THE AMERICAN ASSOCIATION OF BANK DIRECTORS
(301) 938-1887
dbaris@aabd.org

June 20, 2023

U.S. Senate Committee on Banking, Housing, and Urban Affairs
534 Dirksen Senate Office Building
Washington, DC 20510

Dear Members:

This is a preliminary review of the bill that your committee posted online on Friday entitled "Recovering Executive Compensation Obtained from Unaccountable Practices."

This bill is missing the point. The Committee has made a false start and needs to spend more time evaluating any legislation that will emanate from the Committee.

The bill adds enforcement powers of the federal banking agencies based on the perception that the bank failures of SVB, Signature Bank, and First Republic Bank were at least partly attributable to the insufficient enforcement and supervisory authority of the agencies. That perception is reflected in the title to the bill – "Unaccountable Practices."

But almost nothing in the hearing record or the reports issued by the Fed, FDIC, and GAO suggests that the agencies' enforcement powers are lacking. Rather, the hearing record and the reports all suggest that the Fed and FDIC did not properly use their discretion to take enforcement action on a timely basis.

The agencies have wide discretionary authority in how they examine, supervise, and take enforcement action against banks. That is not the same as lacking authority. We are not aware of any "unaccountable" practices committed by insiders of the failed banks; all are fully accountable under the relevant agency's existing authority.

The Committee can play a crucial role in overseeing the agencies in connection with how and when they use their vast enforcement authorities and therefore should continue to be involved in its oversight role. However, legislation without further hearings and review is inappropriate and not helpful.

If it decides to hold thorough hearings on the adequacy and effectiveness of the agencies' enforcement powers, it should look at not just how the agencies may have underutilized those powers in the case of the failed banks, but also how they have overutilized them against other banks and IAPs.

The agencies have wide latitude. In the past, they have used their discretionary authority too much, even arbitrarily; in other instances, they have not used it enough. The apparent passivity of the agencies with respect to the recently failed banks is at odds with our experience over many years of the agencies erring on the side of action rather than inaction. Many bank supervisors have learned that if they even take enforcement actions that are too harsh, they will not be criticized later, but if they don't take enforcement actions, they will subject to criticism by Congress, the GAO, the Inspectors' General and others.

Acting Comptroller Hsu, who also serves as Chairman of FFIEC, has testified that he intends to have FFIEC work on making enforcement authority more consistently used among the agencies. We support that initiative and urge the Committee to encourage the review of enforcement action policies so that they will be used judiciously, wisely, consistently, fairly and effectively.

The bill authorizes the banking agencies to remove and ban senior executive officers, including Board Chairpersons, on flimsy bases that are so broad that most bankers, including very competent ones, would be susceptible to removal at the whim of a regulator. The agencies already have ample authority to remove insiders if justified, and often resort to informal means to make management changes, such as meeting with the board and providing the reasons why the board should make changes. In our experience, most bank boards of directors listen to the agencies and do what is right.

The bill explicitly allows the agencies to recoup compensation earned within two years of the bank failing, regardless of level of responsibility or blame. There are no standards of conduct that would trigger such recoupment. It seems as if the drafters of the bill assumed that all bank failures occur because of misfeasance or malfeasance of insiders. But a majority of banks fail because of extraneous reasons not controllable by insiders and without negligence or misconduct contributing to the failure. As the receiver of failed banks, the FDIC has sued bank directors and officers in a minority of bank failures. That follows an exhaustive three-year review that seeks all viable alternatives to replenish the Deposit Insurance Fund.

While the bill provides a partial exemption for a claw back for those hired within a year of the bank failing, it does not address the problem of qualified persons already employed by the bank willing to remain in office to assist the bank through its challenges. It also ignores the existing authority of the FDIC as receiver and the banking agencies as supervisors to claw back compensation based on misfeasance or malfeasance of the individual.

The bill triples CMPS at the third tier to $3 million a day, plus allows the agency to impose the highest fine based on a much lower standard of culpability, one that could catch senior executive officers on the flimsiest of grounds.

This bill doesn’t work. It doesn’t address the main causes of the recent bank failures and there is little supporting record that it is necessary or even prudent. It diverts attention away from more important issues that need to be addressed.

The recent bank failures raise other issues that need attention and that are more germane to the recent bank failures. The Committee has not held hearings on the adequacy of the current deposit insurance laws and regulations; the character and causes of the unprecedented massive and rapid deposit runs at the failed banks, the role of social media, venture capitalists and short-sellers, and how to prevent such runs in the future; concentrations in business uninsured deposits; and the adequacy of bank liquidity and liquidity management and other sources of liquidity available from the Fed and FHLBanks.

Sincerely,
/s/

David Baris
President, AABD