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March 30, 2023

Chair Gary Gensler
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Incentive-Based Compensation Arrangements, SEC File No.: S7-07-16 , Rin-3064-AD56

Dear Chair Gensler,

On behalf of more than 500,000 members and supporters we offer the following comment to supplement our filing in 2016 regarding “Incentive-Based Compensation Arrangements” (SEC File No.: S7-07-16).

Attached to this letter is a yellow-lined version of the changes we believe are necessary to utilize Section 956 of the 2010 Wall Street Reform and Consumer Protection Act most effectively. We have taken the rule as it was proposed to apply to companies overseen by the Securities and Exchange Commission (SEC) in the 2016 Notice of Proposed Rulemaking. In sum, this rule is 6,977 words long. The changes proposed are roughly five words, along with a few phrases deleted. The changes are highlighted in yellow. Essentially, “must consider forfeiture” of bonus pay is changed to “must institute forfeiture.” And stock options are banned, instead of limited to 15% of incentive compensation.

We believe the recent failure of Silicon Valley Bank (SVB) emphasizes the need to complete implementation of rulemaking for Section 956. In the weeks before this failure, as management undoubtedly understood the bank’s peril, senior executives cashed out their stock. CEO Gary Becker netted \$2.27 million in the weeks leading up to the Friday collapse.¹ Alone, this is appalling. It may amount to illegal insider trading. But it also reveals how prominently executive compensation must have figured in the minds of senior managers.

Importantly, as the policy makers explore what went wrong with SVB, we encourage attention to the role that executive compensation structure played in the poor decisions by SVB management regarding its Treasury securities portfolio. As has been well documented, SVB management’s fatal mistake was to invest in long-term Treasuries at a time when the Federal Reserve raised interest rates precipitously.²

¹ Emily Jacobs, *SVB Collapse: CEO Cashed Out Millions While Employees Got Bonuses* WASHINGTON EXAMINER (March 11, 2023) <https://www.washingtonexaminer.com/policy/economy/svb-ceo-stock-sales-employee-bonuses>

² Gregory Zuckerman, *The Rise and Fall of Silicon Valley Bank*, WALL STREET JOURNAL (March 18, 2023) <https://www.wsj.com/articles/silicon-valley-bank-collapse-ceo-management-cb75f147?page=1>

Compounding this mistake, SVB terminated a hedge against certain other securities, exposing it to even greater interest rate risks. It did so, arguably, to boost net income. Noted one observer: “Essentially, to juice its P&L [profit and loss] in the short term, SVB ambled into 2023 almost completely unhedged — in effect, a massive multibillion-dollar bet that interest rates were approaching their peak.”³ Net income served as the principal driver of the firm’s incentive compensation plan. In 2021, CEO Becker received \$3 million through the incentive compensation plan. This was three times the value of his salary.⁴ The board explains that the incentive compensation plan is driven by return on equity. This is a simply mathematical formula, where net income is divided by the difference between assets and liabilities (shorthand as equity). Without net income, there is zero return on equity, and surely the board could not justify any bonus for zero return on equity.

It appears that in 2022, SVB was headed for a loss, that is, negative net income. Income from investment securities plummeted from a gain of \$761 million in 2021 to a loss of \$285 million in 2022. In 2021, the firm reported overall net income of \$1.7 billion.⁵ With other 2022 line items also trailing their counterparts from 2021, that swing in investment losses of more than \$1 billion might well have put the bank in the red. One way to paper this over: terminate the hedge. The firm explains that the hedge covered roughly \$16 billion in certain securities and reports tersely, “All hedges using the last-of-layer method were terminated in 2022.” Experts estimate the cost of a hedge for a portfolio of this size is more than \$1 billion.⁶⁷

We attach a timeline of the SVB case to help the committee explore the link between this failure and executive compensation.

Section 956 explicitly states that banks must not pay “excessive” compensation, especially when it may lead to “inappropriate” risk-taking. We believe that a bonus based on return on equity that is three times the value of a base salary may qualify as “excessive.” (In a 2013, the EU capped banker bonuses at twice the value of base salary.⁸) We certainly believe that holding long-term securities at a time of rapidly rising interest rates was “inappropriate.” We also believe that selling a hedge to protect against those rising interest rates was “inappropriate.”

A strong rule may have prevented this. In a 2016 proposal on Section 956 (which was not finalized), the regulators wisely proposed that a significant portion of senior executive bonus pay be deferred into a fund. In the case of misconduct or failure, this fund would be forfeited, either to help pay for the resolution of the bank, or to pay fines associated with the misconduct (instead of having shareholders effectively pay the fines). This dynamic would essentially deputize and incentivize all bankers to police one another. These “inside cops” would be better positioned than

³ Robin Wigglesworth, *How Crazy Was Silicon Valley Bank’s Zero-Hedge Strategy?* FINANCIAL TIMES, (March 17, 2023)

⁴ SVB, *Proxy Report*, SECURITIES AND EXCHANGE COMMISSION (2022)

https://www.sec.gov/Archives/edgar/data/719739/000119312522064940/d299123ddef14a.htm#rom299123_16

⁵ SVB *Annual Report*, Securities and Exchange Commission (2022)

https://www.sec.gov/Archives/edgar/data/719739/000071973923000021/sivb-20221231.htm#ibb4dd73a1d3f4bff944b5d35fd2c5e2a_187

⁶ Public Citizen spoke with several interest rate swap experts. One of these was Tim Duncan, principal of Cambridge Financial Technology. They said that it is difficult to estimate the precise cost of the swap without knowing the nature, terms, durations, etc. of the underlying securities, but that the price could easily exceed \$1 billion. The price of a swap is determined by a mathematical estimate of the present value of future interest payments compared with the discount, which must be estimated because it will vary with prevailing interest rates established by the Federal Reserve.

⁷ The Financial Accounting Standards board recently changed hedge accounting standards. See Alanna Armstrong, *FASB Clarifies Hedge Accounting Guidance* Deloitte (March 29, 2022) <https://dart.deloitte.com/USDART/home/publications/deloitte/heads-up/2022/fasb-clarifies-hedge-guidance>

⁸ Mark Thompson, *Europe To Cap Bankers’ Bonuses* CNN BUSINESS (Feb. 28, 2013)

<https://money.cnn.com/2013/02/28/news/economy/europe-bank-bonuses/index.html>

regulators who only visit the bank occasionally, better than shareholders who must depend on imperfect, dated information, better than rating agencies, and better than auditors. Had SVB's senior executives all had their bonuses at risk, one or more of them may have insisted on changing course. (The 2016 proposal left forfeiture to the discretion of the bank's board; we insist that forfeiture be mandatory.⁹)

SVB may be the most conspicuous current example of how badly constructed compensation figures in a banking crisis, but it is not alone, as well-known cases abound. JP Morgan lost \$6 billion in flawed derivatives bets known as the "London Whale," connected to plan to boost senior executive pay.¹⁰ ¹¹ Goldman Sachs bribed Malaysian government officials to win lucrative bond underwriting deals, which also involved embezzlement of more than \$1 billion that might have gone to needed development in that country.¹² Wells Fargo placed untenable quotas on its agents to increase consumer accounts, forcing them to create fake accounts so as to boost senior executive pay linked to account growth metrics.¹³ ¹⁴ Supporters of a OneWest merger flooded regulators with suspect endorsement letters in a deal that promised a \$24 million payout for the CEO. The firm faced criticism for massive foreclosures, an action that might have stymied the merger under the Community Reinvestment Act.¹⁵

In 2022 alone, numerous cases link compensation to fraud and investor abuse by banks, including examples such as: ; investor abuse by Allianz¹⁶, First Republic Bank,¹⁷ and Credit Suisse;¹⁸ and maintain insufficient anti-money laundering controls by USAA Federal Savings Bank²⁰ ²¹and Wells Fargo.²²

⁹ Securities and Exchange Commission, *Incentive Compensation*, FEDERAL REGISTER (2016)

<https://www.sec.gov/rules/proposed/2016/34-77776.pdf>

¹⁰ JP Morgan Chase Whale Trades: A Case History of Derivatives Risks and Abuses: Hearing Before The Permanent Subcommittee on Investigations, 113 Cong. (March 2013), <https://bit.ly/3eu7Ugz>.

¹¹ Bartlett Naylor, *JP Morgan Cheated on Stress Test*, EconIntersect (May 13th, 2013), <https://bit.ly/3akmx2C>.

¹² NPR, *A former Goldman Sachs banker is found guilty in a plot to loot Malaysia's IMDB fund* (April 8th, 2022), <https://n.pr/3cy7klW>.

¹³ Michael Tanglis, Public Citizen, *The King of "Cross-Sell" and the Race to Eight* (September 2016), Int<https://bit.ly/2VwBrO0>.

¹⁴ Sheelah Kolhatkar, *Elizabeth Warren and the Wells Fargo Scandal*

THE NEW YORKER (Sept. 21, 2016) <https://www.newyorker.com/business/currency/elizabeth-warren-and-the-wells-fargo-scam>

¹⁵ Bartlett Naylor, *The Revolving Door and the Assault on Community Reinvestment*, AMERICAN PROSPECT, (Nov. 21, 2018) <https://prospect.org/economy/revolving-door-assault-community-reinvestment/>

¹⁶ DOJ, *Three Portfolio Managers And Allianz Global Investors U.S. Charged In Connection With Multi-Billion Dollar Fraud Scheme*, DOJ, (May 17, 2022) <https://www.justice.gov/usao-sdny/pr/three-portfolio-managers-and-allianz-global-investors-us-charged-connection-multi>

¹⁷ Securities and Exchange Commission, *In the Matter of First Republic Investment Management*, SECURITIES AND EXCHANGE COMMISSION (May 19, 2022) <https://www.sec.gov/litigation/admin/2022/ia-6030.pdf>

¹⁸ Securities and Exchange Commission, *Credit Suisse to Pay Nearly \$475 Million to U.S. and U.K. Authorities to Resolve Charges in Connection with Mozambican Bond Offerings*, SECURITIES AND EXCHANGE COMMISSION, (Oct 19, 2021) <https://www.sec.gov/news/press-release/2021-213>.

¹⁹ Myriam Balezou, *Credit Suisse CEO's Pay Drops 43% After Archegos, Gensill*, BLOOMBERG (March 10, 2022) <https://www.bloomberg.com/news/articles/2022-03-10/credit-suisse-ceo-sees-43-drop-in-pay-after-archegos-greensill>

²⁰ Financial Crime Enforcement Network, *In the Matter of USAA Federal Savings Bank*, Financial Crimes Enforcement Network, (March 31, 2022) [https://www.fincen.gov/sites/default/files/enforcement_action/2022-03-18/USAA%20Consent%20Order_Final%20508%20\(2\).pdf](https://www.fincen.gov/sites/default/files/enforcement_action/2022-03-18/USAA%20Consent%20Order_Final%20508%20(2).pdf)

²¹ Senate Permanent Subcommittee on Investigations, *Offshore Tax Evasion*, U.S. SENATE (Feb. 26, 2014) [https://www.hsgac.senate.gov/imo/media/doc/REPORT%20-%20OFFSHORE%20TAX%20EVASION%20\(Feb%2026%202014,%20208-20-14%20FINAL\).pdf](https://www.hsgac.senate.gov/imo/media/doc/REPORT%20-%20OFFSHORE%20TAX%20EVASION%20(Feb%2026%202014,%20208-20-14%20FINAL).pdf)

²² Securities and Exchange Commission, *SEC Charges Wells Fargo Advisors With Anti-Money Laundering Related Violations*, SECURITIES AND EXCHANGE COMMISSION (May 20, 2022) <https://www.sec.gov/news/press-release/2022-85>

Public Citizen has documented this persistent problem in several reports, including the recent report titled *"Inappropriate"* that we attach to this letter.

We understand there are many failures to explore in the SVB case. We trust you will oblige your statutory duty and complete Section 956 with a strong compensation deferral mechanism as one of the remedies.

For questions, please contact Bartlett Naylor at bnaylor@citizen.org.

Sincerely,

Public Citizen.

Timeline: Silicon Valley Bank Failure

AVS: Available for Sale securities, which are recorded at currently traded values, or the price they'd fetch if sold today.

Bps: basis points. A basis point is a percent of a percent.

FDIC: Federal Deposit Insurance Corp

Fed: Federal Reserve Board, which is head quartered in Washington, and maintains 12 regional reserve banks, one of which is in San Francisco

HTM: Hold to maturity securities, usually Treasury bonds, which are recorded at the price the bank will receive if held to the maturity date.

SVB: Silicon Valley Bank, a \$211 billion asset bank headquartered in Palo Alto, Ca.

10Q: quarterly filing required of all publicly traded U.S. companies.

10k: annual report required of all publicly traded US companies.

Dec. 17, 2015: Fed [increases interest rates](#) (Federal Funds Rate) 25 bps. It increases rates 25 bps every quarter through 2018 ending year at 2.5%

2018: Congress approves S. 2155, raising from \$50b to \$250b the level of assets a bank must have to face “enhanced supervision” with more “stringent standards.” SVB assets in [2016: \\$45b](#). SVB assets [2017: \\$51b](#); [2018: 57b](#)

2019: [Fed reduces](#) interest rates three times, each 25 bps, calling it a “mid-cycle adjustment.”

2019: SVB [assets \\$71b](#)

March 13, 16, 2020: Fed [cuts interest rates](#) twice for a total of 1.5%, leaving them at zero, citing Covid.

2020: SVB [assets: \\$115b](#)

2021 SVB annual earnings of \$1.7 b, up from 2020 earnings of \$1.2b. see p. 95 of [annual report](#). SVB assets \$211 b

2022 SVB establishes a bonus opportunity for CEO based on return on equity (net income/[assets – liabilities]) which results in a bonus that is three times salary. SVB [assets \\$211b](#)

March 17, 2022: Fed [Increases rates 25 bps](#).

April 2022, SVB [chief risk officer Laura Izurieta departs bank](#), w \$7.1 in compensation (stock option gains). Reportedly, management sought her ouster after she sold \$4m worth of stock on Dec. 6, 2021. She is not replaced for eight months.

May 5, 2022: [Fed increases rates 50 bps](#), putting Federal Funds rate at 1%.

May , 2022, SVB 10Q shows Treasury (HtM) unrealized [securities loss of \\$7b](#) (\$91b market, \$98b book)

June 30, 2022, SVB 10q shows Treasury (HTM) unrealized [securities loss of \\$11b](#) (\$84 market, \$95b book)

Nov. 7, 2022 SVB 10Q shows Treasury (HTM) unrealized [securities loss of \\$16b](#) (\$77b market, \$93b book), same as SVB capital)

2022 SVB annual report reveals “All hedges using the last-of-layer method were terminated in 2022.” This generates \$X in income for the bank. See p. 144 of [annual report](#). Company reports 2022 net income of \$1.5 billion (down from \$1.7b in 2021, but would have been loss without termination of hedge).

Late Jan, 2023: CEO Gary Becker, others, [change 10b5-1 plans](#), providing for stock sales. (A new SEC rule, which isn't in effect as of this date, prohibits sales following a new 10b5-1 plan for 90 days.)

Feb 27, 2023: Gary Becker sells [\\$3+m worth of stock, netting \\$2.2m](#). (SEC rule under 10b5-1 takes effect Feb. 27, 2023)

March 8: SVB announces it will [raise capital](#)

March 9, 2023: [bank run](#).

March 10: [FDIC takes over SVB](#). Stock price goes to zero.

Securities and Exchange Commission Authority and Issuance
For the reasons set forth in the joint preamble, the SEC proposes to amend Title 17, Chapter II of the Code of Federal Regulations as follows:

1. Add Part 303, as follows:

PART 303 – INCENTIVE-BASED COMPENSATION ARRANGEMENTS

SUBPART A – Incentive-Based Compensation Arrangements

Authority: 15 U.S.C. 78q, 78w, 80b–4, and 80b–11 and 12 U.S.C. 5641.

Sec.

- § 303.1 Authority, Scope and Initial Applicability.
- § 303.2 Definitions.
- § 303.3 Applicability.
- § 303.4 Requirements and Prohibitions Applicable to All Covered Institutions.
- § 303.5 Additional Disclosure and Recordkeeping Requirements for Level 1 and Level 2 Covered Institutions.
- § 303.6 Reservation of Authority for Level 3 Covered Institutions.
- § 303.7 Deferral, Forfeiture and Downward Adjustment, and Clawback Requirements for Level 1 and Level 2 Covered Institutions.
- § 303.8 Additional Prohibitions for Level 1 and Level 2 Covered Institutions.
- § 303.9 Risk Management and Controls Requirements for Level 1 and Level 2 Covered Institutions.
- § 303.10 Governance Requirements for Level 1 and Level 2 Covered Institutions.
- § 303.11 Policies and Procedures Requirements for Level 1 and Level 2 Covered Institutions.
- § 303.12 Indirect Actions.
- § 303.13 Enforcement.

§ 303.1 Authority, Scope and Initial Applicability.

- (a) Authority. This subpart is issued pursuant to section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5641), 15 U.S.C. 78q, 78w, 80b–4, and 80b–11.
- (b) Scope. This subpart applies to a covered institution with average total consolidated assets greater than or equal to \$1 billion that offers incentive-based compensation to covered persons.
- (c) Initial applicability.
 - (1) Compliance date. A covered institution must meet the requirements of

this

subpart no later than [Date of the beginning of the first calendar quarter that begins at least **540-140** days after a final rule is published in the Federal Register]. Whether a covered institution is a Level 1, Level 2, or Level 3 covered institution at that time will be determined based on average total consolidated assets as of [Date of the beginning of the first calendar quarter that begins after a final rule is published in the Federal Register].

- (2) Grandfathered plans. A covered institution is not required to comply with the requirements of this subpart with respect to any incentive-based compensation plan with a performance period that begins before [Compliance Date as described in paragraph (c)(1) of this section].

- (d) Preservation of authority. Nothing in this subpart in any way limits the authority

of the Commission under other provisions of applicable law and regulations.

§ 303.2 Definitions.

For purposes of this subpart only, the following definitions apply unless otherwise specified:

- (a) Affiliate means any company that controls, is controlled by, or is under common control with another company.
- (b) Average total consolidated assets means the average of a regulated institution's total consolidated assets, as reported on the regulated institution's regulatory reports, for the four most recent consecutive quarters. If a regulated institution has not filed a regulatory report for each of the four most recent consecutive quarters, the regulated institution's average total consolidated assets means the average of its total consolidated assets, as reported on its regulatory reports, for the most recent quarter or consecutive quarters, as applicable. Average total consolidated assets are measured on the as-of date of the most recent regulatory report used in the calculation of the average. Average total consolidated assets for a regulated institution that is an investment adviser means the regulated institution's total assets (exclusive of non-proprietary assets) shown on the balance sheet for the regulated institution for the most recent fiscal year end.
- (c) To award incentive-based compensation means to make a final determination, conveyed to a covered person, of the amount of incentive-based compensation payable to the covered person for performance over a performance period.
- (d) Board of directors means the governing body of a covered institution that oversees the activities of the covered institution, often referred to as the board of directors or board of managers.
- (e) Clawback means a mechanism by which a covered institution can recover vested incentive-based compensation from a covered person.
- (f) Compensation, fees, or benefits means all direct and indirect payments, both cash and

non-cash, awarded to, granted to, or earned by or for the benefit of, any covered person in exchange for services rendered to a covered institution.

- (g) Control means that any company has control over any company if—
- (1) The company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities of the company;
 - (2) The company controls in any manner the election of a majority of the directors or trustees of the company; or
 - (3) The Commission determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the company.
- (h) Control function means a compliance, risk management, internal audit, legal, human resources, accounting, financial reporting, or finance role responsible for identifying, measuring, monitoring, or controlling risk-taking.
- (i) Covered institution means a regulated institution with average total consolidated assets greater than or equal to \$1 billion.
- (j) Covered person means any executive officer, employee, director, or principal shareholder who receives incentive-based compensation at a covered institution.
- (k) Deferral means the delay of vesting of incentive-based compensation beyond the date on which the incentive-based compensation is awarded.
- (l) Deferral period means the period of time between the date a performance period ends and the last date on which the incentive-based compensation awarded for such performance period vests.
- (m) Depository institution holding company means a top-tier depository institution holding company, where “depository institution holding company” has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).
- (n) Director of a covered institution means a member of the board of directors.
- (o) Downward adjustment means a reduction of the amount of a covered person’s incentive-based compensation not yet awarded for any performance period that has already begun, including amounts payable under long-term incentive plans, in accordance with a forfeiture and downward adjustment review under § 303.7(b).
- (p) Equity-like instrument means:
- (1) Equity in the covered institution or any affiliate of the covered institution; or
 - (2) A form of compensation:
 - (i) Payable at least in part based on the price of the shares or other equity instruments of the covered institution or of any affiliate of the covered institution; or
 - (ii) That requires, or may require, settlement in the shares of the covered institution or of any affiliate of the covered institution.
- (q) Forfeiture means a reduction of the amount of deferred incentive-based compensation awarded to a covered person that has not vested.
- (r) Incentive-based compensation means any variable compensation, fees, or

benefits

that serve as an incentive or reward for performance.

- (s) Incentive-based compensation arrangement means an agreement between a covered institution and a covered person, under which the covered institution provides incentive-based compensation to the covered person, including incentive-based compensation delivered through one or more incentive-based compensation plans.
- (t) Incentive-based compensation plan means a document setting forth terms and conditions governing the opportunity for and the payment of incentive-based compensation payments to one or more covered persons.
- (u) Incentive-based compensation program means a covered institution's framework for incentive-based compensation that governs incentive-based compensation practices and establishes related controls.
- (v) Level 1 covered institution means a:
 - (i) Covered institution with average total consolidated assets greater than or equal to \$250 billion; or
 - (ii) Covered institution that is a subsidiary of a depository institution holding company that is a Level 1 covered institution pursuant to 12 CFR 236.2.
- (w) Level 2 covered institution means a:
 - (i) Covered institution with average total consolidated assets greater than or equal to \$50 billion that is not a Level 1 covered institution; or
 - (ii) Covered institution that is a subsidiary of a depository institution holding company that is a Level 2 covered institution pursuant to 12 CFR 236.2.
- (x) Level 3 covered institution means a covered institution with average total consolidated assets greater than or equal to \$1 billion that is not a Level 1 covered institution or Level 2 covered institution.
- (y) Long-term incentive plan means a plan to provide incentive-based compensation that is based on a performance period of at least three years.
- (z) Option means an instrument through which a covered institution provides a covered person the right, but not the obligation, to buy a specified number of shares representing an ownership stake in a company at a predetermined price within a set time period or on a date certain, or any similar instrument, such as a stock appreciation right.
- (aa) Performance period means the period during which the performance of a covered person is assessed for purposes of determining incentive-based compensation.
- (bb) Principal shareholder means a natural person who, directly or indirectly, or acting through or in concert with one or more persons, owns, controls, or has the power to vote 10 percent or more of any class of voting securities of a covered institution.
- (cc) Qualifying incentive-based compensation means the amount of incentive-based compensation awarded to a covered person for a particular performance period, excluding amounts awarded to the covered person for that particular

performance period under a long-term incentive plan.

- (dd) Regulated institution means a broker or dealer registered under section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o) and an investment adviser as such term is defined in section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(11)).
- (ee) Regulatory report means, for a broker-dealer registered under section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o), the Financial and Operational Combined Uniform Single Report, Form X-17A-5, 17 CFR 249.617, or any successors thereto.
- (ff) Section 956 affiliate means an affiliate that is an institution described in § 303.2(i), 12 CFR 42.2(i), 12 CFR 236.2(i), 12 CFR 372.2(i), 12 CFR 741.2(i), or 12 CFR 1232.2(i).
- (gg) Senior executive officer means a covered person who holds the title or, without regard to title, salary, or compensation, performs the function of one or more of the following positions at a covered institution for any period of time in the relevant performance period: president, chief executive officer, executive chairman, chief operating officer, chief financial officer, chief investment officer, chief legal officer, chief lending officer, chief risk officer, chief compliance officer, chief audit executive, chief credit officer, chief accounting officer, or head of a major business line or control function.
- (hh) Significant risk-taker means:
 - (1) Any covered person at a Level 1 or Level 2 covered institution, other than a senior executive officer, who received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period of which at least one-third is incentive-based compensation and is—
 - (i) A covered person of a Level 1 covered institution who received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period that placed the covered person among the highest 5 percent in annual base salary and incentive-based compensation among all covered persons (excluding senior executive officers) of the Level 1 covered institution together with all individuals who receive incentive-based compensation at any section 956 affiliate of the Level 1 covered institution;
 - (ii) A covered person of a Level 2 covered institution who received annual base salary and incentive-based compensation for the last calendar year that ended at least 180 days before the beginning of the performance period that placed the covered person among the highest 2 percent in annual base salary and incentive-based compensation among all covered persons (excluding senior executive officers) of the Level 2 covered institution together with all individuals who receive incentive-based compensation at any section 956 affiliate of the Level 2 covered institution; or
 - (iii) A covered person of a covered institution who may commit or expose 0.5 percent or more of the common equity tier 1 capital, or

- in the case of a registered securities broker or dealer, 0.5 percent or more of the tentative net capital, of the covered institution or of any section 956 affiliate of the covered institution, whether or not the individual is a covered person of that specific legal entity; and
- (2) Any covered person at a Level 1 or Level 2 covered institution, other than a senior executive officer, who is designated as a “significant risk-taker” by the Commission because of that person’s ability to expose a covered institution to risks that could lead to material financial loss in relation to the covered institution’s size, capital, or overall risk tolerance, in accordance with procedures established by the Commission, or by the covered institution.
 - (3) For purposes of this part, an individual who is an employee, director, senior executive officer, or principal shareholder of an affiliate of a Level 1 or Level 2 covered institution, where such affiliate has less than \$1 billion in total consolidated assets, and who otherwise would meet the requirements for being a significant risk-taker under paragraph (1)(iii) of this definition, shall be considered to be a significant risk-taker with respect to the Level 1 or Level 2 covered institution for which the individual may commit or expose 0.5 percent or more of common equity tier 1 capital or tentative net capital. The Level 1 or Level 2 covered institution for which the individual commits or exposes 0.5 percent or more of common equity tier 1 capital or tentative net capital shall ensure that the individual’s incentive compensation arrangement complies with the requirements of this part.
 - (4) If the Commission determines, in accordance with procedures established by the Commission, that a Level 1 covered institution’s activities, complexity of operations, risk profile, and compensation practices are similar to those of a Level 2 covered institution, the Level 1 covered institution may apply paragraph (1)(i) of this definition to covered persons of the Level 1 covered institution by substituting “2 percent” for “5 percent.”
- (ii) Subsidiary means any company that is owned or controlled directly or indirectly by another company.
- (jj) Vesting of incentive-based compensation means the transfer of ownership of the incentive-based compensation to the covered person to whom the incentive-based compensation was awarded, such that the covered person’s right to the incentive-based compensation is no longer contingent on the occurrence of any event.

§ 303.3 Applicability.

- (a) When average total consolidated assets increase.
 - (1) In general.
 - (A) A regulated institution shall become a Level 1, Level 2, or Level 3 covered institution when its average total consolidated assets increase to an amount that equals or exceeds \$250 billion, \$50 billion, or \$1 billion, respectively.
 - (B) A covered institution regardless of its average total consolidated assets (provided that, for the avoidance of doubt, such covered institution has average total consolidated assets greater than or equal to \$1 billion) that

is a subsidiary of a depository institution holding company shall become a Level 1 or Level 2 covered institution when such depository institution holding company becomes a Level 1 or Level 2 covered institution, respectively, pursuant to 12 CFR 236.3.

(2) Compliance date.

(a) A regulated institution that becomes a Level 1, Level 2, or Level 3 covered institution pursuant to paragraph (a)(1)(A) of this section shall comply with the requirements of this subpart for a Level 1, Level 2, or Level 3 covered institution, respectively, not later than the first day of the first calendar quarter that begins at least 540 days after the date on which the regulated institution becomes a Level 1, Level 2, or Level 3 covered institution, respectively. Until that day, the Level 1, Level 2, or Level 3 covered institution will remain subject to the requirements of this subpart, if any, that applied to the regulated institution on the day before the date on which it became a Level 1, Level 2, or Level 3 covered institution.

(b) A covered institution that becomes a Level 1 or Level 2 covered institution pursuant to paragraph (a)(1)(B) of this section shall comply with the requirements of this subpart for a Level 1 or Level 2 covered institution, respectively, not later than the first day of the first calendar quarter that begins at least 540 days after the date on which the regulated institution becomes a Level 1 or Level 2 covered institution, respectively. Until that day, the Level 1 or Level 2 covered institution will remain subject to the requirements of this subpart, if any, that applied to the covered institution on the day before the date on which it became a Level 1 or Level 2 covered institution.

(3) Grandfathered plans.

(a) A regulated institution that becomes a Level 1, Level 2, or Level 3 covered institution under paragraph (a)(1)(A) of this section is not required to comply with requirements of this subpart applicable to a Level 1, Level 2, or Level 3 covered institution, respectively, with respect to any incentive-based compensation plan with a performance period that begins before the date described in paragraph (a)(2)(A) of this section. Any such incentive-based compensation plan shall remain subject to the requirements under this subpart, if any, that applied to the regulated institution at the beginning of the performance period.

(b) A covered institution that becomes a Level 1 or Level 2 covered institution under paragraph (a)(1)(B) of this section is not required to comply with requirements of this subpart applicable to a Level 1 or Level 2 covered institution, respectively, with respect to any incentive-based compensation plan with a performance period that begins before the date described in paragraph (a)(2)(B) of this section. Any such incentive-based compensation plan shall remain subject to the requirements under this subpart, if any, that applied to the covered institution at the beginning of the performance period.

(b) When total consolidated assets decrease.

- (1) A Level 1, Level 2, or Level 3 covered institution will remain subject to the requirements applicable to such covered institution under this subpart unless and until the total consolidated assets of such covered institution, as

reported on the covered institution's regulatory reports, fall below \$250 billion, \$50 billion, or \$1 billion, respectively, for each of four consecutive quarters. The calculation will be effective on the as-of date of the fourth consecutive regulatory report.

- (2) A Level 1, Level 2, or Level 3 covered institution that is an investment adviser will remain subject to the requirements applicable to such covered institution under this subpart unless and until the average total consolidated assets of the covered institution fall below \$250 billion, \$50 billion, or \$1 billion, respectively as of the most recent fiscal year end.
- (3) A covered institution that is a Level 1 or Level 2 covered institution solely by virtue of its being a subsidiary of a depository institution holding company will remain subject to the requirements applicable to such covered institution under this subpart unless and until such depository institution holding company ceases to be subject to the requirements applicable to it in accordance with 12 CFR 236.3.

§ 303.4 Requirements and prohibitions applicable to all covered institutions.

- (a) In general. A covered institution must not establish or maintain any type of incentive-based compensation arrangement, or any feature of any such arrangement, that encourages inappropriate risks by the covered institution:
 - (1) By providing a covered person with excessive compensation, fees, or benefits; or
 - (2) That could lead to material financial loss to the covered institution.
- (b) Excessive compensation. Compensation, fees, and benefits are considered excessive for purposes of § 303.4(a)(1) when amounts paid are unreasonable or disproportionate to the value of the services performed by a covered person, taking into consideration all relevant factors, including, but not limited to:
 - (1) The combined value of all compensation, fees, or benefits provided to the covered person;
 - (2) The compensation history of the covered person and other individuals with comparable expertise at the covered institution;
 - (3) The financial condition of the covered institution;
 - (4) Compensation practices at comparable institutions, based upon such factors as asset size, geographic location, and the complexity of the covered institution's operations and assets;
 - (5) For post-employment benefits, the projected total cost and benefit to the covered institution; and
 - (6) Any connection between the covered person and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the covered institution.
- (c) Material financial loss. An incentive-based compensation arrangement at a covered institution encourages inappropriate risks that could lead to material financial loss to the covered institution, unless the arrangement:
 - (1) Appropriately balances risk and reward;
 - (2) Is compatible with effective risk management and controls; and
 - (3) Is supported by effective governance.
- (d) Performance measures. An incentive-based compensation arrangement will not be

considered to appropriately balance risk and reward for purposes of paragraph (c)(1) of this section, unless:

- (1) The arrangement includes financial and non-financial measures of performance, including considerations of risk-taking, that are relevant to a covered person's role within a covered institution and to the type of business in which the covered person is engaged and that are appropriately weighted to reflect risk-taking;
 - (2) The arrangement is designed to allow non-financial measures of performance to override financial measures of performance when appropriate in determining incentive-based compensation; and
 - (3) Any amounts to be awarded under the arrangement are subject to adjustment to reflect actual losses, inappropriate risks taken, compliance deficiencies, or other measures or aspects of financial and non-financial performance.
- (e) Board of directors. A covered institution's board of directors, or a committee thereof, must:
- (1) Conduct oversight of the covered institution's incentive-based compensation program;
 - (2) Approve incentive-based compensation arrangements for senior executive officers, including the amounts of all awards and, at the time of vesting, payouts under such arrangements; and
 - (3) Approve any material exceptions or adjustments to incentive-based compensation policies or arrangements for senior executive officers.
- (f) Disclosure and recordkeeping requirements. A covered institution must create annually and maintain for a period of at least seven years records that document the structure of all its incentive-based compensation arrangements and demonstrate compliance with this subpart. A covered institution must disclose the records to the Commission upon request. At a minimum, the records must include copies of all incentive-based compensation plans, a record of who is subject to each plan, and a description of how the incentive-based compensation program is compatible with effective risk management and controls.
- (g) Rule of construction. A covered institution is not required to report the actual amount of compensation, fees, or benefits of individual covered persons as part of the disclosure and recordkeeping requirements under this subpart.

§ 303.5 Additional disclosure and recordkeeping requirements for Level 1 and Level 2 covered institutions.

- (a) A Level 1 or Level 2 covered institution must create annually and maintain for a period of at least seven years records that document:
- (1) The covered institution's senior executive officers and significant risk-takers, listed by legal entity, job function, organizational hierarchy, and line of business; The incentive-based compensation arrangements for senior executive officers and significant risk-takers, including information on percentage of incentive-based compensation deferred and form of award;
 - (2) Any forfeiture and downward adjustment or clawback reviews and decisions for senior executive officers and significant risk-takers; and

- (3) Any material changes to the covered institution's incentive-based compensation arrangements and policies.
- (b) A Level 1 or Level 2 covered institution must create and maintain records in a manner that allows for an independent audit of incentive-based compensation arrangements, policies, and procedures, including those required under § 303.11.
- (c) A Level 1 or Level 2 covered institution must provide the records described in paragraph (a) of this section to the Commission in such form and with such frequency as requested by the Commission.

§ 303.6 Reservation of authority for Level 3 covered institutions.

- (a) In general. The Commission may require a Level 3 covered institution with average total consolidated assets greater than or equal to \$10 billion and less than \$50 billion to comply with some or all of the provisions of §§ 303.5 and 303.7 through 303.11 if the Commission determines that the Level 3 covered institution's complexity of operations or compensation practices are consistent with those of a Level 1 or Level 2 covered institution.
- (b) Factors considered. Any exercise of authority under this section will be in writing by the Commission in accordance with procedures established by the Commission and will consider the activities, complexity of operations, risk profile, and compensation practices of the Level 3 covered institution, in addition to any other relevant factors.

§ 303.7 Deferral, forfeiture and downward adjustment, and clawback requirements for Level 1 and Level 2 covered institutions.

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will not be considered to appropriately balance risk and reward, for purposes of § 303.4(c)(1), unless the following requirements are met.

- (a) Deferral.
 - (1) Qualifying incentive-based compensation must be deferred as follows:
 - (i) Minimum required deferral amount.
 - (A) A Level 1 covered institution must defer at least 60 percent of a senior executive officer's qualifying incentive-based compensation awarded for each performance period.
 - (B) A Level 1 covered institution must defer at least 50 percent of a significant risk-taker's qualifying incentive-based compensation awarded for each performance period.
 - (C) A Level 2 covered institution must defer at least 50 percent of a senior executive officer's qualifying incentive-based compensation awarded for each performance period.
 - (D) A Level 2 covered institution must defer at least 40 percent of a significant risk-taker's qualifying incentive-based compensation awarded for each performance period.
 - (ii) Minimum required deferral period.
 - (A) For a senior executive officer or significant risk-taker of a Level 1 covered institution, the deferral period for deferred qualifying

- incentive-based compensation must be at least 4-10 years.
- (B) For a senior executive officer or significant risk-taker of a Level 2 covered institution, the deferral period for deferred qualifying incentive-based compensation must be at least 3-10 years.
- (iii) Vesting of amounts during deferral period.

Pro rata vesting. During a deferral period, deferred qualifying incentive-based compensation may not vest faster than on a pro rata annual basis beginning no earlier than the first anniversary of the end of the performance period for which the amounts were awarded.

Acceleration of vesting. A Level 1 or Level 2 covered institution must not accelerate the vesting of a covered person's deferred qualifying incentive-based compensation that is required to be deferred under this subpart, except in the case of death or disability of such covered person.

- (2) Incentive-based compensation awarded under a long-term incentive plan must be deferred as follows:

(i) Minimum required deferral amount.

- (A) A Level 1 covered institution must defer at least 60 percent of a senior executive officer's incentive-based compensation awarded under a long-term incentive plan for each performance period.
- (B) A Level 1 covered institution must defer at least 50 percent of a significant risk-taker's incentive-based compensation awarded under a long-term incentive plan for each performance period.
- (C) A Level 2 covered institution must defer at least 50 percent of a senior executive officer's incentive-based compensation awarded under a long-term incentive plan for each performance period.
- (D) A Level 2 covered institution must defer at least 40 percent of a significant risk-taker's incentive-based compensation awarded under a long-term incentive plan for each performance period.

(ii) Minimum required deferral period.

- (A) For a senior executive officer or significant risk-taker of a Level 1 covered institution, the deferral period for deferred long-term incentive plan amounts must be at least 10 years.
- (B) For a senior executive officer or significant risk-taker of a Level 2 covered institution, the deferral period for deferred long-term incentive plan amounts must be at least 10 year.

(iii) Vesting of amounts during deferral period.

- (A) Pro rata vesting. During a deferral period, deferred long-term incentive plan amounts may not vest faster than on a pro rata annual basis beginning no earlier than the first anniversary of the end of the performance period for which amounts were awarded.

Acceleration of vesting. A Level 1 or Level 2 covered institution must not accelerate the vesting of a covered person's deferred long-term incentive plan amounts that is required to be deferred under this subpart, except in the case of death or disability of such covered person.

(3) Adjustments of deferred qualifying incentive-based compensation and

deferred long-term incentive plan compensation amounts. A Level 1 or Level

2 covered institution may not increase deferred qualifying incentive-based compensation or deferred long-term incentive plan amounts for a senior executive officer or significant risk-taker during the deferral period. For purposes of this paragraph, an increase in value attributable solely to a change in share value, a change in interest rates, or the payment of interest according to terms set out at the time of the award is not considered an increase in incentive-based compensation amounts.

(4) Composition of deferred qualifying incentive-based compensation and deferred long-term incentive plan compensation for Level 1 and Level 2 covered institutions.

(i) Cash and equity-like instruments. For a senior executive officer or significant risk-taker of a Level 1 or Level 2 covered institution that issues equity or is an affiliate of a covered institution that issues equity, any deferred qualifying incentive-based compensation or deferred long-term incentive plan amounts must include substantial portions of both deferred cash and equity-like instruments throughout the deferral period.

(ii) Options. ~~If~~ A senior executive officer or significant risk-taker of a Level 1 or Level 2 covered institution MAY NOT receives incentive-based compensation for a performance period in the form of options, ~~the total amount of such options that may be used to meet the minimum deferral amount requirements of paragraph (a)(1)(i) or (a)(2)(i) of this section is limited to no more than 15 percent of the amount of total incentive-based compensation awarded to the senior executive officer or significant risk-taker for that performance period.~~ Forfeiture and downward adjustment.

(5) Compensation at risk.

(i) A Level 1 or Level 2 covered institution must place at risk of forfeiture all unvested deferred incentive-based compensation of any senior executive officer or significant risk-taker, including unvested deferred amounts awarded under long-term incentive plans.

(ii) A Level 1 or Level 2 covered institution must place at risk of downward adjustment all of a senior executive officer's or significant risk-taker's incentive-based compensation amounts not yet awarded for the current performance period, including amounts payable under long-term incentive plans.

(6) Events triggering forfeiture and downward adjustment review. At a minimum,

a Level 1 or Level 2 covered institution ~~must consider~~ institute forfeiture and downward adjustment of incentive-based compensation of senior executive officers and significant risk-takers described in paragraph (b)(3) of this section due to any of the following adverse outcomes at the covered institution:

- (i) Poor financial performance attributable to a significant deviation from the risk parameters set forth in the covered institution's policies and procedures;
- (ii) Inappropriate risk taking, regardless of the impact on financial performance;
- (iii) Material risk management or control failures;
- (iv) Non-compliance with statutory, regulatory, or supervisory standards that results in:
 - (A) Enforcement or legal action against the covered institution brought by a federal or state regulator or agency; or
 - (B) A requirement that the covered institution report a restatement of a financial statement to correct a material error; and
- (v) Other aspects of conduct or poor performance as defined by the covered institution.

- (7) Senior executive officers and significant risk-takers affected by forfeiture and downward adjustment. A Level 1 or Level 2 covered institution **must** **institute consider**

forfeiture and downward adjustment for a senior executive officer or significant risk-taker with direct responsibility, or responsibility due to the senior executive officer's or significant risk-taker's role or position in the covered institution's organizational structure, for the events related to the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section.

- (8) Determining forfeiture and downward adjustment amounts. A Level 1 or Level 2 covered institution must consider, at a minimum, the following factors when determining the amount or portion of a senior executive officer's or significant risk-taker's incentive-based compensation that must be forfeited or adjusted downward:

- (i) The intent of the senior executive officer or significant risk-taker to operate outside the risk governance framework approved by the covered institution's board of directors or to depart from the covered institution's policies and procedures;
- (ii) The senior executive officer's or significant risk-taker's level of participation in, awareness of, and responsibility for, the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section;
- (iii) Any actions the senior executive officer or significant risk-taker took or could have taken to prevent the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section; The financial and reputational impact of the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section to the covered institution, the line or sub-line of business, and individuals involved, as applicable, including the magnitude of any financial loss and the cost of known or potential subsequent fines, settlements, and litigation;
- (iv) The causes of the events triggering the forfeiture and downward adjustment review set forth in paragraph (b)(2) of this section,

- including
 - any decision-making by other individuals; and
- (v) Any other relevant information, including past behavior and past risk outcomes attributable to the senior executive officer or significant risk-taker.
- (b) Clawback. A Level 1 or Level 2 covered institution must include clawback provisions in incentive-based compensation arrangements for senior executive officers and significant risk-takers that, at a minimum, allow the covered institution to recover incentive-based compensation from a current or former senior executive officer or significant risk-taker for seven years following the date on which such compensation vests, if the covered institution determines that the senior executive officer or significant risk-taker engaged in:
 - (1) Misconduct that resulted in significant financial or reputational harm to the covered institution;
 - (2) Fraud; or
 - (3) Intentional misrepresentation of information used to determine the senior executive officer or significant risk-taker's incentive-based compensation.

§ 303.8 Additional prohibitions for Level 1 and Level 2 covered institutions. An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will be considered to provide incentives that appropriately balance risk and reward for purposes of § 303.4(c)(1) only if such institution complies with the following prohibitions.

- (a) Hedging. A Level 1 or Level 2 covered institution must not purchase a hedging instrument or similar instrument on behalf of a covered person to hedge or offset any decrease in the value of the covered person's incentive-based compensation. A COVERED INSTITUTION MUST ALSO IMPLEMENT POLICIES TO ENSURE THAT A COVERED PERSON DOES NOT PURCHASE SUCH AN INSTRUMENT.

*Note: This paragraph about hedging should be moved to section 303.4 so that it applies to all covered institutions and not just Level 1 and Level 2 institutions.

- (b) Maximum incentive-based compensation opportunity. A Level 1 or Level 2 covered institution must not award incentive-based compensation to:
 - (1) A senior executive officer in excess of 125 percent of the target amount for that incentive-based compensation; or
 - (2) A significant risk-taker in excess of 150 percent of the target amount for that incentive-based compensation.
- (c) Relative performance measures. A Level 1 or Level 2 covered institution must not use incentive-based compensation performance measures that are based solely on industry peer performance comparisons.
- (d) Volume driven incentive-based compensation. A Level 1 or Level 2 covered institution must not provide incentive-based compensation to a covered person

that is based solely on transaction revenue or volume without regard to transaction quality or compliance of the covered person with sound risk management.

§ 303.9 Risk management and controls requirements for Level 1 and Level 2 covered institutions.

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will be considered to be compatible with effective risk management and controls for purposes of § 303.4(c)(2) only if such institution meets the following requirements.

- (a) A Level 1 or Level 2 covered institution must have a risk management framework for its incentive-based compensation program that:
 - (1) Is independent of any lines of business;
 - (2) Includes an independent compliance program that provides for internal controls, testing, monitoring, and training with written policies and procedures consistent with § 303.11; and
 - (3) Is commensurate with the size and complexity of the covered institution's operations.
- (b) A Level 1 or Level 2 covered institution must:
 - (1) Provide individuals engaged in control functions with the authority to influence the risk-taking of the business areas they monitor; and
 - (2) Ensure that covered persons engaged in control functions are compensated in accordance with the achievement of performance

objectives linked to their control functions and independent of the performance of those business areas.

(c) A Level 1 or Level 2 covered institution must provide for the independent monitoring of:

- (1) All incentive-based compensation plans in order to identify whether those plans provide incentives that appropriately balance risk and reward;
- (2) Events related to forfeiture and downward adjustment reviews and decisions of forfeiture and downward adjustment reviews in order to determine consistency with § 303.7(b) of this subpart; and
- (3) Compliance of the incentive-based compensation program with the covered institution's policies and procedures.

§ 303.10 Governance requirements for Level 1 and Level 2 covered institutions.

An incentive-based compensation arrangement at a Level 1 or Level 2 covered institution will not be considered to be supported by effective governance for purposes of § 303.4(c)(3), unless:

- (a) The covered institution establishes a compensation committee composed solely of directors who are not senior executive officers to assist the board of directors in carrying out its responsibilities under § 303.4(e) of this subpart; and
- (b) The compensation committee established pursuant to paragraph (a) of this section obtains:
 - (1) Input from the risk and audit committees of the covered institution's board of directors, or groups performing similar functions, and risk management function on the effectiveness of risk measures and adjustments used to balance risk and reward in incentive-based compensation arrangements;
 - (2) A written assessment of the effectiveness of the covered institution's incentive-based compensation program and related compliance and control processes in providing risk-taking incentives that are consistent with the risk profile of the covered institution, submitted on an annual or more frequent basis by the management of the covered institution and developed with input from the risk and audit committees of its board of directors, or groups performing similar functions, and from the covered institution's risk management and audit functions; and
 - (3) An independent written assessment of the effectiveness of the covered institution's incentive-based compensation program and related compliance and control processes in providing risk-taking incentives that are consistent with the risk profile of the covered institution, submitted on an annual or more frequent basis by the internal audit or risk management function of the covered institution, developed independently of the covered institution's management.

§ 303.11 Policies and procedures requirements for Level 1 and Level 2 covered institutions.

A Level 1 or Level 2 covered institution must develop and implement policies and procedures for its incentive-based compensation program that, at a minimum:

- (a) Are consistent with the prohibitions and requirements of this subpart;
- (b) Specify the substantive and procedural criteria for the application of forfeiture and clawback, including the process for determining the amount of incentive-based compensation to be clawed back;
- (c) Require that the covered institution maintain documentation of final forfeiture, downward adjustment, and clawback decisions;
- (d) Specify the substantive and procedural criteria for the acceleration of payments of deferred incentive-based compensation to a covered person, consistent with § 303.7(a)(1)(iii)(B) and § 303.7(a)(2)(iii)(B);
- (e) Identify and describe the role of any employees, committees, or groups authorized to make incentive-based compensation decisions, including when discretion is authorized;
- (f) Describe how discretion is expected to be exercised to appropriately balance risk and reward;
- (g) Require that the covered institution maintain documentation of the establishment, implementation, modification, and monitoring of incentive-based compensation arrangements, sufficient to support the covered institution's decisions;
- (h) Describe how incentive-based compensation arrangements will be monitored;
- (i) Specify the substantive and procedural requirements of the independent compliance program consistent with § 303.9(a)(2); and
- (j) Ensure appropriate roles for risk management, risk oversight, and other control function personnel in the covered institution's processes for:
 - (1) Designing incentive-based compensation arrangements, and determining awards, deferral amounts, deferral periods, forfeiture, downward adjustment, clawback, and vesting; and
 - (2) Assessing the effectiveness of incentive-based compensation arrangements in restraining inappropriate risk-taking.

§ 303.12 Indirect actions.

A covered institution must not, indirectly or through or by any other person, do anything that would be unlawful for such covered institution to do directly under this subpart.

§ 303.13 Enforcement.

The provisions of this subpart shall be enforced under section 505 of the Gramm-Leach-Bliley Act and, for purposes of such section, a violation of this subpart shall be treated as a violation of subtitle A of title V of such Act.

**PART 240 – GENERAL RULES AND REGULATIONS,
SECURITIES EXCHANGE ACT OF 1934**

2. Section 240.17a-4 is amended by adding paragraph (e)(10). The addition reads as follows:

§ 240.17a-4 Records to be preserved by certain exchange members, brokers and dealers.

* * *

(e): * * *

* * *

(10) The records required pursuant to §§ 303.4(f), 303.5, and 303.11.

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**PART 275—RULES AND REGULATIONS, INVESTMENT
ADVISERS ACT OF 1940**

3. Section 275.204-2 is amended by adding new paragraph (a)(19) and by revising paragraph (e)(1). The additions and revisions read as follows:

§ 275.204-2 Books and records to be maintained by investment advisers.

(a) * * *

(19) The records required pursuant to, and for the periods specified in, §§ 303.4(f), 303.5, 303.11.

* * *

(e)(1) All books and records required to be made under the provisions of paragraphs (a) to (c)(1)(i), inclusive, and (c)(2) of this section (except for books and records required to be made under the provisions of paragraphs (a)(11), (a)(12)(i), (a)(12)(iii), (a)(13)(ii), (a)(13)(iii), (a)(16), (a)(17)(i), and (a)(19) of this section), shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in an appropriate office of the investment adviser.