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U.S. Senate Committee on Appropriations
Room S-128
The Capitol
Washington, DC 20510

Dear Members:

We understand from press reports that there is an ongoing effort to add S. 2190 to the pending appropriations bills.

S. 2190 has nothing to do with appropriations. Moreover, it is bad legislation – both unnecessary and counterproductive.

It is an overreaction to the failures of three regional banks ten months ago.

The bill is entitled "Recovering Executive Compensation Obtained from Unaccountable Practices" (RECOUP).

But there are no "unaccountable practices" under current law. Current law has granted the federal banking agencies enormous discretionary authority to take effective enforcement action against banks and has empowered the FDIC as receiver broad authority to sue bank officers of failed banks.

Almost nothing in the hearing record relating to the failed banks 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 broad discretionary authority to examine, supervise, and take enforcement action on a timely basis.

The apparent passivity of the agencies with respect to the 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 be subject to criticism by Congress, the GAO, the Inspectors' General and others.

The bill authorizes the banking agencies to remove and ban Senior Executives, 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 of directors 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 earned compensation and gains on stock sales within two years of the bank failing from senior executives "responsible for the failed condition" of the bank or parent company. There are no standards of conduct that would trigger such recoupment such as negligence, gross misconduct, or violation of fiduciary duties, which, under current law, the FDIC may sue former bank officers and directors of failed banks. Being "responsible" could mean just about anything, including being in the wrong place at the wrong time, or approving a loan consistent with safe and sound banking practices when made but that was not repaid for other reasons.

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 based on misfeasance, malfeasance, or violations of fiduciary duties. That follows an exhaustive three-year review that seeks all viable alternatives to replenish the Deposit Insurance Fund.

The recoup provision is placed under the heading "cease and desist proceedings." But the language does not even provide the right of a former senior executive to an administrative hearing.

The bill triples Civil Money Penalties to $3 million a day, plus allows the agency to impose the highest fine based on a lower standard of culpability, one that could catch senior executives 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. It creates disincentives for competent senior executives to remain with a troubled bank, and for new senior executives to join a bank in trouble. It signals to qualified parties who are in or wish to be in the banking industry that because they can be removed from office at a federal banking agency's whim, they are in essence federal government employees at will.

We urge your opposition to any attempt to include extraneous and misguided legislation such as S. 2190 to the necessary business of funding the federal government.

Founded in 1989, the American Association of Bank Directors (AABD) is the only non-profit banking trade association in the United States which exclusively serves individual directors rather than their financial institutions.

Sincerely,

David Baris
President
AABD