UNINTENDED CONSEQUENCES: THE NONSENSE OF EXECUTIVE COMPENSATION OVERSIGHT

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INTRODUCTION

This paper questions the utility of increasingly common oversight of executive compensation that produces unintended or even opposite effects. It focuses on the accumulation of ineffectual government oversight and demonstrates its three flaws. Chief Executive Officer ("CEO") pay averages less than 2.5% of after-tax earnings of S&P 500 companies,[1] making it a rounding error on the corporate profit and loss statement (P&L), but it makes headlines and may be the one thing that rouses the passions of those otherwise uninvolved with the corporation.[2] It is axiomatic that any given issue of *The Wall Street Journal* reports companies losing money on this or that, yet daily reports of spending far exceeding amounts paid to the CEO or the entire executive team do not generate Congressional action or public rebuke, unlike with executive pay "excesses."[3] Further, it does seem to matter just whose pay is at issue. *Forbes* reports that Tiger Woods is America's (and the world's) top-earning athlete, and Tyler Perry the top-earning actor, both at $78 million.[4] This produced no debate on the floor of either the House or Senate. Madonna and Lady Gaga together pulled in $205 million as the two highest-paid musical acts,[5] yet public concern appeared not to progress beyond a Yahoo! Answers webpage poll that simply queried "Madonna vs. Lady Gaga?"[6]

Government has sought to influence the compensation of executives for decades, but with a repetitive result of unintended consequences, as related in Part I of this paper. Government intervenes through mandated public disclosure of private contracts, restrictive tax policy, and direct interference with corporate governance. This comes despite statutes and well-established case law in place to protect those with ownership rights in these corporations. Part II assesses the three things that go wrong with these government efforts, from plainly regulating the wrong thing, to regulating via the wrong analysis, to regulating in a way that imposes costs out of proportion to any benefits. Government fails to advance any benefit of executive compensation—foremost, the impetus to create value for shareholders and the nation—and instead sees only costs to be reined in. The solution proposed in Part III suggests that refocusing on existing corporate governance mechanisms and enforcement by the judiciary, which is designed to conduct appropriate fact-intensive analysis

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1. William Ford & Kevin Zhao, *Are CEOs Overpaid?* 18 Tenn. Bus., May 2009, at 13, *http://capone.mtsu.edu/berc/tnbiz/stimulus/stimulusissue.pdf*.
2. *See infra* n. 7-10.
3. *See infra* n. 31, 46, and 58.
4. Dorothy Pomerantz, *The World's Most Powerful Celebrities*, Forbes, June 26, 2013, http://www.forbes.com/celebrities/.
5. *Id.*
6. *POLL:Madonna vs. Lady Gaga*, Yahoo! Answers, http://answers.yahoo.com/question/index?qid=20120204140841AAaNMpY (accessed Nov. 1, 2013).

on a case-by-case basis, is superior to further one-size-fits-all federal legislation and regulation.