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# KEEPING SCORE: DODD-FRANK SECTION 953(B) REPORTING TEN YEARS LATER

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***Abstract***

Ten years ago, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank)[1] attempted to repair the damage done by the financial crisis and hence required the most substantial changes to business operations and periodic reporting[2] in the American financial services industry since the Securities Exchange Act of 1934.[3] The author had the privilege of commenting on several aspects of the legislation as proposed[4] and has continued to discuss the intent, implementation, and modification of Dodd-Frank's provisions and related rulemaking in the decade since 2009.[5] This Article centers on Section 953(b)'s reporting burden and

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1. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 and 15 U.S.C) [hereinafter Dodd-Frank].

2. "Given the depth of the financial crisis, it took a massive response by our government to keep it from turning into a new Great Depression. And it is not surprising that it resulted in a hefty piece of legislation – the Dodd-Frank Wall Street Reform and Consumer Protection Act – which covered a vast array of topics in its 540 sections." Rick A. Fleming, Keynote Address at the University of Maryland: Examining the Dodd-Frank Act and the Future of Financial Regulation (Nov. 16, 2016), www.sec.gov/news/speech/fleming-speech-keynote-address-111616.html.

3. 15 U.S.C. §§ 78aa-78pp (2018).

4. *E.g.*, Karl T. Muth, Comment, *Comments on Proposed Rule: Net Worth Standard for Accredited Investors*, SEC (Jan. 26, 2011), www.sec.gov/comments/s7-04-11/s70411.shtml [hereinafter No. S7-04-11] (File No. S7-04-11).

5. *E.g.*, Karl T. Muth, Comment, *Comments on Proposed Rule: Family Offices*, SEC (Nov. 2, 2010), www.sec.gov/comments/s7-25-10/s72510-5.pdf (File

how it has affected companies, how it has informed shareholders and non-shareholders, and the degree of public interest in Section 953(b) disclosures.

> Pay ratios are now headline news because of a controversial provision in the 2010 Dodd-Frank Act, passed in the wake of the financial crisis. It requires publicly traded companies to report their median employee pay ($46,127 in Disney's case) and calculate the CEO pay ratio. Since mandatory reporting began last year, these ratios have captured public attention in ways that the typically technical corporate disclosure documents never do.[6]

Written in the context of the COVID-19 crisis, during which many CEOs are taking pay cuts or foregoing bonuses, the author has chosen to focus on pre-crisis market conditions, which are better-understood and likely more representative of normal wage dynamics for executives. Executive compensation, and particularly chief executive officer (CEO) compensation, has been an issue receiving substantial political and media attention in recent years[7] – a phenomenon not unrelated to Section 953(b)'s intents and contents. For context, from 1978 to 2018, the S&P500 index rose 706.7% while CEO compensation grew 1,007.5%.[8]

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No. S7-25-10); No. S7-04-11, *supra* note 4; Karl T. Muth, Comment, *Comments on Proposed Rule: Incentive-Based Compensation Arrangements*, SEC (Apr. 9, 2011), www.sec.gov/comments/s7-12-11/s71211-6.pdf (File No. S7-12-11); Karl T. Muth, *Comments on Proposed Rule: Pay Ratio Disclosure*, SEC (Sep. 24, 2013) (File No. S7-07-13); Karl T. Muth, *Comments on Proposed Rule: Disclosure of Payments by Resource of Extraction Issuers*, SEC (Mar. 27, 2016), www.sec.gov/comments/s7-25-15/s72515-65.htm (File No. S7-25-15); Karl T. Muth, *Comments on Proposed Rule: Definition of "Covered Clearing Agency"*, SEC (Nov. 20, 2016), www.sec.gov/comments/s7-23-16/s72316-5.htm (File No. S7-23-16); Karl T. Muth, *Comments on Proposed Rule: Covered Securities Pursuant to Section 18 of the Securities Act of 1933*, SEC (July 21, 2017), www.sec.gov/comments/s7-06-17/s70617-156841.htm (File No. S7-06-17); Karl T. Muth, *Comments on Proposed Rule: Reporting Threshold for Institutional Investment Managers*, SEC (July 16, 2020), www.sec.gov/comments/s7-08-20/s70820-220167.htm (File No. S7-08-20).

6. Steven A. Bank & George S. Georgiev, *Rage over Bob Iger's Payday Masks How Little We Know About Income Gaps in America*, L.A. TIMES (May 3, 2019), www.latimes.com/opinion/op-ed/la-oe-bank-georgiev-bob-iger-ceo-pay-ratio-disney-20190503-story. html.

7. Mark J. Perry & Michael Saltsman, *About That CEO/Employee Pay Gap*, WALL ST. J. (Oct. 12, 2014), www.wsj.com/articles/mark-perry-and-michael-saltsman-about-that-ceo-employee-pay-gap-1413150999 (discussing at length this controversy journalists, armed with readily-available Section 953(b) executive compensation reports for publicly-traded companies, have stoked).

8. Lawrence Mishel & Julia Wolfe, *CEO Compensation Has Grown 940% Since 1978*, ECON. POL'Y INST. (Aug. 14, 2019), www.epi.org/files/pdf/171191.pdf; *see also id.* (detailing how CEO compensation growth was also 940.3% under the options-realized measure).

# I. INTRODUCTION

Dodd-Frank is composed of thousands of provisions,[9] many of which enhance reporting in an attempt to give both regulators and shareholders increased situational awareness as to firms' financial health, operational practices, and risk-taking behaviors.[10] Several provisions involve increased reporting surrounding human resources or compensation practices at the firm level,[11] and one of these includes disclosure of the ratio between the Chief Executive Officer's pay and the pay of the median employee[12] In some cases, the median employee may make more money than the Chief Executive Officer– though the CEO's total compensation, including eventual appreciation of stock options and or equity compensation, may be vastly larger over time. But, among Fortune 500 firms, these firms are a tiny minority and are nearly all high technology firms;[13] in the vast majority of cases, the ratio $X/Y$, where X is CEO pay,[14] and Y is median employee pay,[15] far exceeds unity.

9. Dodd-Frank*, supra* note 1 (containing over 9,200 provisions, rules adjustments, administrative process alterations, and reporting requirements and over 300 rules or processes eliminated or consolidated).

10. Discussion Draft of Dodd-Frank, H.R. 4173, 111th Cong. (2009), www.llsdc.org/assets/DoddFrankdocs/frank-treasury-discussion-draft_2009-10-27.pdf (contemplating already those three categories of regulatory concern).

11. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Adopts Rule for Pay Ratio Disclosure (Aug. 5, 2015), www.sec.gov/news/pressrelease/2015-160. html (implementing rule as amended, reviewed, and approved by SEC Commissioners in prior months).

12. *See* 17 CFR § 229.402 (2015) (describing and specifying ratio).

13. *See, e.g*., Alphabet, Inc., Definitive Proxy Statement (Form DEF 14A), at 47 (Apr. 27, 2018), www.sec.gov/Archives/edgar/data/1652044/0001308179 18000222/lgoog2018-def14a.htm (exhibiting how Google CEO Larry Page, who was already worth more than forty billion dollars and stated that additional executive pay was not an appropriate motivating factor, was compensated a dollar in 2017); Facebook, Inc., Definitive Proxy Statement (Form DEF-14A), at 28 (Apr. 10, 2020), www.sec.gov/Archives/edgar/data/1326801/0001326801 20000037/facebook2020definitiveprox.htm. *But cf.* Alphabet, Inc., Definitive Proxy Statement (Form DEF 14A), at 49 (Apr. 24, 2020), www.sec.report/Document/0001308179-20-000203 (exhibiting how CEO Page's successor in Sundar Pichai received a $242 million pay package less than two years later).

14. According to publicly available filings thus far in 2020, only a single-digit number of S&P500 firms have CEOs paid less than the firm's median employee. This result is consistent with a study in 2018 of the five hundred S&P500 firms, which found two paying their CEOs less than the median employee. Sarah Berger, *From Bob Iger to Warren Buffett and Jack Dorsey: These are the Highest and Lowest Paid CEOs of 2018*, CNBC, www.cnbc.com/2019/05/16/wsj-report-highest-and-lowest-paid-sp-500-ceos-in-2018.html (last updated May 16, 2019).

15. The concept of a pay ratio disclosure arose early in the debate of Dodd-Frank, but its practical discussion and implementation planning did not come until five years later in the 114th Congress; its first mention explicitly actually came in an amendment meant to block pay ratio reporting. *See* 162 CONG. REC. H4510 (daily ed. July 7, 2016) (House Amendment 1254) (amending Financial

All firms required to make disclosures under Section 953(b) are also required to make compensation disclosures under Item 402(c)(2)(x).[16] The executive compensation and pay ratio aspect of this disclosure began in 2017 or with the first fiscal year beginning after January 1, 2017.[17] Firms are required to make the disclosure no later than the 120th day following the close of the fiscal year for which reporting must occur.[18] Firms may identify the median employee utilized as the ratio's denominator by a "reasonable" method.[19] For instance, choosing the middle employee in terms of "[a]nnual total compensation as determined under existing executive compensation rules" or according to "[a]ny consistently-applied compensation measure from compensation amounts reported in its payroll or tax records."[20] This is substantially identical to the rules for calculating sums provided in director compensation disclosures[21] and not wholly dissimilar from how executive pay sums are typically calculated in periodic communications between publicly-traded corporations and their shareholders.[22]

For this reason, the design of the disclosure itself demands and receives substantial attention at some firms, especially those often scrutinized for executive pay practices by shareholders or by the media.[23]

## II. THE DISCLOSURE'S DESIGN AND IMPLEMENTATION

The origins of the Section 953(b) pay ratio disclosure do not evidence in early drafts of Dodd-Frank. In fact, the early drafts of

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Services and General Government Appropriations Act, H.R. 5485, 114th Cong. (2017)); *id.* (statement of Rep. Huizenga). A later version of the provision eventually was integrated into Dodd-Frank as Section 953(b).

16. 17 C.F.R. § 229, 249 (2015) (incorporating a variety of comments from when it was a proposed rule).

17. Press Release, *supra* note 11.

18. *Id.*

19. David Polk & Wardwell LLP, *SEC's Latest Guidance on Pay Ratio Rule*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (Sep. 26, 2017), www.corpgov.law.harvard.edu/2017/09/26/secs-latest-guidance-on-pay-ratio-rule/ (explaining how business associations have flexibility in determining those methodologies).

20. Press Release, *supra* note 11.

21. *See*, *e.g.*, Boeing Co., Notice of 2017 Annual Meeting & Proxy Statement 40 (Mar. 17, 2017), www.s2.q4cdn.com/661678649/files/doc_financials/annual/2016/Boeing-2017-Proxy-Statement.pdf (including proxy statement language along with CEO pay for the most recent three years); *see also* Table A *infra*.

22. *E.g*, *id.*; Table B *infra*.

23. *See* Nina Trentmann & Kristin Broughton, *Companies That Don't Cut Executive Pay Now Could Pay for it Later*, WALL ST. J. (April 21. 2020), www.wsj.com/articles/companies-that-dont-cut-executive-pay-now-could-pay-for-it-later-11587477361 ("At a time when many investors are putting greater emphasis on environmental, social and governance considerations, perceived missteps could do companies more damage than in the past.").

additional disclosure provisions did not feature any discussion of CEO pay. Instead, Section 953(b) traces its roots to language considered by the drafters of the Troubled Asset Relief Program (TARP),[24] which came into being[25] as part of debates (which stretched on for years[26]) surrounding the Emergency Economic Stabilization Act of 2008[27] which, in turn, modified other parts of the financial system's scaffolding.[28] In October of 2008, the Emergency Economic Stabilization Act (EESA) created both enhanced reporting and "hard ceiling" limits on executive compensation at firms assisted by the federal government through its TARP program.[29]

Through that program,[30] executive compensation at firms was

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24. 154 CONG. REC. S10515-597 (Oct. 14, 2008).

25. Procedurally, see appendix and unnumbered pages to the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (codified as amended at 12 U.S.C. §§ 5211-61 (2018)).

26. *See* H.R. 1424, 110th Cong. (2008). *See generally* debate on Dodd-Frank, supra note 1, §§ 951-57 (subtit. E, tit. IX); Letter from Davis Polk & Wardwell LLP to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n (Nov. 16, 2010), www.sec.gov/comments/df-title-ix/executive-compensation/executivecompensation-51.pdf.

27. *See supra* note 25 and accompanying text; *see* H.R. 1424 (having been amended by multiple Committees of the House of Representatives, having been referred to the Senate as the Emergency Economic Stabilization Act of 2008 with no substantive deviations from H.R. 1424, and having been bi-camerally reconciled substantially on October 2, 2008, with full reconciliation of language occurring in the House in a largely-ceremonial meeting at 27 Independence Ave. S.E. on the morning of October 3, 2008). Because the bill technically was a tax bill, procedural rules did not permit it to originate from the Senate; hence, H.R. 1424 is a House Resolution originating from the House Finance Committee, despite its already having traveled to the Senate for debate, markup, and substantial revision. Barney Frank (a member of the House of Representatives, not the Senate) is its author of record. Though H.R. 1424 (as amended) is very different from H.R. 4173, 111th Cong. (2009) (which Frank originally introduced), they are considered close relatives in the same legislative lineage, and the bill signed by President Bush and enacted October 3, 2008, bore an introductory *chapeau* typed on U.S. House of Representatives letterhead.

28. *See*, *e.g.*, amendments to Section 203 of the Financial Services Regulatory Relief Act of 2006 12 U.S.C. 461, and an increase of FDIC deposit insurance limits from $100,000 to $250,000, this being the first meaningful adjustment of FDIC limits in decades; *see also* contemporaneous proposed amendments in early 2010, e.g., 156 Cong. Rec. S3007 (Apr. 30, 2010) (Murray Amendment),www.llsdc.org/assets/DoddFrankdocs/bill-111th_s3217-amdts_april30-may19.pdf. *Compare* amendments to FDIC Insurance Provisions within Dobb-Frank and separately-but-identially codified at Pub. L. No. 111-203 (substantively identical adjustment).

29. An annual limit of $500,000 was placed on CEO pay for TARP beneficiary firms. *See also* David Weidner, *Banks Kick the TARP Habit, but Keep Another Vice*, WALL ST. J., www.wsj.com/articles/SB124223172335815695 (last updated May 14, 2009) (suggesting TARP firms rushed to pay back government loans in order to resume paying higher, pre-crisis levels of CEO pay).

30. Troubled Asset Relief Program, tit. I, 122 Stat. at 3767-900 (codified as amended at 12 U.S.C. § § 5211-41) [hereinafter TARP]; *see also id.* at 3771

monitored and policed by the Financial Stability Oversight Board (FSOB).[31] Executive compensation practices were tied to corporate governance monitoring.[32] This is despite then-recent evidence that CEOs receiving more generous pay tended to lead firms with better corporate performance and tended to return more value to shareholders more quickly.[33] Little, if any, contemporary evidence suggested that high levels of CEO pay were either indicative of, or the result of, poor corporate governance practices.[34] Even with administrative meddling, the majority of TARP firms were able to retain their chief executives, and essentially all TARP funds were repaid ahead-of-schedule and in amounts that accounted for interim inflation.[35]

## III. USE BY CONGRESS AND REGULATORS IN RELATION TO TARP FIRMS

The reporting required by Section 953(b) is very similar in format and content to the reporting required by the American Recovery and Reinvestment Act.[36] In that context, periodic (quarterly, barring extraordinary events) reporting was sent to the FSOB.[37] Some of the context for this reporting was shared with the public through draft bills[38] and "fact sheets" prepared for the public,[39] but discussions or transcripts of discussions were not

(making substantial modifications by reference to 28 U.S.C. § 535(b) (2018)).

31. 12 U.S.C. § 5214 (2020).

32. § 111, 122 Stat. at 3776-77.

33. Rachel Merhebi et al., *Australian Chief Executive Officer Remuneration: Pay and Performance*, 46 ACCT. & FIN. 481 (2006).

34. Though perhaps counterintuitive to liberal journalists and activist shareholders, the relationship between high executive pay and bad governance practices is not proven and may not even be a strong correlation. *See* Charles M. Elson, *What's Wrong with Executive Compensation*, HARV. BUS. REV., Jan. 2003, at 68, www.hbr.org/2003/01/whats-wrong-with-executive-compensation (discussing grounding principles and persistent questions in this area that have changed little since the financial crisis).

35. Ryan Tracy et al., *Bank Bailouts Approach a Final Reckoning*, WALL ST. J., www.wsj.com/articles/ally-financial-exits-tarp-as-treasury-sells-remaining-stake-1419000430 (last updated Dec. 19, 2014) (asserting that most firms exited TARP with similar stories); Table B *infra*.

36. Pub. L. No. 111-5, tit. VII, § 7001, 123 Stat. 115, 516-20 (2009) (codified as amended in scattered sections of 16 and 42 U.S.C) (Section 7001 of the American Recovery and Reinvestment Act amended Section 111 of the Emergency Economic Stabilization Act). Not to be confused with the materially-different and more comprehensive reporting contemplated in Section 11.1 of H.R. 1424.

37. 12 U.S.C. § 5214 (2020).

38. Discussion Draft of Restoring American Financial Stability Act of 2009, S. 3217, 111th Cong., www.llsdc.org/assets/DoddFrankdocs/bill-111th-s3217-discussion-draft.pdf. This draft was circulated publicly by the Congressional Budget Office and the United States Government Publishing Office.

39. *See* Press Release, U.S. Dep't Treasury, U.S. Treasury Department

generally released in full.[40] As pressure from the public and from the newspapers grew during 2009, more information was released via FSOB in monthly reports on TARP, many of which were communicated through the White House or through press conferences hosted by President Obama, individuals representing the Department of the Treasury, or relevant offices within the Federal Reserve (Fed).[41]

As executive compensation in corporate America increased post-1978, and as this increase accelerated after the 1987 stock market crash,[42] the basis of these pay increases came under question among shareholders, journalists, and the general public – particularly to the extent these increases seemed either unwarranted or untethered from firm-level performance.[43] The public perception in some circles was that CEO total realized compensation reached unreasonably high levels in part due to a collusive relationship between the CEO and the board of directors.[44] The compensation committee of the board of directors typically determines the executive salaries in negotiations that may not be as adversarial or "arms length" as some shareholders and theory-of-the-firm folks would like.[45]

In the financial crisis of 2008, when the United States Government bailed out the "too big to fail" banks,[46] these questions were elevated[47] from boardroom grumblings to front-page news, particularly in the financial sector (construed broadly to include banks, investment banks, and insurers).[48] Populist sentiment

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Releases Financial Regulatory Reform (Jun. 17, 2009), www.treasury.gov/press-center/press-releases/Pages/20096171052487309.aspx.

40. No transcript of the final Senate closed hearing on the topic, for instance, has ever been released. *See* 156 CONG. REC. S5870-933 (daily ed. July 15, 2010) (providing missing document).

41. The Department of the Treasury now maintains the archive of these monthly reports, which are still updated every month in which TARP funds are still used or owed. *See Monthly Report to Congress*, U.S. DEP'T OF THE TREASURY, www.treasury.gov/initiatives/financial-stability/reports/Pages/Monthly-Report-to-Congress.aspx (providing full archive of reports in PDF form).

42. *See generally* Mishel & Wolfe, *supra* note 8 (describing rate and scale of CEO pay increases).

43. *Id.* at 9 Fig. A.

44. This has been studied in depth in the context of Harvard Law School's Forum on Corporate Governance. Stephani A. Mason et al., *Say-on-Pay: Is Anybody Listening?*, 20 MULTINATIONAL FIN. J. 273 (July 11, 2017), www.ssrn.com/abstract=2826640 (2016).

45. *Id.* at 1-9; *see also* Vidhi Chhaochharia & Yaniv Grinstein, *CEO Compensation and Board Oversight*, 64 J. FIN. 231 (2009) (describing complex mix of collaborative and adversarial negotiation conditions).

46. Eric Dash, *If It's Too Big to Fail, Is It Too Big to Exist?*, N.Y. TIMES (Jun. 20, 2009), www.nytimes.com/2009/06/21/weekinreview/21dash.html.

47. Chhaochharia & Grinstein, *supra* note 45, at 235-40.

48. Of the $700B allocated for TARP, some funds were also set aside for the American auto industry. *See Troubled Asset Relief Program (TARP) Information*, FED. RES. BD. OF GOVERNORS, www.federalreserve.gov/superv

against the large salaries and bonuses of bank executives spread onto the editorial pages of many major newspapers for a decade.[49] Some vocal critics believed that the use of taxpayer bailout money to pay large salaries was unconscionable during a time of high unemployment and firm underperformance.[50] It did not take long for these loud voices and newspaper clippings to reach Capitol Hill, where they influenced the questions and policies posed and proposed by legislators there.

While turnover among regulators and administrators of the economy between 2008 and 2010 was very low,[51] some TARP firms experienced executive turnover. For example, Eric Feldstein did not appear on GMAC LLC's (GMAC) website as CEO of GMAC until substantially after he appeared in the 2007 10-K filing as CEO, even though one could consider Feldstein as GMAC CEO for 2007; similarly, Alvaro de Molina's ascension announcement via press release from GMAC was not on the same date as the date on the supplement to the 10-K filing (later filed at exhibit 99 of the 2008 8-K Form).[52] Despite these irregularities in the dataset, one can reasonably determine who was CEO for most of each company's fiscal year, and there were no reporting issues around CEO pay during the administration of TARP so severe as to invite enforcement action.[53] In fact, in every case, the institution receiving

isionreg/tarpinfo.htm (last updated Mar. 7, 2017) (providing additional general information about the program).

49. *See*, *e.g.*, Bank & Georgiev, *supra* note 6; David Gelles, *Six C.E.O. Pay Packages that Explain Soaring Executive Compensation*, N. Y. TIMES (May 25, 2018), www.nytimes.com/2018/05/25/business/top-ceo-pay-packages.html.

50. Lucian A. Bebchuk, *Fixing Bankers' Pay*, ECONOMISTS' VOICE, Nov. 2009, at 1, www.law.harvard.edu/faculty/bebchuk/opeds/11-09-EconVoice.pdf; Frederick Tung, *Pay for Banker Performance: Structuring Executive Compensation for Risk Regulation*, 105 NW. U. L. REV. 1205, 1222-25 (2011).

51. Jon Hilsenrath, *Economists Back Bernanke Reappointment*, WALL ST. J., (Nov. 13, 2008), www.online.wsj.com/article/SB122660195494825105.html. But Bernanke's reappointment was not without opposition: Boxer, Brownback, Cantwell, Cornyn, Crapo, DeMint, Dorgan, Ensign, Feingold, Grassley, Harkin, Hutchinson, Inhofe, McCain, Roberts, Sessions, Shelby, Specter, Thune, and Vitter all voted against Bernanke's confirmation. Contemporaneously, Rep. Ron Paul introduced H.R. 1207 to audit the Federal Reserve (Fed), arguably his career's trademark piece of (failed) legislation. The appointment of Mary Jo White to Chair the SEC in 2013 was the first major post-crisis appointment of a financial markets regulatory agency. *See* Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, Address at the Econ. Club of N.Y.: The SEC After the Financial Crisis: Protecting Investors, Preserving Markets (Jan. 17, 2017), www.sec.gov/news/speech/the-sec-after-the-financial-crisis.html (recounting some of White's thoughts on the crisis and the SEC's role four years later).

52. *Compare* GMAC LLC, Current Report (Form 8-K), at 153 (Mar. 18, 2008), www.sec.report/Document/0000950124-08-001297, *with* GMAC LLC, Annual Report (Form 10-K) exh. 99 (Feb. 26, 2010), www.sec.gov/Archives/edgar/data/1467858/000119312510078119/dex99.htm (providing the newest version of the 8-K filing, now known as the 10-K filing).

53. No actions brought in administrative contexts, by the SEC, or by USA SDNY with failure to disclose or failure to adhere causes of action against TARP

support under TARP reported in a timely and accurate manner its executive pay practices and the total amount of compensation the chief executive received; there were zero instances in which either the FSOB or others involved in administering TARP objected to either the formula used to calculate the amount of CEO pay[54] or the timeliness of the reporting of a firm's CEO pay.

## IV. THE USE OF DISCLOSURES' USE ACROSS SECTORS OR INDUSTRIES

Taking the executive pay reporting structure utilized in the FSOB or TARP context and imposing it on all publicly-traded companies is not as simple as it may sound or seem. This is in part because the enhanced monitoring of TARP has a different and compelling justification:[55] These firms were operating and investing using the People's money (in the uppercase "We the People" sense), not simply investors' risk capital, which the Treasury Department contended meant high-resolution was appropriate.[56] Firms are already subject to heightened scrutiny by virtue of being publicly-traded on regulated United States exchanges.[57]

Is increased babysitting and reporting beyond this already-heightened standard really justified beyond these few TARP firms? "No evidence whatsoever indicates that errant executive compensation 'caused' the financial crisis of 2008, or that its reduction would prevent similar events in the future. The recent scrutiny of executive pay seems to stem from an odd mix of envy and vengeance, unsupported by facts or theories."[58] Similarly, Fahlenbrach and Stulz find "there is no evidence that banks with CEOs whose incentives were less well aligned with the interests of

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firms during this time related to TARP compliance.

54. The only reasonableness-of-compensation discussions occurring at FSOB publicly involved Peter Kraus having been promised a $25 million "goodbye bonus" at the conclusion of his tenure at AllianceBernstein, LP.

55. David Yermack, *Keeping the Pay Police at Bay*, WALL ST. J., www.wsj.com/articles/SB10001424052748703746604574461462598126406 (last updated Oct. 10, 2009).

56. TARP is the only government program where the Treasury Department set up a dashboard for taxpayers to monitor which borrowers were doing the best job paying back public funds. *TARP Tracker from November 2008 to March 2020*, U.S. DEP'T OF THE TREASURY, www.treasury.gov/initiatives/financial-stability/reports/Pages/TARP-Tracker.aspx (last updated July 2, 2015, 9:43 AM).

57. The Commissioner of the SEC's investigations and enforcement activities, along with reasonable self-regulation of the securities industry, forms the backbone of the American system of securities regulation. *See* William L. Cary, *Self-Regulation in the Securities Industry*, 49 A.B.A. J. 244, 246 (1963) (describing industry's preference for, and reliance upon, self-policing as first line of defense against misbehavior).

58. *Id.*

their shareholders performed worse during the crisis"[59] and others found CEOs heavily incentivized to return capital to shareholders took more risk.[60]

Despite the scarcity of evidence that CEO pay mattered much in firm performance, even when disclosed in detail and subjected to unprecedented scrutiny, the journalists and populists[61] at the palace gates continued to call for blood.[62] One of the ideas proposed at the time – to report CEO pay as a multiple of median worker pay at the same firm – was part of a move to scrutinize the governance of TARP bailed-out firms that gained traction and made its way into a later version of Dodd-Frank.[63] This provision has no basis in either economics or finance, and little grounding in the corporate governance literature.[64] Instead, like the Secretaries of State reporting from birth certificate records its most popular baby names each calendar year,[65] it is merely a source of low-hanging fruit for opportunistic slow-news-day journalism.

Even if one believes it is relevant to report CEO pay decisions in more detail, it is completely unclear why one would then also

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59. *See* Rüdiger Fahlenbrach & René M. Stulz, *Bank CEO Incentives and the Credit Crisis* 1, 12 (Nat'l Bureau of Econ. Research, Working Paper No. 15212, 2009), www.nber.org/papers/w15212.pdf.

60. *See* Lucian A. Bebchuk et al., *The Wages of Failure: Executive Compensation at Bear Stearns and Lehman 2000-2008*, 27 YALE J. ON REG. 257, 257 (2010). *But see* Steven N. Kaplan, *"Should Banker Pay Be Regulated?"* ECONOMIST'S VOICE, Dec. 2009, at 1, 2 (calling into question results of Cheng, Hong, and Scheinkman as "results . . . largely driven by insurance firms").

61. Susanna Kim, *Pressure on SEC to Implement Rule Disclosing CEO to Median Worker Pay*, ABC NEWS (Mar. 13, 2012), www.abcnews.go.com/Business/sec-pressured-implement-ceo-worker-pay-disclosure-walmarts/story?id=15886752.

62. A.Q. Smith, *It's Basically Just Immoral to be Rich*, CURRENT AFFAIRS, Jun. 14, 2017, at 27, www.currentaffairs.org/2017/06/its-basically-just-immoral-to-be-rich.

63. It is unclear when these conversations occurred. They likely occurred in the first half of 2010, as these ideas of including governance and the relationship between the Board of Directors and the CEO first appear in a conference report from the House of Representatives in late June of that year. H.R. REP. NO. 111-517, at 549-50 (2010) (Conf. Rep.).

64. *See generally* Duane E. Mitchell et al., *The Pay Ratio Disclosure Rule and Stakeholder Pressures May Give Way to Lower CEO Compensation: A Literary Approach*, 3 J. MGMT. SCI. & BUS. INTELLIGENCE 47 (2018); Steven Balsam et al., *What Explains the CEO-Worker Pay Ratios?: Evidence on the Effects of National Culture and Institutions Around the World* (July 2016) (unpublished manuscript), www.fmaconferences.org/Vegas/Papers/What_explains_the_CEO_worker_pay_ratios_Evidence_on_the_effects_of_national_culture_governance_and_equity_orientation_around_the_world.pdf; Biagio Marino, Show Me the Money: The CEO Pay Ratio Disclosure Rule and the Quest for Effective Executive Compensation Reform, 85 FORDHAM L. REV. 1355 (2016).

65. *See generally* Sonja Haller, *Find Out the Most Popular Girl Baby Names in Your State*, USA TODAY (May 20, 2019), www.usatoday.com/story/life/allthemoms/2019/05/19/most-popular-girl-baby-names-2018-your-state/3734413002 (reporting a list of popular baby names since the 1950s from information drawn from the Secretary of State's data).

believe that the CEO's pay described as a multiple of the firm's median worker's pay is relevant,[66] and those arguing in favor of the ratio's relevance routinely underappreciate the complexity of assembling the figure.[67] Not only is this an arbitrary measure not used by any administrators, agencies, or regulators, it is a particularly non-trans-sector-portable metric.[68] The CEO of Walmart will earn a higher multiple of the median Walmart worker's salary not because Walmart is a greedier or worse-run business than Google, but because Google's median employee is far more likely to be a computer scientist or engineer rather than a forklift operator. These differences in median-worker-pay-to-CEO-pay are evidence of precisely one thing: that Walmart and Google are in different businesses. Is a firm whose CEO accepts lower pay better-run, or has it merely hired a less talented CEO, or an already-very-wealthy CEO? There are many ways to move toward finding answers to these valid questions, but the Dodd-Frank Section 953(b) ratio is a rudderless idea drifting in the opposite direction.

## V. NOTES ON USEFULNESS OF EXECUTIVE PAY DISCLOSURES, PARTICULARLY INTER-FIRM

It was not until half a decade after the financial crisis that the Securities and Exchange Commission (SEC) finally implemented the enhanced reporting proposed and described in Section 953(b).[69] And, when it did occur, it occurred with not-inconsequential disagreement over how it would be instituted.[70] Many attorneys,

66. And, conversely, what does the opposite ratio tell one about the median worker's job performance? If he or she is truly making 1/100th the contribution made by the CEO, is that firm wrong to have a 100:1 CEO pay ratio? Luis Aguilar, Commissioner, SEC, *The CEO Pay Ratio Rule: A Workable Solution for Both Issuers and Investors* (Aug. 5, 2015), www.sec.gov/news/statement/statement-on-open-meeting-on-pay-ratio-aguilar.html (making this point and similar points from the Author's rule commentary to the SEC).

67. Dover, for instance, maintains 110 separate payrolls and 129 unique benefit and retirement plans. *See* Becky Yerak, *Corporate Pay Ratio Plan Proves Divisive*, CHI. TRIB. (Mar. 23, 2014) (providing excerpt written by Ivonne Cabrera, Dover Corporation's general counsel, to SEC).

68. 80 Fed. Reg. 50,109 n.45 (Aug. 18, 2015) (to be codified at 17 C.F.R. pts. 229, 240, 249) (citing this Author's concerns over the proposed rule and noting the proposed rule to report CEO pay ratios could "decrease the ratio's utility (especially for comparing the ratios of different companies)").

69. *Compare* H.R. 4173, www.govinfo.gov/content/pkg/BILLS-111hr4173enr/pdf/BILLS-111hr4173enr.pdf (including final text of Dodd-Frank and passed from committee to floor July 21, 2010), *with* Aguilar, *supra* note 66, *and* Press Release, *supra* note 11

70. This disagreement is showcased in the 287,000 comment letters showing sentiment ranging from enthusiasm to anger stored in file S7-07-13 and alluded to in the Commissioner Aguilar's statement on the open meeting on the topic. *See* Aguilar, *supra* note 66 ("The diverse views expressed by these commenters reflect that Congress tasked the Commission with navigating a highly divisive

former regulators, and professors commented on possible solutions for implementing Section 953(b), including the author of this Article.[71] Later that year, SEC Commissioner Luis A. Aguilar would announce the SEC's implementation decision.[72] Effective October 19, 2015, the SEC began to enforce the final implementation[73] of Section 953(b), which had directed the Commission to amend Item 402 of Regulation S-K to require disclosure of the median of the annual total compensation of all employees of a registrant minus a chief executive officer and the ratio of the median of the annual total compensation of all employees to the annual total compensation of that chief executive officer. According to the SEC's guidance to registered publicly-traded companies, "[t]he disclosure is required in any annual report, proxy or information statement, or registration statement that requires executive compensation disclosure pursuant to Item 402 of Regulation S-K."[74]

One problem with the design as implemented is that flexibility in the scheme – particularly flexibility that makes the reporting sympathetic to other unusual accounting practices that are firm-specific – substantially impairs the consistency of reporting between firms (and, hence, the ease with which investors can compare industries or firms' remuneration practices[75]). Hence, while this reporting latitude may allow for firm-specific precision and nuance, it hobbles investors' attempts at comparisons. Take, for instance, the reporting of Doug McMillon's $22,800,000 pay as CEO of Walmart in a recent year versus the median Walmart worker's pay of $19,177 during that same year, a ratio of 1,188:1.[76] If one reclassifies this in terms of time, Mr. McMillon makes $62,637.36 per day and makes as much as the company's median employee makes per year during a good night's sleep (7.35 hours). Meanwhile, aerospace, defense, and engineering firm Lockheed-Martin in the same year, Marillyn Hewson earned an almost-identical amount to Mr. McMillon at Walmart: $22,915,200.[77] But the median non-CEO employee at Lockheed-Martin earned $123,200 that year (making

subject—a boon or a bane, depending on one's perspective.").

71. Letter from Karl T. Muth to Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n (Sept. 24, 2013), www.sec.gov/comments/s7-07-13/s70713-29.htm.

72. *See* Aguilar, *supra* note 66 (citing Karl T. Muth's comments).

73. *See* 17 C.F.R. § § 229, 249 *as clarified in* Release Nos. 33-9877, 34-75610, *and in* File No. S7-07-13 (2015) (amending and largely replacing earlier drafts).

74. 17 C.F.R. § § 229, 249 *with reference to* Release No. 33-9877 (2015) (creating final language for 2015 consideration, some of which would later be subject to SEC interpretation in 2018 and 2019).

75. *See supra* note 67.

76. *Financial Information*, WALMART, www.stock.walmart.com/investors/financial-information/sec-filings (last visited Aug. 7, 2020) (exhibiting all of Walmart's SEC filings for recent years).

77. *SEC Filings*, LOCKHEED MARTIN, www.investors.lockheedmartin.com/financial-information/sec-filings (last visited Aug. 7, 2020) (exhibiting all of Lockheed Martin's SEC filings for recent years). The year referenced is 2018-2019.

the CEO pay ratio 186:1).[78] The ratio of 186:1 is about six and a half times lower than 1,188:1; does this mean Lockheed-Martin is 6.5 times better run, that Lockheed-Martin is 6.5 times more conservative in its pay, or that the twenty-two million paid to Ms. Hewson is 6.5 times more reasonable than the same amount paid to Mr. McMillon? The 6.5 ratio may mean something, but probably does not mean any of these things.

Which naturally invites the question: Do investors care about this issue? The answer seems to be "no."[79]

When Larry Merlo, as CEO of CVS Health Group, was paid 434 times the salary of the median CVS employee in 2015 (then the largest such ratio ever reported in the Fortune 500), the issue was not raised on the earnings call, in either of the follow-ups to the earnings call, in any shareholder questions submitted contemporaneous with the disclosure, or in any addenda to CVS's Form 4,[80] 8-K,[81] S-8,[82] Proxy Statements (DEF 14A),[83] or securities statements during that period (e.g. CVS's S-3).[84] Nor was the growth of Mr. Merlo's compensation as CEO questioned.[85] Five years later (the most recent information available at the time of this writing), Mr. Merlo now earns 618 times more than the median non-CEO CVS employee – but by CVS's calculation makes a similar annual amount to what Mr. McMillon and Ms. Hewson make: $21.9 million.[86] On CVS's most recent earnings call with analysts and

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78. *Id.*

79. Tomi Kilgore, *CEO Pay Ratio Disclosures Provide Little More Than Noise for Investors*, MARKET WATCH (May 28, 2018), www.marketwatch.com/story/ceo-pay-ratios-provide-little-more-than-noise-for-investors-2018-04-20 ("'Bottom line, it's not telling us any more about income inequality that we didn't already know,' Marcec [of Equilar] said.").

80. CVS Health, Statement of Changes in Beneficial Ownership of Securities (Form 4) (Nov. 6, 2015), www.investors.cvshealth.com/investors/sec-filings/sec-filings-details/default.aspx?FilingId=10995244.

81. CVS Health, Current Report (Form 8-K) (Dec. 16, 2015), www.investors.cvshealth.com/investors/sec-filings/sec-filings-details/default.aspx?FilingId=11063916 (last accessed May 3, 2020).

82. CVS Health, Registration Statement (Form S-8) (Dec. 30, 2015), www.investors.cvshealth.com/investors/sec-filings/sec-filings-details/default.aspx?FilingId=11084848.

83. Omnicare, Inc., Definitive Proxy Statement (Form DEF 14A) (May 21, 2015), www.investors.cvshealth.com/investors/sec-filings/sec-filings-details/default.aspx?FilingId=10718708.

84. CVS Health, Registration Statement (Form S-3) (June 23, 2015), www.investors.cvshealth.com/investors/sec-filings/sec-filings-details/default.aspx?FilingId=10772597.

85. In 2013, Merlo earned $12.1 million, or 422 times the earnings of CVS's median non-CEO worker, which were $28,700. David Lazarus, *Executive Pay is an Insult to Working Families*, L. A. TIMES (May 26, 2014), www.latimes.com/business/la-fi-lazarus-20140527-column.html.

86. With new option grants and accounting for the current-year contribution value of participation in various programs and grants made available to Mr. Merlo in prior pay packages, this amount climbs to $36.5 million and the pay ratio climbs to 790 from 618. *CVS Health CEO's 2019 Total Compensation Was*

investors,[87] no CVS employee's pay was mentioned – including Mr. Merlo's (or, for that matter, the pay of the median non-CEO worker). Rather than the mere ***millions*** paid to Merlo during the past year, people were understandably more interested in hearing about the ***billions*** returned to shareholders by CVS.[88]

## VI. CONCLUSION

While well-intentioned, Section 953(b) of Dodd-Frank does little to give investors new, interesting, actionable information with which to make better decisions. The groundwork of Section 953(b) was laid during the financial crisis, and it was admirable for regulators and legislators to want to give shareholders the same transparency and reporting rigor they enjoyed as to TARP firms. However, the result achieved by Section 953(b) benefits from neither the resolution nor the context of that intense reporting during TARP.

The ratio of pay between the CEO and the median non-CEO employee neither indicates whether the CEO is overpaid, nor whether governance mechanisms are well-functioning (or malfunctioning), nor whether the CEO is well-incentivized to do what is in shareholders' best interests. It creates a metric that is neither useful longitudinally (comparing different years at the same company) or market- or sector-wide (between companies)[89] while creating an accounting headache at each company.

Finally, Section 953(b)'s effect is one of societal demoralization through the language and messages of financial stratification. In practice, Section 953(b) requires the accounting, compliance, and legal departments of large companies to set aside many hours each year[90] during which each company is expected to manufacture a few weapons to be used in class warfare, a few pitchforks and pikes to be waved menacingly in their executives' general direction.

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*$36.5 Million*, REUTERS (Apr. 3, 2020), www.reuters.com/article/brief-cvs-health-ceos-2019-total-compens/brief-cvs-health-ceos-2019-total-compensation-was-36-5-million-idUSFWN2BR1E4.

87. *CVS Health Corp (CVS) Q4 2019 Earnings Call Transcript*, MOTLEY FOOL (Feb. 12, 2020, 12:30 PM), www.fool.com/earnings/call-transcripts/2020/02/12/cvs-health-corp-cvs-q4-2019-earnings-call-transcri.aspx.

88. More than $2.6 billion. *See Dividend History*, CVS HEALTH, www.investors.cvshealth.com/investors/stock-information/dividend-history/default.aspx (last visited Aug. 6, 2020) (displaying recent dividend payout history of CVS).

89. *See* Theo Francis & Vanessa Fuhrmans, *Are You Underpaid? In a First, U.S. Firms Reveal How Much They Pay Workers*, WALL ST. J. (Mar. 12, 2018), www.wsj.com/articles/are-you-underpaid-in-a-first-u-s-firms-reveal-how-much-they-pay-workers-1520766000 ("[C]omparisons between companies can be tricky.").

90. *See*, *e.g.*, Yerak, *supra* note 67 ("Given the administrative complexity of Dover's global operations, Dover estimates that its annual cost to collect required data would exceed $2 million under the proposed rules.").

953(b) disclosures may tell a story. That story is not informative; instead, it is needlessly provocative.

Five years passed between Dodd-Frank (2010) and the SEC's adoption of a pay ratio disclosure rule now commonly referred to as Section 953(b) in 2015.[91] Now, a further five years later, investors are no better-informed, CEOs are no more precisely compensated, Boards of Directors behave similarly, and employees are no better-off. Instead, the winners in Section 953(b) are the consultants, public relations firms, outside accounting firms, and outside law firms that have billed untold hours advising companies on the care and feeding of a regulatory hound bred to have an annoying bark and an inconsequential bite.

91. Press Release, *supra* note 11.

**Table A**[92]

## *2016 Director Compensation Table*

The following table sets forth 2016 compensation for each nonemployee director and for W. James McNerney, Jr., our former CEO, who served as an employee director until March 1, 2016. Compensation for Mr. Muilenburg is set forth in the Summary Compensation Table on page 40.

| Director | Fees Earned or Paid in Cash ($)(8) | Stock Awards ($)(9) | Non-Equity Incentive Plan Compensation ($) | All Other Compensation ($) | Total ($) |
|---|---|---|---|---|---|
| Robert A. Bradway(1) | — | — | — | 30,000(11) | 30,000 |
| David L. Calhoun | 130,000 | 165,000 | — | 31,000(11) | 326,000 |
| Arthur D. Collins, Jr.(2) | 150,000 | 165,000 | — | 31,000(11) | 346,000 |
| Kenneth M. Duberstein(3) | 175,000 | 165,000 | — | 31,000(11) | 371,000 |
| Edmund P. Giambastiani, Jr. | 130,000 | 165,000 | — | 6,800(11) | 301,800 |
| Lynn J. Good | 130,000 | 165,000 | — | 30,000(11) | 325,000 |
| Lawrence W. Kellner(4) | 145,000 | 165,000 | — | 31,000(11) | 341,000 |
| Edward M. Liddy(5) | 155,000 | 165,000 | — | — | 320,000 |
| W. James McNerney, Jr.(6) | 525,000 | — | 6,926,502(10) | 704,160(12) | 8,155,662 |
| Susan C. Schwab | 130,000 | 165,000 | — | 22,000(11) | 317,000 |
| Randall L. Stephenson(7) | 113,128 | 143,586 | — | 25,000(11) | 281,714 |
| Ronald A. Williams | 130,000 | 165,000 | — | 31,000(11) | 326,000 |
| Mike S. Zafirovski | 130,000 | 165,000 | — | 31,000(11) | 326,000 |

(1) Mr. Bradway joined the Board on October 14, 2016, after the payment date for the fourth quarter 2016 installment of retainer fees and retainer stock units.
(2) Compensation Committee Chair.
(3) Lead Director; GON Committee Chair.
(4) Finance Committee Chair.
(5) Audit Committee Chair.
(6) Mr. McNerney served as Chairman of the Board until March 1, 2016, and was compensated as an employee director in accordance with the transition and retirement agreement, dated June 22, 2015.
(7) Mr. Stephenson joined the Board on February 17, 2016.
(8) Reflects total cash compensation paid in 2016 and includes amounts deferred at the director's election pursuant to our Deferred Compensation Plan for Directors. Cash compensation for nonemployee directors is paid in four quarterly installments as of the first business day of each quarter and is pro-rated for directors who join the Board during a quarter. For Mr. McNerney, the amount represents base salary paid in 2016 and cash paid in lieu of accrued vacation pursuant to his transition and retirement agreement.

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92. Boeing Co., *supra* note 21, at 18. A typical Director Compensation Table from the director pay disclosures provided by publicly-traded companies in the United States. Footnotes clarify roles and any tenure-related adjustments in pay.

**Table B**[93]

| (Dollars in thousands)<br>**Name** | **2016 Annualized Base Salary (a)** | **2016 Target Annual Incentive as a % of Base Salary (b)** | **2016 Target Annual Incentive Compensation (c)=(a)x(b)** | **2016 Target Long-Term Incentive as a % of Base Salary (d)** | **2016 Target Long-Term Incentive Compensation (e)=(a)x(d)** | **2016 Total Annualized Target Direct Compensation (f)=(a)+(c)+(e)** |
|---|---|---|---|---|---|---|
| Dennis A. Muilenburg<br>*Chairman, President and Chief Executive Officer* | $1,650 | 170% | $2,805 | 650% | $10,725 | $15,180 |
| Gregory D. Smith<br>*Chief Financial Officer, Executive Vice President, Corporate Development and Strategy* | $ 925 | 110% | $1,018 | 400% | $ 3,700 | $ 5,643 |
| Raymond L. Conner<br>*Vice Chairman, Former President and Chief Executive Officer, Commercial Airplanes* | $1,075 | 110% | $1,183 | 425% | $ 4,569 | $ 6,826 |
| J. Michael Luttig<br>*Executive Vice President and General Counsel* | $ 910 | 110% | $1,001 | 400% | $ 3,640 | $ 5,551 |
| Kevin G. McAllister<br>*President and Chief Executive Officer, Commercial Airplanes** | $1,000 | 110% | $1,100 | 400% | $ 4,000 | $ 6,100 |

* Mr. McAllister joined Boeing on November 21, 2016.

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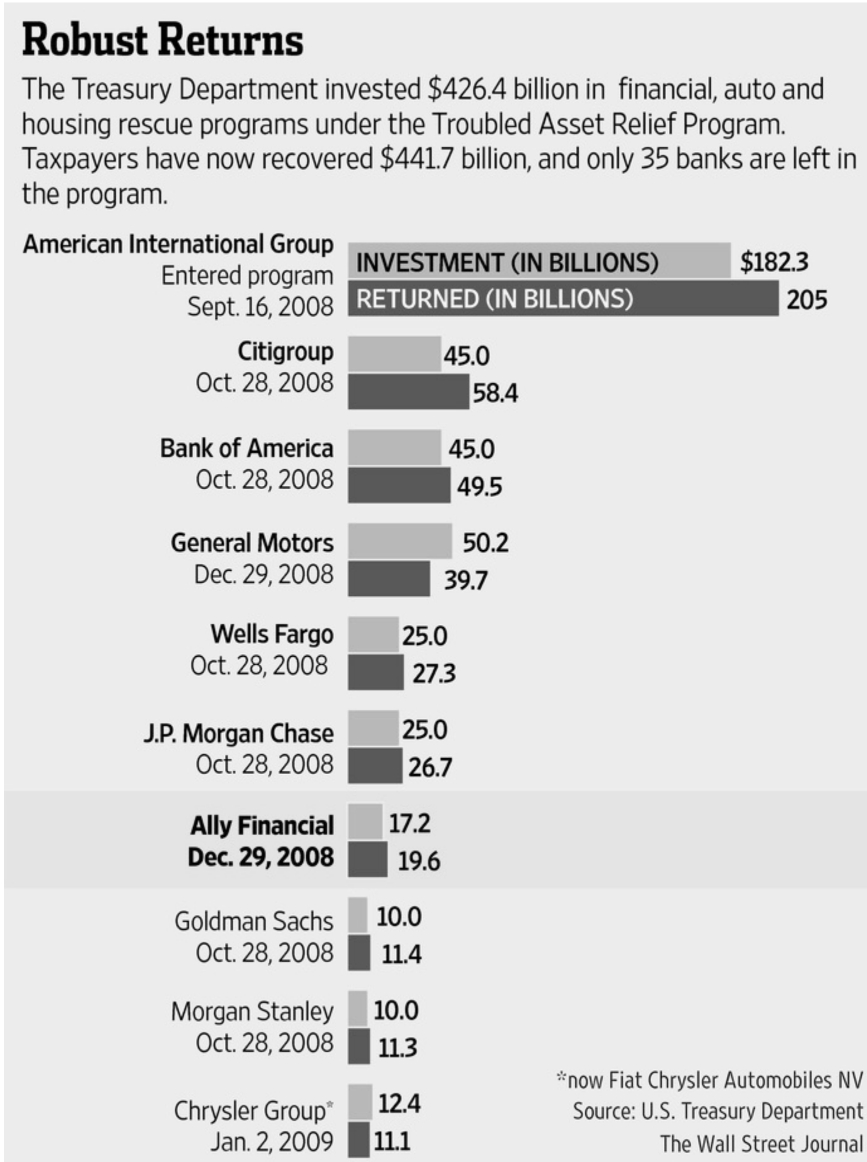
93. Boeing Co., *supra* note 21, at 27. A typical Executive Compensation Table from the executive pay disclosures provided by a publicly-traded company in its occasional and ordinary reporting to shareholders.

**Table C**[94]




94. Ryan Tracy et al., *supra* note 35, at A9 (describing through histogram the posture of TARP firms in 2014).