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6-6-2023

# Memorandum on Reopening the Dodd-Frank Act Section 956 Incentive Compensation Rule

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### Recommended Citation

Herz, Michael E.; Levin, Ronald; Mendelson, Nina A.; Shane, Peter M.; and Strauss, Peter L., "Memorandum on Reopening the Dodd-Frank Act Section 956 Incentive Compensation Rule" (2023). *Online Publications*. 77.

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

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

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

The Honorable Sandra L. Thompson, Director  
Federal Housing Finance Agency  
400 7th Street SW  
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The Honorable Todd M. Harper, Chair  
National Credit Union Administration  
1775 Duke Street  
Alexandria, Virginia 22314-3428

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

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June 6, 2023

### **Memorandum on Reopening the Dodd-Frank Act Section 956 Incentive Compensation Rule<sup>1</sup>**

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

We understand that the regulatory agencies tasked with finalizing the incentive compensation rule under Section 956 of the Dodd-Frank Act are again working towards issuing a final rule—but that there remains some uncertainty about the best procedural route to take in light of prior agency action.<sup>2</sup>

As law professors specializing in administrative law, we write to advise your agencies about the procedural options available to you as you work towards this goal. We note at the outset that we are not scholars of financial regulation and our comments should not be construed as favoring any particular substantive policy. Michael Eric Herz is the Arthur Kaplan Professor of Law at the Benjamin N. Cardozo School of Law at Yeshiva University. Ronald Levin is the William R. Orthwein Distinguished Professor of Law at the Washington University in St. Louis School of Law. Nina A. Mendelson is the Joseph L. Sax Collegiate Professor of Law at the University of Michigan Law School. Peter M. Shane is the Jacob E. Davis and Jacob E. Davis II Chair in Law Emeritus at the Ohio State University Moritz College of Law and a Distinguished Scholar in Residence at NYU Law. Peter L. Strauss is the Betts Professor of Law Emeritus at Columbia Law School.<sup>3</sup>

Below we outline the three paths available to the agencies: (1) finalizing the agencies' 2016 NPRM without reopening the comment period;<sup>4</sup> (2) reopening the comment opportunity for a supplementary period—30-to-60 days would not be unusual—and then finalizing the 2016 NPRM; and (3) issuing a new NPRM. We also identify factors for the agencies to consider in choosing between these paths.

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<sup>1</sup> This letter was prepared with the assistance of Rachael Klarman and Will Dobbs-Allsopp of Governing for Impact and Todd Phillips.

<sup>2</sup> See Victoria Guida, "Gruenberg: Agencies working on long-awaited executive compensation plan," POLITICO (May 31, 2023) (quoting Federal Deposit Insurance Corporation Chair Martin Gruenberg as saying he thinks relevant agencies will "repropose" a rule later this year); Letter, "Re: Notice of Proposed Rulemaking on Incentive Based Compensation Arrangements," Governing for Impact (April 11, 2023) (urging regulators to re-open a new comment period for the 2016 proposal rather than re-proposing), available here: <https://www.sec.gov/comments/s7-07-16/s70716-20163990-333989.pdf>.

<sup>3</sup> Institutional affiliations are indicated solely for purposes of identification.

<sup>4</sup> Incentive-Based Compensation Arrangements, 81 Fed. Reg. 37669 (June 10, 2016).

## 1. Finalizing the Rule Without Reopening the Comment Period

It is possible that the agencies could finalize the 2016 proposal without reopening the comment period. Courts give agencies deference regarding “the timetable of a rulemaking proceeding,”<sup>5</sup> and “[i]f the original record is still fresh, a new round of notice and comment might be unnecessary.”<sup>6</sup> In a 2011 recommendation, the Administrative Conference of the United States (“ACUS”) advised that “agencies should not automatically deem rulemaking comments to have become stale after any fixed period of time.”<sup>7</sup>

It is instructive in this respect that, even when an agency reconsiders a rule on remand from judicial review, there is no *per se* requirement that it go through an additional round of notice and comment. If an agency can rely on an earlier record even when a court has directed that the agency reconsider its proposal, it would seem to follow *a fortiori* that an agency retains discretion to do so when reconsidering an earlier proposal at the agency’s own initiative. In the case of judicial remand, a new comment period *may* be necessary or appropriate depending on the grounds for the court’s action and the specifics of its order and, perhaps, whether the old rule was formally vacated. None of these considerations applies when an agency operates at its own initiative. Of course, relevant changes in the world may make a new comment period appropriate. But the need for a new comment period is not automatic.<sup>8</sup>

Of course, as the D.C. Circuit noted four decades ago that, although the Administrative Procedure Act (“APA”) “does not establish a ‘useful life’ for a notice and comment record, clearly the life of such a record is not infinite.”<sup>9</sup> A court may conclude that a lengthy delay has denied the public a fair opportunity to comment because the state of the world has changed. Only if an agency can show that “[n]ew information relevant to the agency’s decisionmaking [did not] come to light after the original notice and comment proceedings” will courts find that the record retains its useful life.<sup>10</sup>

In this instance, the agencies should consider whether the record is still fresh, given relevant recent events and the amount of time that has passed since the 2016 NPRM was published.

Moreover, if the agencies were to make adjustments to the final rule based on lessons learned from recent events,<sup>11</sup> but neither re-open a new comment period nor issue a wholly new NPRM, the final rule could be subject to challenge under the “logical outgrowth doctrine.” Courts have interpreted the APA’s notice requirement to mean that a final rule must be a “logical outgrowth” of the proposed rule.<sup>12</sup> This requirement prohibits agencies from taking the mere existence of a comment period as “carte blanche to establish a rule contrary to its original proposal.”<sup>13</sup> When determining whether an agency’s notice-and-comment process was adequate, courts consider “whether the notice was ‘sufficient to advise interested parties that comments directed to the’ controverted aspect of the final rule should have been made”<sup>14</sup> and whether “a reasonable member of

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<sup>5</sup> *Sierra Club v. Gorsuch*, 715 F.2d 653, 658 (D.C. Cir. 1983).

<sup>6</sup> *Mobil Oil Corp. v. U.S. E.P.A.*, 35 F.3d 579, 584–85 (D.C. Cir. 1994).

<sup>7</sup> Admin. Conf. of the U.S., Recommendation 2011-2, Rulemaking Comments, 76 Fed. Reg. 48791 (Aug. 9, 2011).

<sup>8</sup> *See, e.g.*, *Intercollegiate Broadcasting System v. Copyright Royalty Board*, 796 F.3d 111, 125 (D.C. Cir. 2015); *Mobil Oil Corp. v. EPA*, 35 F.3d 579, 584–85 (D.C. Cir. 1994); *Nat’l Grain & Feed Ass’n, Inc. v. OSHA*, 903 F.2d 308, 310-11 (5th Cir. 1990).

<sup>9</sup> *Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 800 (D.C. Cir. 1983). *But see* *Sanofi Aventis v. HHS*, 58 F.4th 696 (3d Cir. 2023) (finding that HHS permissibly finalized a rule four years after it had originally been proposed and after the agency had deemed the rule “withdrawn” in the Unified Agenda as “that did not negate that HHS had taken the required steps: the public knew about the proposed rule and had a chance to comment on it, and the agency considered those comments. . . . No more was needed.”).

<sup>10</sup> *Mobil Oil Corp. v. U.S. E.P.A.*, 35 F.3d 579, 584–85 (D.C. Cir. 1994).

<sup>11</sup> As advocates have suggested. *See, e.g.*, Letter, “Re: Incentive-Based Compensation Arrangements,” Public Citizen (March 30, 2023), available here: <https://www.sec.gov/comments/s7-07-16/s70716-20162328-331174.pdf>.

<sup>12</sup> *See generally* *Long Island Care at Home, Ltd. v. Coke*, 551 US 158 (2007).

<sup>13</sup> *Chocolate Mfrs. Ass’n of U.S. v. Block*, 755 F.2d 1098, 1104 (4th Cir. 1985).

<sup>14</sup> *First Am. Disc. Corp. v. Commodity Futures Trading Comm’n*, 222 F.3d 1008, 1015 (D.C. Cir. 2000), quoting *Fertilizer Institute*, 935 F.2d at 1312.

the regulated class ... [would] anticipate' the general aspects of the rule."<sup>15</sup> Whether a Final Rule based wholly on the 2016 NPRM comment period could meet these criteria would depend on the substance of that rule and the content of the NPRM.

## 2. Reopening the 2016 NPRM for Further Comment

Although an old proposal might conceivably become final based upon the original comment period, there is nothing in the APA that prevents an agency from reopening a dormant NPRM and soliciting additional reactions. The Supreme Court has routinely held that the APA provides the “maximum procedural requirements”<sup>16</sup> that an agency must abide by when promulgating a rule, and has rejected attempts to impose “judge-made procedur[es]” beyond the APA’s requirements.<sup>17</sup> But agencies themselves are completely free to go beyond the statutory minima, and often do so.

Section 553(b) of the APA obligates agencies to provide adequate notice before promulgating a final rule. In the rulemaking process, “formal labels” are not necessarily important, so long as the rulemaking process “contain[s] all the elements” required by the APA.<sup>18</sup> As the Supreme Court has articulated, “[t]he object [of the APA’s notice-and-comment requirement] is one of fair notice.”<sup>19</sup> Reopening a comment period based on the original NPRM can fulfill that objective. Reopening the 2016 incentive compensation NPRM for a new round of comments would alert interested parties to the fact that the agencies are considering finalizing the rule; it would also offer those parties the opportunity to provide information that has come to light following the original comment period. Reopening the comment period would therefore ensure the freshness of the record and assuage any concerns that the length of time between proposal and finalization deprived the public of a meaningful chance to comment.

A reopened process would also give the agencies the opportunity to ask specifically for comment on events that have occurred since the 2016 NPRM and to ask whether any aspects of the rule as originally proposed should be revised in light of those events. This would adequately address any concerns about logical outgrowth if the agencies were to make changes in the final rule. As the Seventh Circuit has noted, “the relevant inquiry is whether or not potential commentators would have known that an issue in which they were interested was ‘on the table’” such that commenting—or commenting further—warranted use of their time.<sup>20</sup>

The agencies should also consider that reopening the comment period would arguably be *more* participatory than issuing a new proposal. This is because reopening would allow the agencies to preserve the comments that were submitted during the original comment period, whereas proposing a new rule would require all previous commenters to provide new submissions.<sup>21</sup> The notice could contain language such as: “As a default approach,

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<sup>15</sup> *Telesat Canada v. Fed. Commc’ns Comm’n*, 999 F.3d 707, 713 (D.C. Cir. 2021), quoting *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1109 (D.C. Cir. 2014), *accord* *Market Synergy Group, Inc. v. United States Department of Labor*, 885 F.3d 676, 681 (10th Cir. 2018) (“A final rule qualifies as a logical outgrowth if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.”) (internal citations and quotation marks removed); *State of N.Y. Dept. of Social Services v. Shalala*, 21 F.3d 485, 495 (2d Cir. 1994) (explaining proposed course of action must be sufficient to afford interested persons a reasonable opportunity to participate in the rulemaking process).

<sup>16</sup> *Perez v. Mortgage Bankers Assn.*, 575 U.S. 92, 100 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council Inc.*, 435 U.S. 519, 524 (1978)).

<sup>17</sup> *Perez* at 102. Of course, other statutes may impose rulemaking requirements on particular agencies in particular settings; we mention only the APA for simplicity but the same point holds for these other requirements. As it happens, Section 946 of the Dodd-Frank Act, 12 U.S.C. § 5641, imposes no procedural requirements going beyond the APA with regard to the regulations it mandates.

<sup>18</sup> *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020) (“Formal labels aside, the rules contained all of the elements of a notice of proposed rulemaking as required by the APA.”)

<sup>19</sup> *Long Island Care at Home*, 551 U.S. at 174.

<sup>20</sup> *American Med. Ass’n v. United States*, 887 F.2d 760, 768 (7th Cir. 1989).

<sup>21</sup> If your agencies are currently of the view that your likely approach would not be a “logical outgrowth” of the 2016 NPRM, the method through which anticipated changes could be signaled without opening a new proceeding would involve issuing a so-called

we will give full consideration to the record compiled during the initial phase of rulemaking, including comments submitted during it, but submitters of those comments are invited, if they so desire, to update or withdraw their earlier submissions.”

Finally, it is worth noting that reopening comment periods is relatively common. Agencies have reopened comment periods to refresh the record of dormant proposed rules in light of new information or to cure procedural defects. Indeed, the agencies writing the Section 956 rule have previously used the reopening of comment periods in the manner we suggest. For example, the SEC in 2022 reopened a 2015 proposal on another Dodd-Frank Act executive compensation provision, noting that “[s]ince the Proposed Rules were published, executive compensation practices related to company performance have continued to develop and evolve, to the point that we believe interested persons should be given a further opportunity to analyze and comment upon the Proposed Rules.”<sup>22</sup> The rules were finalized several months later.<sup>23</sup> Similarly, the OCC, Federal Reserve Board, and FDIC in 2012 reopened a 2011 joint proposal on margin and capital requirements for swaps dealers following the publication of a BCBS/IOSCO consultative document; they explained that “the Agencies believe it is appropriate to reopen the comment period for the Proposed Margin Rule in order to give interested persons additional time to analyze the Proposed Margin Rule in light of the Consultative Document.”<sup>24</sup> That rule was finalized in 2015.<sup>25</sup>

Other agencies have done so as well. For example, in December of 2022, the Department of Treasury and the IRS reopened the comment period on a 2011 proposed rule relating to the exemption from taxation afforded to foreign governments under section 892 of the Internal Revenue Code. In the reopening notice, the agencies stated only that “[t]he Treasury Department and the IRS are considering finalizing the 2011 proposed regulations and, therefore, are reopening the comment period with respect to the 2011 proposed regulations for 60 days.”<sup>26</sup> On October 19, 2005, FDA issued a proposed rule, entitled *Cheeses and Related Cheese Products; Proposal to Permit the Use of Ultrafiltered Milk*; the comment period has since been reopened several times and the final rule is expected in October of 2023.<sup>27</sup>

### 3. Issuing a New Proposed Rule

As we explain above, we do not believe that it is legally necessary to issue a new proposed rule as long as the final rule is a “logical outgrowth” of the original NPRM, although the agencies could undoubtedly do so.

The agencies should consider the effect on staff resources and time. Agency staff has already written the 2016 proposal and likely analyzed the comments received during the initial comment period. Reproposing would require staff to put together a new proposal (even if text is largely recycled) and analyze all new comments (as even prior commenters would be required to comment again). Simply put, the agencies will be able to move much more quickly in reopening the 2016 Proposal rather than starting anew.

The agencies should also consider the Congressional Review Act (“CRA”).<sup>28</sup> The CRA allows Congress to enact a “joint resolution of disapproval” to invalidate a rule within 60 legislative days of the rule’s enactment, without

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“Supplemental Notice of Proposed Rulemaking.” An SNPRM would entail a new comment period to respond to changes in the proposed rule, but comments submitted in response to the original NPRM would remain part of the rulemaking record.

<sup>22</sup> Reopening of Comment Period for Pay Versus Performance, 87 Fed. Reg. 5751 (Feb. 2, 2022).

<sup>23</sup> Pay Versus Performance, 87 Fed. Reg. 55134 (Sept. 8, 2022).

<sup>24</sup> Margin and Capital Requirements for Covered Swap Entities; Reopening of Comment Period, 77 Fed. Reg. 60057 (Oct. 2, 2012).

<sup>25</sup> Margin and Capital Requirements for Covered Swap Entities, 80 Fed. Reg. 74839 (Nov. 30, 2015).

<sup>26</sup> Income of Foreign Governments and International Organizations; Comment Period Reopening, 87 Fed. Reg. 80108 (Dec 29, 2022).

<sup>27</sup> RIN: 0910-AI42, Unified Agenda (Fall 2022), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=0910-AI42>.

<sup>28</sup> Pub. L. No. 104–121 § 251 (1996), codified at 5 U.S.C. § 801 et seq

the resolution being subject to filibuster in the Senate.<sup>29</sup> Although the current Senate and President are unlikely to overturn a section 956 rule by the currently constituted agencies, the 2024 election could usher in a new President, Senate, and House—allowing them to overturn rules finalized after mid-2024. Given their extensive prior work on the 2016 Proposal, the agencies should be able to reopen the proposal, analyze new comments, and negotiate and develop a final rule before the CRA window. By contrast, requiring the agencies to negotiate and develop a new proposal, as well as analyze a host of new comments, on that timeline would likely prove difficult.

\* \* \*

Although we are not well positioned to comment on the substantive merits of the 2016 proposal or possible amendments, each of us has researched and written about the law of the administrative process for decades. We thus hope our analysis is helpful in assuring you of your agencies' breadth of procedural discretion in deciding how to move forward.

Sincerely,

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<sup>29</sup> 5 U.S.C. § 801.