interest.[97] In testimony before Congress, Mr. Feinberg elaborated on additional factors that he considered components of serving the "public interest," including

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[93] Statement of Senator Christopher Dodd, Congressional Record, S1652 (Feb. 5, 2009) (online at www.gpo.gov/fdsys/pkg/CREC-2009-02-05/pdf/CREC-2009-02-05-pt1-PgS1617-2.pdf#page=36) ("The problem is, if you don't do something about this, we are never going to be able to build the confidence and optimism people need to feel about the larger part of this program. . . . There will be those who think these are excessive, but unfortunately, what we have seen is excessive. If we are going to convince the American public that what we are trying to do is in their interest, then we have to be certain when it comes to these matters.").

[94] House Committee on Oversight and Government Reform, *Transcript: Executive Compensation: How Much is Too Much?,* at 12, 191 (Oct. 28, 2009) (online at www.gpo.gov/fdsys/pkg/CHRG-111hhrg54553/pdf/CHRG-111hhrg54553.pdf). In fact, neither Treasury nor the Special Master required shareholder approval for compensation packages set by the Special Master. A related but distinct concept—"say on pay"—is discussed in more detail below. See Section B.2.c.ii., *infra.*

[95] 31 CFR § 30.16(b).

[96] 31 CFR § 30.16(b).

[97] See Section C.1.b, *infra.*

emphasizing performance-based compensation, imposing limits on guaranteed cash and perks, and imposing "rational compensation limits" on companies that received government assistance.[98]

The regulations also created a "safe harbor" for employees who received less than $500,000 in annual compensation. Institutions are not required to receive approval of compensation structures from the Special Master for employees who fall within this safe harbor.[99] In addition to approving specified compensation payments and structures for those entities that received exceptional financial assistance, the IFR gave the Special Master several additional responsibilities. The Special Master is authorized to interpret and issue non-binding advisory opinions on Section 111 of EESA as amended, and the IFR.[100] Furthermore, the IFR authorized the Special Master to review compensation paid by TARP recipients prior to February 17, 2009, to determine if such payments were inconsistent with the purposes of Section 111 of EESA as amended, and TARP or contrary to the public interest.[101]

c. Dodd-Frank and the Future of the Office of the Special Master

i. The Future of the Office of the Special Master

The TARP expired on October 3, 2010, but the executive compensation standards under EESA as amended will continue to bind TARP recipients for as long as they hold TARP funding.[102] The Special Master remains responsible for approving the compensation of the top employees at the exceptional assistance recipients. The four remaining exceptional assistance recipients are AIG, Chrysler, General Motors, and GMAC/Ally Financial.[103] The Office of the Special Master will continue to issue advisory opinions on TARP compensation at its discretion or at the request of a TARP institution.

The Special Master intends to determine the compensation for the top employees at the four remaining exceptional assistance companies for 2011. It plans to release these determinations in the first quarter of 2011.[104] Treasury has indicated that it has no intention of disbanding the Office of the Special Master or changing its responsibilities.[105]

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[98] House Committee on Oversight and Government Reform, Testimony of Kenneth R. Feinberg, special master for TARP executive compensation, *Transcript: Executive Compensation: How Much is Too Much?,* at 12, 191 (Oct. 28, 2009) (online at www.gpo.gov/fdsys/pkg/CHRG-111hhrg54553/pdf/CHRG-111hhrg54553.pdf).

[99] The safe harbor provision covers employees who receive less than $500,000 in cash salary and stock salary, excluding long-term restricted stock. 31 CFR 30.16(a)(3)(ii); Interim Final Rule on TARP Standards for Compensation and Corporate Governance, *supra* note 55.

[100] 31 CFR § 30.16(a)(1).

[101] 31 CFR § 30.16(a)(2).

[102] 12 U.S.C. § 5221(a)(5). However, entities in which the federal government only holds warrants to purchase common stock are not subject to the TARP compensation restrictions.

[103] Feinberg October 2010 Written Testimony, *supra* note 60, at 1. Bank of America, Citigroup, and Chrysler Financial are no longer deemed to be recipients of exceptional assistance. *See* Final Report from Special Master Kenneth R. Feinberg, *supra* note 55, at 4.

[104] Treasury expects to receive the data from the companies by February 1, 2010 and release its determinations by the end of the first quarter of 2011. Treasury conversations with the Panel (Jan. 18, 2011).

[105] Treasury conversations with Panel staff (Oct. 6, 2010).

ii. Dodd-Frank and Agency Rulemaking

Signed into law on July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) includes several provisions that will govern executive compensation at financial institutions in the future. It includes a provision permitting clawbacks in certain situations, and it imposes more stringent requirements with respect to independent compensation committees.[106] It also requires disclosure of a wide range of information, including the relationship between compensation and performance and the ratio of the CEO's compensation to median employee pay.[107] Furthermore, Dodd-Frank requires a number of agencies, such as the Federal Deposit Insurance Corporation (FDIC) and the Board of Governors of the Federal Reserve System (Federal Reserve), to work together to prescribe regulations or guidelines on incentive compensation applicable to "covered financial institutions."[108] ARRA and IFR restrictions will remain applicable to TARP recipients, without respect to whether Dodd-Frank also applies.

As required under Dodd-Frank, several agencies have already begun developing guidance on executive compensation.[109] On June 21, 2010, the Office of the Comptroller of the Currency (OCC), Federal Reserve, FDIC, and Office of Thrift Supervision (OTS) adopted final guidance on incentive compensation for banking organizations.[110] The guidance released by the OCC, Federal Reserve, FDIC, and OTS is centered on three core principles, which are aimed at maintaining the safety and soundness of the banking organization while discouraging "imprudent" risk taking. According to the guidance, incentive compensation should (1) provide incentives that "appropriately balance risk and reward," (2) "be compatible with effective controls and risk management," and (3) "be sup-

[106] 15 U.S.C. § 78j–4(b)(2). The clawback provision under Dodd-Frank is triggered by an accounting restatement that results from material noncompliance with any financial reporting requirements under relevant securities laws. 15 U.S.C. § 78j–3.

[107] 15 U.S.C. § 78n(i); *Dodd-Frank Wall Street Reform and Consumer Protection Act,* Pub. L. No. 111–203, § 953(b) (2010).

[108] These institutions include depository institutions and holding companies regulated by the FDIC, SEC registered broker-dealers, credit unions regulated by the Board of Governors of the Federal Reserve, Fannie Mae, Freddie Mac, and certain other financial institutions. 12 U.S.C. § 5641(e)(2). However, the rules are not applicable to covered financial institutions with less than $1 billion in assets. 12 U.S.C. § 5641(f).

[109] There have also been efforts to address compensation issues at the international level. In April 2009, a working group of the G–20 released "Principles for Sound Compensation Practices," and in September 2009, the Financial Stability Board released implementation standards for those principles. Financial Stability Board, *FSB Principles for Sound Compensation Practices—Implementation Standards* (Sept. 25, 2009) (online at www.financialstabilityboard.org/publications/r_090925c.pdf). These principles included effective governance of compensation, effective alignment of compensation with prudent risk taking, and effective supervisory oversight and engagement by stakeholders. Financial Stability Forum, *FSF Principles for Sound Compensation Practices,* at 2–3 (Apr. 2, 2009) (online at www.financialstabilityboard.org/publications/r_0904b.pdf). In March 2010, the Financial Stability Forum released a peer review of the implementation of these principles. Financial Stability Forum, *Thematic Review on Compensation Peer Review Report,* at 23–24 (Mar. 30, 2010) (online at www.financialstabilityboard.org/publications/r_100330a.pdf). Taking into account the principles and implementation standards set forth by the Financial Stability Board, on December 27, 2010 the Basel Committee on Banking Supervision issued a consultive document containing proposed compensation disclosure requirements. This consultive document is open for comment until February 25, 2011. Basel Committee on Banking Supervision, *Consultative Document—Pillar 3 Disclosure Requirements for Remuneration* (Dec. 2010) (online at www.bis.org/publ/bcbs191.pdf).

[110] Board of Governors of the Federal Reserve System et al., *Guidance on Sound Incentive Compensation Policies,* at 24 (online at www.federalreserve.gov/newsevents/press/bcreg/bcreg20100621a1.pdf) (accessed Feb. 8, 2011).

ported by strong corporate governance."[111] Unlike the bonus restrictions in EESA as amended, and the IFR, which apply only to a specified number of "highly-compensated" executives, this guidance applies to any employees who have the ability to expose their organizations to "material amounts of risk."[112]

The FDIC is also developing enhanced examination procedures to use in evaluating incentive compensation at institutions under its supervision.[113] Furthermore, the SEC recently adopted regulations that require shareholder approval of executive compensation and "golden parachute" compensation arrangements, and the SEC is in the process of formulating regulations that require institutional investment managers to disclose how they voted on these compensation arrangements.[114]

C. Summary of the Special Master's Determinations

1. Overview

a. Process

To make each determination, the Special Master first formally requested data from each exceptional assistance recipient on its historical compensation practices. The companies also submitted proposed compensation packages to the Special Master for each covered employee. To the extent necessary, the Special Master would request additional data or hold follow-up conversations with the exceptional assistance companies.[115]

Upon receiving the information, the Office of the Special Master would perform legal due diligence as well as market and historical

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[111] *Id.* at 24 ("Provide 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."). The guidance then goes on to describe methods to implement each of the principles. For instance, under the first principle (balanced risk taking incentives), the guidance describes four methods for achieving this goal, including: (i) the modification time horizons of incentive compensation schemes; (ii) the addition or modification features of current schemes to better reflect risk; (iii) the tailoring of schemes between different levels of employees (i.e., a senior executive might have a different risk profile than a trader); and (iv) a requirement for the carefully consideration when using "golden parachutes" and accelerated vesting for departing employees. In addition, the banking institution needs to communicate effectively to employees that the incentive structure is designed to minimize risk, and that the amount of compensation they may receive will be dependent on risk associated with an activity. *Id.* At 30–34. The guidance also goes into further detail on the factors that should be considered and evaluated when modifying and designing internal controls and risk management to successfully monitor and implement incentive compensation schemes as well as elements to be considered in a strong corporate governance structure. *Id.* at 35–41.

[112] *Id.* at 26–27. The determination is based on specific facts and circumstances; however, the guidance is applicable to both executive officers and non-executive officers who are able to expose the bank to material amounts of risk and could pose a threat to the organization's safety and soundness. *Id.* at 26–27.

[113] In the coming months, the FDIC and the other federal banking agencies will contribute to a Federal Reserve Board report on trends and developments in compensation. House Committee on Financial Services, Written Testimony of Marc Steckel, associate director, Division of Insurance and Research, Federal Deposit Insurance Corporation, *Executive Compensation Oversight after the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Sept. 24, 2010) (online at financialservices.house.gov/Media/file/hearings/111/09242010/Steckel%209_24_10.pdf). *See also* note 51, *supra,* for a discussion of the FDIC-led interagency proposal.

[114] U.S. Securities and Exchange Commission, *SEC Adopts Rules for Say-on-Pay and Golden Parachute Compensation as Required Under Dodd-Frank Act* (Jan. 25, 2011) (proposed rule) (online at www.sec.gov/news/press/2011/2011–25.htm); U.S. Securities and Exchange Commission, *Reporting of Proxy Votes on Executive Compensation and Other Matters,* 75 Fed. Reg. 66622 (Oct. 18, 2010) (proposed rule) (online at www.sec.gov/rules/proposed/2010/34-63123.pdf).

[115] Final Report from Special Master Kenneth R. Feinberg, *supra* note 55, at 8. Once the Special Master declared the company's submission substantially complete, the Special Master was required to issue a determination within 60 days. Final Report from Special Master Kenneth R. Feinberg, *supra* note 55, at 8.

analysis of the proposed compensation structures. During this process, the Office of the Special Master used data provided by the companies and data on compensation practices at comparable firms. At the height of its oversight of seven companies, the Office of the Special Master employed two executive compensation specialists with over 15 years of experience each, two compensation analysts, three full-time attorneys with compensation experience, and one part-time attorney in addition to the Special Master. Currently, the staff includes the Special Master, one executive compensation specialist, one analyst, and two full-time attorneys.[116] The Special Master also formally consulted with officials from Treasury, the Federal Reserve, and other agencies, as well as two academic experts, Professors Bebchuk and Murphy.[117] Following this review, the Special Master developed proposed compensation packages. These proposals were then debated within the Office of the Special Master and with the exceptional assistance companies. At this point, the Special Master drafted final compensation determinations. These determinations were presented in letters to the exceptional assistance companies.[118]

To date, the Special Master has released compensation determinations for 2009 and 2010, as well as a number of supplemental determinations. The first round of determinations was released on October 22, 2009 and established 2009 pay for the 25 highest-paid employees at the exceptional assistance companies. On December 11, 2009, the Special Master released his determinations for the 26th–100th highest-paid employees. The determinations for the top 25 employees' 2010 compensation were released on March 23, 2010, and the determinations for the 26th–100th employees' 2010 compensation were released on April 16, 2010. Supplemental determinations were made at various points in response to specific developments at the companies.[119]

b. Principles and Recurrent Determinations

The IFR required the Special Master to make determinations according to the six principles described above in Section B.2.b.ii, which the Special Master referred to as the "Public Interest Standard." In many determinations, the Special Master noted that three of these principles were of particular importance: that compensation be performance-based, that compensation be competitive enough to maximize taxpayer return, and that the compensation be appropriately allocated between types of compensation and between the long and short term.[120] In the Special Master's judgment, an

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[116] Treasury conversations with the Panel (Jan. 18, 2011).

[117] In describing the organization and administration of the office, Mr. Feinberg lists Professors Bebchuk and Murphy in the staffing section. Final Report from Special Master Kenneth R. Feinberg, *supra* note 55, at 6–7.

[118] Final Report from Special Master Kenneth R. Feinberg, *supra* note 55, at 8–9.

[119] *See* U.S. Department of the Treasury, *Special Master for Executive Compensation* (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Pages/spcMaster.aspx) (accessed Feb. 8, 2011) (hereinafter "Special Master for Executive Compensation").

[120] *See, e.g.,* Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Robert Benmosche, president and chief executive officer, American International Group, Inc., *Proposed Compensation Payments and Structures for Senior Executive Officers and Most Highly Compensated Employees,* at 3–4 (Oct. 22, 2009) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20091022%20AIG%202009%20Top%2025%20Determination.pdf) (hereinafter "October 2009 Feinberg Determination Letter to AIG"); Letter from Kenneth R. Feinberg, special master for

allocation was "appropriate" if it heavily favored long-term structures.[121]

Though the specific compensation for each employee was calculated on an employee-by-employee, company-by-company basis, the Special Master applied four standards to implement the Public Interest Standard across all determinations:

- Strict Limits on Guaranteed Cash Compensation: The cash portion of an employee's salary generally was not to be excessive, and cash incentives were not to be guaranteed under any circumstances. Additional salary was instead to be composed of vested stock with extended holding requirements.
- Achievement of Objective Performance Goals: Incentive compensation was to be based on measurable and enforceable performance metrics. When the goals were not met, they were to be enforced fully, and no incentive compensation was to be paid.
- Long-term Structures: A significant amount of compensation was to reflect the company's long-term performance and value, often using grants of company stock. A large proportion of compensation was to be held or deferred for a period of at least three years.
- Minimization of Indirect and Ancillary Compensation: Compensation structures not aligned with shareholder and taxpayer interests in the firm were to be minimized or eliminated.[122]

The Special Master principally divided compensation between cash payments, salary stock (stock given regardless of performance and therefore a component of base pay),[123] and incentive payments. The Special Master's four standards led to several concrete policies for each type of compensation:

- Cash Compensation: In most cases, the Special Master limited cash compensation to $500,000 or less.[124] For the 26th–

TARP executive compensation, to Gregory E. Lau, executive director—global compensation, General Motors Company, *Proposed Compensation Structures for Certain Executive Officers and Most Highly Compensated Employees ("Covered Employees 26–100"),* at 3 (Dec. 11, 2009) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/2091210%20General%20Motors%20Determination%20Letter.pdf) (hereinafter "December 2009 Feinberg Determination Letter to GM").

[121] Final Report from Special Master Kenneth R. Feinberg, *supra* note 55, at 10. *See also* Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Gregory E. Lau, executive director—global compensation, General Motors Company, *Proposed Compensation Payments and Structures for Senior Executive Officers and Most Highly Compensated Employees,* at E1 (Oct. 22, 2009) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20091022%20GM%202009%20Top%2025%20Determination.pdf) (hereinafter "October 2009 Feinberg Determination Letter to GM"). The Office of the Special Master stated that three years was appropriately long-term. Treasury conversations with the Panel (Jan. 18, 2011). For more information, see Sections B.1.b, D.3, and C.1.b.

[122] Final Report from Special Master Kenneth R. Feinberg, *supra* note 55, at 10.

[123] Salary stock was not prohibited by EESA or the IFR. In fact, the IFR specifically permitted "an arrangement under which an employee receives salary or another permissible payment in property, such as TARP recipient stock." 31 CFR § 30.1. The Special Master's use of salary stock permitted him to provide additional compensation to executives without providing that compensation in cash. ARRA's amendments to EESA prohibited incentive payments—including the payment of long-term restricted stock—that exceeded one-third of total compensation, but did not restrict the amount of "base salary." Accordingly, the use of salary stock allowed the Special Master to increase the portion of overall compensation paid in the form of stock without running afoul of EESA's prohibitions. *See* Murphy October 2010 Written Testimony, *supra* note 14.

[124] Final Report from Special Master Kenneth R. Feinberg, *supra* note 55, at 9.

100th highest-paid employees, cash compensation was limited, at most, to 45 percent of total compensation.[125]

• Salary Stock: The Special Master required that, for the 25 highest-paid employees, salary stock be redeemable only in three equal, annual installments beginning on the second anniversary of the grant.[126] For the 26th–100th highest-paid employees, salary stock was redeemable after at least one year.[127]

• Incentive Payments: For the top 25 employees, the Special Master generally required incentive payments to be paid to the top 25 employees only if the employees remained with the company for three years following the grant and only in 25 percent installments for each 25 percent of the company's TARP obligations that are repaid.[128] For the 26th–100th highest-paid employees, generally at least 50 percent of incentive payments had to be in stock redeemable only after a minimum of three years. If any cash incentive payments were awarded to employees 26–100, at least 50 percent of the cash award had to be deferred a year. The Special Master limited total incentive payments to no more than a third of all compensation, as required by EESA, and also required that they be paid only if specific observable performance metrics were met. Generally, the Special Master obliged the company's compensation committee to develop these metrics and judge whether employees met their metrics.

• Other forms of compensation: Some of the exceptional assistance companies proposed non-qualified deferred compensation, severance plans (such as golden parachutes), and other forms of compensation. The Special Master generally prohibited non-qualified deferred compensation, severance payments, and "bonus" or "retention" awards. He limited all other compensation to $25,000 and prohibited tax gross-ups.[129]

Accordingly, top 25 employees had the potential to receive cash, stock salary (fully redeemable in four years), and incentive payments (in stock redeemable after a minimum of three years). Employees 26–100 also had the potential to receive cash, stock salary (fully redeemable after at least one year), and incentive payments

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[125] *See, e.g.,* Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Michael S. Helfer, general counsel & corporate secretary, Citigroup Inc., *Proposed Compensation Structures for Certain Executive Officers and Most Highly Compensated Employees ("Covered Employees 26–100"),* at A5 (Dec. 11, 2009) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20091210%20Citigroup%20Determination.pdf) (hereinafter "December 2009 Feinberg Determination Letter to Citigroup").

[126] *See, e.g.,* October 2009 Feinberg Determination Letter to GM, *supra* note 121, at A7.

[127] *See, e.g.,* Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Robert Benmosche, president and chief executive officer, American International Group, Inc., *Proposed Compensation Structures for Certain Executive Officers and Most Highly Compensated Employees ("Covered Employees 26–100"),* at A6–A7 (Dec. 11, 2009) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20091210%20AIG%20Determination.pdf) (hereinafter "December 2009 Feinberg Determination Letter to AIG").

[128] Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Nancy A. Rae, executive vice president—human resources, Chrysler Group, LLC, *Proposed Compensation Structures for Certain Executive Officers and Most Highly Compensated Employees,* at A8, A10–A11 (Oct. 22, 2009) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20091022%20Chrysler%202009%20Top%2025%20Determination.pdf) (hereinafter "October 2009 Feinberg Determination Letter to Chrysler"); 12 U.S.C. § 5221(b)(3)(D)(i).

[129] October 2009 Feinberg Determination Letter to Chrysler, *supra* note 128, at A8–A10, A12; December 2009 Feinberg Determination Letter to Citigroup, *supra* note 125, at A8–A9, A11.

(at least 50 percent in stock, which was redeemable after three years, and no more than 50 percent in cash, of which 50 percent was to be deferred at least one year).

The Special Master, when determining the amount to award, generally targeted the 50th percentile of compensation for comparable employees at comparable companies, stating that this level was in line with the Public Interest Standard's principles of competitive and comparable pay.[130] The compensation structures of employees who had total compensation below $500,000 were automatically approved.[131] There were no set upper limits on total compensation, though EESA as amended required that for the top 25 employees, no more than one-third of their compensation could be from incentive payments.[132] In addition, for the 26th–100th highest-paid employees, at least 50 percent of total compensation had to be redeemable no earlier than three years from the date of the award.[133]

In a number of determinations, some employees who were in the top 25 had either already left the company or were leaving before the end of the year. In most such cases, these employees were allowed either their cash salary or both cash and stock salary through their termination date and $25,000 in other payments, but no other payments of any kind, such as severance or incentive payments.[134] In addition, the Special Master compelled some of the ex-

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[130] *See, e.g.,* October 2009 Feinberg Determination Letter to Chrysler, *supra* note 128, at 2.

[131] *See, e.g.,* Final Report from Special Master Kenneth R. Feinberg, *supra* note 55, at 6.

[132] 12 U.S.C. § 5221(b)(3)(D).

[133] *See, e.g.,* December 2009 Feinberg Determination Letter to GM, *supra* note 120.

[134] *See, e.g.,* Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to J. Steele Alphin, chief administrative officer, Bank of America Corporation, *Proposed Compensation Payments and Structures for Senior Executive Officers and Most Highly Compensated Employees,* at A12 (Oct. 22, 2009) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20091022%20BofA%202009%20Top%2025%20Determination.pdf) (hereinafter "October 2009 Feinberg Determination Letter to Bank of America"). As a result, the Special Master did not issue individualized compensation determinations for each of the top 25 employees at several of the institutions he supervised. For example, at Bank of America and AIG in 2009, he made such pay determinations for only 13 employees. In total, in 2009 he made individual compensation determinations only for 136 employees, which is 23 percent fewer than if he had covered the full 25 at each firm. Although the numbers increased in his 2010 determinations, he still made individual compensation decisions for fewer than 25 employees at several institutions. Letter from Patricia Geoghegan, special master for TARP executive compensation, to Ted Kaufman, chairman, Congressional Oversight Panel, *Re: Data Request,* at 5 (Nov. 18, 2010) (online at cop.senate.gov/documents/cop-121410-report-correspondence.pdf) (hereinafter "Re: Data Request").

The Office of the Special Master states that the most workable interpretation of the IFR requires including departed employees in the list of and approach to the top 25 employees rather than attempting to replace employees who had departed with the next most highly compensated employees. Treasury conversations with the Panel (Jan. 27, 2011). Question 3 of the IFR identifies the top 25 employees by reference to the previous year's salary. 31 CFR § 30.03. As a result, according to the Office of the Special Master, the list of the top 25 employees is fixed as of January 1 for the entire year, even if some of those employees then leave during the course of the year. Moreover, according to the Office of the Special Master, attempting to replace employees who had departed would not have been practical. For example, according to the Office of the Special Master, because the treatment of the top 25 employees differed from the treatment of the top 26–100 employees, moving an employee from the category of 26–100 into the top 25 would alter their compensation packages and subject them to additional restrictions during the course of the year. In the view of the Office of the Special Master, this would cause significant difficulties for covered employees at the companies. In addition, the Office of the Special Master noted that post-severance pay also came within the Office of the Special Master's jurisdiction for the top 25, and that it was therefore important to keep the list intact as of January 1. Treasury conversations with the Panel (Jan. 27, 2011).

Alternatively, the Special Master could have chosen to set pay amounts for more than just the top 25 employees. Question 16 of the IFR authorizes the Special Master to set compensation amounts for the five senior executive officers and *at least* the twenty next most highly compensated employees. 31 CFR § 30.16. As a result, the Special Master could theoretically have

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ceptional assistance companies to ensure that employees were prohibited from engaging in any derivative or other hedging transactions with regard to company stock, stating that this could blunt the effect of the long-term performance incentives.[135]

2. Determinations

a. AIG

i. 2009

The Special Master's 2009 determinations for AIG's 25 highest-paid employees made individual compensation determinations for 13 employees,[136] and reduced total compensation by 58 percent compared to 2008.[137] AIG had proposed to increase cash salaries, pay retention awards between $1,500,000 and $2,400,000, pay salary stock between $250,000 and $4,600,000, and award considerable "other" compensation in the form, for example, of perquisites, retirement income, and severance plans. AIG did not propose any incentive payments.[138] The Special Master automatically accepted any compensation package with total direct compensation of less than $500,000.[139] For five covered employees who worked at AIG

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set compensation amounts for more than just the top 25 most highly compensated employees at the exceptional assistance companies. The Office of the Special Master explained to the Panel that they never considered setting compensation amounts for more than the top 25 employees. Treasury conversations with the Panel (Jan. 27, 2011).

[135] *See, e.g.,* October 2009 Feinberg Determination Letter to AIG, *supra* note 120, at 3, A13.

[136] The remaining 12 employees in the "top 25" were those employees that had already left AIG by the time of the Special Master's determination. At most of the exceptional assistance companies, some of the top 25 employees had left the company before the Special Master made his determination for that year. As noted above, the Special Master determined the list of the "top 25" for each company as of January 1 of the relevant year and did not alter the list to replace employees that left the company with the next most highly compensated employees. Thus, departed employees were still considered part of the "top 25" by the Special Master. However, they were not individually covered. Instead, they were generally treated as a group, with the Special Master authorizing the payments made to them through the date of termination plus up to $25,000 in perquisites, but no other payments of any kind. Thus, despite being called the determinations for the 25 highest-paid employees, the Special Master made individual compensation determinations for the full 25 employees at only one of the institutions he supervised in 2009 and at only one institution in 2010. Instead, the Special Master made individual compensation determinations for only those employees who were with the institution on January 1 and remained with the institution on the date he reached his determinations. Treasury conversations with the Panel (Jan. 27, 2011); October 2009 Feinberg Determination Letter to AIG, *supra* note 120, at A5–A15, E1.

The Special Master explained this choice to treat departed employees as part of the top 25 as being the result of the most workable interpretation of the IFR. For a more complete discussion of the Special Master's rationale, see footnote 134, *supra.*

[137] Prior to this top 25 employee determination, on October 2, 2009, the Special Master released a supplemental determination approving AIG's proposed compensation for the incoming president and chief executive officer, Robert Benmosche. The approved annual compensation provided for $3,000,000 in cash, $4,000,000 in salary stock in AIG not transferable for five years, and $3,500,000 in incentive pay. Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Compensation and Management Resources Committee, American International Group, Inc., *Proposed Compensation Payments and Structure for Robert H. Benmosche,* at 4 (Oct. 2, 2009) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/RobertBenmoscheDeterminationLetter.pdf) (hereinafter "Proposed Compensation Payments and Structure for Robert H. Benmosche").

[138] During the submission process, AIG changed CEOs and business strategy, which affected the negotiations with the Special Master. Treasury conversations with the Panel (Jan. 27, 2011).

[139] One employee's compensation package was initially proposed as under $500,000 based on the expectation that the employee was going to leave AIG before the end of 2009. The employee later decided to stay, and AIG requested that the employee's pay be increased beyond the $500,000 threshold. The proposed compensation package requested that, in addition to the previously approved cash compensation, the Special Master approve $3,258,333 in salary stock (valued as of the grant date) and $1,000,000 in incentive payments. The Special Master approved the request. Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Robert Benmosche, president and chief executive officer, American International Group, Inc., *Reconsideration Request and Supplemental Determination Regarding 2009 Compensation Payments and Structures for Senior Executive Officers and Most Highly Compensated Employees,*

Financial Products, a division that was at the center of AIG's collapse in 2008, he awarded no additional compensation beyond what they had already been paid in 2009. Compared to what the employees would have received in 2009 absent the Special Master, cash salaries remained unchanged for 10 employees and decreased for three employees.[140] In total, the Special Master granted cash compensation, salary stock,[141] and incentive payments worth between $100,000 and $10,500,000. In addition, he demanded that those AIG employees who had pledged to return previously awarded 2009 bonuses actually return them.[142]

For its 26th–100th highest-paid employees in 2009, AIG proposed compensation structures divided between cash, stock, and previously existing cash retention agreements. Stock was the largest component, divided between salary stock and long-term restricted stock, and cash represented approximately 40 percent of total compensation. The Special Master, though approving AIG's proposal for stock salary, adjusted all of AIG's proposals to accord with his general timing, amount, and allocation requirements for compensation structures.[143] In addition, he required that cash awards be reduced by the amount of any previously existing cash retention agreement.[144]

ii. 2010

In 2010, AIG proposed that its 25th highest-paid employees be paid cash salaries of between $350,000 and $1,500,000; salary stock worth between $200,000 and $7,740,000; incentive awards worth 10 percent of their total compensation; and additional "other" compensation. The Special Master made individual compensation determinations for 22 employees, limited cash salaries to a maximum of $500,000, reduced the amount of salary stock payments, increased the proportion of total compensation that was given as incentive payments, and capped other forms of compensation at $25,000 compared to AIG's proposal. In addition, with one exception, the Special Master froze cash compensation at 2008 levels for covered employees at AIG Financial Products. The Special Master did, however, approve additional non-cash compensation for AIG

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at 2–3 (Dec. 21, 2009) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20091221%20AIG%20Supplemental%20Determination%20Letter.pdf) (hereinafter "Reconsideration Request and Determination on 2009 Compensation Payments and Structures for AIG Officers").

[140] October 2009 Feinberg Determination Letter to AIG, *supra* note 120, at A5–A15, E1. Unless otherwise noted, these discussions of compensation for 2009 absent the special master set forth the comparison between what the covered entity was paying the executive prior to the Special Master's determination, assuming that the entity would have continued to pay those amounts for the rest of the year, and what the covered entity paid the executive after the Special Master's determination on an annualized basis.

[141] Salary stock was given in units reflecting the value of a "basket" of four AIG subsidiaries that AIG, the Federal Reserve Bank of New York, and the Treasury determined were critical to the future of the company. October 2009 Feinberg Determination Letter to AIG, *supra* note 120, at 2, A9. Subsequently, AIG requested that salary stock instead be paid in AIG common stock. The Special Master reviewed the proposal and allowed salary stock to include common stock. Reconsideration Request and Determination on 2009 Compensation Payments and Structures for AIG Officers, *supra* note 139, at 4.

[142] October 2009 Feinberg Determination Letter to AIG, *supra* note 120, at A5–A15, E1.

[143] See Section C.1.b, *supra;* December 2009 Feinberg Determination Letter to AIG, *supra* note 127.

[144] December 2009 Feinberg Determination Letter to AIG, *supra* note 127. The Special Master did not provide the ranges of approved salaries for the 26th–100th highest-paid employees because he set only compensation structures for these employees, not actual amounts.

Financial Products employees after noting that AIG had informed him that all of the 2009 bonuses that had been pledged to be returned had actually been repaid. Total compensation for all individual employees ranged from $312,500 to $10,500,000.[145]

The Special Master largely reaffirmed for 2010 the compensation structures for the 26th–100th highest-paid employees that were authorized in 2009. AIG's proposed compensation for these employees largely adhered to these same 2009 guidelines and was approved with only minor modifications.[146]

b. Bank of America

The Special Master's determinations for Bank of America's 25 highest-paid employees 2009 compensation made individual compensation determinations for 13 employees and reduced total compensation by 62 percent from 2008 levels. Bank of America initially proposed cash compensation of either $700,000 or $950,000; stock salary of between $1,966,667 and $19,050,000; incentive payments ranging from $1,333,334 to $10,000,000; and additional "other" compensation in the form, for example, of perquisites, retirement income, and severance plans. The Special Master, in general, reduced these amounts and adjusted the awards to match his stand-

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[145] Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Robert Benmosche, president and chief executive officer, American International Group, Inc., *Proposed Compensation Structures for Certain Executive Officers and Most Highly Compensated Employees ("Covered Employees 1–25")* (Mar. 23, 2010) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20100323%20AIG%202010%20Top%2025%20Determination%20(3-23-10).pdf) (hereinafter "March 2010 Feinberg Determination Letter to AIG"). Subsequent to this determination, AIG identified two employees who had mistakenly been omitted from the 2010 determinations. AIG proposed and the Special Master approved compensation plans for these employees similar to the Special Master's other determinations. In another instance, AIG sought to increase compensation for two employees. These increases were approved, in one case because of expanded responsibilities and in the other because the increases were due to the employee earning greater than expected commissions. AIG also sought to hire three employees for which the Special Master's approval was needed on compensation. For two employees, their compensation structures and amounts were consistent with the Special Master's 2010 determination and were approved. Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Jeffrey J. Hurd, senior vice president—human resources and communications, American International Group, Inc., *Supplemental Determination Regarding 2010 Compensation Payments and Structures for Most Highly Compensated Employees* (May 18, 2010) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20100518+AIG+Letter.PDF); Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Jeffrey J. Hurd, senior vice president—human resources and communications, American International Group, Inc., *Supplemental Determination Regarding 2010 Compensation Payments and Structures for Most Highly Compensated Employees* (Aug. 3, 2010) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_ Guidance/executive-compensation/Documents/20100803%20AIG%20Supplemental%20Determination.pdf); Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Jeffrey J. Hurd, senior vice president—human resources and communications, American International Group, Inc., *Supplemental Determination Regarding Proposed Compensation Structure for Chief Risk Officer* (Nov. 8, 2010) (online at www.treasury.gov/initiatives/ financial-stability/about/Recipient_Guidance/executive-compensation/Documents/Signed%20Letter%20to%20AIG%20re%20Supplemental%20Determination%20of%20CRO%20Comp.%20(Exhibit%20I%20attached).pdf). For the last potential employee, Peter Hancock, AIG proposed for 2010 a cash salary of $1,500,000; stock salary of $2,400,000; and incentive pay of $3,600,000. The Special Master approved this proposal and agreed in principle to a substantial raise in 2011. Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Robert Benmosche, president and chief executive officer, American International Group, Inc., *Supplemental Determination Regarding Proposed Compensation Structure for Peter Hancock* (Feb. 5, 2010) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/exec_comp20100208AIGLetter.pdf).

[146] Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Robert Benmosche, president and chief executive officer, American International Group, Inc., *Proposed Compensation Structures for Certain Executive Officers and Most Highly Compensated Employees ("Covered Employees 26–100"),* at 1 (Apr. 16, 2010) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20100416%20AIG%2026-100%20Determination.pdf).

ard structure for timing, allocation, and amount.[147] Compared to what the employees would have received in 2009 absent the Special Master, cash salaries increased for nine employees, remained unchanged for two, and decreased for two.[148] Total compensation approved ranged, with one exception, from $3,318,750 to $9,900,000. The lone exception to these structures was Bank of America's CEO Kenneth Lewis, who was retiring and who all parties agreed would take $0 in compensation.[149]

Bank of America repaid its TARP obligations on December 9, 2009, removing itself from the Special Master's jurisdiction. Though Bank of America agreed to be bound by the top 25 employee restrictions through the end of 2009, it was not subject to any further Special Master determinations, including the 2009 determinations for the 26th–100th highest-paid employees.[150]

c. Chrysler

For its 25 highest-paid employees in 2009, Chrysler proposed cash salaries of between $276,672 and $603,000, salary stock ranging from $56,000 to $122,000, incentive payments of $56,001 to $122,002, and additional "other" compensation. The Special Master made individual compensation determinations for 25 employees and automatically approved compensation packages that totaled less than $500,000. The Special Master capped cash compensation at that level for all other top 25 employees. Compared to what the employees would have received in 2009 absent the Special Master, cash salaries increased for 21 employees, remained unchanged for one, and decreased for three.[151] The Special Master approved the amounts of salary stock and incentive payments proposed,[152] but adjusted the awards to match the standard structure for the timing and allocation of the compensation.[153] Total compensation ranged, with one exception, from $334,018 to $2,150,000. The exception to these structures was the CEO, who was paid through Fiat, and who all parties agreed would take $0 in compensation from Chrysler.[154]

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[147] See Section C.1.b, *supra;* October 2009 Feinberg Determination Letter to Bank of America, *supra* note 134.

[148] October 2009 Feinberg Determination Letter to Bank of America, *supra* note 134, at E1.

[149] *See* October 2009 Feinberg Determination Letter to Bank of America, *supra* note 134.

[150] Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to J. Steele Alphin, chief administrative officer, Bank of America Corporation, *Proposed Compensation Structures for Certain Executive Officers and Most Highly Compensated Employees ("Covered Employees 26–100")* (Dec. 11, 2009) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20091210%20Bank%20of%20America%20Determination.pdf) (hereinafter "December 2009 Feinberg Determination Letter to Bank of America"). For information on Bank of America's compensation practices after leaving the Special Master's jurisdiction, see Section D.4, *infra.*

[151] October 2009 Feinberg Determination Letter to Chrysler, *supra* note 128.

[152] The amount of incentive payments was later increased in response to a request by Chrysler. Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Nancy A. Rae, executive vice president—human resources, Chrysler Group, LLC, *Supplemental Determination Regarding 2009 Compensation Payments and Structures for Senior Executive Officers and Most Highly Compensated Employees* (Mar. 12, 2010) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/Chrysler%20Supplemental%20Determination%20(3–12–10).pdf).

[153] October 2009 Feinberg Determination Letter to Chrysler, *supra* note 128.

[154] October 2009 Feinberg Determination Letter to Chrysler, *supra* note 128, at A5. This was subsequently altered with the Special Master's approval to provide $600,000 in company stock redeemable on the third anniversary of the stock grant or the date of full repayment of Chrysler's TARP obligations, whichever was later. Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Nancy A. Rae, executive vice president—human resources,

Continued

In 2010, Chrysler's proposals for the top 25 highest-paid employees were largely consistent with the Special Master's determinations for 2009. Chrysler proposed cash salaries frozen at 2009 levels: stock salary of up to $180,000; incentive payments of up to $340,000; and additional "other" compensation. The Special Master made individual compensation determinations for 24 employees. The Special Master reduced "other" compensation to no more than $25,000 but approved all other proposed compensation. Total compensation ranged from $280,008 to $1,020,000.[155]

In both 2009 and 2010, Chrysler proposed compensation packages for its 26th–100th highest-paid employees that were all below $500,000 in total compensation. As a result, the Special Master automatically approved them.[156]

d. Chrysler Financial

The Special Master's determinations for Chrysler Financial are unique because the company seemed to be winding down its operations until it was bought by Toronto Dominion Bank and repaid its exceptional assistance.[157] As a result, the Special Master concluded that the traditional business metrics used to determine compensation were inappropriate.

For its top 25 employees' 2009 compensation, Chrysler Financial requested cash salaries ranging from $175,872 to $1,500,000 and additional "other" compensation. It did not request any stock salary or incentive payments. The Special Master made individual compensation determinations for 22 employees and approved the cash salaries, noting that long-term incentives are not appropriate for a company that is winding down. Compared to what the employees would have received in 2009 absent the Special Master, cash salaries increased for all 22 covered employees. Consistent with the other determinations, though, the Special Master limited "other" compensation to $25,000.[158]

Chrysler Group, LLC, *Supplemental Determination Regarding 2009 Compensation Payments for the Chief Executive Officer ("CEO")* (Dec. 23, 2009) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20091223%20 Chrysler%20 Supplemental%20Determination%20Letter.pdf).

[155] Chrysler's CEO, who received $0 compensation from Chrysler because he was being paid by Fiat, is excluded from this range. Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Nancy A. Rae, executive vice president—human resources, Chrysler Group LLC, *Proposed Compensation Structures for Certain Executive Officers and Most Highly Compensated Employees ("Covered Employees 1–25")* (Mar. 23, 2010) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20100323%20Chrysler%202010%20Top%2025%20Determination%20(3–23–10).pdf) (hereinafter "March 2010 Feinberg Determination Letter to Chrysler").

[156] Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Nancy A. Rae, executive vice president—human resources, Chrysler Group LLC, *Proposed Compensation Structures for Certain Executive Officers and Most Highly Compensated Employees ("Covered Employees 26–100")* (Dec. 11, 2009) (online at www.treasury.gov/initiatives/ financial-stability/about/Recipient_Guidance/executive-compensation/Documents/ 20091210%20Chrysler%20Determination.pdf); Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Nancy A. Rae, executive vice president—human resources, Chrysler Group LLC, *Proposed Compensation Structures for Certain Executive Officers and Most Highly Compensated Employees ("Covered Employees 26–100")* (Apr. 16, 2010) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20100416%20Chrysler%2026-100%20Letter.pdf).

[157] Congressional Oversight Panel, *January Oversight Report: An Update on TARP Support for the Domestic Automotive Industry,* at 15–16 (Jan. 13, 2011) (online at cop.senate.gov/ documents/cop-011311-report.pdf).

[158] Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Tracy Hackman, vice president, general counsel and secretary, Chrysler Financial, *Proposed Compensation Payments and Structures for Senior Executive Officers and Most Highly Compensated Employees* (Oct. 22, 2009) (online at www.treasury.gov/initiatives/financial-stability/

In 2010, Chrysler Financial's proposals for its 25 highest-paid employees were largely consistent with the Special Master's 2009 determinations. Chrysler Financial proposed increasing cash salaries 20 percent over 2009 and some additional "other" compensation. The Special Master allowed an increase in cash salaries of 10 percent and accepted Chrysler Financial's justifications for "other" compensation. The Special Master made individual compensation determinations for 25 employees. Total compensation ranged from $237,600 to $1,650,000.[159]

In both 2009 and 2010, Chrysler Financial proposed compensation packages for its 26th–100th highest-paid employees that were all below $500,000 in total compensation. As a result, the Special Master automatically approved them.[160]

e. Citigroup

In 2009, the Special Master's determinations for Citigroup's 25 highest-paid employees' compensation made individual compensation determinations for 21 employees and reduced total compensation by 70 percent from 2008 levels. Citigroup had initially proposed cash salaries of up to $800,000; stock salary of between $2,311,667 and $5,525,000; incentive payments ranging from $1,393,333 to $3,000,000; and additional "other" compensation. In addition, Citigroup proposed that some stock salary be immediately transferable. According to the Special Master, Citigroup's proposal represented a reduction in total compensation, and in almost all cases, the Special Master accepted the proposed amounts. The Special Master did, however, reject Citigroup's proposed immediate stock salary transferability and adjusted the awards to match the timing used in other determinations. Compared to what the employees would have received in 2009 absent the Special Master, cash salaries increased for 18 employees, remained unchanged for three, and decreased for none. Citigroup proposed and was authorized to award its CEO $1 in 2009 base salary. Other than the CEO, total compensation as approved ranged from $712,500 to $9,000,000.[161]

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about/Recipient_Guidance/executive-compensation/Documents/20091022%20Chrysler%20Financial%202009%20Top%2025%20Determination.pdf) (hereinafter "October 2009 Feinberg Determination Letter to Chrysler Financial").

[159] Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Tracy Hackman, vice president, general counsel and secretary, Chrysler Financial, *Proposed Compensation Structures for Certain Executive Officers and Most Highly Compensated Employees ("Covered Employees 1–25")* (Mar. 23, 2010) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20100323%20Chrysler%20Financial%202010%20Top%2025%20Determination%20(3-23-10).pdf).

[160] Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Tracy Hackman, vice president, general counsel and secretary, Chrysler Financial, *Proposed Compensation Structures for Certain Executive Officers and Most Highly Compensated Employees ("Covered Employees 26–100")* (Dec. 11, 2009) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executivecompensation/Documents/20091210%20Chrysler%20Financial%20Determination%20Letter.pdf); Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Tracy Hackman, vice president, general counsel and secretary, Chrysler Financial, *Proposed Compensation Structures for Certain Executive Officers and Most Highly Compensated Employees ("Covered Employees 26–100")* (Apr. 16, 2010) (online at www.treasury.gov/initiatives/financial-stability/ about/Recipient_Guidance/executive-compensation/Documents/20100416%20Chrysler%20Financial%2026-100%20Letter.pdf).

[161] Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Michael S. Helfer, general counsel & corporate secretary, Citigroup Inc., *Proposed Compensation Structures for Certain Executive Officers and Most Highly Compensated Employees* (Oct. 22, 2009) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/

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For its 26th-100th highest-paid employees in 2009, Citigroup proposed compensation with stock as the largest component, divided between salary stock and long-term restricted stock. Cash represented approximately 10 to 20 percent of total compensation. The Special Master altered these arrangements to match his standard structures for compensation and divided payments between cash compensation (limited to, at most, 45 percent of total compensation and capped at $500,000), salary stock, and incentive payments.[162]

On December 23, 2009, Citigroup repaid its obligations under the Targeted Investment Program (TIP), removing itself from the Special Master's jurisdiction. Citigroup agreed to abide by the Special Master's determinations for the remainder of 2009.[163]

f. General Motors

i. 2009

For GM's 25 highest-paid employees in 2009, total direct compensation declined 20.4 percent from 2008 levels. GM proposed cash salaries of up to $1,800,000; stock salary of up to $2,235,000; incentive payments of up to $1,815,000;[164] and additional "other" compensation. The Special Master made individual compensation determinations for 20 employees and restructured the awards to match his standard timing, amounts, and allocation.[165] In addition, the Special Master limited cash compensation to $500,000; approved GM's proposed stock salary amounts; and limited "other" compensation amounts to $25,000.[166] Compared to what the employees would have received in 2009 absent the Special Master, cash salaries increased for 15 employees, remained unchanged for one, and decreased for four. Total direct compensation ranged from $437,200 to $5,445,000.[167]

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executive-compensation/Documents/
20091022%20Citigroup%202009%20Top%2025%20Determination.pdf) (hereinafter "October 2009 Feinberg Determination Letter to Citigroup").

[162] December 2009 Feinberg Determination Letter to Citigroup, *supra* note 125.

[163] Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Michael S. Helfer, general counsel & corporate secretary, Citigroup Inc., *Compensation Structures for Executive Officers and Certain Most Highly Compensated Employees* (Dec. 23, 2009) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/
20091223%20Citigroup%20Supplemental%20Determination%20Letter.pdf). Unlike Bank of America, which also repaid its exceptional assistance funds, the later timing of Citigroup's repayment meant that Citigroup was bound by the Special Master's determinations for the 26th–100th highest-paid employees as well as the top 25 highest-paid employees. For information on Citigroup's compensation practices after leaving the Special Master's jurisdiction, see Section D.4, *infra*.

[164] GM later requested and was authorized to replace these payments with salary stock for some employees in consideration for their unique skills. Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Gregory E. Lau, executive director—global compensation, General Motors Company, *Supplemental Determination Regarding 2009 Compensation Structures for Senior Executive Officers and Most Highly Compensated Employees* (Dec. 23, 2009) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/
20091223%20GM%20Supplemental%20Determination%20Letter%20
(Technical%20Corrections).pdf) (hereinafter "Supplemental Determination Regarding 2009 Compensation Structures for GM Officers").

[165] October 2009 Feinberg Determination Letter to GM, *supra* note 121.

[166] The Special Master subsequently approved a GM request to allow some employees to receive "other" compensation in personal security awards and up to $350,000 in expatriate payments. Supplemental Determination Regarding 2009 Compensation Structures for GM Officers, *supra* note 164.

[167] October 2009 Feinberg Determination Letter to GM, *supra* note 121. Subsequently, GM sought to hire a new chief financial officer and requested approval of compensation totaling $6,200,000. The Special Master approved this proposal. Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Gregory E. Lau, executive director—global

For GM's 26th–100th highest-paid employees in 2009, among those who were in its automotive business, GM proposed compensation based mainly on stock. For employees who managed GM's pension fund, the proposed payments were mostly cash salary and short- and long-term bonuses. The Special Master largely approved GM's proposed structures, modifying them as needed to match the standard timing, amount, and allocation structures.[168]

ii. 2010

GM's 2010 proposals for its 25 highest-paid employees were largely consistent with the structure of the Special Master's 2009 determinations. GM requested an increase in cash salaries; stock salaries of up to $5,300,000; incentive payments of up to $2,000,000; and additional "other" payments. The Special Master made individual compensation determinations for 24 employees and reduced the proposed cash salaries, but otherwise approved GM's proposals. Total approved compensation ranged from $550,000 to $9,000,000.[169]

The Special Master largely reaffirmed for 2010 the compensation structures for the 26th–100th highest-paid employees that were authorized in 2009. GM's proposed compensation for these employees largely adhered to these same 2009 guidelines and was approved with only minor modifications.[170]

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compensation, General Motors Company, *Proposed Compensation Payments and Structure for Christopher Liddell* (Dec. 23, 2009) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20091223%20GM%20Supplemental%20Determination%20Letter.pdf).

[168] December 2009 Feinberg Determination Letter to GM, *supra* note 120.

[169] Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Gregory E. Lau, executive director—global compensation, General Motors Company, *Proposed Compensation Structures for Certain Executive Officers and Most Highly Compensated Employees ("Covered Employees 1–25")* (Mar. 23, 2010) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20100323%20GM%202010%20Top%2025%20Determination%20(3-23-10).pdf) (hereinafter "March 2010 Feinberg Determination Letter to GM"). Subsequently, GM requested and the Special Master approved an increase in compensation amounts of approximately 13 percent for two top 25 employees because of increased responsibilities. The identity of these employees was not disclosed, so the Panel cannot determine if the range of total compensation was affected. Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Gregory E. Lau, executive director—global compensation, General Motors Company, *Supplemental Determination Regarding 2010 Compensation Payments and Structures for Senior Executive Officers and Most Highly Compensated Employees* (June 23, 2010) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/Supplemental%202010%20GM%20Determination%20(6-23-10).pdf). In addition, GM also later hired a new chief executive officer, whose $9,000,000 proposed compensation was approved. Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Gregory E. Lau, executive director—global compensation, General Motors Company, *Proposed Compensation Payments and Structure for Daniel F. Akerson* (Sept. 10, 2010) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/Supplemental%202010%20 GM%20New%20CEO%20Determination%20(09-10-10).pdf). In a recent speech, GM's chief executive officer stated that he would like the Special Master to relax the pay restrictions in order to retain top employees. Daniel Akerson, chief executive officer, General Motors, *Future of General Motors* (Dec. 10, 2010) (online at www.c-spanarchives.org/program/GeneralMot). It should also be noted that due to its initial public offering, GM must abide by the same regulatory reporting standards set by the SEC as all other publicly traded companies.

[170] Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Gregory E. Lau, executive director—global compensation, General Motors Company, *Proposed Compensation Structures for Certain Executive Officers and Most Highly Compensated Employees ("Covered Employees 26–100"),* at 1 (Apr. 16, 2010) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20100416%20GM%2026-100%20Determination.pdf). GM did subsequently request that, based on GM's first quarter earnings report, the Special Master reconsider the timing of incentive payments. The Special Master denied the request. Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Mary T. Barra, vice president—human resources, General

Continued

g. GMAC/Ally Financial

i. 2009

For its 25 highest-paid employees in 2009, GMAC/Ally Financial proposed cash salaries ranging from $380,000 to $1,000,000; stock salary of between $400,000 and $5,330,000; incentive payments ranging from $400,000 to $3,170,000; and additional "other" compensation. The Special Master made individual compensation determinations for 22 employees, reduced the amounts of the awards, and restructured them to match his standard allocation, amounts, and timing. Compared to what the employees would have received in 2009 absent the Special Master, cash salaries increased for 16 employees, remained unchanged for three, and decreased for three. Total direct compensation was reduced by 86 percent from 2008 levels, to between $1,200,000 and $8,450,000.[171]

GMAC/Ally Financial's 2009 proposal for its 26th–100th highest-paid employees included cash salaries comprising between 20 and 50 percent of total compensation. Additional short-term bonuses would be awarded at the discretion of GMAC/Ally Financial's Compensation Committee based on individual unit performance. The Special Master determined that this proposal was inconsistent with the Public Interest Standard and required GMAC/Ally Financial to conform to the standard compensation structure.[172]

ii. 2010

The proposals for GMAC/Ally Financial's 25 highest-paid employees in 2010 were largely consistent with the structure of the Special Master's 2009 determinations. GMAC/Ally Financial requested cash salaries of between $400,000 and $500,000, freezing returning top 25 employees' cash salaries at 2009 levels. GMAC/Ally Financial also proposed stock salaries ranging from $900,000 to $4,937,500, incentive payments of up to one-third of total compensation, and additional "other" payments. The Special Master made individual compensation determinations for 24 employees and approved GMAC/Ally Financial's cash salaries, but reduced

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Motors Company, *Reconsideration Request Regarding Proposed Compensation Structures for Certain Executive Officers and Most Highly Compensated Employees ("Covered Employees 26–100")* (June 10, 2010) (online at www.treasury.gov/ initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/Response%20to%20GM %20Reconsideration%20Request%20(6-10-10).pdf). As noted above, the Special Master did not provide the ranges of approved salaries for the 26th–100th highest-paid employees because he set only compensation structures for these employees, not actual amounts.

[171] Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Al de Molina, chief executive officer, GMAC Financial Services, *Proposed Compensation Structures for Certain Executive Officers and Most Highly Compensated Employees* (Oct. 22, 2009) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20091022%20GMAC%202009%20Top%2025%20Determination.pdf). Subsequently, GMAC/Ally Financial hired a new chief executive officer and proposed that he receive total compensation of $9,500,000. The Special Master approved the award. Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Drema M. Kalajian, GMAC Financial Services, *Supplemental Determination Regarding 2009 Compensation Payments for the Chief Executive Officer (the "CEO")* (Dec. 23, 2009) (online at www.treasury.gov/ initiatives/ financial-stability/about/Recipient_Guidance/executive-compensation/Documents/ 20091223%20GMAC%20Supplemental%20Determination%20Letter.pdf).

[172] Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Drema M. Kalajian, GMAC Financial Services, *Proposed Compensation Structures for Certain Executive Officers and Most Highly Compensated Employees ("Covered Employees 26–100")* (Dec. 11, 2009) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/ executive-compensation/Documents/20091211%20GMAC%202009%2026%20- %20100%20Determination.pdf).

stock salaries and incentive payments. Total compensation ranged from $1,252,278 to $8,000,000.[173] GMAC/Ally Financial had also proposed that stock salary be redeemable in five equal annual installments beginning on the first anniversary of the grant, rather than the Special Master's standard four-year redemption period for stock salary of the top 25 employees. The Special Master approved the change.[174]

The Special Master largely reaffirmed for 2010 the compensation structures for the 26th–100th highest-paid employees that were authorized in 2009. GMAC/Ally Financial's proposed compensation for these employees largely adhered to these same 2009 guidelines and was approved with only minor modifications.[175]

3. Advisory Opinions

In addition to setting compensation for exceptional assistance companies, the Special Master is responsible for interpreting the executive compensation provisions of ARRA and the IFR and determining how they apply to particular facts and circumstances. This includes the authority to initiate and issue an advisory opinion to any TARP recipient about its compliance with the compensation rules. If the Special Master issues an adverse advisory opinion, the Special Master had the authority to seek to negotiate with the TARP recipient for appropriate reimbursements.[176]

To date, the Special Master has issued only one advisory opinion. On March 3, 2010, AIG wrote the Special Master requesting an opinion on the implications of AIG's sale of American Life Insurance Company (ALICO) to MetLife, Inc. AIG asserted that, upon its sale, ALICO would no longer be considered a TARP recipient, since it would no longer be majority-owned by a TARP recipient. In addition, AIG asserted that MetLife would not be a TARP recipient as a result of the transaction. The Special Master concurred with this assessment.[177]

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[173] Notably, GMAC/Ally Financial's CEO, Michael Carpenter, received no cash compensation. He received $8 million in stock salary alone. Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Drema M. Kalajian, GMAC Financial Services, *Proposed Compensation Payments and Structures for Senior Executive Officers and Most Highly Compensated Employees ("Covered Employees 1–25")* (Mar. 23, 2010) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20100323%20GMAC%202010%20Top%2025%20Determination%20(3–23–10).pdf).

[174] *Id.* GMAC/Ally Financial subsequently requested the Special Master's approval to enter into agreements with even longer redemption periods. The Special Master agreed after requiring certain minimum provisions. Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to James J. Duffy, Ally Financial Inc., *Supplemental Determination Regarding 2010 Compensation Payments and Structures* (Aug. 3, 2010) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20100803%20Ally%20Supplemental%20Determination.pdf).

[175] Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Drema M. Kalajian, GMAC Financial Services, *Proposed Compensation Structures for Certain Executive Officers and Most Highly Compensated Employees ("Covered Employees 26–100"),* at 1 (Apr. 16, 2010) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20100416%20GMAC%2026-100%20Determination.pdf).

[176] 31 CFR § 30.16(a).

[177] Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to P. Nicholas Kourides, deputy general counsel, American International Group, Inc., and Ralph R. Gonzalez, senior vice president and general counsel, American Life Insurance Company, *MetLife's Purchase of American Life Insurance Company* (Mar. 5, 2010) (online at www.treasury.gov/initiatives/financial-stability/about/Recipient_Guidance/executive-compensation/Documents/20100305%20Letter%20re%20ALICO%20transaction.pdf).

4. Look Back Review

Section 111(f) of EESA as amended by ARRA required the Secretary of the Treasury to "review bonuses, retention awards, and other compensation" paid to the 25 highest-paid employees of any TARP recipient from the day the company first received TARP funding to the date of ARRA's enactment, February 17, 2009. The Secretary was to determine whether any such compensation was not in the public interest, and if so, to seek to negotiate with the TARP recipient for its reimbursement to the federal government. The Secretary, however, was not authorized to require that the payments be returned.[178] In the IFR, the Secretary delegated this "Look Back Review" authority to the Special Master. The Special Master was required to follow the Public Interest Standard in making his determinations, but was given the discretion to determine the scope of the review, including factors such as the payment amount, the type of payment, the total compensation, or other factors.[179]

On March 23, 2010, the Special Master issued requests for information from all 419 TARP recipients covered by the Look Back Review. For each covered employee the Special Master sought the name, title, historical annual compensation information from 2007, 2008, and 2009, any applicable employment termination date, and an accounting of all compensation paid to the employee during the relevant period.[180] The Special Master, judging that any package of less than $500,000 in total annual compensation would not be against the public interest, exempted all employees with compensation below that threshold from the data request. Of the 419 reviewed companies, 240 did not have any employees with compensation in excess of $500,000.[181]

Once the remaining 179 companies had completed their data submissions, the Special Master examined the information on an employee-by-employee and company-by-company basis.[182] The Special Master focused his review on employees who had received the type of payments that were later restricted by ARRA and the IFR, such as cash bonuses, retention awards, stock grants, golden parachutes, and tax gross-ups.[183] He referred to these types of payments as "disfavored."

In total, the 179 companies reviewed paid $2.3 billion in compensation payments during the relevant period. Of that, $1.7 billion fell into the disfavored categories,[184] but the Special Master

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[178] 12 U.S.C. § 5221(f).

[179] 31 CFR § 30.16.

[180] Final Report from Special Master Kenneth R. Feinberg, *supra* note 55, at 12–13.

[181] U.S. Department of the Treasury, *The Special Master for TARP Executive Compensation Concludes the Review of Prior Payments,* at 1 (July 23, 2010) (online at www.treasury.gov/press-center/press-releases/Pages/tg786.aspx) (hereinafter "Special Master Concludes Review of Prior Payments").

[182] The Special Master's review examined a number of factors, including payment structure and allocation, aggregate amounts relative to peer firms and TARP funds received, payment timing, whether the company had repaid the TARP funds, and descriptions of incentive payments. Final Report from Special Master Kenneth R. Feinberg, *supra* note 55, at 12.

[183] Special Master Concludes Review of Prior Payments, *supra* note 181, at 2.

[184] One hundred and twenty-six companies made at least some payments in these categories. However, $1.6 billion of the $1.7 billion was paid by just 17 institutions. Those 17 institutions were American Express Company, American International Group, Inc., Bank of America Corporation, Boston Private Financial Holdings, Inc., Capital One Financial Corporation, CIT Group Inc., Citigroup Inc., JPMorgan Chase & Co., M&T Bank Corporation, Morgan Stanley, Regions Financial Corporation, SunTrust Banks, Inc., The Bank of New York Mellon Corpora-

did not determine that the payments were inconsistent with the public interest.[185] He explained this decision by noting that they were legal at the time and that most of the disfavored payments were made by firms that have since repaid their TARP funds.[186]

As a result of this finding, the Special Master did not negotiate with the companies for possible reimbursement of the offending payments. However, the Special Master proposed a "brake" policy that any company could voluntarily adopt. Under the proposed policy, the compensation committee at the company would be given the authority to restructure, reduce, or cancel pending payments to executives if the board of directors identified extraordinarily adverse circumstances that posed a threat to the company's financial viability.[187] To date, of the 17 firms responsible for the majority of the disfavored payments in the look-back review, only Goldman Sachs has publicly announced that it has adopted such a "brake" policy.[188]

5. Final Report

Before stepping down, Mr. Feinberg issued a final report in which he summarized his actions as Special Master and provided his recommendations as to how the operations of the Office of the Special Master should proceed going forward. In particular, he observed that "a more permanent Treasury official should be appointed to lead the Office [of the Special Master]." With respect to how this more permanent official should lead the Office, he made two recommendations: (1) the person should retain the core set of standards that have been applied so far such as limited cash salaries, a performance component for most compensation, a focus on long-term value creation, and a halt to excessive perquisites and other giveaways; and (2) the person should continue the constructive dialogue with the leadership, advisors, and directors of the affected firms.[189]

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tion, The Goldman Sachs Group, Inc., The PNC Financial Services Group, Inc., U.S. Bancorp, and Wells Fargo & Company. Final Report from Special Master Kenneth R. Feinberg, *supra* note 55, at 13, 21 n.106.

[185] As further discussed below, at a hearing before the Panel Mr. Feinberg nonetheless described the payments as "inappropriate," and in his final report did not conclude that the payments were appropriate or advisable. Final Report from Special Master Kenneth R. Feinberg, *supra* note 55, at 13; Congressional Oversight Panel, Testimony of Kenneth R. Feinberg, former special master for TARP executive compensation, *Transcript: COP Hearing on the TARP and Executive Compensation Restrictions* (Oct. 21, 2010) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-102110-compensation.cfm) (hereinafter "Feinberg Oral Testimony before the Panel").

[186] Special Master Concludes Review of Prior Payments, *supra* note 181, at 2–3. For further discussion of the look-back review, see Section D.2, *infra.*

[187] Final Report from Special Master Kenneth R. Feinberg, *supra* note 55, at 13–14.

[188] The Goldman Sachs Group, Inc., *Form 8–K for the Period Ended December 17, 2010: Exhibit 10.4,* at 3–4 (Dec. 23, 2010) (online at www.sec.gov/Archives/edgar/data/886982/000095012310116277/y88643exv10w4.htm).

[189] Final Report from Special Master Kenneth R. Feinberg, *supra* note 55, at 15.

D. Evaluation of Treasury's Implementation of the Executive Compensation Restrictions

1. The Interim Final Rule and the Special Master's Implementation of the Rule

a. Terms of the Interim Final Rule

As described above, the IFR laid out six principles for the Special Master to use in reaching compensation determinations: (1) minimize excessive risk; (2) maximize the capacity to repay TARP obligations; (3) appropriately allocate compensation; (4) use performance-based compensation; (5) make payments that are consistent with compensation for similar employees at similar entities; and (6) base compensation on an employee's contributions.[190]

Although these principles touch upon many of the issues covered under EESA as amended, such as the relationship between performance-based compensation and excessive risk, the IFR includes few specifics on how the rule should be implemented. As one commentator notes, this leaves a significant amount of discretion in the hands of the Special Master.[191] On the one hand, this discretion allowed the Special Master to tailor his determinations to the particular factual situations at specific institutions.[192] According to Mr. Feinberg, it also provided him with room to develop his own principles for implementing ARRA and the IFR.[193]

On the other hand, giving the Special Master such discretion obscured the decision-making process in individual determinations. As one commentator implied in testimony to the Panel, the breadth of the principles makes it difficult for the public to assess whether the Special Master has acted in accordance with the mandate.[194] In effect, Treasury's compensation principles are so amorphous that they could support a very wide range of disparate decisions.[195] In one case, the Special Master could have been acting to minimize excessive risk taking. In another, the Special Master might have aimed to provide a competitive salary. The IFR does not shine a light on how these principles should be weighed against each other.

Second, making the six principles operational is complicated, as there may be tensions between them in individual cases. For exam-

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[190] See Section B.2.b.ii, *supra*.

[191] The language in the IFR rule is vague. For example, the IFR uses the term "appropriate" 23 times, a term that invites subjective interpretation. *See generally* 31 CFR § 30. *See also* Murphy October 2010 Written Testimony, *supra* note 14, at 13 ("In my opinion, the 'public interest standard' is not an objective function, but a[n] ill-defined concept that allows too much discretion and destroys accountability for those exercising the discretion.").

[192] As discussed in more detail in Section D.3, *infra,* the Special Master did not disclose information sufficient to evaluate the extent to which he tailored his decisions.

[193] Feinberg October 2010 Written Testimony, *supra* note 60, at 3 ("Under the regulations, I had discretion to determine the appropriate weight or relevance of a particular principle depending on the facts and circumstances surrounding the compensation structure or payment for a particular executive, which I often exercised when two or more principles were in conflict in a particular situation.").

[194] *See* Murphy October 2010 Written Testimony, *supra* note 14, at 15 ("While the IFR require compensation committees to 'identify and limit the features' in pay plans that could lead executives to take excessive risks, the law stops short of defining 'excessive risk' or providing guidance on how one might distinguish excessive risk from the normal risks inherent in all successful business ventures.").

[195] The Panel raised a parallel concern in its January 2010 report on Treasury's exit strategy. In that report, the Panel noted its concerns that the three principles Treasury adopted to guide its exit strategy were overly broad such that "there is effectively no metric to determine whether Treasury's actions met its stated goals." Congressional Oversight Panel, *January Oversight Report: Exiting TARP and Unwinding Its Impact on the Financial Markets,* at 5 (Jan. 13, 2010) (online at cop.senate.gov/documents/cop-011410-report.pdf).

ple, the Special Master was charged with the competing objectives of reining in excessive risk-taking to protect the public good, while simultaneously permitting compensation sufficient to attract and retain executives who could maximize the public's investment in the exceptional assistance institutions.[196] Zealously restricting compensation in the name of prudent risk management could have the unintended impact of inhibiting the firm's growth potential and decreasing long-term shareholder value. At the same time, if the determinations were not restrictive enough, they could permit compensation that would contribute to excessive risk taking, which is precisely the problem the rules were designed to prevent. Likewise, for employees who perform outside the average, it requires particular care to ensure that payments are both performance-based and comparable to others at comparable firms.

The IFR provides essentially no guidance on how the Special Master should attempt to navigate these types of tensions.[197] Mr. Feinberg has stated in congressional testimony that striking a balance between "reining in excessive compensation" and maximizing the public's return on its investment played a determinative role in each of his rulings.[198] Yet he has offered relatively little insight to the public into how he reconciled these principles when they conflicted. In conversations with the Panel, the Office of the Special Master has noted that they had an obligation to give equal weight to all six principles primarily with a view to maximizing return for the taxpayers and preserving financial stability, as required by EESA.[199]

b. Did the Special Master Successfully Implement the Interim Final Rule?

Because the IFR endowed the Special Master with a tremendous amount of discretion in approving pay packages and structures, he was able to create metrics and processes for the implementation of the rule that were instrumental in the determinations he made. One of those decisions merits particular attention: he emphasized stock compensation relative to cash compensation.

The Special Master interpreted his mandate under the Public Interest Standard to be consistent with allocating a greater portion of compensation in stock rather than cash, so as to align the interests of the employee with the long-term interests of the institu-

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[196] Feinberg October 2010 Written Testimony, *supra* note 60, at 3 ("When making compensation determinations, these principles demanded that I strike a balance between prohibiting excessive compensation and permitting the appropriate competitive compensation to attract talented executives capable of maximizing shareholder value."). *See also* House Committee on Financial Services, Written Testimony of Kenneth R. Feinberg, special master for TARP Executive Compensation, *Compensation in the Financial Industry—Government Perspectives,* at 2 (Feb. 25, 2010) (online at www.house.gov/apps/list/hearing/financialsvcs_dem/20100224_feinberg_hfsc_testimony_(final).pdf) (hereinafter "Feinberg Testimony on Government Perspectives") ("The tension between reining in excessive compensation and allowing necessary compensation is, of course, a very real difficulty that I have faced and continue to face in making individual compensation determinations.").

[197] *See* Feinberg Testimony on Government Perspectives, *supra* note 196, at 4.

[198] Feinberg Testimony on Government Perspectives, *supra* note 196, at 2 ("Because achieving this balance is a fundamental component of the Public Interest Standard, it has played a determinative role in each of the rulings issued by the Office of the Special Master."). In his final report, Mr. Feinberg stated that, in general, he does not believe that his determinations have led to recruiting and retention problems at the firms under his jurisdiction. Final Report from Special Master Kenneth R. Feinberg, *supra* note 55, at 15.

[199] Treasury conversations with the Panel (Jan. 18, 2011). For further discussion on how the Special Master resolved conflicts between the six principles, see Section D.3, *infra.*

tion.[200] Some consultants have suggested that larger stock allocation rewards employees for creating long-term value, as opposed to short-term gains.[201]

There may be some circumstances, however, in which allocating a greater portion of compensation in the form of stock, even when it is not redeemable for years, is not consistent with the principles set forth in the IFR, including minimizing "unnecessary or excessive risks."[202] While the Special Master's use of "salarized stock" has been commended as a "brilliant idea" by some,[203] others questioned it for "sharply boost[ing] fixed compensation at many banks."[204] The Special Master has noted, however, that he was required by the IFR to allocate two-thirds of total compensation as "fixed salary," and he deemed it preferable to allocate much of that fixed compensation as stock compensation rather than cash. Nonetheless, unless employees are prohibited from receiving their stock for a significant period of time, they may be able to cash in before the impact of their activities is fully realized. A full redemption period of four years, the length selected by the Special Master for stock salary for the top 25 employees, may not provide a delay sufficient to determine whether an employee's contributions have resulted in long-term value.[205] Others have critiqued equity awards at banks more generally for incentivizing risky practices.[206] In response to Panel questions, the Office of the Special Master stated that it did not consider anything other than common stock as the optimal form of stock to use for stock salary because that was what most companies did.[207]

In addition, when companies are in the midst of financial duress, as several of the exceptional assistance firms were during much of 2008 and 2009, stock compensation may create an even stronger in-

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[200] *See, e.g.,* October 2009 Feinberg Determination Letter to AIG, *supra* note 120, at 2 ("Rather than cash, the majority of each individual's base salary will be paid in the form of stock units . . . .").

[201] Johnson Associates (a boutique compensation consulting firm), for instance, included such a recommendation in their 2002 recommendations on compensation. Johnson Associates, Inc., *Executive and Professional Compensation: Issues and Potential Directions,* at 2 (June 25, 2002) (online at www.johnsonassociates.com/2002%20Exec%20Comp%201.pdf) (hereinafter "Johnson Associates: Executive Compensation") ("Significant [stock] ownership continues to be the single best remedy for a host of executive compensation issues.").

[202] *See* 31 CFR § 30.16(b)(1).

[203] Murphy October 2010 Written Testimony, *supra* note 14, at 21.

[204] Council of Institutional Investors, *Wall Street Pay: Size, Structure, and Significance for Shareholders,* at 2 (Nov. 2010) (online at www.cii.org/UserFiles/file/CII%20White%20Paper%20-%20Wall%20Street%20Pay%20FINAL%20Nov%202010.pdf) (hereinafter "Wall Street Pay"); Congressional Oversight Panel, Written Testimony of Rose Marie Orens, senior partner, Compensation Advisory Partners, *COP Hearing on the TARP and Executive Compensation Restrictions,* at 2 (Oct. 21, 2010) (online at cop.senate.gov/documents/testimony-102110-orens.pdf) (hereinafter "Orens October 2010 Written Testimony") ("As a result of the limitations in the Interim Rules, only a modest amount (at most one-third) of each employee's compensation was actually based on performance—the portion that was provided in restricted stock. Existing pay programs would have had a far larger amount conditioned on performance."). Professor Murphy questioned whether the use of salarized stock was consistent with the "intentions" of Congress. Murphy October 2010 Written Testimony, *supra* note 14, at 2.

[205] *See* Johnson Associates: Executive Compensation, *supra* note 201, at 2 ("Longer vesting periods (i.e., 5+ years) would help link stockholder and executive interests across volatile markets and business cycles. Modest vesting periods make little sense given the size of today's awards and volatile markets.").

[206] Bebchuk & Spamann: Regulating Bankers' Pay, *supra* note 30, at 247 ("Equity-based awards, coupled with the capital structure of banks, tie executives" compensation to a highly levered bet on the value of banks' assets.").

[207] Treasury conversations with the Panel (Jan. 18, 2011). The Special Master said that for AIG, the only reason he used a "basket" of stock representing four subsidiaries was because the company requested this arrangement since it was generally believed that AIG's common stock was worthless, while there was value in the stock of the subsidiaries.

centive to engage in risky behavior.[208] Low stock prices can fall only to zero, but there is no upper limit on the amount they can increase. In other words, there is tremendous upside potential but little downside risk.[209] Furthermore, CEOs who have received a substantial portion of their compensation in stock may be reluctant to lead their institutions into bankruptcy, as a declaration of bankruptcy would wipe out the value of any stock they hold. Senior executives with substantial stock holdings therefore may exhibit a disinclination to consider filing for bankruptcy, even when doing so might be in the company's best interest.

2. Look Back Review

As discussed above, ARRA and the IFR obligated the Special Master to conduct a Look Back Review to determine if any payments made to TARP recipients from the day the company first received TARP funding to February 17, 2009—the date ARRA was passed—were "inconsistent with the purposes" of ARRA or "otherwise contrary to the public interest."[210] If he found any payments that met this standard, then he was required to "seek to negotiate" with the offending TARP recipient for "appropriate reimbursements."[211] Although the compensation rules required the Special Master to conduct this review and required him to negotiate with any TARP recipients that he found to have violated the standard, they gave him no power to demand repayment.[212] In the words of Mr. Feinberg, "[a]ll I could do under the statute was seek, beseech, request, urge."[213]

As noted above, at the conclusion of his review, the Special Master found that TARP recipients had made $1.7 billion in "disfavored" payments, but he concluded that these payments did not violate the Public Interest Standard.[214] In the Final Report of Special Master Feinberg, the Special Master notes that not finding the payments to be contrary to the Public Interest Standard "does not express a conclusion that these payments were appropriate or advisable, particularly in light of the circumstances facing the financial system generally, and some institutions specifically, in late

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[208] *See* Orens October 2010 Written Testimony, *supra* note 204, at 2 ("While delivering compensation in stock reinforces a long term focus, it does not guarantee the existence of a pay-for-performance program or a culture that properly evaluates individual risk-taking."); Bebchuk & Spamann: Regulating Bankers' Pay, *supra* note 30, at 247 ("Equity-based awards, coupled with the capital structure of banks, tie executives" compensation to a highly levered bet on the value of banks' assets."); Tuck: Pay for Banker Performance, *supra* note 28 ("[E]quity compensation tends to induce greater risk taking by aligning managers" risk preferences with those of equity holders."). *See also* Congressional Oversight Panel, Written Testimony of Ted White, strategic advisor, Knight Vinke Asset Management, and co-chair of the executive remuneration committee, International Corporate Governance Network, *COP Hearing on the TARP and Executive Compensation Restrictions,* at 4–5 (Oct. 21, 2010) (online at cop.senate.gov/documents/testimony-102110-white.pdf) ("[M]any companies use equity with associated vesting periods as a form of long-term alignment, and articulate that it satisfies investors' desire for performance. While I believe investors generally support the use of equity, and recognize certainly the retention aspects of this tool, there is less agreement on pure incentive characteristics.").

[209] *See* Murphy October 2010 Written Testimony, *supra* note 14, at 16 ("When executives receive rewards for upside risk, but are not penalized for downside risk, they will naturally take greater risks than if they faced symmetric consequences in both directions.").

[210] 12 U.S.C. § 5221(f).

[211] *See* Section C.4, *supra. See also* 12 U.S.C. § 5221(f).

[212] *See* 12 U.S.C. § 5221(f)(2); Special Master Concludes Review of Prior Payments, *supra* note 181, at 1 ("Statutory authority to review payments, but no authority to require reimbursement."); Feinberg Oral Testimony before the Panel, *supra* note 185 ("I also recognized I had no authority to force that money back.").

[213] Feinberg Oral Testimony before the Panel, *supra* note 185.

[214] See Section C.2, *supra.*

2008 and early 2009."[215] At the Panel's hearing with Mr. Feinberg, however, he conceded that the payments were "inappropriate" because they amounted to TARP recipients "taking taxpayer money and feathering their own nest." He also acknowledged that determining whether the payments contradicted the Public Interest Standard was a "very close question," but that he thought that it was "overkill" to hold recipients accountable when they "hadn't violated any regulation at the time" they made the payments.[216]

He also implied that concluding that the payments were contrary to the public interest could trigger a futile negotiation process that would require the government to seek reimbursement from Wall Street banks that had no obligation to comply with government demands. According to the Special Master, a futile negotiation process could itself be contrary to the public interest.[217] The Office of the Special Master also emphasized that at the time of the review, 11 of the 17 reviewed TARP institutions had repaid the government, specifically the larger institutions, so according to the Office of the Special Master, there was very little to actually claw back at that point. In addition, according to the Office of the Special Master, seeking a clawback from companies that were shortly to pay back the taxpayers could have had the potential to disrupt those repayments by diverting funds designated for TARP repayments. In the view of the Office of the Special Master, disrupting those repayments would not have served the public interest.[218]

The Special Master's description of the payments as "inappropriate"—or his refusal to describe them as appropriate or advisable, although not contrary to the public interest—raises at least two concerns. First, this decision may have been at odds with Congress' determination that he should make every effort to seek to claw back the payments, even if he lacked the authority to compel reimbursement.[219] Second, the fine distinctions drawn by Mr. Feinberg and the Office of the Special Master between the public interest and the appropriateness of the payment may appear excessively legalistic, and the public may view the payments as contrary to the public interest, even though the Special Master concluded that they were not. Fundamentally, the distinction between the public interest and "inappropriate"—or not necessarily appropriate—is difficult to describe.[220] Nor is the explanation that funds

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[215] Final Report from Special Master Kenneth R. Feinberg, *supra* note 55, at 13–14.

[216] Feinberg Oral Testimony before the Panel, *supra* note 185.

[217] Feinberg Oral Testimony before the Panel, *supra* note 185 ("Mr. Feinberg: It was inappropriate because they were taking taxpayer money and feathering their own nest. ... Damon Silvers, COP Panelist: [I]t can't be true that feathering your own nest, when you're a—when you're holding the public's money, is in the public's interest. That can't be true. It seems to me, what you just said is the key thing, that you felt that it was not in the public's interest to have an accurate finding here, because it would trigger a process of recapture that you felt was not in the public interest to trigger. . . . Mr. Feinberg: You say it well. You say it well. But . . . I also recognized I had no authority to force that money back.").

[218] Treasury conversations with the Panel (Jan. 27, 2011). While Citigroup remained one of the reviewed institutions with TARP funds outstanding, at that point the government stake had been converted into common equity, complicating the process of seeking clawbacks. The Office of the Special Master noted continually in its discussions with the Panel that all internal discussions about clawbacks were hypothetical, as the Special Master never deemed them to be necessary.

[219] 12 U.S.C. § 5221(f)(2) ("[T]he Secretary shall seek to negotiate with the TARP recipient and the subject employee for appropriate reimbursements to the Federal Government with respect to compensation or bonuses.").

[220] For instance, taxpayers may recognize that the payments could have violated ARRA if they had been made five months later.

might have been diverted from TARP repayments entirely satisfactory if the concern is that executives were unjustly enriched—and feathering their own nests—with taxpayer funds. Thus, the Special Master's finding may leave the impression that the government condoned the payments despite their being inappropriate, a finding that could set an undesirable precedent.

3. Transparency: The Office of the Special Master and the Office of Internal Review

a. The Office of the Special Master

The Special Master has disclosed virtually all the official documents produced by his office to date. This includes all 23 general compensation determinations, 18 supplemental determinations, one advisory opinion, five fact sheets on compensation decisions, and a final report summarizing the Office's activities. In addition, the Office of the Special Master's website has all of the laws and rules governing the Special Master's activities, relevant statements and congressional testimony by the Special Master, and documents used in the Look Back Review.[221] Moreover, all materials submitted to the Office of the Special Master are subject to disclosure under the Freedom of Information Act.[222] This repository is important to the public's understanding of the Special Master's actions, and it is to the Special Master's credit that these documents are in the public record.

This extensive disclosure has not, however, publicly presented a transparent process capable of replication. In conversations with Panel staff, the Office of the Special Master said that there was no formula for its determinations, but that they were part art and part science.[223] As a result, aspects of Special Master's process are essentially black boxes. For example, in one determination, the Special Master simply stated that "I have reviewed the Letter Agreement in light of the [Public Interest Standard] . . . I hereby determine that the compensation structure set forth in the Letter Agreement . . . will not result in payments that are inconsistent with the purposes of section 111 of EESA or TARP, or are otherwise contrary to the public interest."[224] Despite the many posted documents and because of the Special Master's wide discretion in interpreting the Public Interest Standard, it is difficult to get insight into fundamental questions about the Special Master's efforts. How, exactly, did the Special Master pick compensation amounts and structures? Did his determinations cause employees to leave? And did he permit companies to pay their employees too much?

The Special Master is required by the IFR to make determinations in accordance with the six principles of the Public Interest Standard.[225] As discussed above, though, the principles are potentially in conflict with one another.[226] For example, it may not always be possible to both reduce excessive pay and offer compensation comparable to compensation at peer firms. Aware of this po-

[221] *See* Special Master for Executive Compensation, *supra* note 119.
[222] 31 CFR § 30.16(d)(2).
[223] Treasury conversations with Panel staff (Dec. 22, 2010).
[224] Proposed Compensation Payments and Structure for Robert H. Benmosche, *supra* note 137.
[225] For a description of the six principles see Section B.1.c, *supra*.
[226] See Section B.2.b, *supra*.

tential, the IFR also gave the Special Master discretion to determine the appropriate weight to give a particular principle depending on the circumstances.[227] The Office of the Special Master stated that the principles were generally of equal importance. The Office of the Special Master also emphasized, however, that all determinations proceeded on a case-by-case basis.[228] In many determinations, the Special Master would list some of the principles that were of particular importance in that particular instance. Often the principles cited were: (1) performance-based compensation; (2) taxpayer return; and (3) appropriate allocation.[229] The Office of the Special Master has explained to Panel staff that in its view, for the top 25 employees, the other principles were largely addressed by the compensation structures mandated by EESA as amended and the IFR. According to the Office of the Special Master, the remaining principles helped guide the Special Master in the use of his discretion and so were particularly important.[230]

Additionally, the Special Master crafted a number of specific rules to translate these principles into the individual determinations he was required to make. These included provisions that total compensation for the top 25 highest-paid employees would be targeted at the 50th percentile of comparable employees at peer firms, that for the top 25 employees stock salary would be redeemable in equal annual installments from the second anniversary of the grant, with each installment redeemable a year earlier if the company repays all of its TARP obligations, and that cash salaries would generally be limited to $500,000.[231]

These rules were the core of the Special Master's work, and they were specifically formulated by the Special Master. They form the basis of virtually all of the Special Master's determinations, and the Special Master used them to judge almost all of the companies' proposals. Mr. Feinberg himself stated that the area of his work that will "hopefully have the most permanent impact" was the creation and application of these general rules.[232] That said, the Office of the Special Master provides no explanation or background to the public for how he crafted these specific rules to satisfy the Public Interest Standard principles.[233]

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[227] 31 CFR § 30.16(b). In testimony before the Panel, Mr. Feinberg noted, "Under the regulations, I had discretion to determine the appropriate weight or relevance of a particular principle depending on the facts and circumstances surrounding the compensation structure or payment for a particular executive, which I often exercised when two or more principles were in conflict in a particular situation." Feinberg October 2010 Written Testimony, *supra* note 60, at 1.

[228] Treasury conversations with the Panel (Jan. 18, 2011).

[229] *See, e.g.,* December 2009 Feinberg Determination Letter to Bank of America, *supra* note 150.

[230] Treasury conversations with Panel staff (Feb. 3, 2011). Thus, for example, the requirement that the top 25 receive no more than 1/3 of their pay in incentive payments addressed the considerations of excessive risk as well as allocation under the principles. Similarly, employee contribution was viewed in tandem with taxpayer return.

[231] *See, e.g.,* March 2010 Feinberg Determination Letter to Chrysler, *supra* note 155, at 1–2; October 2009 Feinberg Determination Letter to Citigroup, *supra* note 161, at 2. For a more complete listing of these general rules, see Section C.2, *supra.*

[232] Feinberg Testimony on Government Perspectives, *supra* note 196, at 6 ("Not only has my office promulgated generally applicable compensation principles and prescriptions, but we have shown that these principles can work in practice by calculating individual compensation packages for officials in these companies. I believe this is the most 'unique' aspect of my work and will hopefully have the most permanent impact.").

[233] *See, e.g.,* October 2009 Feinberg Determination Letter to Chrysler, *supra* note 128, at A7–A8 ("The Rule requires that the Special Master consider whether an appropriate portion of an employee's compensation is allocated to long-term incentives. Stock salary that can be liquidated too soon would not be performance-based over the relevant period to provide such a long-term

The Special Master had the discretion to craft these rules,[234] and stated that he did so only after carefully balancing the competing principles and pressures.[235] But it is insufficient for the Office of the Special Master to conduct that balancing and then simply present the results. The Office of the Special Master should publicly explain the steps they took to go from principle to rule if they wish the determinations to become a widely used model.

The 50th percentile rule provides a specific example of the questions that remain. The rule states that for the top 25 employees, the Special Master will target compensation at the 50th percentile of comparable employees at comparable firms and that it is designed to accord with the Public Interest Standard principles that compensation be comparable and be competitive enough to ensure the company maximizes return to the taxpayer.[236] Though the 50th percentile is an intuitively appealing middle ground, the Special Master presents no evidence that it is the appropriate level of pay for a firm to remain competitive. When asked about the logic behind choosing the 50th percentile, the Office of the Special Master stated that the 50th percentile seemed appropriate on the basis of the staff's experience with setting executive compensation.[237] It is possible that the target is ideal, controlling salaries while still attracting talent. It is also conceivable, though, that the best employees, those who will make the firm the most competitive, will be paid at a higher than median level and so would not be attracted to a salary at the 50th percentile. Without more information, it is impossible to determine which of these possibilities is accurate. Moreover, the Panel cannot tell if the Special Master acted arbitrarily in choosing the 50th percentile.

Similarly, for stock salary, the Special Master appealed to the Public Interest Standard principle that compensation be performance-based over the relevant performance period. The Special Master decided that for the top 25 employees, stock salary would be redeemable only in three equal annual installments from the second anniversary of the grant, with each installment redeemable a year earlier if the company repaid all of its TARP obligations.[238] But for the 26th–100th highest-paid employees, stock salary was redeemable after at least a single year.[239] The Office of the Special Master stated in conversations with Panel staff that three years was an appropriate time period for long-term compensation, but the reasoning remains opaque and, in the public record, unsupported by

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incentive. Instead, such stock salary could incentivize employees to pursue short-term results instead of long-term value creation by paying excessive benefits to employees for short-term increases in share price. Under the Company's proposal, 50% of stock salary would be redeemable by the employee after two years and the remaining 50% of stock salary would be redeemable after three years, which the Special Master has concluded is insufficient holding period to provide an appropriate long-term incentive and could result in payments that would be inconsistent with the Public Interest Standard.") (citations omitted).

[234] *See* 31 CFR § 30.16; Feinberg Oral Testimony before the Panel, *supra* note 185.

[235] Feinberg October 2010 Written Testimony, *supra* note 60, at 3 ("When making compensation determinations, these principles demanded that I strike a balance between prohibiting excessive compensation and permitting the appropriate competitive compensation to attract talented executives capable of maximizing shareholder value.").

[236] *See, e.g.,* October 2009 Feinberg Determination Letter to Citigroup, *supra* note 161, at 2, A7.

[237] Treasury conversations with Panel staff (Jan. 7, 2011).

[238] October 2009 Feinberg Determination Letter to Bank of America, *supra* note 134, at A9.

[239] December 2009 Feinberg Determination Letter to GM, *supra* note 120, at 3.

data, particularly given the wide range of opinions on what is an appropriate time period.[240]

Moreover, the Special Master did not alter his set of core rules for specific types of firms. For example, should a four-year redemption schedule for the stock salary of the top 25 employees apply equally to employees of an automotive company and employees of a large bank?[241] Similarly, a presumption that cash salaries should not exceed $500,000 might have different ramifications for hiring and retention at an institution based in New York compared to one based in Michigan: $500,000 goes a great deal farther in Detroit than it does in New York, and therefore presents a more attractive compensation package in Detroit.[242] In addition, it is not clear that these rules should be immutable; allowing them to be flexible over time may allow them to be more closely tailored to specific circumstances at specific institutions.

Equally important to the Special Master's derivation of these rules, however, is the application of the rules to the individual facts and circumstances of each exceptional assistance company. In this respect as well, the Special Master has not provided critical information to the public, and the Panel cannot determine precisely why the particular dollar amounts were awarded and why those awards varied so significantly between companies.[243] The rules, though much more concrete than the principles of the Public Interest Standard, still require the Special Master to make active choices in how to apply them. These choices were often critical to the outcomes he reached, but were never publicly explained. Even if the Special Master had been unwilling to provide detailed explanations for each individual, a few illustrative examples would have greatly improved the public's understanding. Instead, at points, the Special Master's determination letters did not note that he had made a choice at all.

For example, applying the 50th percentile rule requires the Special Master to determine which firms were comparable. In fact, the IFR specifically mentions that the Special Master could consider employees at a wide variety of types of firms, including firms that are "financially distressed or that are contemplating or undergoing reorganization."[244] The Special Master's determinations demonstrate that he sought input from a variety of sources, as each of the determinations lists a variety of sources consulted. The sources

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[240] See Section B.1.b, *supra.*

[241] The "one size fits all" nature of the rules is particularly worth questioning given the history of different pay practices at banks and other firms. For further discussion of these differences, see Section B.1.a, *supra.*

[242] For example, housing in New York is approximately two and a half times more expensive than in Detroit. Standard and Poor's, *S&P/Case-Shiller Home Prices Indices: Home Price Index Levels* (Oct. 2010) (online at www.standardandpoors.com/indices/sp-case-shiller-home-price-indices/en/us/?indexId=spusa-cashpidff- -p-us- - - -). Similarly, the Consumer Price Index was 17 percent higher in New York than in Detroit. Bureau of Labor Statistics, *Consumer Price Index Detailed Report: Data for October 2010,* at 44 (Nov. 17, 2010) (online at www.bls.gov/ro5/cpidet.htm). In total, the cost of living for Detroit is just 1 percent above the national average, while New York's cost of living is 116 percent above the national average. PayScale, *Cost of Living in New York, New York by Expense Category* (online at www.payscale.com/cost-of-living-calculator/New-York-New-York) (accessed Feb. 8, 2011); PayScale, *Cost of Living in Detroit, Michigan by Expense Category* (online at www.payscale.com/cost-of-living-calculator/Michigan-Detroit) (accessed Feb. 8, 2011).

[243] As further described below, the Special Master relied on a variety of comparators and jobs within those comparators in order to inform the determinations, and according to the Office of the Special Master, the variety in the comparators contributed to the differences in awards.

[244] 31 CFR § 30.16(b)(v).

range from professors like Lucian Bebchuk to competitive market data provided by the institution, to compensation databases, such as Equilar's *Executive Insight* database.[245]

While these lists provide some insight into the Special Master's decision-making process, the Special Master does not disclose information that is critical to evaluating the mechanisms used to select comparators. For example, the Office of the Special Master has generally said to the Panel that they looked at distressed firms, specifically other TARP recipients,[246] but did not consider market data on pay for turnaround specialists generally.[247] However, it is unclear how many distressed firms were considered or what impact they had on the Special Master's calculations. Similarly, there is no information in the determination letters on whether the Special Master dealt with situations in which few comparators were available or in which the Special Master supervised two firms that might be considered similarly situated, such as GM and Chrysler. The Office of the Special Master has explained to Panel staff that they used a wide variety of comparators and job descriptions within those comparators to come to their determinations. Where the Special Master dealt with companies with few clear peers under the circumstances—such as Chrysler or GM—the Special Master used other auto companies and multinationals. For an outsider, however, given the subjectivity of the process the Office of the Special Master employed, it would be difficult if not impossible to replicate the process and to assess whether the Office of the Special Master chose appropriate comparators.

For stock salary, the Special Master had to determine which stocks the employees would receive. In general, the Special Master provided common stock in the company, but provided no public explanation of why common stock is the optimal form of stock to give. The Office of the Special Master informed the Panel, however, that the decision to use common stock was based on the use of common stock by companies as the predominant form of equity compensation. For AIG, the Special Master mandated that stock be given in units representing a "basket" of four AIG subsidiaries. Mr. Feinberg explained in testimony to the Panel that AIG requested this arrangement because of its unique situation and that the "basket" was a compromise between the Special Master, the Federal Reserve, Treasury officials, and AIG.[248] This answer is not, however, apparent from the determination letter. The Office of the Special Master and the public could have benefited from more detailed and prompter explanations on this point.

In one instance, the Special Master did explicitly and publicly provide at least some reasoning. Chrysler Financial was in the process of winding down its business, making long-term incentives inappropriate. As a result, the Special Master decided to award pri-

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[245] *See, e.g.,* March 2010 Feinberg Determination Letter to GM, *supra* note 169.

[246] Treasury conversations with Panel staff (Jan. 7, 2011). *See also* Feinberg Oral Testimony before the Panel, *supra* note 185.

[247] Treasury conversations with the Panel (Jan. 18, 2011).

[248] Feinberg Oral Testimony before the Panel, *supra* note 185; Treasury conversations with the Panel (Jan. 18, 2011). *See also* October 2009 Feinberg Determination Letter to AIG, *supra* note 120, at A9; Steven Brill, *What's a Bailed-Out Banker Really Worth?,* New York Times (Jan. 3, 2010) (online at www.nytimes.com/2010/01/03/magazine/03Compensation-t.html).

marily cash compensation to Chrysler Financial employees.[249] This accommodation and several others, as well as the Special Master's statements,[250] demonstrate that the Special Master was considering the circumstances at each company. This consideration, however, only emphasizes that the same rules were used across many companies despite the fact that it is uncertain whether the same incentive structures will be optimal for companies as different as Bank of America and General Motors. The Special Master did not explain these choices.

It should be noted, however, that the Special Master's determination letters do provide important information, not least of which is compensation structures, types, and amounts for each individual top 25 employee. A considerable portion of that compensation is usually provided in the form of incentive payments for performance. The performance goals are typically set by the company subject to the Special Master's approval.[251] The Special Master, however, has not released these goals to the public (to the extent permitted by applicable laws). Such information is vital both to understand how executives' incentives are actually aligned and to allow the public to ensure that the goals are being rigorously enforced.

Similarly, the public's understanding depends on the Special Master's determination letters, which generally frame his decisions in terms of whether a company's proposed compensation package is consistent with the public interest. In each determination letter, the Special Master provides a brief summary of the company's proposals, but does not provide detailed information.[252] To the Panel, the Office of the Special Master provided the employee-by-employee percentage change in cash and total direct compensation between the initial company proposal and the final determination.[253] However, benchmarking the Special Master's determinations to initial company proposals is potentially problematic, as the exceptional assistance companies would have had an incentive to propose high salaries as the first step in a negotiation. Moreover, some of the changes from the initial company proposals could have been driven by factors external to the Special Master, as may have been the case with Citigroup's CEO's decision in 2009 to accept only $1 in salary.[254] Instead of just the summaries in the determination letters, the Office of the Special Master should, consistent with applicable laws, disclose information on the compensation negotiations, as it would allow the public much greater insight into the Special Master's actual impact.

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[249] *See, e.g.,* October 2009 Feinberg Determination Letter to Chrysler Financial, *supra* note 158, at A6.

[250] Feinberg Oral Testimony before the Panel, *supra* note 185 ("[E]very company has a culture and a [sic] environment that is different. I'm not sure you can answer that very legitimate question by saying that GM and automobile companies should have the same prescriptions as AIG or Bank of America. I think they're very different.").

[251] *See, e.g.,* October 2009 Feinberg Determination Letter to Bank of America, *supra* note 134.

[252] *See, e.g.,* March 2010 Feinberg Determination Letter to AIG, *supra* note 145, at A4–A5.

[253] See Annex I, *infra.*

[254] House Committee on Financial Services, Written Testimony of Vikram Pandit, chief executive officer, Citigroup, *TARP Accountability: Use of Federal Assistance by the First TARP Recipients* (Feb. 11, 2009) (online at frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:48675.pdf) ("My goal is to return Citi to profitability as soon as possible, and I have told my board of directors that my salary should be $1 per year with no bonus until we return to profitability.").

Further, Treasury has released no information to the public on whether exceptional assistance recipients complied with the IFR between its issuance in June 2009 and the release of the Special Master's first determinations in October.[255] In conversations with the Panel, Treasury stated that the exceptional assistance companies submitted certifications of their compliance for this period.[256] Without knowing more about the compensation practices of exceptional assistance recipients during this period, though, it is difficult to develop an accurate assessment of the impact of the restrictions.

The Office of the Special Master has made less information public than it could, subject to applicable laws. By contrast, the Office of the Special Master has been responsive to the Panel and has provided considerable new information that helps explain its decision-making process.[257] This information could have been included in the Special Master's public determination letters or on Treasury's website and, going forward, it should be. The Special Master's reticence in explaining his actions to the public has significantly affected the public's ability to evaluate the Special Master's actions. Moreover, the Special Master's general lack of detail in the determination letters and other publications also limits the future impact of his model, as it is difficult for an outside observer to mimic the Special Master's work. The Special Master aspired to make his work a model for others.[258] Without more transparency, though, it is unlikely that it will be.

b. Office of Internal Review

Although the Office of the Special Master has received considerable attention, it is only responsible for executive compensation at exceptional assistance companies. The executive compensation provisions of ARRA applied in total and at the peak to 760 other

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[255] Exceptional assistance recipients were required to comply with the IFR during this period, and the Special Master was permitted to take payments made during this period into consideration when he issued determinations. *See* 31 CFR § 30(a)(3)(iii) ("For the period from June 15, 2009 through the date of the Special Master's final determination, the TARP recipient will be treated as complying with this section if, with respect to employees covered by paragraph (a)(3)(i) of this section, the TARP recipient continues to pay compensation to such employees in accordance with the terms of employment as of June 14, 2009 to the extent otherwise permissible under this Interim Final Rule (for example, continued salary payments but not any bonus payments) and if, with respect to employees covered by paragraph (a)(3)(ii) of this section, the TARP recipient continues to pay compensation to such employees under the compensation structure established as of June 14, 2009, and if in addition the TARP recipient promptly complies with any modifications that may be required by the Special Master's final determination. However, the Special Master may take into account the amounts paid to an employee during such period in determining the appropriate compensation amounts and compensation structures, as applicable, for the remainder of the year.").

[256] Treasury conversations with the Panel (Jan. 21, 2011).

[257] For example, in the 2009 determinations, the Special Master included only aggregate comparison between 2008 and 2009 compensation. *See, e.g.,* October 2009 Feinberg Determination Letter to AIG, *supra* note 120, at E1 (noting that 2009 compensation decreased by 57.8 percent compared to 2008 and by 55.7 percent compared to 2007). The Special Master did not include comparisons at an individual employee level, and this information has not yet been posted on Treasury's website. In response to a Panel request, the Office of the Special Master provided information on individual percentage changes in compensation between 2007 and 2009 and between 2008 and 2009. This information is included as Annex I, *infra*.

[258] Feinberg October 2010 Written Testimony, *supra* note 60, at 3–4. *See also* House Committee on Oversight and Government Reform, Written Testimony of Kenneth R. Feinberg, special master for TARP executive compensation, *Executive Compensation: How Much Is Too Much?,* at 7 (Oct. 28, 2009) (online at oversight.house.gov/images/stories/Hearings/pdfs/20091028Feinberg.pdf) (hereinafter "Feinberg October 2009 Written Testimony") ("Hopefully, the individual final compensation determinations I make may yet be used, in whole or in part, by other companies in modifying their individual compensation practices. I believe the final compensation determinations I make and discuss in my Report are a useful model to guide others in the private marketplace.").

TARP recipients[259] whose practices are overseen by Treasury's Office of Internal Review (OIR), including several large institutions like Morgan Stanley, JPMorgan Chase, Wells Fargo, and Goldman Sachs.[260]

Despite OIR's significantly more far-reaching jurisdiction, OIR has not published a single document to the public record. To date, they have not publicly disclosed any information about their activities, and their record is completely opaque. To the Panel, OIR has indicated that, for non-exceptional assistance companies, its activities are focused on reviewing the companies' annual certifications for completeness and generally bringing companies into compliance. If, as has happened a few times, a certification is not complete, OIR informed the Panel that its primary duty is to bring the company into compliance rather than make a public record of its actions. If OIR had difficulties bringing a company into compliance, the next step would be to consult Treasury's legal department before taking further action, but OIR has not yet required such assistance from the legal department. OIR is currently working with two or three companies that it states are making good progress toward full compliance.[261]

OIR also stated to the Panel that, for exceptional assistance companies, it performs on-site reviews of payroll documentation and internal audit documentation to ensure that the companies have actually paid their employees in accordance with the Special Master's determinations. To date, OIR has concurred with the companies' assessments of their own compliance. OIR has informed the Panel that in the future, it plans to expand the scope of its reviews to examine other aspects of the Special Master's determinations, such as ensuring that the anti-hedging provisions are being followed.[262]

The Panel is troubled that a body with such significant scope has disclosed so little information to the public. Though OIR's responses to the Panel's questions are helpful, the public would benefit from more widespread disclosure of OIR's activities. Nor does OIR's stated primary objective of bringing companies into compliance provide an adequate explanation for its practice of not releasing information publicly. The omission is particularly startling given OIR's determinations that the vast majority of the companies under its jurisdiction have been compliant, information that would be of significant value to the public. OIR should publish specific information on its activities to date and should continue to do so going forward.

Furthermore, it is notable that some of OIR's reviews are still quite limited almost two years after the passage of ARRA and more than a year after the Special Master's first determinations, raising questions as to whether its enforcement of compliance with a variety of provisions under the IFR has been effective. OIR should promptly expand its oversight activities to incorporate reviews of all relevant provisions.

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[259] Treasury conversations with Panel staff (Feb. 7, 2011). As of the date of this report, the Office of Internal Review oversees the compensation practices of four exceptional assistance recipients and 660 other TARP recipients. Treasury Transactions Report, *supra* note 5. See note 5, *supra,* for more information about the monitoring performed by OIR.

[260] Geithner Response to Questions on Executive Compensation, *supra* note 5.

[261] Treasury conversations with the Panel (Jan. 21, 2011).

[262] Treasury conversations with the Panel (Jan. 21, 2011).

c. Additional Data Necessary to Evaluate the Government's Work on Executive Compensation

Given that data are critical tools for evaluation, the Office of the Special Master and the Office of Internal Review should release key data that would enable the public to evaluate the impact of their work. For example, the Special Master was tasked with balancing talent retention with reasonable pay, yet when he released his 2009 determinations, he included no information on turnover at the firms he supervised. Without this information, it is essentially impossible to evaluate whether his pay determinations were too stringent or too lenient, because their effect on talent retention is not clear. The Office of the Special Master released some turnover data in response to a request from the Panel. The letter states that 40 of the 175 total top 25 employees left exceptional assistance firms between January 1 and October 22, 2009, and another 17 left between the 2009 determination and the 2010 submissions.[263] The Office of the Special Master still has not released information on the number of employees who left exceptional assistance firms after March 23, 2010, when the Special Master released the 2010 determinations.[264] In addition, the Office of Internal Review has released essentially no information on the impact of its work. Despite the Office's supervision of more than 700 TARP recipients, there is no record of the impact of executive compensation regulations on those firms.[265] The absence of these data will make it very difficult for government agencies or other observers involved in monitoring compensation, such as pension funds like the California Public Employees' Retirement System (CALPERS) and other entities such as the Investment Company Institute, to implement best practices for monitoring and enforcement derived from the work of the Special Master and the Office of Internal Review.[266]

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[263] Re: Data Request, *supra* note 134, at 1. The 175 employees are all of those covered by the Special Master, and not only those for which he made individual compensation determinations. There were seven exceptional assistance firms on October 22, 2009, but only five were covered in the 2010 determinations due to the exit from the TARP of Bank of America and Citigroup.

[264] Some experts have speculated that turnover may increase at TARP recipients as the economy improves and a greater percentage of executives at TARP recipients are able to find alternative employment. Orens October 2010 Written Testimony, *supra* note 204, at 3.

[265] According to a SIGTARP audit, as of June 29, 2010, the Office of Internal Review had not reviewed institutions' compliance with the executive compensation restrictions. The audit states that the Office of Internal Review delayed this review until 2010 because the Special Master was working with exceptional assistance institutions in the latter half of 2009. The report also states that the office planned to review executive compensation compliance in 2010, but it has not yet released results of that review. In addition, the Office elected to terminate its reviews of Bank of America and Citigroup since those institutions repaid their "exceptional assistance." *See* Treasury's Monitoring of Compliance for Companies Receiving Exceptional Assistance, *supra* note 8, at 7–8. It is impossible, of course, to evaluate the work of the Office of Internal Review when it has not completed its review or released any of the information about the results of that review. Nonetheless, the Panel shares SIGTARP's concern that prior reviews have relied heavily on disclosures by institutions, rather than independent fact-finding by the Office of Internal Review. *Id.* at 13–14 ("Treasury should promptly take steps to verify TARP participants' conformance to their obligations, not only by ensuring that they have adequate compliance procedures but also by independently testing participants' compliance."). It would be troubling if the office's review of executive compensation were to rely similarly on disclosure by financial institutions rather than independent data-gathering and monitoring.

[266] *Cf.* Bebchuk's Fix Bankers' Pay, *supra* note 21 ("Monitoring and encouraging such compensation structures should be an important instrument in the toolkit of financial regulators.").

4. Impact

a. Evaluation of the Special Master's Work

The Special Master had an impact at the firms under his jurisdiction and potentially at institutions closely linked to those firms, but he did not have a broad enough mandate directly to alter compensation practices across the board. A measure of his potential effect on firms outside his narrow jurisdiction is the use of his recommendations as a model. Some companies have altered their pay practices in the wake of the financial crisis and ARRA's compensation provisions. At some firms, compensation levels declined, and institutions adopted a range of practices designed to address and control executive compensation: stronger clawback provisions, longer deferral periods, a greater use of stock compensation, and the use of variable pay as a means of mitigating risk tasking.[267] The Special Master also presided over a restructuring of compensation that generally provided employees with a lower percentage of guaranteed pay: his emphasis on stock compensation and performance-based compensation made pay more dependent on the performance of the individual and the institution.[268]

In evaluating the Special Master's work, it is important to note the historical structure of compensation on Wall Street. Typically, large financial institutions provided employees with a low cash base salary relative to their total compensation, with the bulk of their pay bundled in a year-end bonus comprised of both cash and stock-based compensation. According to the Office of the Special Master, this year-end bonus was often considered guaranteed compensation, regardless of actual employee performance.[269] The Special Master's work on compensation therefore took place in the context of compensation structured towards a proportionately significantly large cash incentive payment. In most instances, for the exceptional assistance recipients, the Special Master reduced total compensation, primarily through the elimination of bonuses, which, as noted above, the Office of the Special Master viewed as being functionally guaranteed rather than performance-based. But, according to the Office of the Special Master, in order to assist with employee retention and thus company viability, in many cases the Special Master increased cash base salary relative to the prior year cash base salary.[270] However, total cash compensation generally

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[267] In a study by the Council of Institutional Investors, all of the domestic banks examined, Bank of America, Citigroup, Goldman Sachs, JPMorgan Chase, Morgan Stanley, and Wells Fargo, strengthened or expanded existing clawback policies, such as by moving from a fraud-based policy to a performance-based policy and requiring clawbacks if executives operate outside the firm's risk parameters. Bank of America, Goldman Sachs, JPMorgan Chase, and Wells Fargo also increased incentive equity vesting and deferral or retention periods. At the time of the survey, only Morgan Stanley and Wells Fargo had introduced long-term performance incentives. Wall Street Pay, *supra* note 204, at 2.

[268] Feinberg October 2009 Written Testimony, *supra* note 258, at 5 ("I succeeded in almost all cases in getting the companies to agree to restructure guaranteed contracts and other forms of guaranteed compensation into prospective, performance-based compensation packages."). Although stock salary could obviously fluctuate based on the value of the company's shares and could theoretically fall to zero, it also has some characteristics of guaranteed compensation. It vests immediately and is therefore not subject to forfeiture.

[269] Treasury conversations with Panel staff (Feb. 3, 2011).

[270] Treasury conversations with Panel staff (Feb. 3, 2011). Compared to what the exceptional assistance companies were already scheduled to pay in base cash in 2009, the Special Master often increased cash compensation. In other words, he raised the cash salary that most employees were being paid in 2009. Among the institutions subject to the Special Master's determinations, excluding AIG, 12 employees' cash base salary decreased, 10 employees' cash base salary

decreased, as the compensation structure no longer included a large cash bonus.[271] The limits on cash bonuses were designed to increase the relevant executives' interest in longer-term performance, as the firm would have to thrive through more than three years that some of the stock compensation would take to become liquid in order for the executive to realize their full compensation—although, as noted above, stock compensation might also create a significant incentive for risk.

As an example of potential after-effects of the Special Master's determinations, Goldman Sachs recently adopted a long-term performance incentive plan with the intention of aligning compensation with long-term performance "in a manner that does not encourage imprudent risk taking."[272] Equilar, an executive compensation research firm, found that 34 percent of Fortune 100 companies eliminated some perquisites for CEOs in 2009 and 2010 and that total "other" compensation decreased 28.3 percent from 2008 to 2009.[273] According to Mr. Feinberg, his determinations did not result in an exodus of employees, as 84 percent of the top 25 employees covered in his 2009 compensations stayed at the institutions through his 2010 determinations.[274] Also, other government agencies like the Federal Reserve have considered the Special Master's work in developing their own guidance on executive compensation.[275]

Firms have begun to take the link between risk-taking and compensation more seriously. According to executive compensation consultant Rose Marie Orens in testimony before the Panel, "[c]ompanies have responded to TARP, SEC, Treasury guidance and current Federal Reserve/regulatory reviews by developing processes that integrate risk management with human resources and finance in incentive compensation design and retrospective reviews." Institutions have introduced measures that give them more control over the balance between risk and pay, such as clawback

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remained the same, and 101 employees' cash base salary increased from 2008 to the Special Master's determination.

[271] For certain employees at AIG's Financial Products unit, total cash compensation in 2009 included certain "grandfathered" payments, potentially causing total 2009 cash compensation for those employees to be larger than their 2008 cash compensation. Treasury conversations with Panel staff (Feb. 3, 2011).

[272] Awards granted under Goldman Sachs' Long-Term Performance Incentive Plan may include equity, cash, and other securities of Goldman Sachs and may be conditioned wholly or in part on meeting one or more performance measures relating to the firm. Awards may also include clawback provisions. The Goldman Sachs Group, Inc., *Form 8–K for the Period Ended Dec. 17, 2010* (Dec. 23, 2010) (online at sec.gov/Archives/edgar/data/886982/000095012310116277/y88643e8vk.htm).

[273] Equilar, Inc., *Equilar Study: Value of CEO Perks Drops 28.3 Percent in 2009* (June 30, 2010) (online at www.equilar.com/company/press-release/press-release-2010/equilar-study-value-of-ceo-perks-drops-28-percent-in-2009.html).

[274] Feinberg October 2010 Written Testimony, *supra* note 60, at 3. This statistic is relevant, but it is worth noting that many employees left exceptional assistance recipients between January 1, 2009 and March 23, 2010, the date of the Special Master's 2010 determinations. The time period between the 2009 determinations and the 2010 determinations was only five months. In addition, low turnover may have reflected other factors, such as poor employment opportunities in a constrained market.

[275] See Section B.2.c, *supra.* Federal Reserve staff communications with Panel staff (Jan. 27, 2011). The Federal Reserve staff noted, however, that TARP executive compensation restrictions related to a particular circumstance—the government as an equity holder in an institution—while the Federal Reserve focused on the threat to a supervised institution's safety and soundness posed by poorly balanced incentive compensation arrangements. Further, the TARP executive compensation restrictions applied only to certain individuals, while the Federal Reserve guidance focused on all individuals who could expose the institution to material amounts of risk. Federal Reserve staff communications with Panel staff (Jan. 27, 2011).

provisions. Ms. Orens views this development as a "relatively new, but essential, component of the pay design process."[276]

Despite these achievements, the overall decline in pay has been "modest," according to the Council of Institutional Investors.[277] Professor Murphy stated in testimony before the Panel that he was "not aware that the Special Master's determinations have been adopted by any companies that were not subject to his oversight."[278] According to a study by the Council of Institutional Investors, "[m]ore vigorous federal oversight of Wall Street does not appear to have changed compensation on the Street for the better." The study also found that some institutions enacted "excessive" increases in levels of fixed pay, which executives receive regardless of whether their leadership generates large profits or huge losses. None of the banks in the study "addressed adequately the importance of tying compensation to long-term value growth." The study also concluded that the government's involvement may have been even worse than ineffectual: it may have actually had a negative effect, as the "new rules resulted in a less performance-related compensation structure."[279] According to some commentators, recruitment and retention problems are a concern as well. Ms. Orens noted that for TARP firms, "the possibility of recruiting new talent at the highest levels in the firm was viewed as virtually impossible" due to the "the relatively inflexible pay programs."[280] Even at the exceptional assistance recipients, however, it is difficult to determine whether the Special Master's determinations were likely to have an effect on risk taking, performance-based compensation, employee contribution, and other elements of executive compensation. For example, while the Special Master's use of salarized stock to separate vesting and transferability was innovative in some respects,[281] it also had the effect of "sharply" increasing fixed compensation at certain institutions,[282] and could have the effect of encouraging executives to take excessive risks in hopes of capturing the upside gains in the then low-priced stock.[283]

Regardless of the effect of the Special Master's determinations on individual TARP recipients, it is clear that his determinations have not had a broad impact on executive compensation in the United States. The Council of Institutional Investors concluded that "very little of any real import has changed; on balance, pay practices have worsened."[284] There are other indications that the Special

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[276] Orens October 2010 Written Testimony, *supra* note 204, at 1.

[277] Wall Street Pay, *supra* note 204, at 2.

[278] Murphy October 2010 Written Testimony, *supra* note 14, at 21–22.

[279] Wall Street Pay, *supra* note 204, at 2.

[280] Orens October 2010 Written Testimony, *supra* note 204, at 3. *See also* Sharon Terlep and Josh Mitchell, *GM Seeks More Leeway on Pay,* Wall Street Journal (Dec. 11, 2010) (online at online.wsj.com/article/SB10001424052748704457604576011314012028354.html) ("Mr. Akerson said the auto maker has been able to attract quality executives despite the pay limits, 'but we're starting to lose them now . . . . We sold half the government position in the company. There ought to be a new perspective . . . . We have to be competitive. We have to be able to attract good people.'").

[281] Congressional Oversight Panel, Testimony of Fred Tung, Howard Zhang Faculty Research Scholar and Professor of Law, Boston University School of Law, *Transcript: COP Hearing on the TARP and Executive Compensation Restrictions* (Oct. 21, 2010) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-102110-compensation.cfm) ("I think that the salary-stock approach was a useful way to generate a longer-term perspective than what came before.").

[282] Wall Street Pay, *supra* note 204, at 19.

[283] See discussion in Section D.1.b, *supra.*

[284] Wall Street Pay, *supra* note 204, at 16.

Master failed to constrain excessive risk-taking.[285] According to Thomas Hoenig, president of the Federal Reserve Bank of Kansas City, "little has changed on Wall Street," and "[t]wo years later, the largest firms are again operating with bonus and compensation schemes that reflect success, not the reality of recent failures."[286] William Cohan, writing in *The New York Times* said, "the incentives on Wall Street have not been changed one iota."[287]

The Council of Institutional Investors maintains that the work of the Special Master is "likely to be short-lived."[288] As evidence, it cites Bank of America's 2009 statement that "[g]iven that the bank has fully repaid all TARP financing, the Compensation and Benefits Committee expects that for 2010 it will apply the principled, structured compensation framework described above under 'Overview of Our Executive Compensation Program,' consistent with our Global Compensation Principles, rather than continuing with the forms of compensation required by the Special Master."[289] This statement suggested that as soon as Bank of America was no longer obligated to follow the determinations of the Special Master, it would revert to its own compensation policies. This impression appears to be confirmed by the company's behavior. Bank of America dropped salarized stock as part of its compensation packages and elected to increase cash compensation for several of its senior executive officers. It claimed that greater levels of cash salary "better reflect the size and scope of the jobs and are more competitive with broader market practices."[290] At the time of the TARP repayments by Bank of America and Citigroup, many commentators speculated that the rush to repay TARP funds was driven by the companies' desire to be out from under the Special Master's thumb and increase compensation.[291] However, in testimony before the Panel, Mr. Feinberg noted that Congress, Secretary Geithner, and the Administration made clear "that the single most important thing I could do is get those seven companies to repay the tax-

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[285] Wall Street Pay, *supra* note 204, at 19 ("These incentive packages, which afforded big gains in pay for small increases in short-term performance, also appear to have encouraged excessively risky behavior in two other sectors where they were common: residential construction and financial services more broadly.").

[286] Thomas M. Hoenig, president, Federal Reserve Bank of Kansas City, *Too Big To Succeed,* New York Times (Dec. 1, 2010) (online at www.nytimes.com/2010/12/02/opinion/02hoenig.html?_r=1&ref=todayspaper).

[287] William D. Cohan, *Make Wall Street Risk It All,* New York Times (Oct. 7, 2010) (online at opinionator.blogs.nytimes.com/2010/10/07/make-wall-street-risk-it-all/).

[288] Wall Street Pay, *supra* note 204, at 15.

[289] Wall Street Pay, *supra* note 204, at 15. *See also* Bank of America Corporation, *Schedule 14A: Definitive Notice & Proxy Statement,* at 33 (Mar. 17, 2010) (online at www.sec.gov/Archives/edgar/data/70858/000119312510059187/ddef14a.htm) (hereinafter "Schedule 14A").

[290] *See* Schedule 14A, *supra* note 289, at 33. Of course, deviating from the course set by the Special Master may not necessarily mean that a financial institution has rejected all of the principles underlying the TARP's compensation regime. For example, despite Bank of America's insistence that it would employ its own compensation policies rather than employing the Special Master's, it emphasized its efforts to tie employee compensation to the institution's performance. *Id.* at 30 ("Our year-end compensation decisions over the last several years most clearly illustrate the direct linkage between our executive officers' pay and our company's performance.").

[291] *See, e.g.,* Associated Press, *Bank of America to Repay TARP, Raise Cash* (Dec. 2, 2009) (online at www.msnbc.msn.com/id/34245560/ns/business-us_business/); *See also* Stephen Gandel, *Citi's TARP Repayment: The Downside for a Troubled Bank,* Time (Dec. 15, 2009) (online at www.time.com/time/business/article/0,8599,1947625,00.html). In its TARP repayment, Bank of America used a combination of $19.3 billion raised from a common stock offering and $25.7 billion from excess liquidity to redeem its CPP Preferred. Debt proceeds may have comprised a portion of the "excess liquidity," although precise usage of debt proceeds is difficult to track. *See* Bank of America Corporation, *Form 10–K for the Fiscal Year Ended December 31, 2009,* at 18 (Feb 26, 2010) (online at www.sec.gov/Archives/edgar/data/70858/000119312510041666/d10k.htm).

payer" and that those stakeholders viewed repayment as a good thing, no matter the motivation behind it.[292]

b. Compensation Trends

The data collected to date do not indicate that compensation levels have been altered significantly. CEO pay at companies in the S&P 400, which is made up of firms with an average market capitalization of around $2 billion,[293] increased between 2008 and 2009, despite the widespread turmoil in financial markets.[294] Bonus pay increased 11.6 percent, and a higher percentage of CEOs received a bonus in 2009 than in 2008.[295] At S&P 500 companies, which comprise many of the largest publicly traded firms in the United States, CEO compensation fell, but bonus compensation "surged."[296] Strikingly, among both S&P 400 and S&P 500 firms, more stock options were granted in 2009 than in 2008, as companies increased the number of options they granted to their employees so as to account for lower share values.[297]

Overall, in 2009, the median pay for 12 CEOs at TARP recipients surveyed by *The New York Times* decreased 34 percent, although median cash compensation rose 20 percent.[298] Wells Fargo, a TARP recipient that was not subject to direct oversight by the Special Master, gave its CEO a 107 percent raise and increased his base salary by $4.7 million (an increase of 537 percent).[299] In 2010, pay at many TARP recipients increased, even when revenues did not. At Goldman Sachs, compensation increased by $3.7 billion, even though revenue decreased 13.3 percent. A similar disconnect between revenue and compensation occurred at Bank of America, one of the firms formerly supervised by the Special Master, where compensation as a percentage of total revenue increased by 5 percent.[300]

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[292] Feinberg Oral Testimony before the Panel, *supra* note 185.

[293] Standard & Poor's, *S&P MidCap 400,* at 2 (online at www2.standardandpoors.com/spf/pdf/index/SP_MidCap_400_Factsheet.pdf).

[294] Equilar, Inc., *Bucking Trend, S&P 400 CEO Compensation Rises in Equilar Pay Study* (May 12, 2010) (online at www.equilar.com/company/press-release/press-release-2010/bucking-trend-sp-400-ceo-compensation-rises-in-equilar-pay-study.html) (hereinafter "CEO Compensation Rises in Equilar Pay Study") ("Median S&P 400 CEO compensation rose slightly from 2008 to 2009, increasing 1.7 percent. The median CEO's pay was $3.76 million in 2009, compared to $3.7 million in 2008.").

[295] *Id.* ("Bonus payouts surged from a median of $656,531 in 2008 to a median of $732,331 in 2009, an 11.6 percent increase. 25.4 percent of CEOs received no bonus this year, compared to 27.8 percent last year.").

[296] Equilar, Inc., *Overall CEO Compensation Falls, But Bonuses Surge in S&P 500 Pay Study* (May 5, 2010) (online at www.equilar.com/company/press-release/press-release-2010/overall-ceo-compensation-falls-bonuses-surge-in-sp-500-pay-study.html) (hereinafter "Compensation Falls, But Bonuses Surge"). *See also* Devin Leonard, *Bargain Rates for a C.E.O.?,* New York Times (Apr. 3, 2010) (online at www.nytimes.com/2010/04/04/business/04comp.html?pagewanted=all) (hereinafter "Bargain Rates for a C.E.O.?") (stating that according to a study prepared for it by Equilar, the median pay package of CEOs at the largest companies for which data was available fell 13 percent, although the median cash payout increased 1 percent, the average cash payout fell 5 percent).

[297] CEO Compensation Rises in Equilar Pay Study, *supra* note 294; Compensation Falls, But Bonuses Surge, *supra* note 296.

[298] Bargain Rates for a C.E.O.?, *supra* note 296.

[299] New York Times, *The Pay at the Top* (Apr. 3, 2010) (online at projects.nytimes.com/executive_compensation?ref=business).

[300] Data accessed through SNL Financial Data Service (accessed Feb. 8, 2011). It is important to note that these compensation figures represent total compensation and benefits for all employees at Goldman Sachs and Bank of America, and therefore are affected by the inclusion of the lowest- and the highest-paid employees at the firm.

Unlike Bank of America, Citigroup (which is also no longer under the supervision of the Special Master) lowered compensation and benefits approximately 4 percent, even though it saw

A *Wall Street Journal* study on pay at top financial firms in 2010 found that pay would increase 4 percent overall in 2010; of the firms surveyed, 74 percent were expected to increase their compensation in 2010.[301] Several exceptional assistance recipients, including Citigroup and Bank of America, enacted significant compensation increases after they exited from under the Special Master's oversight. In September 2010, Citigroup decided to pay stock salary to its top 25 employees, following the construct developed by the former Special Master. Based on this plan, the annual stock salary for Citigroup's named officers ranged from $4.2 million to $9 million.[302] The company has also recently disclosed that it has awarded approximately $50 million in stock bonuses to its 15 top executives.[303] In 2010, Bank of America increased its CEO's annual base salary from $800,000 to $950,000, also increasing the annual rates for two other officers.[304] According to recent filings, Bank of America did not grant cash bonuses in 2010 for its executive officers. However, the company did issue long-term incentive awards totaling $35.7 million for four of its named executive officers, which

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a 7 percent increase in revenues in 2010. Compensation as a percentage of total revenue decreased by 3 percent.

[301] It is important to note that compensation costs should not necessarily follow revenue growth, as revenue does not take into consideration the net profitability of a company, but compensation compared to revenue is a metric often employed when analyzing pay practices. Liz Rappaport, Aaron Lucchetti, and Stephen Grocer, *Wall Street Pay: A Record $144 Billion,* Wall Street Journal (Oct. 11, 2010) (online at online.wsj.com/article/SB10001424052748704518104575546542463746562.html) (stating that revenues are expected to increase 3 percent at the surveyed firms in 2010 in comparison to 2009).

[302] This group of executive officers excludes Citigroup CEO Vikram Pandit, who did not receive a stock salary for 2010, and whose annual salary was $1 per year. Citigroup, Inc., *Form 8–K for the Period Ended September 21, 2010* (Sept. 24, 2010) (online at sec.gov/Archives/edgar/data/831001/000114420410050767/v197421_8k.htm); Citigroup Inc., *Citi Files Disclosure Regarding 2010 Compensation* (Sept. 24, 2010) (online at www.citigroup.com/citi/press/2010/100924a.htm).

[303] Common stock awards may be subject to certain vesting and/or transfer restrictions. Value based on the company's closing stock price on January 18, 2011 ($4.80). Staff compilation from SEC Form 4 disclosures for 15 top Citi executives. *See* Citigroup, Inc., *Form 4: Shirish Apte (CEO, Asia Pacific)* (Jan. 20, 2011) (online at www.sec.gov/Archives/edgar/data/831001/000118143111004505/xslF345X03/rrd297989.xml); Citigroup, Inc., *Form 4: Don Callahan (Chief Administration Officer)* (Jan. 20, 2011) (online at www.sec.gov/Archives/edgar/data/831001/000118143111004507/xslF345X03/rrd297992.xml); Citigroup, Inc., *Form 4: John C. Gerspach (Chief Financial Officer)* (Jan. 20, 2011) (online at www.sec.gov/Archives/edgar/data/831001/000118143111004509/xslF345X03/rrd297996.xml); Citigroup, Inc., *Form 4: Michael S. Helfer (General Counsel)* (Jan. 20, 2011) (online at www.sec.gov/Archives/edgar/data/831001/000118143111004512/xslF345X03/rrd297999.xml); Citigroup, Inc., *Form 4: Edward J. Kelly III (Vice Chairman)* (Jan. 20, 2011) (online at www.sec.gov/Archives/edgar/data/831001/000118143111004514/xslF345X03/rrd298002.xml); Citigroup, Inc., *Form 4: Eugene M. McQuade (CEO, Citibank, N.A.)* (Jan. 20, 2011) (online at www.sec.gov/Archives/edgar/data/831001/000118143111004517/xslF345X03/rrd298004.xml); Citigroup, Inc., *Form 4: William Mills (CEO Europe, Middle East, Africa)* (Jan. 20, 2011) (online at www.sec.gov/Archives/edgar/data/831001/000118143111004520/xslF345X03/rrd298006.xml); Citigroup, Inc., *Form 4: Jeffrey R. Walsh (Controller)* (Jan. 20, 2011) (online at www.sec.gov/Archives/edgar/data/831001/000118143111004523/xslF345X03/rrd298009.xml); Citigroup, Inc., *Form 4: Stephen Bird (CEO Asia Pacific)* (Jan. 20, 2011) (online at www.sec.gov/Archives/edgar/data/831001/000118143111004506/xslF345X03/rrd297991.xml); Citigroup, Inc., *Form 4: Michael Corbat (CEO, Citi Holdings)* (Jan. 20, 2011) (online at www.sec.gov/Archives/edgar/data/831001/000118143111004508/xslF345X03/rrd297995.xml); Citigroup, Inc., *Form 4: John P. Havens (President and Chief Operating Officer)* (Jan. 20, 2011) (online at www.sec.gov/Archives/edgar/data/831001/000118143111004510/xslF345X03/rrd297998.xml); Citigroup, Inc., *Form 4: Lewis B. Kaden (Vice Chairman)* (Jan. 20, 2011) (online at www.sec.gov/Archives/edgar/data/831001/000118143111004513/xslF345X03/rrd298001.xml); Citigroup, Inc., *Form 4: Brian Leach (Chief Risk Officer)* (Jan. 20, 2011) (online at www.sec.gov/Archives/edgar/data/831001/000118143111004515/xslF345X03/rrd298003.xml); Citigroup, Inc., *Form 4: Manuel Medina-Mora (CEO Consumer Banking for the Americas)* (Jan. 20, 2011) (online at www.sec.gov/Archives/edgar/data/831001/000118143111004518/xslF345X03/rrd298005.xml); Citigroup, Inc., *Form 4: Alberto J. Verme (CEO, Europe, Middle East, Africa)* (Jan. 20, 2011) (online at www.sec.gov/Archives/edgar/data/831001/000118143111004521/xslF345X03/rrd298007.xml).

[304] Bank of America Corporation, *Form 8–K for the Period Ended January 27, 2010* (Feb. 2, 2010) (online at sec.gov/Archives/edgar/data/70858/000119312510019661/d8k.htm).

will be granted based on the company's future performance.[305] Other TARP recipients enacted increases as well, with salaries at Wells Fargo rising to between $3.3 million and $5.6 million for four officers, increases of more than 500 percent.[306]

Beyond disclosing details on compensation plans for 2010, several companies have already begun to report changes in 2011 base salary rates for some of their senior executive officers. For example, Citigroup's CEO will have an annual base salary rate of $1.75 million for 2011, after accepting only a $1 salary in 2009 and 2010.[307] Bank of America raised the base salary for three of its named executive officers to $850,000, although its CEO, Brian Moynihan, will maintain his previous annual base salary rate of $900,000.[308] At Goldman Sachs, CEO Lloyd Blankfein's base salary for 2011 will increase more than threefold, from $600,000 to $2 million. The company also stated that it would increase the individual base salary for four other officers from $600,000 to $1.85 million.[309] The Council of Institutional Investors referred to post-crisis compensation increases as the "unintended consequences" of the government's compensation regime, which created a "loophole" by not imposing salary caps.[310] The Special Master's full impact may be unknown at this point, but Wall Street pay shows no signs of slowing.

c. Challenges of Evaluating Impact

Despite this data suggesting that the Special Master's impact has been limited, it is difficult to develop a precise assessment of the Special Master's impact because in cases where institutions changed their pay practices, it is difficult to ascribe plainly the changes to the Special Master, because there are few, if any, clear links.[311] In other cases, it may be that the Special Master's impact

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[305] Of the amount granted in long-term incentive awards, $33.0 million came in the form of performance contingent restricted stock units (PRSUs), and $2.7 million were cash-settled stock units. One-twelfth of the total cash-settled stock units will vest and become payable on the 15th day of each month beginning in March 2011 and ending in February 2012. PRSUs will be awarded based on whether Bank of America's return on assets (ROA) from the first quarter of 2011 to the fourth quarter of 2015 exceeds certain percentage benchmarks. Bank of America Corporation, *Form 8–K for the Period Ended January 25, 2011* (Jan. 31, 2011) (online at sec.gov/Archives/edgar/data/70858/000095012311007348/g25940e8vk.htm) (hereinafter "BofA Form 8–K January 25, 2011"); Bank of America Corporation, *Form 8–K: Exhibit 10.1* (Jan. 31, 2011) (online at sec.gov/Archives/edgar/data/70858/000095012311007348/g25940exv10w1.htm).

[306] Wall Street Pay, *supra* note 204, at 15.

[307] Citigroup, Inc., *Form 8–K for the Period Ended January 18, 2011* (Jan. 21, 2011) (online at sec.gov/Archives/edgar/data/831001/000114420411003391/v208667_8k.htm).

[308] BofA Form 8–K January 25, 2011, *supra* note 305. The previous base salary for the three individuals was $800,000.

[309] The Goldman Sachs Group, Inc., *Schedule 14A: Definitive Proxy Statement,* at 20 (Apr. 7, 2010) (online at www.sec.gov/Archives/edgar/data/886982/000119312510078005/ddef14a.htm); The Goldman Sachs Group, Inc., *Form 8–K for the Period Ended January 26, 2011* (Jan. 28, 2011) (online at sec.gov/Archives/edgar/data/886982/000095012311006686/y89310e8vk.htm).

[310] Wall Street Pay, *supra* note 204, at 15. However, although in many cases pay has rebounded to pre-crisis levels—or surpassed them—the structure of that pay may have changed. Mercer, *Organizations are Focusing on Measuring Performance Aligned with Pay, Mercer survey shows* (Jan. 19, 2011) (online at www.mercer.com/press-releases/1405765) ("In response to the ongoing legislative and regulatory demands regarding executive compensation, organizations are focusing efforts on measuring performance and aligning it with pay. Nearly two-thirds of companies are introducing new financial performance measures in their annual incentive programs, according to a new survey by Mercer.").

[311] For example, Morgan Stanley—which was a TARP recipient but not an exceptional assistance recipient—significantly altered its compensation practices in April 2009, but it is not apparent that those changes were related to the Special Master's work. Its 10-page report on the new plan never once mentioned the Special Master, even though it contains certain elements that mimic core elements in the design of the Special Master's determinations. Despite containing many elements that are similar to the government's compensation regime, Morgan Stanley stated that the plan was derived from the institution's "clear and well-defined 'pay-for-per-

cannot be distinguished from the effect of other government policies. For example, an institution may have set a certain compensation package as a result of ARRA, and this level was left unaltered by the Special Master.[312] Further, there are numerous factors that go into executive pay that are difficult to capture in a consistent way, and it is difficult to establish causation between compensation and multiple possible influences on that compensation.

The amounts determined by firms that are establishing pay for a particular executive in a given year may reflect concerns that that executive may leave and will be difficult to replace, returns to the firm from the department requiring the executive's area of expertise, pay at prior employers, the overall health of the firm, concerns with public relations, general trends, and any number of similar influences, in addition to the work of the Special Master. Determining the extent of the influence of the Special Master, particularly on firms that were not within the Special Master's jurisdiction, is very difficult.

Finally, even beyond the difficulties in establishing causation between the Special Master's work and larger compensation trends or influences, and as noted above, the Special Master's governing concerns were not necessarily identical to those common in the academic and policy literature. The Special Master had statutory and regulatory instructions that included themes common to the academic and policy debate, but were not necessarily identical. Risk, return, and performance are clearly germane to the debate, but many of the agency problems that animate the "managerial power" and "optimal contracting" theories are less relevant, because there was an agent with the ability to review and affect compensation: the Special Master. Further, of returns to taxpayers, market stability, and market disruption, cited by the Office of the Special Master as its primary concerns, only the first has a clear analog to more typical, non-crisis, non-TARP executive compensation discussions, in the form of returns accruing to shareholders or creditors. Although market stability has been a thread in the executive compensation debate generally, it has little role in a typical board's determination of what to pay a CEO.[313] Finally, although the IFR conferred significant discretion on the Office of the Special Master, the IFR still created limitations: for example, the Special Master could only examine structure, not dollar amounts, for employees 26–100, among other similar requirements. Such limitations mean

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formance' philosophy that pervades the Firm's culture and motivates its employees." At the same time, it is evident that the new policy was developed with the government's compensation standards in mind. The report states that its clawback provision "exceeds TARP requirements" and that in light of "recent amendments" to EESA and ARRA, it would be "reviewed" and "modified if necessary to comply with applicable law." *See* Morgan Stanley, *2009 Compensation Report: Adapting Employee Compensation to the Current Environment,* at 3, 7 (Apr. 2009) (online at www.morganstanley.com/about/ir/pdf/comp_report042009.pdf).

[312] This scenario may have occurred in several of the Special Master's 2009 determinations. Because the Special Master's cash compensation determinations applied to only two months—November and December 2009—he was in the position of reviewing a pre-existing payment plan and determining whether that plan should continue or should be altered. He had two options: he could use the final two months of 2009 to balance compensation paid in prior months, or he could leave the rate intact. See Sections C.2. and D.4.a, *supra.*

[313] *See, e.g.,* International Business Machines Company, *Schedule 14A: Definitive Proxy Statement* (Mar. 8, 2010) (online at www.sec.gov/Archives/edgar/data/51143/000110465910012758/a09-36376_1def14a.htm) (describing the Compensation Committee's approach to benchmarks, strategic objectives and performance-based compensation, contributions by the employee, and other similar factors).

that the Special Master is not perfectly comparable to a compensation committee on a corporate board. Those committees would typically be bound by a variety of regulations and principles but would nonetheless have the capacity to be creative and would not have the additional concerns conferred by a taxpayer investment weighing upon their decisions.

As a result, although the Special Master stated that he hoped to affect compensation in the market generally, it is unclear whether this was in fact a realistic goal: it is possible that the unique elements of the Special Master's involvement will outweigh the more universal concerns that contributed to his determinations. The Office of the Special Master has stated that it is, at this point, too early to tell what their contribution to the debate will be.[314] As the financial markets have only recently emerged from the acute crisis, it may take some time before some form of equilibrium appears in executive compensation practices, at which point it may be possible to evaluate the Special Master's contribution more clearly.

d. Compliance

There have also been reports that some firms did not comply with their obligations under EESA as amended and the IFR. According to the Council of Institutional Investors study, "[s]ome banks found ways around prohibitions that were explicit, namely the ban on golden parachutes." The study found that at least three TARP recipients paid "golden parachutes," which included a payment to a chief operating officer in the form of a "non-compete" payment that "was clearly a golden parachute by another name."[315] According to a 2009 SIGTARP report based on self-reported data, nearly 83 percent of surveyed institutions reported that they complied with the golden parachute provisions, and 80 percent reported that they complied with the clawback requirements.[316]

While these reports suggest that at least some institutions—either intentionally or negligently—opted not to comply with the government's compensation rules, it is impossible to determine the scope of noncompliance without more extensive reporting by the Office of the Special Master and Treasury. Current public disclosures by the Special Master include a substantial amount of critical information, but they do not detail the Office's ongoing monitoring efforts and findings. Treasury's Office of Internal Review has not made any information on its actions or findings available to the public. To the Panel, OIR noted that it reviews non-exceptional assistance recipients only for the completeness of their self-certifications. For exceptional assistance recipients, OIR does conduct onsite audits of payroll and internal audit information to ensure compliance with the Special Master's pay amounts. This review, how-

[314] Treasury conversations with the Panel (Jan. 18, 2011). It is also worth noting that there may be unintended consequences from the Special Master's work that have yet to be determined: as discussed above, efforts to align more closely executive compensation and company performance contributed substantially to the increase in executive pay over the 1980s and 1990s. See Section B.1.a, *supra*.

[315] Wall Street Pay, *supra* note 204, at 15.

[316] SIGTARP Survey Provides Insights on Compliance, *supra* note 8, at 9. These data should be considered in light of the fact that in both cases, the bulk of the remaining respondents did not specifically address compliance with the provision. In other words, no institutions reported that they choose not to comply with the provisions.

ever, examines only the amounts paid, and does not examine whether the companies complied with other provisions of the Special Master's determinations, such as the requirement that employees not engage in any derivative or other hedging transactions with regard to company stock. Without this information, the Panel cannot assess whether other institutions failed to abide by the rules or whether the rules had any impact at all at the non-exceptional assistance TARP recipients.

5. Missed Opportunities

In the early days of his tenure, the Special Master told *Reuters* that he anticipated that his pay scheme could be used as a "model" for pay rules used by other government agencies in the future.[317] He made similar statements in his testimony before the Panel: "I believe that these standards could help lay the groundwork for appropriate compensation structures at all financial institutions, regardless of whether those institutions are receiving financial assistance from the government."[318] In statements to Panel staff, Treasury echoed this sentiment, expressing its view that it hoped to use publicly available advisory opinions to create a body of best practices that would serve as non-binding precedents for financial firms.[319]

Measured against the initial expectations that executive compensation practices for TARP recipients might have a long-term effect on a broad swath of institutions, the data suggest that the Special Master's ambitious aspirations are unlikely to be fulfilled.[320] In his response to a question at the Panel's executive compensation hearing in October 2010, Mr. Feinberg said that if the culture of pay on Wall Street has not changed, "I think that our work has not been successful and it's not being followed and it is a problem."[321] Similarly, when probed by the Panel, Secretary Geithner concurred, adding that "I would not claim that we've seen enough change in the structure of compensation."[322] As noted above, it is possible that in the future the Special Master's work will be seen to have a more broad-ranging impact, but at present, that does not appear to be the case. In conversations with Panel staff, the Office of the Special Master stated that it is too early to tell.[323]

The Special Master himself has cautioned against extending the Office's jurisdiction to other TARP recipients and emphasized the uniqueness of his situation and the narrowness of his determinations. In the Final Report, he stated that he might have created a "useful model" for future determinations made by future Special

[317] Steve Eder, *U.S. "Pay Czar" Feinberg Using Formulas, Not Caps,* Reuters (Sept. 25, 2009) (online at www.reuters.com/article/idUSTRE58O3KP20090925).

[318] Feinberg October 2010 Written Testimony, *supra* note 60, at 3–4. *See also* Feinberg October 2009 Written Testimony, *supra* note 258, at 7 ("Hopefully, the individual final compensation determinations I make may yet be used, in whole or in part, by other companies in modifying their individual compensation practices. I believe the final compensation determinations I make and discuss in my Report are a useful model to guide others in the private marketplace.").

[319] Treasury conversations with Panel staff (June 8, 2009).

[320] *See* Orens October 2010 Written Testimony, *supra* note 204, at 3 ("The Special Master's actions may have supported the public interest and attempted to lower the tension between Wall Street and Main Street, but most companies would not view them as a model for effective incentive compensation.").

[321] Feinberg Oral Testimony before the Panel, *supra* note 185.

[322] Geithner Oral Testimony before the Panel, *supra* note 44.

[323] Treasury conversations with the Panel (Jan. 18, 2011).

Masters, but he cautioned against extending the Office's jurisdiction.[324]

Despite the many observers—ranging from government agencies to corporate compensation committees to pension funds—who might be interested in using the Special Master's work on compensation as a data point for developing their own compensation policies, it will be difficult for them to do so. In the absence of more disclosure about the Special Master's decision-making process and more data on the impact of the Special Master's work on the companies he supervised, the work of the Office will not serve as a detailed guide to best practices on executive compensation, as was once hoped. What seemed an opportunity for sweeping reform now seems likely to leave a far more modest legacy.

E. Conclusions and Recommendations

In the more than two years since EESA was passed, exceptional assistance institutions have altered their cash compensation and their compensation structures. The Office of the Special Master has been at the center of these two reforms. In 2009, the year of the Special Master's first determinations the average percentage decrease in overall compensation was 54.8 percent (with a range between 24.2 percent and 85.6 percent) for the top 25 employees. The Special Master also restructured compensation at several of the institutions he supervised, as stock compensation came to play a more significant role in their compensation packages, and employees generally received a lower percentage of their pay in the form of guaranteed compensation. Furthermore, the Special Master demanded that AIG repay certain bonuses paid to its employees, and when certain employees pledged to do so, the Special Master ensured that AIG returned all of the money it pledged to return. The Special Master achieved these changes in a complex environment in which he was constantly operating in the media's spotlight.

Furthermore, the Special Master's Look Back Review of payments made by TARP recipients prior to February 17, 2009 covered 419 firms and analyzed $2.3 billion in payments. In the Final Report, Mr. Feinberg offered a set of recommendations that could be adopted by compensation committees, including a recommendation that firms restructure existing payment agreements in the event of a crisis situation. In the wake of Dodd-Frank, as agencies like the Federal Reserve and the FDIC begin the work of drafting rules on executive compensation, these recommendations may prove useful.

Despite these achievements, the public knows very little about how the government has implemented the compensation rules or about the impact of these measures. The public has been deprived of this information because Treasury has neglected to disclose critical information about its implementation of the compensation rules. Of particular concern are the unanswered questions about monitoring of the 767 TARP recipients that were covered by the compensation rules and overseen by the OIR, including several

[324] Final Report from Special Master Kenneth R. Feinberg, *supra* note 55, at 15. It is worth noting in this context that in communications with Panel staff, Federal Reserve staff explained that they had included the Special Master's work as a source for their executive compensation guidance, but kept the particular context for the Special Master's work in mind as they did so. See note 275, *supra*.

large institutions like Morgan Stanley and Goldman Sachs. How many employees have been covered by the government's oversight? How many employees have had their pay altered as a result of the government's involvement? How has the government's involvement affected compensation at these institutions? Has it affected the structure of compensation in addition to the level of compensation? How many employees have left TARP recipients as a result of the compensation rules?

Unlike the Office of Internal Review, the Special Master has made a substantial amount of summary information on his determinations publicly available. The Office of the Special Master also provided considerable additional information to the Panel, though the information could, and should, have been included in public determination letters or on Treasury's website. Important information still remains obscured from public view, such as the specific comparators used as the basis of his determinations. Due to the lack of disclosure, it would be very difficult, if not impossible, for any board of directors, shareholder, or government agency to use the Special Master's public determination letters as the basis for mimicking those decisions.

While a comprehensive assessment of the government's work will not be possible until more information is released, recent data suggest that the government's intervention in executive compensation through the TARP ultimately may have little effect on executive compensation practices. Pay has rebounded at many Wall Street firms although the structure of compensation has changed in some cases. Although the Special Master may have successfully achieved a key set of goals—including following the specific guidelines set forth in the IFR and reducing cash compensation at the companies supervised during the relevant period—the Special Master's effect on long-term compensation practices seems likely to be more limited than initially hoped.

Regardless, the government's work is not done. Ms. Geoghegan will continue to oversee compensation determinations at exceptional assistance firms that have not yet repaid their TARP assistance. While she will continue to oversee four institutions, 660 TARP institutions that were subject to the compensation rules remain subject to ongoing government oversight by Treasury's Office of Internal Review, and bank regulators will continue to oversee pay at still more institutions.

The Office of the Special Master and the Office of Internal Review have opportunities to incorporate lessons learned from the past two years. As the new Special Master, Ms. Geoghegan has the opportunity to issue strong, thoughtful determinations for employees at the institutions she continues to supervise. The Office of the Special Master can also become more transparent, so that more companies and individuals can gain an understanding of its decision-making process. Similarly, the Office of Internal Review has an opportunity to share data on its efforts to ensure that TARP recipients comply with compensation rules. Improved transparency will enable taxpayers to reach a more informed view of the successes and failures of the government's regulation of compensation and will increase the likelihood that other institutions will employ

the Special Master's prescriptions and principles as a model for compensation practices in the future.

The Panel recommends that Treasury, and the Office of the Special Master specifically, address the following issues:

- **Transparency and Accountability**

— *Non-exceptional assistance institutions:* Treasury's Office of Internal Review should issue a report on the compensation practices of TARP recipients who did not fall under the Special Master's purview. The report should include details on pay practices at these institutions since the IFR was issued, including the number of employees covered, the number of employees who have had their compensation altered as a result of the Office's involvement, the impact on cash compensation, the impact on compensation structure, and employee turnover. It should also note instances in which the Office of Internal Review discovered violations of the IFR and steps that the Office took to remedy to these situations.

— *Release of information on compensation paid between the passage of the IFR and the Special Master's release of his first determinations:* The Office of the Special Master should release data on compensation paid to exceptional assistance recipients during this four-month period. The Special Master, in consultation with the Office of Internal Review, should release a statement on whether the exceptional assistance institutions complied with the provisions of the IFR during this period.

— *Turnover data:* Given that part of the Special Master's mandate was to balance reasonable pay levels with talent retention, the Office of the Special Master should release data on employee turnover at exceptional assistance recipients. These data should include turnover data for exceptional assistance firms for 2009 and 2010, as well as comparative data for prior years. It should also include turnover data for other similar firms.

— *Individual pay comparison data:* In response to a Panel request, the Office of the Special Master provided the Panel with data on compensation changes for covered employees between 2008 and 2009 and between 2007 and 2009. The Office of the Special Master should make individual pay data available for several years prior to 2007 as well, and should also post this information on Treasury's website, including the data in terms of values and percentages.

— *Detailed information on performance incentives:* Consistent with applicable laws, the Special Master should release more information to the public about the performance targets used as the basis for performance-based compensation. Without this information, it is impossible to determine whether institutions are adequately linking employee performance to employee compensation. The Special Master should also release information on whether any performance-based compensation was improperly provided to employees who did not meet performance targets.

— *Company proposals:* When the Special Master publishes a determination letter, the letter should also include detailed in-

formation on what the exceptional assistance companies proposed compensation packages contained.

— *Specific rationales for determination decisions:* The determination letters often do not explain how the Special Master arrived at or applied the compensation structures used to evaluate companies' proposals. Further discussion of the Special Master's decision-making process beyond boilerplate language is necessary to determine the appropriateness of compensation. In addition, award amounts above certain amounts required the Special Master's specific authorization, which was occasionally given. However, the rationale for these outlier decisions was not provided.

— *The future of the Office of the Special Master:* Treasury should make a formal public announcement of its plans for the Office of the Special Master, including the anticipated release date of its 2011 determinations.

— *Office of Internal Review monitoring:* The Office of Internal Review should publicly disclose specific information on its activities in monitoring both exceptional and non-exceptional assistance institutions, including the frequency of such monitoring, whether it initiates independent investigations into a company's pay practices or relies solely on factual information provided by the TARP recipient, its process for communicating its findings to the institutions, and enforcement mechanisms it pursues to ensure that the institutions comply with ARRA and the IFR. Finally, the Office should disclose its plans for monitoring compensation at these institutions in the future.

— *Expand scope of Office of Internal Review monitoring:* The Office of Internal Review should promptly expand its oversight activities to incorporate reviews of all relevant provisions of EESA as amended, the IFR, and the Special Master's determinations.

— *Lessons Learned and Best Practices:* The extraordinary legislation and regulations enacted during the financial crisis provided Treasury with unprecedented authority to intervene with private institutions' compensation practices. Given these circumstances, it is important that Treasury make publicly available a guide on the lessons it has learned during this process, including best practices for executive compensation.

— *Publish a summary report:* Treasury should release a report on executive compensation at all TARP recipients, akin to the Special Master's Final Report, including information on compensation changes at *non-exceptional assistance institutions* and comparative data on institutions that did not receive TARP assistance.

— *Publish a follow-up report:* The Office of the Special Master should release a follow-up to the Final Report of Special Master Feinberg that discusses the Office of the Special Master's decision-making process. The report should discuss how he responded to different circumstances at the companies and how the Special Master balanced competing principles.

ANNEX I: SALARY TABLES

FIGURE 1: AMERICAN INTERNATIONAL GROUP, INC. 2009 PROPOSAL v. EXHIBIT I

Employee ID	Percentage Change in Cash Salary from Proposal to Exhibit I	Percentage Change in Total Direct Compensation from Proposal to Exhibit I
AIGa	(89.5)	(96.6)
AIGb	(86.8)	(95.8)
AIGc	(84.8)	(95.1)
AIGd	(47.4)	(94.0)
AIGe	(56.1)	(91.1)
AIGf	(77.5)	(91.0)
AIGg	(57.5)	(87.9)
AIGh	(65.1)	(80.8)
AIGi	(46.2)	(25.0)
AIGj	0.0	0.0
AIGk	(73.1)	9.2
AIGl	(75.0)	18.8
AIGm	(74.6)	32.8

FIGURE 2: BANK OF AMERICA 2009 PROPOSAL v. EXHIBIT I

Employee ID	Percentage Change in Cash Salary from Proposal to Exhibit I	Percentage Change in Total Direct Compensation from Proposal to Exhibit I
BoAa	(100.0)	(100.0)
BoAb	(47.4)	(67.0)
BoAc	(41.1)	(59.4)
BoAd	(42.3)	(52.5)
BoAe	(28.6)	(51.8)
BoAf	(28.6)	(50.0)
BoAg	(57.1)	(38.7)
BoAh	(49.6)	(36.8)
BoAi	(47.4)	(33.3)
BoAj	(47.4)	(32.9)
BoAk	(41.1)	(27.6)
BoAl	(42.3)	(18.3)
BoAm	(41.1)	(17.0)

FIGURE 3: CHRYSLER 2009 PROPOSAL v. EXHIBIT I

Employee ID	Percentage Change in Cash Salary from Proposal to Exhibit I	Percentage Change in Total Direct Compensation from Proposal to Exhibit I
ChryslerA	(100.0)	(16.8)
ChryslerB	3.5	(13.6)
ChryslerC	2.3	(8.8)
ChryslerD	2.6	(7.9)
ChryslerE	2.2	(7.5)
ChryslerF	(6.4)	(5.2)
ChryslerG	(13.7)	(4.1)
ChryslerH	2.2	(4.0)
ChryslerI	8.5	(2.5)
ChryslerJ	(8.5)	(2.1)
ChryslerK	3.2	(0.8)
ChryslerL	2.0	(0.4)
ChryslerM	1.7	(0.3)
ChryslerN	1.7	(0.3)
ChryslerO	1.2	(0.2)
ChryslerP	1.2	(0.2)
ChryslerQ	0.9	(0.2)
ChryslerR	1.1	(0.2)

FIGURE 3: CHRYSLER 2009 PROPOSAL v. EXHIBIT I—Continued

Employee ID	Percentage Change in Cash Salary from Proposal to Exhibit I	Percentage Change in Total Direct Compensation from Proposal to Exhibit I
ChryslerS	1.1	(0.2)
ChryslerT	1.1	(0.2)
ChryslerU	0.8	(0.2)
ChryslerV	0.0	0.0
ChryslerW	11.1	8.8
ChryslerX	56.9	41.7
ChryslerY	115.3	54.7

FIGURE 4: CHRYSLER FINANCIAL 2009 PROPOSAL v. EXHIBIT I

Employee ID	Percentage Change in Cash Salary from Proposal to Exhibit I	Percentage Change in Total Direct Compensation from Proposal to Exhibit I
ChryslerFinA	0.0	(50.8)
ChryslerFinB	0.0	(48.3)
ChryslerFinC	0.0	(48.2)
ChryslerFinD	0.0	(47.7)
ChryslerFinE	0.0	(47.0)
ChryslerFinF	0.0	(46.7)
ChryslerFinG	0.0	(46.3)
ChryslerFinH	0.0	(45.4)
ChryslerFinI	0.0	(42.9)
ChryslerFinJ	0.0	(42.4)
ChryslerFinK	0.0	(42.1)
ChryslerFinL	0.0	(41.3)
ChryslerFinM	0.0	(41.3)
ChryslerFinN	0.0	(41.0)
ChryslerFinO	0.0	(40.1)
ChryslerFinP	0.0	(35.2)
ChryslerFinQ	0.0	(5.5)
ChryslerFinR	0.0	(5.3)
ChryslerFinS	0.0	(5.0)
ChryslerFinT	0.0	(4.5)
ChryslerFinU	0.0	(4.5)
ChryslerFinV	0.0	(2.0)

FIGURE 5: CITIGROUP INC. 2009 PROPOSAL v. EXHIBIT I

Employee ID	Percentage Change in Cash Salary from Proposal to Exhibit I	Percentage Change in Total Direct Compensation from Proposal to Exhibit I
CitiA	(100.0)	(100.0)
CitiB	35.7	(40.7)
CitiC	0.0	0.0
CitiD	0.0	0.0
CitiE	(37.5)	0.0
CitiF	0.0	0.0
CitiG	0.0	0.0
CitiH	0.0	0.0
CitiI	0.0	0.0
CitiJ	0.0	0.0
CitiK	0.0	0.0
CitiL	0.0	0.0
CitiM	0.0	0.0
CitiN	0.0	0.0
CitiO	0.0	0.0
CitiP	0.0	0.0
CitiQ	0.0	0.0
CitiR	0.0	0.0

FIGURE 5: CITIGROUP INC. 2009 PROPOSAL v. EXHIBIT I—Continued

Employee ID	Percentage Change in Cash Salary from Proposal to Exhibit I	Percentage Change in Total Direct Compensation from Proposal to Exhibit I
CitiS	(37.5)	0.0
CitiT	(37.5)	0.0
CitiU	0.0	0.0

FIGURE 6: GENERAL MOTORS 2009 PROPOSAL V. EXHIBIT I

Employee ID	Percentage Change in Cash Salary from Proposal to Exhibit I	Percentage Change in Total Direct Compensation from Proposal to Exhibit I
GMa	26.8	(23.4)
GMb	8.0	(5.9)
GMc	5.8	(4.6)
GMd	6.1	(3.8)
GMe	8.4	(3.3)
GMf	22.3	(3.2)
GMi	(34.6)	(0.5)
GMh	21.9	0.0
GMj	32.8	0.0
GMk	36.8	0.0
GMl	14.5	0.0
GMo	15.4	0.0
GMp	(27.0)	0.0
GMq	(31.9)	0.0
GMr	(10.0)	0.0
GMs	15.4	4.5
GMt	4.1	4.6
GMu	38.6	6.5
GMv	46.4	10.5
GMw	22.8	13.7

FIGURE 7: GMAC 2009 PROPOSAL V. EXHIBIT I

Employee ID	Percentage Change in Cash Salary from Proposal to Exhibit I	Percentage Change in Total Direct Compensation from Proposal to Exhibit I
GMACa	(38.5)	(25.8)
GMACb	(15.0)	(11.1)
GMACc	(33.3)	(10.3)
GMACd	(26.2)	(9.8)
GMACe	(47.4)	(6.3)
GMACf	(44.4)	(3.1)
GMACg	(41.2)	(2.7)
GMACh	(33.3)	(1.9)
GMACi	(40.0)	(1.4)
GMACj	(43.8)	(1.2)
GMACk	(25.0)	(1.1)
GMACl	(27.3)	(1.1)
GMACm	(30.8)	(1.0)
GMACn	(25.0)	(0.3)
GMACo	(6.3)	0.0
GMACp	(27.0)	0.0
GMACq	0.0	0.8
GMACr	(10.0)	2.0
GMACs	(16.7)	2.3
GMACt	(33.3)	3.0
GMACu	(20.0)	3.5
GMACv	0.0	5.6

SECTION TWO: ADDITIONAL VIEWS

A. Professor Kenneth R. Troske and J. Mark McWatters

We concur with the issuance of the February report and offer the additional observations below. We appreciate the efforts the Panel staff made incorporating our suggestions offered during the drafting of the report.

In these additional views we want to expand on the following passage in the report:

> As a result of providing a "too-big-to-fail" backstop, the government may have eliminated certain disincentives for pay arrangements that encourage excessive risk taking. Too-big-to-fail status permits shareholders and executives to accept substantial amounts of risk, since they can reap the benefits but will not suffer the consequences if the gambles are unsuccessful. Accordingly, some commentators have speculated that government guarantees could spur higher wages for bank employees, as guarantees may have the effect of minimizing the costs to bank shareholders and bondholders of awarding higher compensation to employees, which in turn could skew incentives for executives toward projects that are riskier and produce higher expected returns even if the associated risks ultimately turn out to be excessive.[325] The idea that government involvement in an entity can further distort executive compensation practices has led some lawmakers to argue that recipients of TARP funds should not be held to ordinary standards.[326]

In our view this is a key point for understanding the current state of executive compensation and the potential for future changes in the way executives are paid.

As the report points out, there currently exist two main views about executive compensation—those who believe that shareholders have sufficient power to design compensation schemes that will maximize their wealth, and those who believe that executives are able to capture boards of directors allowing them to design compensation schemes that benefit managers at the expense of shareholders. However, as the above passage makes clear, in the presence of a "too-big-to-fail" (TBTF) guarantee provided by the govern-

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[325] Incentive Compensation in the Banking Industry, *supra* note 45, at 8–9 ("[P]romises to pay the employee in the event of default are a way of shifting the bank's wage bill onto the government. Government guarantees of financial institution debt may perversely encourage dangerous levels of risk taking and the offloading of employee compensation to the government."). *See also* Stiglitz Written Testimony on Compensation in the Financial Industry, *supra* note 29, at 7 ("But in some critical ways, incentives are actually worse now than they were before the crisis. The way the bank bailout was managed—with money flowing to the big banks while the smaller banks were allowed to fail (140 failed in 2009 alone)—has led to a more concentrated banking system. Incentives have been worsened too by the exacerbation of the problem of moral hazard. A new concept—with little basis in economic theory or historical experience—was introduced: the largest financial institutions were judged to be too big to be resolved.").

[326] *See, e.g.,* Don't Call it a Bonus, *supra* note 46 (Congressman Elijah Cummings of Maryland stating "When folks come to the government for money, I want them understanding they have to live by new rules, or don't come at all. This is a time when all of America must come together to sacrifice ... Everybody, all of us, needs to be a part of that sacrifice."); Sam Johnson Livid at AIG Bonus, *supra* note 46 ("AIG asserts it can not risk a lawsuit if the company demands the money back. Johnson vehemently disagrees and believes that once the taxpayers own 80% of a company, the company no longer has the right to offer multi-million dollar bonuses to employees, especially those who sparked such extreme economic turmoil.").

ment, both shareholders and executives have an incentive to design compensation schemes that reward executives for investing in risky projects.

In a well-functioning competitive market, both shareholders and creditors have significant incentives to monitor the behavior of executives to prevent them from pursuing projects that expose the firm to excessive risk. However, once the government provides a guarantee that it will step in and bail out creditors and employees if the firm becomes insolvent, then creditors no longer have any incentive to pay attention to the risk the firm is absorbing. In fact, the presence of this government guarantee means that creditors are willing to lend money to the firm at a lower rate than they would charge to a similar firm without the TBTF guarantee.

This lower price for credit causes the firm to rely more on debt to finance projects. In addition, the TBTF guarantee means that shareholders want managers to focus on riskier, higher return projects since shareholders will reap the gains from these higher returns projects but will be protected from the full extent of the loss if projects go bad. Shareholders incentivize managers to pursue riskier projects by compensating them for doing so through the use of bonuses and stock options that reward short-term gains. Firm managers are willing to go along with these plans because they know that the government will protect their pay in the event that the risky projects blow up and the firm begins teetering on the brink of bankruptcy. In addition, in order to encourage managers to invest in high-risk, high-return projects, shareholders are also willing to pay managers upfront bonuses so that, in the event the project turns bad, managers have already received hefty bonuses and are more than happy to "retire" from the firm. The key point is that in the presence of a TBTF guarantee provided by the federal government, the incentives of firm shareholders and executives are aligned—both want compensation schemes that encourage managers to invest in riskier projects.

Recently, Standard & Poor's announced that it believed the market will experience another banking crisis and, in this crisis, the federal government will once again step in and bail out TBTF firms. Consequently, S&P will explicitly account for this TBTF guarantee in their credit ratings.[327] This is a clear sign that the market remains convinced the TBTF guarantee remains in effect and goes a long way towards explaining why there has been very little change in the way Wall Street executives are paid. This also demonstrates why reforms such as say-on-pay and independent compensation committees that are part of the recently enacted Dodd-Frank legislation will have little, if any, impact. As long as the government is willing to guarantee the survival of large financial firms, both shareholders and executives will continue to push for compensation plans that reward executives for focusing on risky projects. It seems clear to us that if policymakers want to reform the way Wall Street executives are compensated, then they need to start by having the government stop guaranteeing the survival of "too-big-to-fail" financial firms.

[327] Standard & Poor's, *Banks: Rating Methodology,* at 16, 48–59 (Jan. 6, 2011) (online at www2.standardandpoors.com/spf/pdf/media/CriteriaFinancialInstitutionsRequestforCommentBanksRatingMethodology.pdf).

SECTION THREE: TARP UPDATES SINCE LAST REPORT

A. Fifth Third Repays TARP Funds

Fifth Third Bancorp of Cincinnati, Ohio fully repaid its $3.4 billion in outstanding TARP funds on February 2, 2011. Fifth Third was one of the five remaining stress-tested banks to have still outstanding TARP funds.

B. Sale of Citigroup Warrants

Treasury recorded gross proceeds of $312.2 million from its sale on January 25, 2011 of the final 465.1 million warrants to purchase Citigroup common stock.

C. AIG Repays FRBNY, Converts Stock, Issues Warrants—Treasury Stake Jumps to 92.1 Percent

On January 14, 2011, AIG closed its previously announced recapitalization. Treasury converted its preferred shares in AIG to 1.655 billion shares of common stock, giving Treasury a 92.1 percent stake in AIG. Monies from various asset sales were used to repay fully the remaining $21 billion outstanding under the Federal Reserve Bank of New York's revolving credit facility. Warrants were distributed on January 19, 2011, entitling AIG's common shareholders prior to the issuance of Treasury's common stock to purchase AIG common stock at $45 per share.

Additionally, AIG announced a plan to sell its Taiwan life insurance business, Nan Shan Life, to a Taiwanese consortium for $2.16 billion. The sale could face regulatory hurdles.

D. New Stress Tests

The Federal Reserve is holding two rounds of stress tests for the 19 largest U.S. banks, with the groupings dependent on when the lenders want to increase their 2011 dividend. Banks planning to increase dividends in the second half of 2011 will have their test results released later than banks planning to raise dividends before mid-2011.

E. Metrics

Each month, the Panel's report highlights a number of metrics that the Panel and others, including Treasury, the Government Accountability Office (GAO), the Special Inspector General for the Troubled Asset Relief Program (SIGTARP), and the Financial Stability Oversight Board, consider useful in assessing the effectiveness of the administration's efforts to restore financial stability and accomplish the goals of EESA. This section discusses changes that have occurred in several indicators since the release of the Panel's January 2011 report.

1. Financial Indices

Financial Stress. The St. Louis Financial Stress Index, a proxy for financial stress in the U.S. economy, remains at a relatively low level of 0.05 as of February 1, 2011. The index has decreased approximately 95 percent since its post-crisis peak in June 2010. Fur-

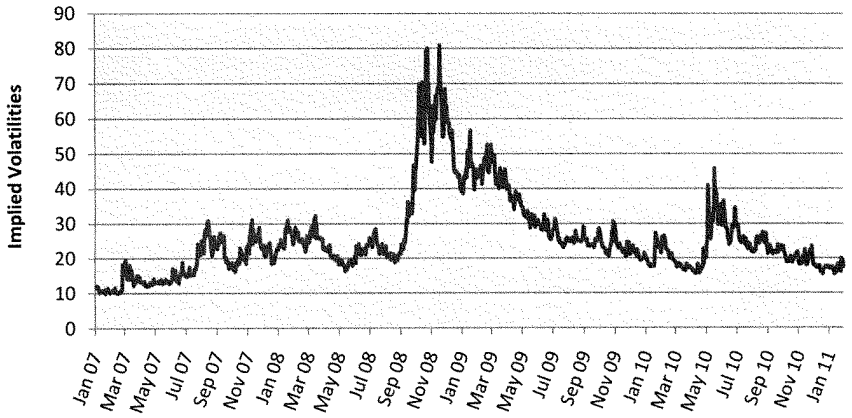
thermore, the recent trend in the index suggests that financial stress continues moving toward its long-run norm. The index has decreased by more than five standard deviations since EESA was enacted in October 2008.

FIGURE 8: ST. LOUIS FEDERAL RESERVE FINANCIAL STRESS INDEX [328]

Stock Market Volatility. Stock market volatility, as measured by the Chicago Board Options Exchange Volatility Index (VIX) on February 1, 2011, has remained flat since the Panel's January 2011 report. The VIX has fallen by more than sixty percent since its post-crisis peak in May 2010, although it remains higher than its post-crisis low on April 12, 2010.

[328] Federal Reserve Bank of St. Louis, *Series STLFSI: Business/Fiscal: Other Economic Indicators* (Instrument: St. Louis Financial Stress Index, Frequency: Weekly) (online at research.stlouisfed.org/fred2/series/STLFSI) (accessed Feb. 8, 2011). The index includes 18 weekly data series, beginning in December 1993 to the present. The series are: effective federal funds rate, 2-year Treasury, 10-year Treasury, 30-year Treasury, Baa-rated corporate, Merrill Lynch High Yield Corporate Master II Index, Merrill Lynch Asset-Backed Master BBB-rated, 10-year Treasury minus 3-month Treasury, Corporate Baa-rated bond minus 10-year Treasury, Merrill Lynch High Yield Corporate Master II Index minus 10-year Treasury, 3-month LIBOR–OIS spread, 3-month TED spread, 3-month commercial paper minus 3-month Treasury, the J.P. Morgan Emerging Markets Bond Index Plus, Chicago Board Options Exchange Market Volatility Index, Merrill Lynch Bond Market Volatility Index (1-month), 10-year nominal Treasury yield minus 10-year Treasury Inflation Protected Security yield, and Vanguard Financials Exchange-Traded Fund (equities). The index is constructed using principal components analysis after the data series are de-meaned and divided by their respective standard deviations to make them comparable units. The standard deviation of the index is set to 1. For more details on the construction of this index, *see* Federal Reserve Bank of St. Louis, *National Economic Trends Appendix: The St. Louis Fed's Financial Stress Index* (Jan. 2010) (online at research.stlouisfed.org/publications/net/NETJan2010Appendix.pdf).

FIGURE 9: CHICAGO BOARD OPTIONS EXCHANGE VOLATILITY INDEX [329]



Interest Rates. Since the Panel's January 2011 report, the 3-month LIBOR has increased by approximately 2.5 percent, while the 1-month LIBOR decreased by less than a percentage point. Both rates remain below their post-crisis highs in June 2010.[330] Over the longer term, interest rates remain extremely low relative to pre-crisis levels, reflecting the impact of the actions of central banks and institutions' perceptions of reduced risk in lending to other banks.

FIGURE 10: 3-MONTH AND 1-MONTH LIBOR RATES (AS OF FEBRUARY 1, 2011)

Indicator	Current Rates	Percent Change from Data Available at Time of Last Report (1/3/2011)
3-Month LIBOR [331]	0.31	2.5
1-Month LIBOR [332]	0.26	(0.1)

[331] Data accessed through Bloomberg Data Service (Feb. 1, 2011).
[332] Data accessed through Bloomberg Data Service (Feb. 1, 2011).

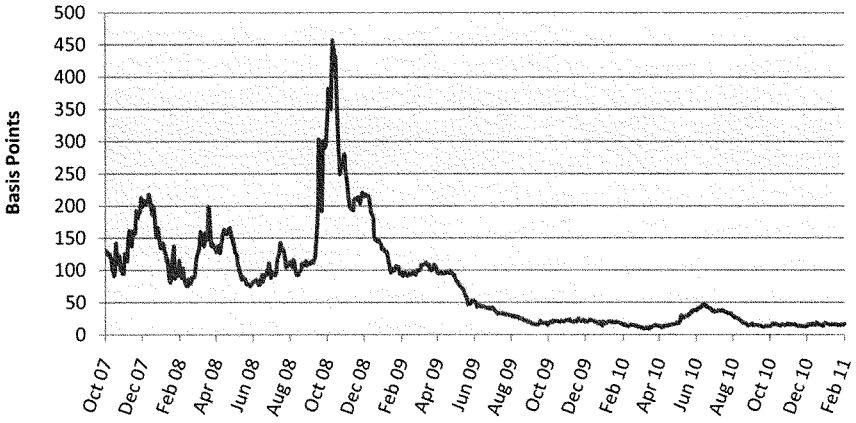
Interest Rate Spreads. As of February 1, 2011, the conventional mortgage rate spread, which measures the difference between 30-year mortgage rates and 10-year Treasury bond yields, had decreased by 4 percent since the Panel's January 2011 report.[333] The TED spread, which captures the difference between the 3-month LIBOR and the 3-month Treasury bill rates, serves as an indicator for perceived risk in the financial markets.[334] As of

[329] Data accessed through Bloomberg Data Service (Feb. 1, 2011). The CBOE VIX is a key measure of market expectations of near-term volatility. Chicago Board Options Exchange, *The CBOE Volatility Index—VIX,* 2009 (online at www.cboe.com/micro/vix/vixwhite.pdf) (accessed Feb. 1, 2011).
[330] Data accessed through Bloomberg Data Service (Feb. 1, 2011).
[333] Board of Governors of the Federal Reserve System, *Federal Reserve Statistical Release H.15: Selected Interest Rates: Historical Data* (Instrument: Conventional Mortgages, Frequency: Weekly) (online at www.federalreserve.gov/releases/h15/data/Weekly_Thursday_/H15_MORTG_NA.txt) (accessed Feb. 8, 2011) (hereinafter "Federal Reserve Statistical Release H.15"); Federal Reserve Bank of St. Louis, *Series DGS10: Interest Rates: Treasury Constant Maturity* (Instrument: 10-Year Treasury Constant Maturity Rate, Frequency: Daily) (online at research.stlouisfed.org/fred2/series/DGS10) (accessed Feb. 8, 2011).
[334] Federal Reserve Bank of Minneapolis, *Measuring Perceived Risk—The TED Spread* (Dec. 2008) (online at www.minneapolisfed.org/publications_papers/pub_display.cfm?id=4120).

February 1, 2011, the spread was 16.6 basis points, decreasing by over 9 percent in January.

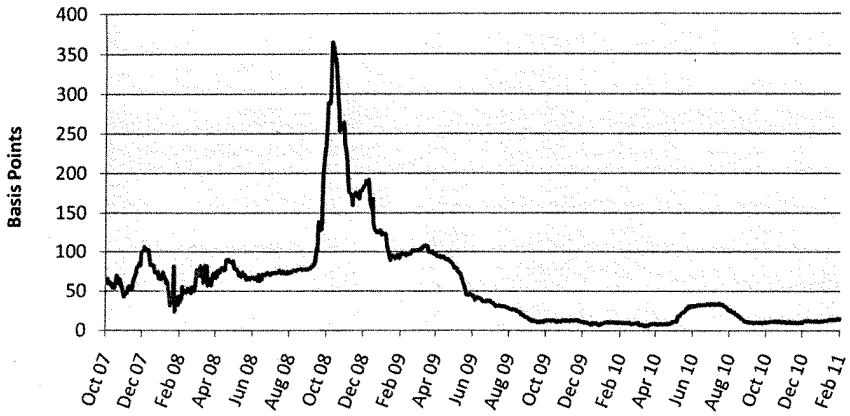
The LIBOR–OIS (Overnight Index Swap) spread serves as a metric for the health of the banking system, reflecting what banks believe to be the risk of default associated with interbank lending.[335] The spread increased over threefold from early April to July 2010, before falling in mid-July.[336] The LIBOR–OIS spread grew by more than 26 percent since the Panel's January 2011 report. As shown in Figures 11 and 12 below, these spreads remain below pre-crisis levels. The decrease in both the LIBOR–OIS spread and the TED spread from the middle of 2010 suggests that hesitation among banks to lend to counterparties has receded.

FIGURE 11: TED SPREAD[337]



[335] Federal Reserve Bank of St. Louis, *What the LIBOR–OIS Spread Says* (May 11, 2009) (online at research.stlouisfed.org/publications/es/09/ES0924.pdf).
[336] Data accessed through Bloomberg Data Service (Feb. 1, 2011).
[337] Data accessed through Bloomberg Data Service (Feb. 1, 2011).

FIGURE 12: LIBOR–OIS SPREAD [338]



The interest rate spread on AA asset-backed commercial paper, which is considered mid-investment grade, has increased by more than 65 percent since the Panel's January 2011 report. The interest rate spread on A2/P2 commercial paper, a lower grade investment than AA asset-backed commercial paper, increased by approximately 9 percent. Both interest rate spreads remain below pre-crisis levels.

FIGURE 13: INTEREST RATE SPREADS (AS OF FEBRUARY 1, 2011)

Indicator	Current Spread	Percent Change Since Last Report (1/3/2011)
Conventional mortgage rate spread [339]	1.38	(4.2)
TED Spread (basis points)	16.55	(9.5)
Overnight AA asset-backed commercial paper interest rate spread [340]	0.10	65.5
Overnight A2/P2 nonfinancial commercial paper interest rate spread [341]	0.15	8.8

[339] Federal Reserve Statistical Release H.15, *supra* note 333; Board of Governors of the Federal Reserve System, *Federal Reserve Statistical Release H.15: Selected Interest Rates: Historical Data* (Instrument: U.S. Government Securities/Treasury Constant Maturities/Nominal 10-Year, Frequency: Weekly) (online at www.federalreserve.gov/releases/h15/data/Weekly_Friday_/H15_TCMNOM_Y10.txt) (accessed Feb. 8, 2011).

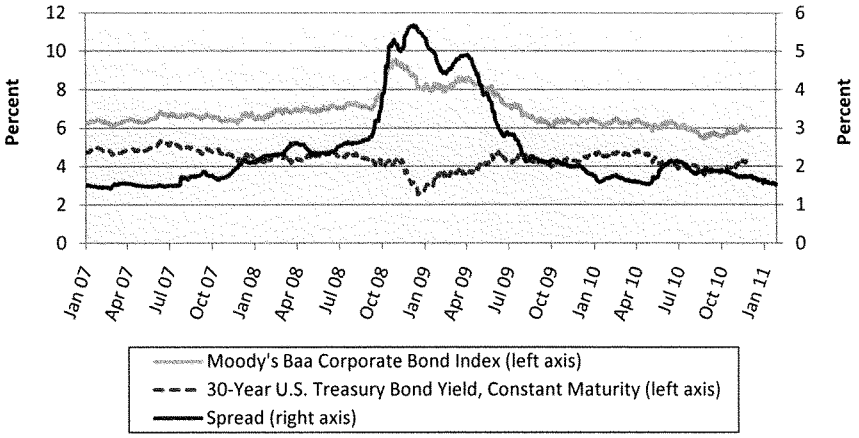
[340] The overnight AA asset-backed commercial paper interest rate spread reflects the difference between the AA asset-backed commercial paper discount rate and the AA nonfinancial commercial paper discount rate. Board of Governors of the Federal Reserve System, *Federal Reserve Statistical Release: Commercial Paper Rates and Outstandings: Data Download Program* (Instruments: AA Asset-Backed Discount Rate, AA Nonfinancial Discount Rate; Frequency: Daily) (online at www.federalreserve.gov/DataDownload/Choose.aspx?rel=CP) (accessed Feb. 8, 2011). In order to provide a more complete comparison, this metric utilizes the average of the interest rate spread for the last five days of January.

[341] The overnight A2/P2 nonfinancial commercial paper interest rate spread reflects the difference between the A2/P2 nonfinancial commercial paper discount rate and the AA nonfinancial commercial paper discount rate. Board of Governors of the Federal Reserve System, *Federal Reserve Statistical Release: Commercial Paper Rates and Outstandings: Data Download Program* (Instruments: A2/P2 Nonfinancial Discount Rate, AA Nonfinancial Discount Rate; Frequency: Daily) (online at www.federalreserve.gov/DataDownload/Choose.aspx?rel=CP) (accessed Feb. 8, 2011). In order to provide a more complete comparison, this metric utilizes the average of the interest rate spread for the last five days of January.

Corporate Bonds. The spread between Moody's Baa Corporate Bond Yield Index and 30-year constant maturity U.S. Treasury Bond, which indicates the difference in perceived risk between corporate and government bonds, doubled from late April to mid-June 2010. During January, the spread declined slightly, and has fallen almost 30 percent since its post-crisis peak in mid-June. The declining spread could indicate waning concerns about the riskiness of corporate bonds.

[338] Data accessed through Bloomberg Data Service (Feb. 1, 2011).

FIGURE 14: MOODY'S BAA CORPORATE BOND INDEX AND 30-YEAR U.S. TREASURY YIELD [342]



2. Bank Conditions

Senior Loan Officer Opinion Survey. The January 2011 "Senior Loan Officer Opinion Survey on Bank Lending Practices" details lending conditions at 57 domestic banks and 22 branches of foreign banks during the fourth quarter of 2010. According to the survey, banks continued to ease standards and terms for commercial and industrial (C&I) loans, particularly to large and medium-sized firms. Respondents attributed these changes to increasing competition from other banks and nonbank lenders, a "more favorable or less uncertain" economic horizon, as well as growth in demand for C&I loans during the fourth quarter of 2010. Banks also reported no changes in standards on commercial real estate (CRE) loans. Approximately 20 percent of banks surveyed indicated a reduction in lines of credit for commercial construction. The net percentage of domestic banks reporting increased demand for CRE loans grew to approximately 12.6 percent, the highest since the second quarter of 2006.[343]

[342] Federal Reserve Bank of St. Louis, *Series DGS30: Selected Interest Rates* (Instrument: 30-Year Treasury Constant Maturity Rate, Frequency: Daily) (online at research.stlouisfed.org/fred2/release?rid=18) (accessed Feb. 8, 2011). Corporate Baa rate data accessed through Bloomberg data service (Feb. 1, 2011).

[343] Board of Governors of the Federal Reserve System, *The January 2011 Senior Loan Officer Opinion Survey on Bank Lending Practices,* at 1–5 (Jan. 31, 2011) (online at www.federalreserve.gov/boarddocs/snloansurvey/201102/fullreport.pdf).

FIGURE 15: NET PERCENTAGE OF DOMESTIC RESPONDENTS REPORTING STRONGER DEMAND FOR COMMERCIAL AND INDUSTRIAL LOANS (2004–2010) [344]

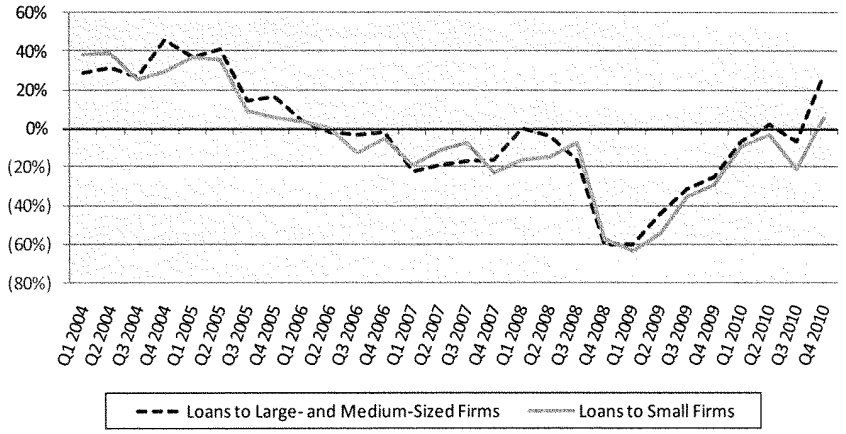
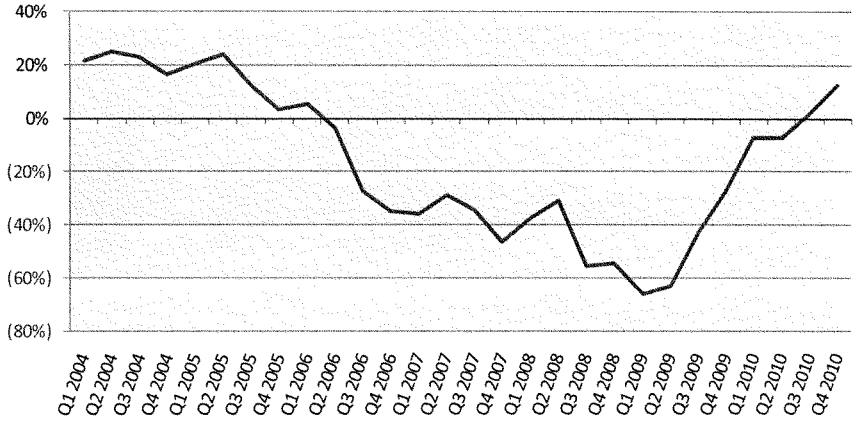


FIGURE 16: NET PERCENTAGE OF DOMESTIC RESPONDENTS REPORTING STRONGER DEMAND FOR COMMERCIAL REAL ESTATE LOANS (2004–2010) [345]



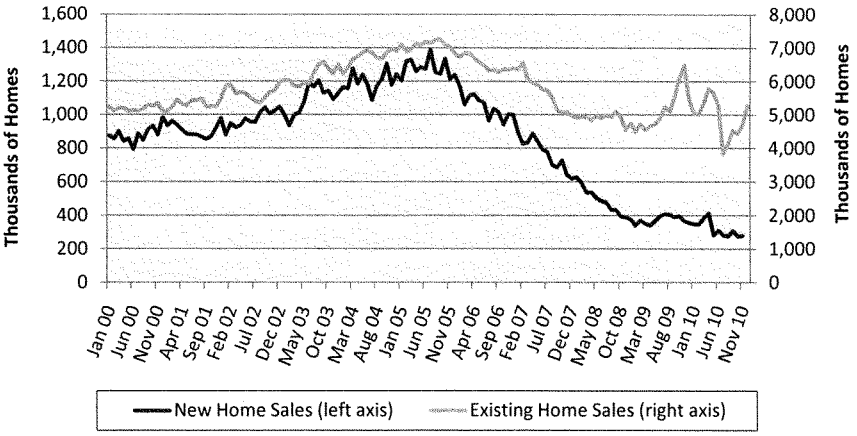
3. Housing Indices

Home Sales. Both new and existing home sales experienced a significant month-over-month increase in December 2010. New home sales, as measured by the U.S. Census Bureau, increased 17.5 percent to 329,000 during the month. With respect to existing home sales, the National Association of Realtors estimates a 12 percent month-over-month increase in December, to an annual rate of 5.3 million homes sold. Despite the recent increase in December 2010, new and existing home sales remain below their December

[344] Board of Governors of the Federal Reserve System, *Senior Loan Officer Opinion Survey on Bank Lending Practices Chart Data* (Jan. 31, 2011) (online at www.federalreserve.gov/boarddocs/snloansurvey/201102/chartdata.htm).
[345] *Id.*

2009 levels, when the new home sales estimate was 356,000 and the annual rate of existing home sales was 5.4 million homes.

FIGURE 17: NEW AND EXISTING HOME SALES (2000–2010)[346]



Foreclosures. Foreclosure actions, which consist of default notices, scheduled auctions, and bank repossessions, decreased by nearly 2 percent in December 2010 to 257,747.[347] During the fourth quarter, 799,064 foreclosure actions were taken, representing a 14 percent decrease from the previous quarter, and a total of 3.8 million were reported for the year. The significant decline between the third and the fourth quarter of 2010 is primarily attributable to foreclosure suspensions in the fall of 2010 as large loan servicers conducted internal reviews of their foreclosure procedures.[348] Since the enactment of EESA, there have been approximately 8.4 million foreclosure actions.[349]

Home Prices. With respect to housing price indices, both the Case-Shiller Composite 20-City Composite Home Price Index and the FHFA Housing Price Index decreased by less than 1 percent in November 2010. The Case-Shiller and FHFA indices are approximately 9 percent and 6 percent, respectively, below their respective October 2008 levels.[350]

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[346] Data accessed through Bloomberg Data Service (Feb. 1, 2011). Spikes in both new and existing home sales in January 2009 and November 2009 correlate with the tax credits extended to first-time and repeat home buyers during these periods. After both tax credits were extinguished on April 30, 2010, existing home sales dropped to 3.8 million homes in July, their lowest level in a decade. National Association of Realtors, *July Existing-Home Sales Fall as Expected but Prices Rise* (Aug. 24, 2010) (online at www.realtor.org/press_room/news_releases/2010/08/ehs_fall).

[347] RealtyTrac, *Record 2.9 Million U.S. Properties Receive Foreclosure Filings in 2010 Despite 30-Month Low in December* (Jan. 13, 2011) (online at www.realtytrac.com/content/press-releases/record-29-million-us-properties-receive-foreclosure-filings-in-2010-despite-30-month-low-in-december-6309) (hereinafter "2.9 Million U.S. Properties Receive Foreclosure Filings in 2010"). The most recent data available are for December 2010.

[348] For more information on foreclosure irregularities, *see* Congressional Oversight Panel, *November Oversight Report: Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation* (Nov. 16, 2010) (online at cop.senate.gov/documents/cop-111610-report.pdf).

[349] Data accessed through Bloomberg Data Service (Feb. 1, 2011).

[350] The most recent data available are for November 2010. *See* Standard and Poor's, *S&P/Case-Shiller Home Price Indices* (Instrument: Case-Shiller 20-City Composite Seasonally Adjusted, Frequency: Monthly) (online at www.standardandpoors.com/indices/sp-case-shiller-home-price-indices/en/us/?indexId=spusa-cashpidff- -p-us- - - -) (accessed Feb. 1, 2011) (hereinafter

Case-Shiller futures prices indicate a market expectation that home-price values for the major Metropolitan Statistical Areas (MSAs) will decrease through 2011.[351] These futures are cash-settled to a weighted composite index of U.S. housing prices in the top ten MSAs, as well as to those specific markets. They are used as a hedge by businesses whose profits and losses are related to a specific area of the housing industry, and to balance portfolios by businesses seeking exposure to an uncorrelated asset class. As such, futures prices are a composite indicator of market information known to date and can be used to indicate market expectations for home prices.

FIGURE 18: HOUSING INDICATORS

Indicator	Most Recent Monthly Data	Percent Change from Data Available at Time of Last Report	Percent Change Since October 2008
Monthly foreclosure actions [352]	257,747	(1.8)	(7.8)
S&P/Case-Shiller Composite 20 Index [353]	142.70	(0.5)	(8.7)
FHFA Housing Price Index [354]	189.96	(0.4)	(5.8)

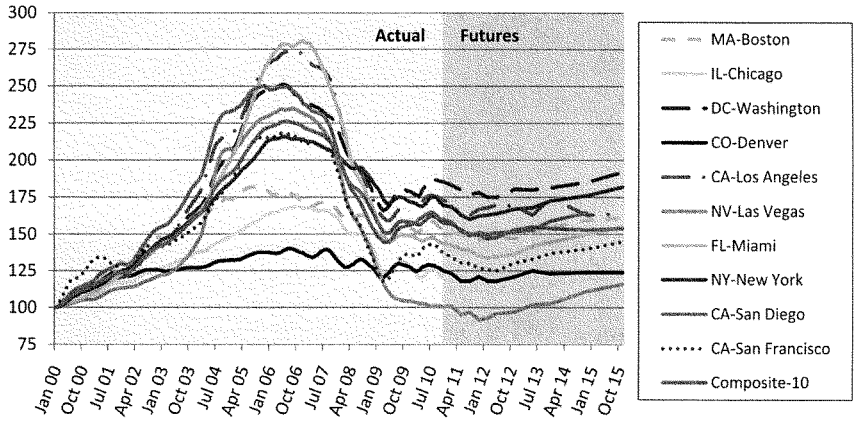
[352] 2.9 Million U.S. Properties Receive Foreclosure Filings in 2010, *supra* note 347. The most recent data available are for December 2010.
[353] S&P/Case-Shiller Home Price Indices, *supra* note 350. The most recent data available are for November 2010.
[354] U.S. and Census Division Monthly Purchase Only Index, *supra* note 350. The most recent data available are for November 2010.

"S&P/Case-Shiller Home Price Indices"); Federal Housing Finance Agency, *U.S. and Census Division Monthly Purchase Only Index* (Instrument: USA, Seasonally Adjusted) (online at www.fhfa.gov/Default.aspx?Page=87) (accessed Feb. 1, 2011) (hereinafter "U.S. and Census Division Monthly Purchase Only Index"). S&P has cautioned that the seasonal adjustment is probably being distorted by irregular factors. These factors could include distressed sales and the various government programs. *See* Standard and Poor's, *S&P/Case-Shiller Home Price Indices and Seasonal Adjustment* (Apr. 2010) (online at www.standardandpoors.com/servlet/BlobServer?blobheadername3= MDT-Type&blobcol= urldata&blobtable= MungoBlobs&blobheadervalue2 =inline;+ filename%3DCaseShiller _Seasonal Adjustment2,0.pdf &blobheadername2=Content-Disposition&blobheadervalue1=application/ pdf&blobkey=id& blobheadername1=content-type&blobwhere=1243679046081&blobheadervalue3=UTF-8). For a discussion of the differences between the Case-Shiller Index and the FHFA Index, *see* Congressional Oversight Panel, *April Oversight Report: Evaluating Progress on TARP Foreclosure Mitigation Programs,* at 98 (Apr. 14, 2010) (online at cop.senate.gov/documents/cop-041410-report.pdf).

[351] Data accessed through Bloomberg Data Service (Feb. 1, 2011). The Case-Shiller Futures contract is traded on the Chicago Mercantile Exchange (CME) and is settled to the Case-Shiller Index two months after the previous calendar quarter. For example, the February contract will be settled against the spot value of the S&P Case-Shiller Home Price Index values representing the fourth calendar quarter of the previous year, which is released in February one day after the settlement of the contract. Note that most close observers believe that the accuracy of these futures contracts as forecasts diminishes the further out one looks.

A Metropolitan Statistical Area is defined as a core area containing a substantial population nucleus, together with adjacent communities having a high degree of economic and social integration with the core. U.S. Census Bureau, *About Metropolitan and Micropolitan Statistical Areas* (online at www.census.gov/population/www/metroareas/aboutmetro.html) (accessed Feb. 1, 2011).

FIGURE 19: CASE-SHILLER HOME PRICE INDEX AND FUTURES VALUES [355]



F. Financial Update

Each month, the Panel summarizes the resources that the federal government has committed to the rescue and recovery of the financial system. The following financial update provides: (1) an updated accounting of the TARP, including a tally of income, repayments, and warrant dispositions that the program has received as of January 28, 2011; and (2) an updated accounting of the full federal resource commitment as of January 28, 2011.

1. The TARP

a. Program Updates [356]

Treasury's spending authority under the TARP officially expired on October 3, 2010. Though it can no longer make new funding commitments, Treasury can continue to provide funding for programs for which it has existing contracts and previous commitments. To date, $419.2 billion has been spent under the TARP's $475 billion ceiling.[357] Of the total amount disbursed, $240.4 bil-

[355] All data normalized to 100 in January 2000. Futures data accessed through Bloomberg Data Service (Feb. 1, 2011). S&P/Case-Shiller Home Price Indices, *supra* note 350.

[356] U.S. Department of the Treasury, *Cumulative Dividends, Interest and Distributions Report as of December 31, 2010* (Jan. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/dividends-interest/DocumentsDividendsInterest/December%202010%20Dividends%20Interest%20Report.pdf) (hereinafter "Treasury Dividends, Interest and Distributions Report"); Treasury Transactions Report, *supra* note 5.

[357] The original $700 billion TARP ceiling was reduced by $1.26 billion as part of the Helping Families Save Their Homes Act of 2009. 12 U.S.C. § 5225(a)–(b); *Helping Families Save Their Homes Act of 2009,* Pub. L. No. 111–22 § 202(b) (2009). On June 30, 2010, the House-Senate Conference Committee agreed to reduce the amount authorized under the TARP from $700 billion to $475 billion as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act that was signed into law on July 21, 2010. *See Dodd-Frank Wall Street Reform and Consumer Protection Act,* Pub. L. No. 111–203 (2010); The White House, *Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act* (July 21, 2010) (online at www.whitehouse.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act).

[358] This figure is comprised of the $4.2 billion in net proceeds from the sale of Citigroup common stock between April 26 and December 6, 2010 as well as $2.7 billion in proceeds from the December 6 equity underwriting.

lion has been repaid. Treasury has also incurred $6.1 billion in losses associated with its Capital Purchase Program (CPP) and Automotive Industry Financing Program (AIFP) investments. Over two-thirds of the $172.8 billion in TARP funds currently outstanding relates to Treasury's investments in AIG and assistance provided to the automotive industry. For further information, see Figure 21 below.

CPP Repayments

As of January 28, 2011, 135 of the 707 banks that participated in the CPP have fully redeemed their preferred shares either through capital repayment or exchanges for investments under the Community Development Capital Initiative (CDCI). During January 2011, Treasury received funds from the sale of the Citigroup warrants, adding an additional $312.2 million in profit onto the $6.9 billion in profit from the sale of shares, and fully ending Treasury's investment in Citigroup.[358] An additional four banks fully repaid their remaining CPP capital during January 2011, returning $80.3 million in principal to Treasury. See Figure 20 below for repayment amounts.

FIGURE 20: BANKS THAT FULLY REPAID THEIR CPP LOANS IN JANUARY 2011[359]

Bank	Amount Repaid	Remaining Investment
Capital Bank Corporation	$41,279,000	None.
BCSB Bancorp, Inc.	10,800,000	Warrants.
Washington Banking Company	26,380,000	Warrants.
American Premier Bancorp	1,800,000	None.
Total	**$80,259,000**	

[359] Treasury Transactions Report, *supra* note 5. Treasury received $90,000 from American Premier Bancorp for additional preferred stock, as the warrants in the company were immediately exercised at investment date.

Additionally, during January 2011, Stockmens Financial Corporation made a partial repayment of $4 million. A total of $168.01 billion has been repaid under the program, leaving $34.35 billion in funds currently outstanding.[360]

b. Income: Dividends, Interest, and Warrant Sales

In conjunction with its preferred stock investments under the CPP and the Targeted Investment Program (TIP), Treasury generally received warrants to purchase common equity.[361] As of January 28, 2011, 50 institutions have repurchased their warrants from Treasury at an agreed-upon price. Treasury has also sold warrants for 16 other institutions at auction. To date, income from warrant dispositions totals $8.5 billion.[362]

[358] This figure is comprised of the $4.2 billion in net proceeds from the sale of Citigroup common stock between April 26 and December 6, 2010 as well as $2.7 billion in proceeds from the December 6 equity underwriting.

[360] The $34.35 billion currently outstanding is net of the $2.6 billion in announced losses associated with the program. See Figure 22 for further details on losses associated with programs.

[361] For its CPP investments in privately held financial institutions, Treasury also received warrants to purchase additional shares of preferred stock, which it exercised immediately. Similarly, Treasury also received warrants to purchase additional subordinated debt that were immediately exercised along with its CPP investments in subchapter S corporations. Treasury Transactions Report, *supra* note 5, at 14.

[362] This total is only for the TIP and CPP programs and does not include the $67.2 million received pursuant to the AGP.

In addition to warrant proceeds, Treasury also receives dividend payments on the preferred shares that it holds under the CPP, 5 percent per year for the first five years and 9 percent per year thereafter.[363] For preferred shares issued under the TIP, Treasury received a dividend of 8 percent per year.[364] In total, Treasury has received approximately $31.0 billion in net income from warrant repurchases, dividends, interest payments, profit from the sale of stock, and other proceeds deriving from TARP investments, after deducting losses.[365] For further information on TARP profit and loss, see Figure 22.

[363] U.S. Department of the Treasury, *Capital Purchase Program* (Oct. 3, 2010) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/cpp/Pages/capitalpurchaseprogram.aspx).

[364] Congressional Oversight Panel, Written Testimony of Herbert M. Allison, Jr., assistant secretary for financial stability, U.S. Department of the Treasury, *COP Hearing on Assistance Provided to Citigroup Under TARP* (Mar. 4, 2010) (online at cop.senate.gov/documents/testimony-030410-allison.pdf).

[365] Treasury Dividends, Interest and Distributions Report, *supra* note 356; Treasury Transactions Report, *supra* note 5. Treasury also received an additional $1.2 billion in participation fees from its Guarantee Program for Money Market Funds. U.S. Department of the Treasury, *Treasury Announces Expiration of Guarantee Program for Money Market Funds* (Sept. 18, 2009) (online at 205.168.45.55/latest/tg_09182009.html).

c. TARP Accounting

FIGURE 21: TARP ACCOUNTING (AS OF JANUARY 28, 2011)

[Dollars in billions] [i]

Program	Maximum Amount Allotted	Actual Funding	Total Repayments/ Reduced Exposure	Total Losses	Funding Currently Outstanding	Funding Available
Capital Purchase Program (CPP)	$204.9	$204.9	[ii] $(168.0)	[iii] $(2.6)	$34.4	$0
Targeted Investment Program (TIP)	40.0	40.0	(40.0)	0	0	0
Asset Guarantee Program (AGP)	5.0	[iv] 5.0	[v] (5.0)	0	0	0
AIG Investment Program (AIGIP)	70.0	[vi] 70.0	0	0	70.0	0
Auto Industry Financing Program (AIFP)	81.3	81.3	(26.4)	[vii] (3.4)	[viii] 51.5	0
Auto Supplier Support Program (ASSP) [ix]	0.4	0.4	(0.4)	0	0	0
Term Asset-Backed Securities Loan Facility (TALF)	[x] 4.3	[xi] 0.1	0	0	0.1	4.2
Public-Private Investment Program (PPIP) [xii]	22.4	[xiii] 15.6	[xiv] (0.6)	0	15.0	6.8
SBA 7(a) Securities Purchase Program	0.4	[xv] 0.4	0	0	0.4	[xvi] 0
Home Affordable Modification Program (HAMP)	29.9	0.8	0	0	0.8	29.1
Hardest Hit Fund (HHF)	[xvii] 7.6	[xviii] 0.1	0	0	0.1	7.5
FHA Refinance Program	8.1	[xix] 0.1	0	0	0.1	8.0
Community Development Capital Initiative (CDCI)	[xx] 0.8	[xxi] 0.6	0	0	0.6	0
Total	**$475.0**	**$419.2**	**$(240.4)**	**$(6.0)**	**$172.8**	**$55.7**

[i] Figures affected by rounding. Unless otherwise noted, data in this table are from the following sources: U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011* (Feb. 1, 2011) (online at www.treasury.gov/initiatives/ financial-stability/ briefing-room/reports/ tarp-transactions/ DocumentsTARPTransactions/ 2-1-11%20 Transactions%20Report%20as%20of%201-28-11.pdf); U.S. Department of the Treasury, *Troubled Assets Relief Program Monthly 105(a) Report—December 2010* (Jan. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/December105(a) report_FINAL_v4.pdf).

[ii] In June 2009, Treasury exchanged $25 billion in Citigroup preferred stock for 7.7 billion shares of the company's common stock at $3.25 per share. As of January 28, 2011, Treasury had sold the entirety of its Citigroup common shares for $31.85 billion in gross proceeds. The amount repaid under CPP includes $25 billion Treasury received as part of its sales of Citigroup common stock. The difference between these two numbers represents the $6.85 billion in net profit Treasury has received from the sale of Citigroup common stock.

Total CPP repayments also include amounts repaid by institutions that exchanged their CPP investments for investments under the CDCI, as well as proceeds earned from the sale of preferred stock issued by South Financial Group, Inc., TIB Financial Corp, and The Bank of Currituck. *See* U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* 2, 7, 13–15 (Feb. 1, 2011) (online at www.treasury.gov/initiatives/ financial-stability/ briefing-room/reports/ tarp-transactions/ DocumentsTARPTransactions/ 2-1-11%20Transactions%20 Report%20as%20of%201-28-11.pdf); U.S. Department of the Treasury, *Troubled Asset Relief Program: Two-Year Retrospective,* at 25 (Oct. 2010) (online at www.financialstability.gov/docs/ TARP%20Two%20Year%20 Retrospective_10%2005%2010_transmittal%20letter.pdf); U.S. Department of the Treasury, *Treasury Commences Plan to Sell Citigroup Common Stock* (Apr. 26, 2010) (online at ustreas.tpaq.treasury.gov/press/releases/tg660.htm).

[iii] In the TARP Transactions Report, Treasury has classified the investments it made in two institutions, CIT Group ($2.3 billion) and Pacific Coast National Bancorp ($4.1 million), as losses. In addition, Treasury sold its preferred ownership interests, along with warrants, in South Financial Group, Inc., TIB Financial Corp., and the Bank of Currituck to non-TARP participating institutions. These shares were sold at prices below the value of the original CPP investment, at respective losses of $217 million, $25 million, and $2.3 million. Therefore, Treasury's net current CPP investment is $34.4 billion due to the $2.6 billion in losses thus far. *See* U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 1–14 (Feb. 1, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/ DocumentsTARPTransactions/2-1-11%20Transactions%20Report%20as%20of%201-28-11.pdf).

[iv] The $5.0 billion AGP guarantee for Citigroup was unused since Treasury was not required to make any guarantee payments during the life of the program. U.S. Department of the Treasury, *Troubled Asset Relief Program: Two-Year Retrospective,* at 31 (Oct. 2010) (online at www.treasury.gov/initiatives/ financial-stability/ briefing-room/reports/ agency_reports/Documents/ TARP%20Two%20Year%20 Retrospective_ 10%2005%2010_transmittal%20letter.pdf).

[v] Although this $5.0 billion is no longer exposed as part of the AGP, Treasury did not receive a repayment in the same sense as with other investments. Treasury did receive other income as consideration for the guarantee, which is not a repayment and is accounted for in Figure 22. *See* U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 20 (Feb. 1, 2011) (online at www.treasury.gov/ initiatives/ financial-stability/ briefing-room/ reports/tarp-transactions/ DocumentsTARPTransactions/ 2-1-11%20Transactions%20 Report%20as%20of%201-28-11.pdf).

[vi] AIG has completely utilized the $40 billion that was made available on November 25, 2008, in exchange for the company's preferred stock. *See* U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 21 (Feb. 1, 2011) (online at www.treasury.gov/initiatives/ financial-stability/briefing-room/ reports/tarp-transactions/ DocumentsTARPTransactions/ 2-1-11%20Transactions%20 Report%20as%20of%201-28-11.pdf). It has also drawn down the entirety of the $30 billion made available on April 17, 2009. Of this $30 billion investment, $165 million was used for retention payments and the remainder was exchanged or used in the execution of AIG's recapitalization plan. In total $29.8 billion was drawn by AIG. The $7.5 billion that was outstanding under the facility at the time AIG executed its recapitalization plan was converted to 167.6 million shares of AIG common stock. Upon the closing of the recapitalization plan, $16.9 billion of the funds drawn-down from the Series F TARP investment was exchanged for a corresponding liquidation preference of preferred stock in the AIA Aurora LLC, $3. 4 billion was exchanged for junior preferred stock interest in the ALICO Holdings LLC, and $2 billion was designated as Series G preferred stock, which provides AIG with an equity capital facility they can draw on for general corporate purposes. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 21 (Feb. 1, 2011) (online at www.treasury.gov/initiatives/ financial-stability/ briefing-room/ reports/ tarp-transactions/ DocumentsTARPTransactions/ 2-1-11%20Transactions%20 Report%20as%20of%201-28-11.pdf). This figure does not include $1.6 billion in accumulated but unpaid dividends owed by AIG to Treasury due to the restructuring of Treasury's investment from cumulative preferred shares to non-cumulative shares. *See* U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 21 (Feb. 1, 2011) (online at www.treasury.gov/ initiatives/ financial-stability/ briefing-room/reports/ tarp-transactions/ DocumentsTARPTransactions/ 2-1-11%20Transactions%20Report%20as%20of%201-28-11.pdf); For a full discussion of AIG's recapitalization plan, see American International Group, Inc., *Form 8–K* (Jan. 14, 2011) (online at phx.corporate-ir.net/phoenix.zhtml?c =76115&p=irol -SECText&TEXT=aHR0cDovL2lyLm ludC53ZXN0bGF3Y nVzaW5lc3MuY29tL2RvY3V tZW50L3YxLzAwMDA5NTAxMjMtMTEt MDAzMDYxL3htbA%3d%3d).

[vii] On May 14, 2010, Treasury accepted a $1.9 billion settlement payment for its $3.5 billion loan to Chrysler Holding. The payment represented a $1.6 billion loss from the termination of the debt obligation. *See* U.S. Department of the Treasury, *Chrysler Financial Parent Company Repays $1.9 Billion in Settlement of Original Chrysler Loan* (May 17, 2010) (online at www.treasury.gov/press-center/press-releases/Pages/tg700.aspx); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 18–19 (Feb. 1, 2011) (online at www.treasury.gov/initiatives/ financial-stability/ briefing-room/reports/ tarp-transactions/ Documents TARPTransactions/2-1-11%20 Transactions%20 Report%20as%20of%201-28-11.pdf).

Also, following the bankruptcy proceedings for Old Chrysler, which extinguished the $1.9 billion debtor-in-possession (DIP) loan provided to Old Chrysler, Treasury retained the right to recover the proceeds from the liquidation of specified collateral. Although Treasury does not expect a significant recovery from the liquidation proceeds, Treasury is not yet reporting this loan as a loss in the TARP Transactions Report. To date, Treasury has collected $48.1 million in proceeds from the sale of collateral. Treasury includes these proceeds as part of the $26.4 billion repaid under the AIFP. U.S. Department of the Treasury, *Troubled Assets Relief Program Monthly 105(a) Report—September 2010* (Oct. 12, 2010) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/September%20105(a)%20report_FINAL.pdf); Treasury conversations with Panel staff (Aug. 19, 2010 and Nov. 29, 2010); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 18 (Feb. 1, 2011) (online at www.treasury.gov/initiatives/ financial-stability/briefing-room/reports/tarp-transactions/ DocumentsTARPTransactions/ 2-1-11%20 Transactions%20 Report%20as%20of%201-28-11.pdf).

[viii] In the TARP Transactions Report, the $1.9 billion Chrysler debtor-in-possession loan, which was extinguished April 30, 2010, was deducted from Treasury's current AIFP investment amount. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 18 (Feb. 1, 2011) (online at www.treasury.gov/ initiatives/ financial-stability/ briefing-room/ reports/tarp-transactions/ DocumentsTARPTransactions/2-1-11%20Transactions%20Report%20as%20of%201-28-11.pdf). *See* endnote vii, *supra,* for details on losses from Treasury's investment in Chrysler.

[ix] On April 5, 2010, Treasury terminated its commitment to lend to the GM special purpose vehicle (SPV) under the ASSP. On April 7, 2010, it terminated its commitment to lend to the Chrysler SPV. In total, Treasury received $413 million in repayments from loans provided by this program ($290 million from the GM SPV and $123 million from the Chrysler SPV). Further, Treasury received $101 million in proceeds from additional notes associated with this program. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 19 (Feb. 1, 2011) (online at www.treasury.gov/ initiatives/ financial-stability/briefing-room/reports/tarp-transactions/ DocumentsTARPTransactions/2-1-11%20Transactions%20 Report%20as%20of%201-28-11.pdf).

[x] For the TALF, $1 of TARP funds was committed for every $10 of funds obligated by the Federal Reserve. The program was intended to be a $200 billion initiative, and the TARP was responsible for the first $20 billion in loan-losses, if any were incurred. The loan was incrementally funded. When the program closed in June 2010, a total of $43 billion in loans was outstanding under the TALF, and the TARP's commitments constituted $4.3 billion. The Federal Reserve Board of Governors agreed that it was appropriate for Treasury to reduce TALF credit protection from the TARP to $4.3 billion. Board of Governors of the Federal Reserve System, *Federal Reserve Announces Agreement with the Treasury Department Regarding a Reduction of Credit Protection Provided for the Term Asset-Backed Securities Loan Facility (TALF)* (July 20, 2010) (online at www.federalreserve.gov/newsevents/press/monetary/20100720a.htm).

[xi] As of February 3, 2011, Treasury had provided $106 million to TALF LLC. This total is net of accrued interest payable to Treasury. Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Feb. 3, 2010) (online at www.federalreserve.gov/releases/h41/20110203/).

[xii] As of September 30, 2010, the total value of securities held by the PPIP fund managers was $19.3 billion. Non-agency residential mortgage-backed securities represented 82 percent of the total; commercial mortgage-backed securities represented the balance. U.S. Department of the Treasury, *Legacy Securities Public-Private Investment Program, Program Update—Quarter Ended September 30, 2010,* at 4 (Oct. 20, 2010) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/ppip/s-ppip/Documents/ppip-%2012-10%20vFinal.pdf).

[xiii] U.S. Department of the Treasury, *Troubled Assets Relief Program Monthly 105(a) Report—December 2010,* at 3 (Jan. 10, 2011) (online at www.treasury.gov/initiatives/ financial-stability/briefing-room/ reports/105/Documents105/December105(a) report_FINAL_v4.pdf).

[xiv] As of January 28, 2011, Treasury has received $620 million in capital repayments from two PPIP fund managers. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 24 (Feb. 1, 2011) (online at financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20 Report%20as%20of%2012-30-10.pdf).

[xv] As of January 28, 2011, Treasury's purchases under the SBA 7(a) Securities Purchase Program totaled $368.1 million. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 23 (Feb. 1, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/ DocumentsTARPTransactions/ 2-1-11%20 Transactions%20 Report%20as%20of%201-28-11.pdf).

[xvi] Treasury will not make additional purchases pursuant to the expiration of its purchasing authority under EESA. U.S. Department of the Treasury, *Troubled Asset Relief Program: Two-Year Retrospective,* at 43 (Oct. 2010) (online at www.treasury.gov/initiatives/ financial-stability/ briefing-room/ reports/ agency_reports/ Documents/ TARP%20Two%20Year%20 Retrospective_ 10%2005%2010_transmittal%20letter.pdf).

[xvii] On June 23, 2010, $1.5 billion was allocated to mortgage assistance through the Hardest Hit Fund (HHF). Another $600 million was approved on August 3, 2010. U.S. Department of the Treasury, *Obama Administration Approves State Plans for $600 million of 'Hardest Hit Fund' Foreclosure Prevention Assistance* (Aug. 4, 2010) (online at www.treasury.gov/press-center/press-releases/Pages/tg813.aspx). As part of its revisions to TARP allocations upon enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Treasury allocated an additional $2 billion in TARP funds to mortgage assistance for unemployed borrowers through the HHF. U.S. Department of the Treasury, *Obama Administration Announces Additional Support for Targeted Foreclosure-Prevention Programs to Help Homeowners Struggling with Unemployment* (Aug. 11, 2010) (online at www.treasury.gov/press-center/press-releases/Pages/tg1042.aspx). In October 2010, another $3.5 billion was allocated among the 18 states and the District of Columbia currently participating in HHF. The amount each state received during this round of funding is proportional to its population. U.S. Department of the Treasury, *Troubled Asset Relief Program: Two Year Retrospective,* at 72 (Oct. 2010) (online at www.financialstability.gov/ docs/ TARP%20 Two%20Year%20 Retrospective_10%2005%2010_ transmittal%20letter.pdf).

[xviii] As of December 31, 2010, a total of $103.6 million has been disbursed to 12 state Housing Finance Agencies (HFAs). Treasury conversations with Panel staff (Jan. 6, 2011).

[xix] This figure represents the amount Treasury disbursed to fund the advance purchase account of the Letter of Credit issued under the FHA Short Refinance Program. The $53.3 million in the FHA Short Refinance program is broken down as follows: $50 million for a deposit into an advance purchase account as collateral to the initial $50 million Letter of Credit, $2.9 million for the closing and funding of the Letter of Credit, $115,000 in trustee fees, $175,000 in claims processor fees, and $156,000 for an unused commitment fee for the Letter of Credit. Data provided by Treasury (Dec. 2, 2010).

[xx] U.S. Department of the Treasury, *Troubled Assets Relief Program Monthly 105(a) Report—November 2010,* at 4 (Dec. 10, 2010) (online at www.treasury.gov/initiatives /financial-stability/briefing-room/reports/105/Documents105/November%20105(a)%20FINAL.pdf).

[xxi] U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 16–17 (Feb. 1, 2011) (online at www.treasury.gov/ initiatives/ financial-stability/ briefing-room/reports/ tarp-transactions/ DocumentsTARPTransactions/ 2-1-11%20Transactions%20Report%20as%20of%201-28-11.pdf). Treasury closed the program on September 30, 2010, after investing $570 million in 84 CDFIs. U.S. Department of the Treasury, *Treasury Announces Special Financial Stabilization Initiative Investments of $570 Million in 84 Community Development Financial Institutions in Underserved Areas* (Sept. 30, 2010) (online at www.treasury.gov/press-center/ press-releases/ Pages/tg885.aspx).

FIGURE 22: TARP PROFIT AND LOSS

[Dollars in millions]

TARP Initiative [xxii]	Dividends [xxiii] (as of 12/31/2010)	Interest [xxiv] (as of 12/31/2010)	Warrant Disposition Proceeds [xxv] (as of 1/28/2011)	Other Proceeds (as of 12/31/2010)	Losses [xxvi] (as of 1/28/2011)	Total
Total	**$16,013**	**$1,223**	**$8,476**	**$9,835**	**($6,018)**	**$29,530**
CPP	10,290	59	7,030	[xxvii] 6,852	(2,578)	21,653
TIP	3,004	—	1,446	—	—	4,450
AIFP	2,274	1,061	—	[xxviii] 15	(3,440)	(90)
ASSP	—	15	—	[xxix] 101	—	116
AGP	443	—	—	[xxx] 2,246	—	2,689
PPIP	—	85	—	[xxxi] 345	—	430
SBA 7(a)	—	4	—	—	—	4
Bank of America Guarantee	—	—	—	[xxxii] 276	—	276
CDCI	1	1	—	—	—	2

[xxii] AIG is not listed in this table because no profit or loss has been recorded to date for AIG. Its missed dividends were capitalized as part of the issuance to Treasury of Series E preferred shares. Following the closing of AIG's recapitalization, the $1.6 billion in missed and capitalized dividends were exchanged along with the $40 billion Series E TARP preferred investment for 924.5 million AIG common stock shares. Therefore, no profit or loss has been realized on Treasury's AIG investment to date. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 21 (Feb. 1, 2011) (online at www.treasury.gov/ initiatives/financial-stability/ briefing-room/reports/tarp-transactions/Documents TARPTransactions/2-1-11%20Transactions%20Report%20as%20of%201-28-11.pdf).

HAMP is not listed in this table because HAMP is a 100 percent subsidy program, and no profit is expected.

[xxiii] U.S. Department of the Treasury, *Cumulative Dividends, Interest and Distributions Report as of December 31, 2010* (Jan. 10, 2011) (online at www.treasury.gov/ initiatives/financial-stability/briefing-room/reports/dividends- interest/Documents DividendsInterest/December%202010%20Dividends %20Interest%20Report.pdf).

[xxiv] U.S. Department of the Treasury, *Cumulative Dividends, Interest and Distributions Report as of December 31, 2010* (Jan. 10, 2011) (online at www.treasury.gov/initiatives/ financial-stability/briefing-room/reports/ dividends-interest/DocumentsDividendsInterest/ December%202010%20Dividends%20Interest%20Report.pdf).

[xxv] U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011* (Feb. 1, 2011) (online at www.treasury.gov/ initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/2-1-11% 20Transactions%20Report%20as%20of%201-28-11.pdf).

[xxvi] In the TARP Transactions Report, Treasury classified the investments it made in two institutions, CIT Group ($2.3 billion) and Pacific Coast National Bancorp ($4.1 million), as losses. Treasury has also sold its preferred ownership interests and warrants from South Financial Group, Inc., TIB Financial Corp, and the Bank of Currituck. This represents a $244.0 million loss on its CPP investments in these three banks. Two TARP recipients, UCBH Holdings, Inc. ($298.7 million) and a banking subsidiary of Midwest Banc Holdings, Inc. ($89.4 million), are currently in bankruptcy proceedings. As of January 28, 2011, three TARP recipients, Pierce County Bancorp, Sonoma Valley Bancorp, and Tifton Banking Company, had entered receivership. Cumulatively, these three had received $19.3 million in TARP funding. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011* (Feb. 1, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/2-1-11% 20Transactions%20Report%20as%20of%201-28-11.pdf).

[xxvii] This figure also reflects net proceeds to Treasury from the sale of Citigroup common stock to date. For details on Treasury's sales of Citigroup common stock, see endnote ii, *supra. See also* U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 15 (Feb. 1, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/2-1-11%20 Transactions%20Report%20as%20of%201-28-11.pdf).

[xxviii] Treasury received proceeds from an additional note connected with the loan made to Chrysler Financial on January 16, 2009. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 18 (Feb. 1, 2011) (online at www.treasury.gov/initiatives/ financial-stability/briefing-room/reports/ tarp-transactions/DocumentsTARPTransactions/2-1-11%20 Transactions%20Report%20as%20of%201-28-11.pdf).

[xxix] This represents the total proceeds from additional notes connected with Treasury's investments in GM Supplier Receivables LLC and Chrysler Receivables SPV LLC. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 19 (Feb. 1, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/ 2-1-11%20Transactions% 20Report%20as%20of%201-28-11.pdf).

[xxx] As a fee for taking a second-loss position of up to $5 billion on a $301 billion pool of ring-fenced Citigroup assets as part of the AGP, Treasury received $4.03 billion in Citigroup preferred stock and warrants. Treasury exchanged these preferred stocks for trust preferred securities in June 2009. Following the early termination of the guarantee in December 2009, Treasury cancelled $1.8 billion of the trust preferred securities, leaving Treasury with $2.23 billion in Citigroup trust preferred securities. On September 30, 2010, Treasury sold these securities for $2.25 billion in total proceeds. At the end of Citigroup's participation in the FDIC's Temporary Liquidity Guarantee Program (TLGP), the FDIC may transfer $800 million of $3.02 billion in Citigroup Trust Preferred Securities it received in consideration for its role in the AGP to Treasury. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 20 (Feb. 1, 2011) (online at www.treasury.gov/initiatives/ financial-stability/briefing-room/ reports/tarp-transactions/ DocumentsTARPTransactions/2-1-11%20Transactions% 20Report%20as%20of%201-28-11.pdf); U.S. Department of the Treasury, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Citigroup Inc., *Termination Agreement,* at 1 (Dec. 23, 2009) (online at www.treasury.gov/ initiatives/financial-stability/ investment-programs/agp/ Documents/Citi%20AGP%20Termination% 20Agreement%20-%20Fully%20Executed% 20Version.pdf); U.S. Department of the Treasury, *Treasury Announces Further Sales of Citigroup Securities and Cumulative Return to Taxpayers of $41.6 Billion* (Sept. 30, 2010) (online at www.treasury.gov/press-center/press-releases/Pages/tg887.aspx); Federal Deposit Insurance Corporation, *2009 Annual Report,* at 87 (June 30, 2010) (online at www.fdic.gov/about/strategic/report/2009annualreport/AR09final.pdf).

[xxxi] As of December 31, 2010, Treasury has earned $324.0 million in membership interest distributions from the PPIP. Additionally, Treasury has earned $20.6 million in total proceeds following the termination of the TCW fund. *See* U.S. Department of the Treasury, *Cumulative Dividends, Interest and Distributions Report as of December 31, 2010,* at 14 (Jan. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/dividends-interest/Documents DividendsInterest/December%202010%20Dividends% 20Interest%20Report.pdf); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 23 (Feb. 1, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/2-1-11% 20Transactions%20Report%20as%20of%201-28-11.pdf).

[xxxii] Although Treasury, the Federal Reserve, and the FDIC negotiated with Bank of America regarding a guarantee similar to that received by Citigroup through the AGP, the parties never reached an agreement. In September 2009, Bank of America agreed to pay each of the prospective guarantors a fee as though the guarantee had been in place during the negotiations period. This agreement resulted in payments of $276 million to Treasury, $57 million to the Federal Reserve, and $92 million to the FDIC. U.S. Department of the Treasury, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Bank of America Corporation, *Termination Agreement,* at 1–2 (Sept. 21, 2009) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/agp/Documents/BofA%20-%20Termination%20Agreement%20-%20executed.pdf).

d. CPP Unpaid Dividend and Interest Payments [366]

As of December 31, 2010, 140 institutions have missed at least one dividend payment on outstanding preferred stock issued under the CPP.[367] Among these institutions, 111 institutions are not current on cumulative dividends, amounting to $151.5 million in missed payments. Another 29 banks have not paid $9.5 million in non-cumulative dividends. Of the $34.4 billion currently outstanding in CPP funding, Treasury's investments in banks with non-current dividend payments total $4.1 billion. A majority of the banks that remain delinquent on dividend payments have under $1 billion in total assets on their balance sheets. Also, there are 21 institutions that no longer have outstanding unpaid dividends, after previously deferring their quarterly payments.[368]

Twelve banks have failed to make six dividend payments, six banks have missed seven quarterly payments, and one bank has missed all eight quarterly payments. These institutions have received a total of $897.2 million in CPP funding. Under the terms of the CPP, after a bank fails to pay dividends for six periods, Treasury has the right to elect two individuals to the company's board of directors.[369]

As of December 31, 2010, multiple institutions with missed dividends have agreed to have Treasury observers attend Board of Directors meetings.

FIGURE 23: INSTITUTIONS WHERE TREASURY OBSERVERS NOW ATTEND BOARD MEETINGS [xxxiii]

Institution	CPP Investment Amount	Non-Current Dividends/ Interest	No. of Missed Payments
Anchor BanCorp Wisconsin, Inc.	$110,000,000	9,854,167	7
Blue Valley Ban Corp	21,750,000	1,903,125	7
Central Pacific Financial Corp.	135,000,000	10,125,000	6
Centrue Financial Corporation	32,668,000	2,450,100	6
Citizens Bancorp	10,400,000	850,200	6
Citizens Commerce Bancshares, Inc.	6,300,000	429,188	5
Dickinson Financial Corporation II	146,053,000	11,939,880	6
First BanCorp (PR) [xxxiv]	400,000,000	6,775,001	2
First Banks, Inc.	295,400,000	24,148,950	6
Grand Mountain Bancshares, Inc.	3,076,000	244,970	6
Heritage Commerce Corp	40,000,000	2,500,000	5
Idaho Bancorp	6,900,000	564,075	6
Integra Bank Corporation	83,586,000	5,224,125	5
Pacific Capital Bancorp [xxxv]	180,634,000	–	0

[366] Treasury Dividends, Interest and Distributions Report, *supra* note 356, at 20.

[367] This figure does not include banks with missed dividend payments that have either repaid all delinquent dividends, exited the TARP, gone into receivership, or filed for bankruptcy.

[368] Fifteen of these institutions made payments later. The 21 institutions also include those that have either (a) fully repaid their CPP investment and exited the program, or (b) entered bankruptcy or their subsidiary was placed into receivership. Treasury Dividends, Interest and Distributions Report, *supra* note 356, at 20.

[369] U.S. Department of the Treasury, *Fact Sheet Capital Purchase Program Nomination of Board Observers & Directors* (online at www.treasury.gov/ initiatives/financial-stability/ investment-programs/cpp/Documents/ CPP%20 Directors%20-%20Observer% 20 Fact%20Sheet.pdf) (accessed Feb. 8, 2011).

FIGURE 23: INSTITUTIONS WHERE TREASURY OBSERVERS NOW ATTEND BOARD MEETINGS [xxxiii]—Continued

Institution	CPP Investment Amount	Non-Current Dividends/ Interest	No. of Missed Payments
Pacific City Financial Corporation	16,200,000	1,324,350	6
Pathway Bancorp	3,727,000	253,863	5
Premierwest Bancorp	41,400,000	2,587,500	5
Rogers Bancshares, Inc.	25,000,000	1,703,125	5
Royal Bancshares of Pennsylvania, Inc.	30,407,000	2,280,525	6
Seacoast Banking Corporation of Florida	50,000,000	4,375,000	7
Georgia Primary Bank	4,500,000	377,413	6
Lone Star Bank	3,072,000	297,242	7
One Georgia Bank	5,500,000	455,453	6
OneUnited Bank	12,063,000	1,055,513	7
Premier Service Bank	4,000,000	323,972	6
United American Bank	8,700,000	823,177	7
Total	**$1,676,336,000**	**$92,865,912**	**146**

[xxxiii] U.S. Department of the Treasury, *Cumulative Dividends, Interest, and Distributions Report as of January 31, 2010* (Feb. 10, 2011) (online at www.www.treasury.gov/ initiatives/ financial-stability/ briefing-room/ reports/ dividends-interest/ Documents DividendsInterest/ January%202011%20Dividends%20Interest%20Report.pdf).

[xxxiv] On July 20, 2010, Treasury completed the exchange of its $400,000,000 of Preferred Stock in First BanCorp for $424,174,000 of Mandatorily Convertible Preferred Stock (MCP), which is equivalent to the initial investment amount of $400,000,000, plus $24,174,000 of capitalized previously accrued and unpaid dividends. Subject to the fulfillment by First BanCorp of certain conditions, including those related to its capital plan, the MCP may be converted to common stock. This institution has agreed to have Treasury observers attend board of directors meetings.

[xxxv] On August 31, 2010, following the completion of the conditions related to Pacific Capital Bancorp's (Pacific Capital) capital plan, Treasury exchanged its $180,634,000 of Preferred Stock in Pacific Capital for $195,045,000 of Mandatorily Convertible Preferred Stock (MCP), which is equivalent to the initial investment amount of $180,634,000, plus $14,411,000 of capitalized previously accrued and unpaid dividends. On September 27, 2010, following the completion of the conversion conditions set forth in the Certificate of Designations for the MCP, all of Treasury's MCP was converted into 360,833,250 shares of common stock of Pacific Capital. This institution has agreed to have Treasury observers attend board of directors meetings.

Figure 24 below provides further details on the distribution and the number of institutions that have missed dividend payments.

FIGURE 24: CPP MISSED DIVIDEND PAYMENTS (AS OF DECEMBER 31, 2010) [370]

Number of Missed Payments	1	2	3	4	5	6	7	8	Total
Cumulative Dividends:									
Number of Banks, by asset size	17	28	20	20	14	9	3	0	111
Under $1B	10	21	17	16	9	6	1	0	80
$1B-$10B	6	6	3	3	5	3	2	0	28
Over $10B	1	1	0	1	0	0	0	0	3
Non-Cumulative Dividends:									
Number of Banks, by asset size	6	1	6	6	3	3	3	1	29
Under $1B	5	1	6	5	3	3	3	1	27
$1B-$10B	0	0	0	1	0	0	0	0	1
Over $10B	1	0	0	0	0	0	0	0	1
Total Banks Missing Payments	....	....	....	....	....	....	....	....	**140**
Total Missed Payments	....	....	....	....	....	....	....	....	**470**

[370] Treasury Dividends, Interest and Distributions Report, *supra* note 356, at 17–20. Data on total bank assets compiled using SNL Financial data service (accessed Feb. 2, 2011).

In addition, eight CPP participants have missed at least one interest payment, representing $4.0 million in cumulative unpaid interest payments. Treasury's total investments in these non-public institutions represent less than $1 billion in CPP funding.

e. CPP Losses

As of January 28, 2011, Treasury has realized a total of $2.6 billion in losses from investments in five CPP participants. CIT Group Inc. and Pacific Coast National Bancorp have both completed bankruptcy proceedings and there was no monetary recovery to the TARP, and the preferred stock and warrants issued by the South

Financial Group, TIB Financial Corp., and the Bank of Currituck were sold to third-party institutions at a discount. Excluded from Treasury's total losses are investments in institutions that have pending receivership or bankruptcy proceedings, as well as an institution that is currently the target of an acquisition.[371] Settlement of these transactions and proceedings would increase total losses in the CPP to $3.0 billion. Figure 25 below details settled and unsettled investment losses from CPP participants that have declared bankruptcy, been placed into receivership, or renegotiated the terms of their CPP contracts.

[371] Treasury Transactions Report, *supra* note 5, at 13.

FIGURE 25: CPP SETTLED AND UNSETTLED LOSSES[372]

Institution	Investment Amount	Investment Disposition Amount	Warrant Disposition Amount	Dividends & Interest	Possible Losses/ Reduced Exposure	Action
Cadence Financial Corporation	$44,000,000	$38,000,000	–	$2,970,000	$(6,000,000)	10/29/2010: Treasury agreed to sell preferred stock and warrants issued by Cadence Financial to Community Bancorp LLC for $38 million plus accrued and unpaid dividends. Completion of the sale subject to fulfillment of certain closing conditions.
CIT Group Inc.*	2,330,000,000	—	—	43,687,500	(2,330,000,000)	12/10/2009: Bankruptcy reorganization plan for CIT Group Inc. became effective. CPP preferred shares and warrants were extinguished and replaced with contingent value rights (CVR). On Feb. 8, 2010, the CVRs expired without value.
Midwest Banc Holdings, Inc.	89,388,000	—	—	824,289	(89,388,000)	5/14/2010: Midwest Banc Holdings, Inc. subsidiary, Midwest Bank and Trust, Co., placed into receivership. Midwest Banc Holdings is currently in bankruptcy proceedings.
Pacific Coast National Bancorp*	4,120,000	—	—	18,088	(4,120,000)	2/11/2010: Pacific Coast National Bancorp dismissed its bankruptcy proceedings without recovery to creditors or investors. Investments, including Treasury's CPP investments, were extinguished.
Pierce County Bancorp	6,800,000	—	—	207,948	(6,800,000)	11/5/2010: Pierce County Bancorp subsidiary, Pierce Commercial Bank, placed into receivership.
Sonoma Valley Bancorp	8,653,000	—	—	347,164	(8,653,000)	8/20/2010: Sonoma Valley Bancorp subsidiary, Sonoma Valley Bank, placed into receivership.
South Financial Group*	347,000,000	130,179,219	$400,000	16,386,111	(216,820,781)	9/30/2010: Preferred stock and warrants sold to Toronto-Dominion Bank.
The Bank of Currituck*	4,021,000	1,742,850	—	169,834	(2,278,150)	12/3/2010: The Bank of Currituck completed its repurchase of all preferred stock (including preferred stock received upon exercise of warrants) issued to Treasury.
TIB Financial Corp.*	37,000,000	12,119,637	40,000	1,284,722	(24,880,363)	9/30/2010: Preferred stock and warrants sold to North American Financial Holdings.

Tifton Banking Company	3,800,000	—	—	223,208	(3,800,000)	11/12/2010: Tifton Banking Company placed into receivership.
UCBH Holdings, Inc.	298,737,000	—	—	7,509,920	(298,737,000)	11/6/2009: United Commercial Bank, a wholly owned subsidiary of UCBH Holdings, Inc., was placed into receivership. UCBH Holdings is currently in bankruptcy proceedings.
Total	**$3,173,519,000**	**$182,041,706**	**$440,000**	**$73,628,784**	**$(2,991,477,294)**	

[372] Treasury Transactions Report, *supra* note 5, at 14. The asterisk ("*") denotes recognized losses on Treasury's Transactions Report.

f. Rate of Return

As of February 2, 2011, the average internal rate of return for all public financial institutions that participated in the CPP and fully repaid the U.S. government (including preferred shares, dividends, and warrants) rose to 10.1 percent.[373] During January 2011, Huntington Bancshares, First PacTrust Bancorp, Inc., East West Bancorp, and Susquehanna Bancshares, Inc. repurchased their warrants, while Citigroup's warrants were sold at auction. The internal rate of return is the annualized effective compounded return rate that can be earned on invested capital.

g. Warrant Disposition

FIGURE 26: WARRANT REPURCHASES/AUCTIONS FOR FINANCIAL INSTITUTIONS THAT HAVE FULLY REPAID CPP AND TIP FUNDS (AS OF FEBRUARY 2, 2011)

Institution	Investment Date	Warrant Repurchase Date	Warrant Repurchase/ Sale Amount	Panel's Best Valuation Estimate at Disposition Date	Price/ Estimate Ratio	IRR (Percent)
Old National Bancorp	12/12/2008	5/8/2009	$1,200,000	$2,150,000	0.558	9.3
Iberiabank Corporation	12/5/2008	5/20/2009	1,200,000	2,010,000	0.597	9.4
Firstmerit Corporation	1/9/2009	5/27/2009	5,025,000	4,260,000	1.180	20.3
Sun Bancorp, Inc.	1/9/2009	5/27/2009	2,100,000	5,580,000	0.376	15.3
Independent Bank Corp.	1/9/2009	5/27/2009	2,200,000	3,870,000	0.568	15.6
Alliance Financial Corporation	12/19/2008	6/17/2009	900,000	1,580,000	0.570	13.8
First Niagara Financial Group	11/21/2008	6/24/2009	2,700,000	3,050,000	0.885	8.0
Berkshire Hills Bancorp, Inc.	12/19/2008	6/24/2009	1,040,000	1,620,000	0.642	11.3
Somerset Hills Bancorp	1/16/2009	6/24/2009	275,000	580,000	0.474	16.6
SCBT Financial Corporation	1/16/2009	6/24/2009	1,400,000	2,290,000	0.611	11.7
HF Financial Corp.	11/21/2008	6/30/2009	650,000	1,240,000	0.524	10.1
State Street	10/28/2008	7/8/2009	60,000,000	54,200,000	1.107	9.9
U.S. Bancorp	11/14/2008	7/15/2009	139,000,000	135,100,000	1.029	8.7
The Goldman Sachs Group, Inc.	10/28/2008	7/22/2009	1,100,000,000	1,128,400,000	0.975	22.8
BB&T Corp.	11/14/2008	7/22/2009	67,010,402	68,200,000	0.983	8.7
American Express Company	1/9/2009	7/29/2009	340,000,000	391,200,000	0.869	29.5
Bank of New York Mellon Corp	10/28/2008	8/5/2009	136,000,000	155,700,000	0.873	12.3
Morgan Stanley	10/28/2008	8/12/2009	950,000,000	1,039,800,000	0.914	20.2
Northern Trust Corporation	11/14/2008	8/26/2009	87,000,000	89,800,000	0.969	14.5
Old Line Bancshares Inc.	12/5/2008	9/2/2009	225,000	500,000	0.450	10.4
Bancorp Rhode Island, Inc.	12/19/2008	9/30/2009	1,400,000	1,400,000	1.000	12.6
Centerstate Banks of Florida Inc.	11/21/2008	10/28/2009	212,000	220,000	0.964	5.9
Manhattan Bancorp	12/5/2008	10/14/2009	63,364	140,000	0.453	9.8
CVB Financial Corp	12/5/2008	10/28/2009	1,307,000	3,522,198	0.371	6.4
Bank of the Ozarks	12/12/2008	11/24/2009	2,650,000	3,500,000	0.757	9.0
Capital One Financial	11/14/2008	12/3/2009	148,731,030	232,000,000	0.641	12.0
JPMorgan Chase & Co.	10/28/2008	12/10/2009	950,318,243	1,006,587,697	0.944	10.9
CIT Group Inc.	12/31/2008	–	–	562,541	–	(97.2)
TCF Financial Corp	1/16/2009	12/16/2009	9,599,964	11,825,830	0.812	11.0

[373] Calculation of the internal rate of return (IRR) also includes CPP investments in public institutions not repaid in full (for reasons such as acquisition by another institution), such as The South Financial Group and TIB Financial Corporation. The Panel's total IRR calculation now includes CPP investments in public institutions recorded as a loss on the TARP Transactions Report due to bankruptcy, such as CIT Group Inc. Going forward, the Panel will continue to include losses due to bankruptcy when Treasury determines that any associated contingent value rights have expired without value. When excluding CPP investments that have resulted in losses from the calculation, the resulting IRR is 11.4 percent. Treasury Transactions Report, *supra* note 5.

FIGURE 26: WARRANT REPURCHASES/AUCTIONS FOR FINANCIAL INSTITUTIONS THAT HAVE FULLY REPAID CPP AND TIP FUNDS (AS OF FEBRUARY 2, 2011)—Continued

Institution	Investment Date	Warrant Repurchase Date	Warrant Repurchase/ Sale Amount	Panel's Best Valuation Estimate at Disposition Date	Price/ Estimate Ratio	IRR (Percent)
LSB Corporation	12/12/2008	12/16/2009	560,000	535,202	1.046	9.0
Wainwright Bank & Trust Company	12/19/2008	12/16/2009	568,700	1,071,494	0.531	7.8
Wesbanco Bank, Inc.	12/5/2008	12/23/2009	950,000	2,387,617	0.398	6.7
Union First Market Bankshares Corporation (Union Bankshares Corporation)	12/19/2008	12/23/2009	450,000	1,130,418	0.398	5.8
Trustmark Corporation	11/21/2008	12/30/2009	10,000,000	11,573,699	0.864	9.4
Flushing Financial Corporation	12/19/2008	12/30/2009	900,000	2,861,919	0.314	6.5
OceanFirst Financial Corporation	1/16/2009	2/3/2010	430,797	279,359	1.542	6.2
Monarch Financial Holdings, Inc.	12/19/2008	2/10/2010	260,000	623,434	0.417	6.7
Bank of America [374]	10/28/2008 [375] 1/9/2009 [376] 1/14/2009 [377]	3/3/2010	1,566,210,714	1,006,416,684	1.533	6.5
Washington Federal Inc./Washington Federal Savings & Loan Association	11/14/2008	3/9/2010	15,623,222	10,166,404	1.537	18.6
Signature Bank	12/12/2008	3/10/2010	11,320,751	11,458,577	0.988	32.4
Texas Capital Bancshares, Inc.	1/16/2009	3/11/2010	6,709,061	8,316,604	0.807	30.1
Umpqua Holdings Corp.	11/14/2008	3/31/2010	4,500,000	5,162,400	0.872	6.6
City National Corporation	11/21/2008	4/7/2010	18,500,000	24,376,448	0.759	8.5
First Litchfield Financial Corporation	12/12/2008	4/7/2010	1,488,046	1,863,158	0.799	15.9
PNC Financial Services Group Inc.	12/31/2008	4/29/2010	324,195,686	346,800,388	0.935	8.7
Comerica Inc.	11/14/2008	5/4/2010	183,673,472	276,426,071	0.664	10.8
Valley National Bancorp	11/14/2008	5/18/2010	5,571,592	5,955,884	0.935	8.3
Wells Fargo Bank	10/28/2008	5/20/2010	849,014,998	1,064,247,725	0.798	7.8
First Financial Bancorp	12/23/2008	6/2/2010	3,116,284	3,051,431	1.021	8.2
Sterling Bancshares, Inc./Sterling Bank	12/12/2008	6/9/2010	3,007,891	5,287,665	0.569	10.8
SVB Financial Group	12/12/2008	6/16/2010	6,820,000	7,884,633	0.865	7.7
Discover Financial Services	3/13/2009	7/7/2010	172,000,000	166,182,652	1.035	17.1
Bar Harbor Bancshares	1/16/2009	7/28/2010	250,000	518,511	0.482	6.2
Citizens & Northern Corporation	1/16/2009	8/4/2010	400,000	468,164	0.854	5.9
Columbia Banking System, Inc.	11/21/2008	8/11/2010	3,301,647	3,291,329	1.003	7.3
Hartford Financial Services Group, Inc.	6/26/2009	9/21/2010	713,687,430	472,221,996	1.511	30.3
Lincoln National Corporation	7/10/2009	9/16/2010	216,620,887	181,431,183	1.194	27.1
Fulton Financial Corporation	12/23/2008	9/8/2010	10,800,000	15,616,013	0.692	6.7
The Bancorp, Inc./The Bancorp Bank	12/12/2008	9/8/2010	4,753,985	9,947,683	0.478	12.8
South Financial Group, Inc./Carolina First Bank	12/5/2008	9/30/2010	400,000	1,164,486	0.343	(34.2)
TIB Financial Corp/TIB Bank	12/5/2008	9/30/2010	40,000	235,757	0.170	(38.0)
Central Jersey Bancorp	12/23/2008	12/1/2010	319,659	1,554,457	0.206	6.3
Huntington Bancshares	11/14/2008	1/19/2011	49,100,000	45,180,929	1.087	6.4
First PacTrust Bancorp, Inc.	11/21/2008	1/5/2011	1,033,227	1,750,518	0.590	7.3
East West Bancorp	12/5/2008	1/26/2011	14,500,000	32,726,663	0.443	7.0
Susquehanna Bancshares, Inc	12/12/2008	1/19/2011	5,269,179	14,708,811	0.358	6.2

FIGURE 26: WARRANT REPURCHASES/AUCTIONS FOR FINANCIAL INSTITUTIONS THAT HAVE FULLY REPAID CPP AND TIP FUNDS (AS OF FEBRUARY 2, 2011)—Continued

Institution	Investment Date	Warrant Repurchase Date	Warrant Repurchase/ Sale Amount	Panel's Best Valuation Estimate at Disposition Date	Price/ Estimate Ratio	IRR (Percent)
Citigroup [378]	[379] 10/25/2008 [380] 12/31/2008	1/25/2011	245,008,277	136,161,499	1.799	13.4
Total			**$8,463,562,508**	**$8,231,926,132**	**1.028**	**10.1**

[374] Calculation of the IRR for Bank of America does not include fees received by Treasury as part of an agreement to terminate that bank's participation under the AGP. U.S. Department of the Treasury, *Troubled Assets Relief Program Monthly 105(a) Report—December 2010,* at A–3 (Jan. 10, 2010) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/December105(a)%20report_FINAL_v4.pdf).

[375] Investment date for Bank of America in the CPP.

[376] Investment date for Merrill Lynch in the CPP.

[377] Investment date for Bank of America in the TIP.

[378] Calculations for the IRR of Citigroup do not include dividends or warrant proceeds earned from the Asset Guarantee Program (AGP). This IRR also does not incorporate proceeds received from Treasury's sale of Citigroup's trust preferred securities, given as a premium for Treasury's guarantee under the AGP. It is important to note that subject to the AGP termination agreement with Citigroup, Treasury could receive $800 million in trust preferred securities held by the FDIC upon the company's exit from the FDIC's Temporary Liquidity Guarantee Program (TLGP). As of February 3, 2010, the company and its subsidiaries had $58.3 billion in long-term debt outstanding, which is guaranteed under the TLGP. Treasury Transactions Report, *supra* note 5, at 20. Data on Citigroup debt guaranteed by the TLGP accessed through SNL Financial Data Service.

[379] Investment date for Citigroup in the CPP.

[380] Investment date for Citigroup in the TIP.

FIGURE 27: VALUATION OF CURRENT HOLDINGS OF WARRANTS (AS OF FEBRUARY 2, 2011)

[Dollars in millions]

Financial Institutions with Warrants Outstanding	Warrant Valuation		
	Low Estimate	High Estimate	Best Estimate
SunTrust Banks, Inc.	$57.98	$328.46	$149.21
Regions Financial Corporation	13.18	195.09	109.36
Fifth Third Bancorp	174.07	469.56	230.85
KeyCorp	36.57	180.59	90.27
AIG	384.03	1,892.92	973.39
All Other Banks	615.05	1421.37	1052.02
Total	**$1,280.88**	**$4,487.99**	**$2,605.10**

2. Federal Financial Stability Efforts

a. Federal Reserve and FDIC Programs

In addition to the direct expenditures Treasury has undertaken through the TARP, the federal government has engaged in a much broader program directed at stabilizing the U.S. financial system. Many of these initiatives explicitly augment funds allocated by Treasury under specific TARP initiatives, such as FDIC and Federal Reserve asset guarantees for Citigroup, or operate in tandem with Treasury programs. Other programs, like the Federal Reserve's extension of credit through its Section 13(3) facilities and special purpose vehicles (SPVs) and the FDIC's Temporary Liquidity Guarantee Program (TLGP), operate independently of the TARP.

b. Total Financial Stability Resources

Beginning in its April 2009 report, the Panel broadly classified the resources that the federal government has devoted to stabilizing the economy in the aftermath of the financial crisis through myriad programs and initiatives such as outlays, loans, or guarantees. With the reductions in funding for certain TARP programs,

the Panel calculates the total value of these resources to be approximately $2.5 trillion. However, this would translate into the ultimate "cost" of the stabilization effort only if: (1) assets do not appreciate; (2) no dividends are received, no warrants are exercised, and no TARP funds are repaid; (3) all loans default and are written off; and (4) all guarantees are exercised and subsequently written off.

With respect to the FDIC and Federal Reserve programs, the risk of loss varies significantly across the programs considered here, as do the mechanisms providing protection for the taxpayer against such risk. As discussed in the Panel's November 2009 report, the FDIC assesses a premium of up to 100 basis points, or 1 percentage point, on TLGP debt guarantees.[381] In contrast, the Federal Reserve's liquidity programs are generally available only to borrowers with good credit, and the loans are over-collateralized and with recourse to other assets of the borrower. If the assets securing a Federal Reserve loan realize a decline in value greater than the "haircut," the Federal Reserve is able to demand more collateral from the borrower. Similarly, should a borrower default on a recourse loan, the Federal Reserve can turn to the borrower's other assets to make the Federal Reserve whole. In this way, the risk to the taxpayer on recourse loans only materializes if the borrower enters bankruptcy.

c. Mortgage Purchase Programs

On September 7, 2008, Treasury announced the GSE Mortgage Backed Securities Purchase (MBS) Program. The Housing and Economic Recovery Act of 2008 provided Treasury with the authority to purchase MBS guaranteed by government-sponsored enterprises (GSEs) through December 31, 2009. Treasury purchased approximately $225 billion in GSE MBS by the time its authority expired.[382] As of January 2011, there was approximately $139.6 billion in MBS still outstanding under this program.[383]

In March 2009, the Federal Reserve authorized purchases of $1.25 trillion MBS guaranteed by Fannie Mae, Freddie Mac, and Ginnie Mae, and $200 billion of agency debt securities from Fannie Mae, Freddie Mac, and the Federal Home Loan Banks.[384] The intended purchase amount for agency debt securities was subsequently decreased to $175 billion.[385] All purchasing activity was completed on March 31, 2010. As of February 3, 2011, the Federal

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[381] Congressional Oversight Panel, *November Oversight Report: Guarantees and Contingent Payments in TARP and Related Programs,* at 36 (Nov. 6, 2009) (online at cop.senate.gov/documents/cop-110609-report.pdf).

[382] U.S. Department of the Treasury, *FY2011 Budget in Brief,* at 138 (Feb. 2010) (online at www.treasury.gov/about/budget-performance/budget-in-brief/Documents/FY%202011%20BIB%20(2).pdf).

[383] U.S. Department of the Treasury, *MBS Purchase Program: Portfolio by Month* (online at www.treasury.gov/resource-center/data-chart-center/Documents/January%202011%20Portfolio%20by%20month.pdf). Treasury has received $80.7 billion in principal repayments and $16.2 billion in interest payments from these securities. *See* U.S. Department of the Treasury, *MBS Purchase Program Principal and Interest Received* (online at www.treasury.gov/resource-center/data-chart-center/Documents/January%202011%20MBS%20Principal%20and%20Interest%20Monthly%20Breakout.pdf).

[384] Board of Governors of the Federal Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet,* at 5 (Dec. 2010) (online at federalreserve.gov/monetarypolicy/files/monthlyclbsreport201012.pdf).

[385] *Id.* at 5.

Reserve held $965 billion of agency MBS and $145 billion of agency debt.[386]

d. Federal Reserve Treasury Securities Purchases[387]

On November 3, 2010, the Federal Open Market Committee (FOMC) announced that it has directed the Federal Reserve Bank of New York (FRBNY) to begin purchasing an additional $600 billion in longer-term Treasury securities. In addition, FRBNY will reinvest $250 billion to $300 billion in principal payments from agency debt and agency MBS in Treasury securities.[388] The additional purchases and reinvestments will be conducted through the end of the second quarter of 2011, meaning the pace of purchases will be approximately $110 billion per month. In order to facilitate these purchases, FRBNY will temporarily lift its System Open Market Account per-issue limit, which prohibits the Federal Reserve's holdings of an individual security from surpassing 35 percent of the outstanding amount.[389] As of February 3, 2010, the Federal Reserve held $1.11 trillion in Treasury securities.[390]

FIGURE 28: FEDERAL GOVERNMENT FINANCIAL STABILITY EFFORT (AS OF JANUARY 28, 2011)[xxxvi]

[Dollars in billions]

Program	Treasury (TARP)	Federal reserve	FDIC	Total
Total	**$475.1**	**$1,200.4**	**$683.1**	**$2,358.5**
Outlays[xxxvii]	201.5	1,109.7	188.9	1,500.1
Loans	23.2	90.7	0	113.9
Guarantees[xxxviii]	4.3	0	494.2	498.5
Repaid and Unavailable TARP Funds	246.0	0	0	246.0
AIG[xxxix]	**70.0**	**25.2**	**0**	**95.2**
Outlays	[xl] 70.0	[xli] 0	0	70.0
Loans	0	[xlii] 25.2	0	25.2
Guarantees	0	0	0	0
Citigroup	**0**	**0**	**0**	**0**
Outlays	[xliii] 0	0	0	0
Loans	0	0	0	0
Guarantees	0	0	0	0
Capital Purchase Program (Other)	**34.4**	**0**	**0**	**34.4**
Outlays	[xliv] 34.4	0	0	34.4
Loans	0	0	0	0
Guarantees	0	0	0	0
Capital Assistance Program	**N/A**	**0**	**0**	[xlv] **N/A**
TALF	**4.3**	**18.3**	**0**	**22.6**
Outlays	0	0	0	0
Loans	0	[xlvii] 18.3	0	18.3
Guarantees	[xlvi] 4.3	0	0	4.3
PPIP (Loans)[xlviii]	**0**	**0**	**0**	**0**
Outlays	0	0	0	0

[386] Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Feb. 3, 2011) (online at www.federalreserve.gov/releases/h41/20110203/) (hereinafter "Factors Affecting Reserve Balances (H.4.1)").

[387] Board of Governors of the Federal Reserve System, *Press Release—FOMC Statement* (Nov. 3, 2010) (online at www.federalreserve.gov/newsevents/press/monetary/20101103a.htm); Federal Reserve Bank of New York, *Statement Regarding Purchases of Treasury Securities* (Nov. 3, 2010) (online at www.federalreserve.gov/newsevents/press/monetary/monetary20101103a1.pdf).

[388] On August 10, 2010, the Federal Reserve began reinvesting principal payments on agency debt and agency MBS holdings in longer-term Treasury securities in order to keep the amount of their securities holdings in their System Open Market Account portfolio at their then-current level. Board of Governors of the Federal Reserve System, *FOMC Statement* (Aug. 10, 2010) (online at www.federalreserve.gov/newsevents/press/monetary/20100810a.htm).

[389] Federal Reserve Bank of New York, *FAQs: Purchases of Longer-term Treasury Securities* (Nov. 3, 2010) (online at www.newyorkfed.org/markets/lttreas_faq.html).

[390] Factors Affecting Reserve Balances (H.4.1), *supra* note 386.

FIGURE 28: FEDERAL GOVERNMENT FINANCIAL STABILITY EFFORT (AS OF JANUARY 28, 2011) [xxxvi]—Continued

[Dollars in billions]

Program	Treasury (TARP)	Federal reserve	FDIC	Total
Loans	0	0	0	0
Guarantees	0	0	0	0
PPIP (Securities)	[xlix] **22.1**	**0**	**0**	**22.1**
Outlays	7.4	0	0	7.4
Loans	14.7	0	0	14.7
Guarantees	0	0	0	0
Making Home Affordable Program/Foreclosure Mitigation	**45.6**	**0**	**0**	**45.6**
Outlays	[1] 45.6	0	0	45.6
Loans	0	0	0	0
Guarantees	0	0	0	0
Automotive Industry Financing Program	[li] **51.4**	**0**	**0**	**51.4**
Outlays	43.3	0	0	43.3
Loans	8.1	0	0	8.1
Guarantees	0	0	0	0
Automotive Supplier Support Program	**0.4**	**0**	**0**	**0.4**
Outlays	0	0	0	0
Loans	[lii] 0.4	0	0	0.4
Guarantees	0	0	0	0
SBA 7(a) Securities Purchase	[liii] **0.37**	**0**	**0**	**0.37**
Outlays	0.37	0	0	0.37
Loans	0	0	0	0
Guarantees	0	0	0	0
Community Development Capital Initiative	[liv] **0.57**	**0**	**0.57**	**0.57**
Outlays	0	0	0	0
Loans	0.57	0	0	0.57
Guarantees	0	0	0	0
Temporary Liquidity Guarantee Program	**0**	**0**	**494.2**	**494.2**
Outlays	0	0	0	0
Loans	0	0	0	0
Guarantees	0	0	[lv] 494.2	494.2
Deposit Insurance Fund	**0**	**0**	**188.9**	**188.9**
Outlays	0	0	[lvi] 188.9	188.9
Loans	0	0	0	0
Guarantees	0	0	0	0
Other Federal Reserve Credit Expansion	**0**	**1,157.0**	**0**	**1,157.0**
Outlays	0	[lvii] 1,109.7	0	1,109.7
Loans	0	[lviii] 47.3	0	47.3
Guarantees	0	0	0	0

[xxxvi] Unless otherwise noted, all data in this figure are as of January 28, 2011.

[xxxvii] The term ''outlays'' is used here to describe the use of Treasury funds under the TARP, which are broadly classifiable as purchases of debt or equity securities (e.g., debentures, preferred stock, exercised warrants, etc.). These values were calculated using (1) Treasury's actual reported expenditures, and (2) Treasury's anticipated funding levels as estimated by a variety of sources, including Treasury statements and GAO estimates. Anticipated funding levels are set at Treasury's discretion, have changed from initial announcements, and are subject to further change. Outlays used here represent investment and asset purchases—as well as commitments to make investments and asset purchases—and are not the same as budget outlays, which under section 123 of EESA are recorded on a ''credit reform'' basis.

[xxxviii] Although many of the guarantees may never be exercised or will be exercised only partially, the guarantee figures included here represent the federal government's greatest possible financial exposure at this point in time.

[xxxix] U.S. Department of the Treasury, *Treasury Update on AIG Investment Valuation* (Nov. 1, 2010) (www.treasury.gov/press-center/press-releases/Pages/pr_11012010.aspx). AIG values exclude accrued interest payable to FRBNY on the Maiden Lane LLCs.

[xl] This number includes investments under the AIGIP/SSFI Program: a $40 billion investment made on November 25, 2008, and a $30 billion investment made on April 17, 2009 (less a reduction of $165 million representing bonuses paid to AIG Financial Products employees). As of January 28, 2011, AIG had utilized all $70 billion available under the AIGIP/SSFI in the recapitalization process. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 21 (Feb. 1, 2011) (online at www.treasury.gov/ initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/2-1-11%20Transactions%20Report%20as%20of%201-28-11.pdf).

[xli] As part of the restructuring of the U.S. government's investment in AIG announced on March 2, 2009, the amount available to AIG through the Revolving Credit Facility was reduced by $25 billion in exchange for preferred equity interests in two special purpose vehicles, AIA Aurora LLC and ALICO Holdings LLC. These SPVs were established to hold the common stock of two AIG subsidiaries: American International Assurance Company Ltd. (AIA) and American Life Insurance Company (ALICO). This interest was exchanged as part of the AIG recapitalization plan. Board of Governors of the Federal Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet,* at 18 (Nov. 2010) (online at www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201011.pdf).

Upon the completion of AIG's recapitalization plan, FRBNY no longer held an interest in the AIA and ALICO SPVs. The remaining holdings in these vehicles is consolidated under Treasury. Treasury, through TARP, currently holds $16.9 billion in liquidation preference of preferred stock in the AIA Aurora LLC and $3.8 billion in junior preferred stock interest in ALICO Holdings LLC. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 21 (Feb. 1, 2011) (online at www.treasury.gov/ initiatives/ financial-stability/ briefing-room/reports/ tarp-transactions/ DocumentsTARPTransactions/ 2-1-11%20 Transactions%20Report%20as%20of%201-28-11.pdf).

[xliii] This number represents the outstanding principal of the loans extended to the Maiden Lane II and III SPVs to buy AIG assets (as of February 3, 2011, $12.6 billion and $12.7 billion, respectively). Federal Reserve Bank of New York, *Factors Affecting Reserve Balances (H.4.1)* (Feb. 3, 2011) (online at www.federalreserve.gov/ releases/h41/20110203/); Board of Governors of the Federal Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet* (Nov. 2010) (online at www.federalreserve.gov/ monetarypolicy/files/ monthlyclbsreport201011.pdf). The amounts outstanding under the Maiden Lane II and III facilities do not reflect the accrued interest payable to FRBNY. Income from the purchased assets is used to pay down the loans to the SPVs, reducing the taxpayers' exposure to losses over time. Board of Governors of the Federal Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet,* at 15 (Nov. 2010) (online at www.federalreserve.gov/ monetarypolicy /files/ monthlyclbsreport201011.pdf).

[xliii] The final sale of Treasury's Citigroup common stock resulted in full repayment of Treasury's investment of $25 billion. *See* endnote ii, *supra.* For further details concerning the sales of Citigroup common stock, *see* U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 15 (Feb. 1, 2011) (online at www.treasury.gov/ initiatives/ financial-stability/ briefing-room/ reports/tarp-transactions/ DocumentsTARPTransactions/ 2–1–11%20 Transactions%20Report%20as%20of%201–28–11.pdf).

[xliv] U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 13 (Feb. 1, 2011) (online at www.treasury.gov/ initiatives/financial-stability/ briefing-room/reports/tarp-transactions/DocumentsTARP Transactions/2-1-11%20Transactions% 20Report%20as%20of%201-28-11.pdf).

[xlv] On November 9, 2009, Treasury announced the closing of the CAP and that only one institution, GMAC/Ally Financial, was in need of further capital. GMAC/Ally Financial, however, received further funding through the AIFP. U.S. Department of the Treasury, *Treasury Announcement Regarding the Capital Assistance Program* (Nov. 9, 2009) (online at www.treasury.gov/ press-center/ press-releases/Pages/tg359.aspx).

[xlvi] This figure represents the $4.3 billion adjusted allocation to the TALF SPV. However, as of February 3, 2011, TALF LLC had drawn only $106 million of the available $4.3 billion. Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Feb. 8, 2011) (online at www.federalreserve.gov/releases/h41 /20110203/); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 22 (Feb. 1, 2011) (online at www.treasury.gov/initiatives/ financial-stability/ briefing-room/reports/tarp-transactions/ DocumentsTARPTransactions/ 2-1-11%20Transactions%20Report%20as%20of%201-28-11.pdf). On June 30, 2010, the Federal Reserve ceased issuing loans collateralized by newly issued CMBS. As of this date, investors had requested a total of $73.3 billion in TALF loans ($13.2 billion in CMBS and $60.1 billion in non-CMBS) and $71 billion in TALF loans had been settled ($12 billion in CMBS and $59 billion in non-CMBS). It ended its issues of loans collateralized by other TALF-eligible newly issued and legacy ABS (non-CMBS) on March 31, 2010. Federal Reserve Bank of New York, *Term Asset-Backed Securities Loan Facility: Terms and Conditions* (online at www.newyorkfed.org/ markets/ talf_terms.html) (accessed Feb. 8, 2011); Federal Reserve Bank of New York, *Term Asset-Backed Securities Loan Facility: CMBS* (online at www.newyorkfed.org/ markets/ cmbs_operations.html) (accessed Feb. 8, 2011); Federal Reserve Bank of New York, *Term Asset-Backed Securities Loan Facility: CMBS* (online at www.newyorkfed.org/ markets/CMBS_recent_operations.html) (accessed Feb. 8, 2011); Federal Reserve Bank of New York, *Term Asset-Backed Securities Loan Facility: non-CMBS* (online at www.newyorkfed.org /markets/ talf_operations.html) (accessed Feb. 8, 2011); Federal Reserve Bank of New York, *Term Asset-Backed Securities Loan Facility: non-CMBS* (online at www.newyorkfed.org/markets/TALF_recent_operations.html) (accessed Feb. 8, 2011).

[xlvii] This number is derived from the unofficial 1:10 ratio of the value of Treasury loan guarantees to the value of Federal Reserve loans under the TALF. U.S. Department of the Treasury, *Fact Sheet: Financial Stability Plan,* at 4 (Feb.10, 2009) (online at financialstability.gov/docs/fact-sheet.pdf). Since only $43 billion in TALF loans remained outstanding when the program closed, Treasury is currently responsible for reimbursing the Federal Reserve Board for only up to $4.3 billion in losses from these loans. Thus, since the outstanding TALF Federal Reserve loans currently total $22.6 billion, the Federal Reserve's maximum potential exposure under the TALF is $18.3 billion. *See* Board of Governors of the Federal Reserve System, *Federal Reserve Announces Agreement with Treasury Regarding Reduction of Credit Protection Provided for the Term Asset-Backed Securities Loan Facility (TALF)* (July 20, 2010) (online at www.federalreserve.gov/newsevents/press/monetary/20100720a.htm); Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Feb. 3, 2011) (online at www.federalreserve.gov /releases/h41/20110203/).

[xlviii] No TARP resources were expended under the PPIP Legacy Loans Program, a TARP program that was announced in March 2009 but never launched. Since no TARP funds were allocated for the program by the time the TARP expired in October 2010, this or a similar program cannot be implemented unless another source of funding is available.

[xlix] On January 24, 2011, Treasury released its fifth quarterly report on PPIP. The report indicates that as of December 31, 2010, all eight investment funds have realized an internal rate of return since inception (net of any management fees or expenses owed to Treasury) of at least 23 percent. Thus far, the highest performing fund is AG GECC PPIF Master Fund, L.P., which has a net internal rate of return of 59.7 percent. U.S. Department of the Treasury, *Legacy Securities Public-Private Investment Program: Program Update—Quarter Ended December 31, 2010,* at 8 (Jan. 24, 2011) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/ppip/s-ppip/Documents/ppip- 12-10 vFinal.pdf).

[l] As of January 28, 2011, the total amount of TARP funds committed to HAMP is $29.9 billion. However, as of January 28, 2011, only $840.1 million in non-GSE payments has been disbursed under HAMP. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 45 (Feb. 1, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/ DocumentsTARP Transactions/ 2-1-11%20Transactions%20Report%20as%20of%201-28-11.pdf).

[li] A substantial portion of the total $81.3 billion in debt instruments extended under the AIFP has since been converted to common equity and preferred shares in restructured companies. $8.1 billion has been retained as first-lien debt (with $1 billion committed to Old GM and $7.1 billion to Chrysler). This figure ($51.4 billion) represents Treasury's current obligation under the AIFP after repayments and losses. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 18 (Feb. 1, 2011) (online at www.treasury.gov/ initiatives/financial-stability /briefing-room/ reports/ tarp-transactions/ DocumentsTARPTransactions/2-1-11%20Transactions%20Report%20as%20of%201-28-11.pdf).

[lii] This figure represents Treasury's total adjusted investment amount in the ASSP. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 19 (Feb. 1, 2011) (online at www.treasury.gov/ initiatives/financial-stability/ briefing-room/reports/tarp-transactions/Documents TARPTransactions/2-1-11%20Transactions%20Report%20as%20of%201-28-11.pdf).

[liii] U.S. Department of the Treasury, *Troubled Asset Relief Program: Two Year Retrospective,* at 42–43 (Oct. 2010) (online at www.treasury.gov/ initiatives/ financial-stability/ briefing-room/ reports/ agency_reports/ Documents/ TARP%20Two%20Year%20 Retrospective_10%2005%2010_ transmittal%20letter.pdf).

[liv] U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending January 28, 2011,* at 17 (Feb. 1, 2011) (online at www.treasury.gov/ initiatives/ financial-stability/ briefing-room/ reports/tarp-transactions/Documents TARPTransactions/2-1-11%20Transactions%20Report%20as%20of%201-28-11.pdf).

[lv] This figure represents the current maximum aggregate debt guarantees that could be made under the program, which is a function of the number and size of individual financial institutions participating. $267.1 billion of debt subject to the guarantee is currently outstanding, which represents approximately 54.0 percent of the current cap. Federal Deposit Insurance Corporation, *Monthly Reports Related to the Temporary Liquidity Guarantee Program: Debt Issuance Under Guarantee Program* (Dec. 31, 2010) (online at www.fdic.gov/regulations/resources/TLGP/total_issuance12-10.html). The FDIC has collected $10.4 billion in fees and surcharges from this program since its inception in the fourth quarter of 2008. Federal Deposit Insurance Corporation, *Monthly Reports Related to the Temporary Liquidity Guarantee Program: Fees Under Temporary Liquidity Guarantee Debt Program* (Dec. 31, 2010) (online at www.fdic.gov/regulations/resources/tlgp/fees.html).

[lvi] This figure represents the FDIC's provision for losses to its deposit insurance fund attributable to bank failures in the third and fourth quarters of 2008; the first, second, third, and fourth quarters of 2009; and the first, second, and third quarters of 2010. Federal Deposit Insurance Corporation, *Chief Financial Officer's (CFO) Report to the Board: DIF Income Statement—Third Quarter 2010* (Nov. 12, 2010) (online at www.fdic.gov/about /strategic/corporate/ cfo_report_3rdqtr_10/income.html). For earlier reports, *see* Federal Deposit Insurance Corporation, *Chief Financial Officer's (CFO) Report to the Board* (Sept. 23, 2010) (online at www.fdic.gov/about/strategic/corporate/index.html). This figure includes the FDIC's estimates of its future losses under loss-sharing agreements that it has entered into with banks acquiring assets of insolvent banks during these eight quarters. Under a loss-sharing agreement, as a condition of an acquiring bank's agreement to purchase the assets of an insolvent bank, the FDIC typically agrees to cover 80 percent of an acquiring bank's future losses on an initial portion of these assets and 95 percent of losses on another portion of assets. *See, e.g.,* Federal Deposit Insurance Corporation, *Purchase and Assumption Agreement—Whole Bank, All Deposits—Among FDIC, Receiver of Guaranty Bank, Austin, Texas, Federal Deposit Insurance Corporation and Compass Bank,* at 65–66 (Aug. 21, 2009) (online at www.fdic.gov/ bank/ individual/failed/ guaranty- tx_p_and_a_w_ addendum.pdf).

[lvii] Outlays are comprised of the Federal Reserve Mortgage Related Facilities. The Federal Reserve balance sheet accounts for these facilities under federal agency debt securities and mortgage-backed securities held by the Federal Reserve. Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Feb. 3, 2011) (online at www.federalreserve.gov/releases/h41/20110203/) (accessed Feb. 8, 2011). Although the Federal Reserve does not employ the outlays, loans, and guarantees classification, its accounting clearly separates its mortgage-related purchasing programs from its liquidity programs. *See, e.g.,* Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1),* at 2 (Feb. 3, 2011) (online at www.federalreserve.gov/ releases/h41/20110203/) (accessed Feb. 8, 2011).

[lviii] Federal Reserve Liquidity Facilities classified in this table as loans include primary credit, secondary credit, central bank liquidity swaps, Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility, loans outstanding to Commercial Paper Funding Facility LLC, seasonal credit, term auction credit, the Term Asset-Backed Securities Loan Facility, and loans outstanding to Bear Stearns (Maiden Lane LLC). Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Feb. 3, 2011) (online at www.federalreserve.gov/ releases/h41/20110203/) (accessed Feb. 8, 2011). For further information, see the data that the Federal Reserve disclosed on these programs pursuant to its obligations under the Dodd-Frank Wall Street Reform and Consumer Protection Act. Board of Governors of the Federal Reserve System, *Credit and Liquidity Programs and the Balance Sheet: Overview* (May 11, 2010) (online at www.federalreserve.gov/monetarypolicy/bst.htm); Board of Governors of the Federal Reserve System, *Credit and Liquidity Programs and the Balance Sheet: Reports and Disclosures* (Aug. 24, 2010) (online at www.federalreserve.gov/monetarypolicy/bst_reports.htm); Board of Governors of the Federal Reserve System, *Usage of Federal Reserve Credit and Liquidity Facilities* (Dec. 3, 2010) (online at www.federalreserve.gov /newsevents/reform_transaction.htm).

SECTION FOUR: OVERSIGHT ACTIVITIES

The Congressional Oversight Panel was established as part of the Emergency Economic Stabilization Act (EESA) and formed on November 26, 2008. Since then, the Panel has produced 27 oversight reports as well as a special report on regulatory reform, issued on January 29, 2009, and a special report on farm credit, issued on July 21, 2009. Since the release of the Panel's January oversight report, the following developments pertaining to the Panel's oversight of the TARP took place:

- The Panel held a hearing in Washington, DC on February 4, 2011. Industry experts and regulators from the FDIC, the OCC, and the Federal Reserve each provided testimony with an update on the current state of the commercial real estate market and its continued implications for financial stability, the health of small and medium-sized banks, and repayment of CPP funds under the TARP. The hearing was the Panel's third on commercial real estate and came a year after the publication of its February 2010 report on the topic.

Upcoming Reports and Hearings

The Panel will release its next report in March. This final oversight report will summarize and update the Panel's work in each of its past reports, revisiting the broad array of topics covered throughout its oversight of the TARP.

SECTION FIVE: ABOUT THE CONGRESSIONAL OVERSIGHT PANEL

In response to the escalating financial crisis, on October 3, 2008, Congress provided Treasury with the authority to spend $700 billion to stabilize the U.S. economy, preserve home ownership, and promote economic growth. Congress created the Office of Financial Stability (OFS) within Treasury to implement the TARP. At the same time, Congress created the Congressional Oversight Panel to "review the current state of financial markets and the regulatory system." The Panel is empowered to hold hearings, review official data, and write reports on actions taken by Treasury and financial institutions and their effect on the economy. Through regular reports, the Panel must oversee Treasury's actions, assess the impact of spending to stabilize the economy, evaluate market transparency, ensure effective foreclosure mitigation efforts, and guarantee that Treasury's actions are in the best interests of the American people. In addition, Congress instructed the Panel to produce a special report on regulatory reform that analyzes "the current state of the regulatory system and its effectiveness at overseeing the participants in the financial system and protecting consumers." The Panel issued this report in January 2009. Congress subsequently expanded the Panel's mandate by directing it to produce a special report on the availability of credit in the agricultural sector. The report was issued on July 21, 2009.

On November 14, 2008, Senate Majority Leader Harry Reid and the Speaker of the House Nancy Pelosi appointed Richard H. Neiman, Superintendent of Banks for the State of New York, Damon Silvers, Director of Policy and Special Counsel of the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), and Elizabeth Warren, Leo Gottlieb Professor of Law at Harvard Law School, to the Panel. With the appointment on November 19, 2008, of Congressman Jeb Hensarling to the Panel by House Minority Leader John Boehner, the Panel had a quorum and met for the first time on November 26, 2008, electing Professor Warren as its chair. On December 16, 2008, Senate Minority Leader Mitch McConnell named Senator John E. Sununu to the Panel. Effective August 10, 2009, Senator Sununu resigned from the Panel, and on August 20, 2009, Senator McConnell announced the appointment of Paul Atkins, former Commissioner of the U.S. Securities and Exchange Commission, to fill the vacant seat. Effective December 9, 2009, Congressman Jeb Hensarling resigned from the Panel, and House Minority Leader John Boehner announced the appointment of J. Mark McWatters to fill the vacant seat. Senate Minority Leader Mitch McConnell appointed Kenneth Troske, Sturgill Professor of Economics at the University of Kentucky, to fill the vacancy created by the resignation of Paul Atkins on May 21, 2010. Effective September 17, 2010, Elizabeth Warren resigned from the Panel, and on September 30, 2010, Senate Majority Leader Harry Reid announced the appointment of Senator Ted Kaufman to fill the vacant seat. On October 4, 2010, the Panel elected Senator Kaufman as its chair.