



## Via Electronic Submission

May 19, 2011

Robert E. Feldman  
Executive Secretary  
Attention: Comments  
Federal Deposit Insurance Corporation  
550 17<sup>th</sup> Street, NW  
Washington, DC 20429

*RE: RIN number 3064–AD73, Orderly Liquidation Authority<sup>1</sup>*

I am writing on behalf of the Council of Institutional Investors (Council), a non-profit association of corporate, public and union pension funds with combined assets in excess of \$3 trillion.<sup>2</sup> We appreciate the opportunity to voice our general support for the clawback provisions in the above referenced proposed rule. We encourage the Federal Deposit Insurance Corporation (FDIC) to exercise its authority to the fullest extent possible by establishing broad criteria for recouping compensation from executives responsible for the failure of a covered financial institution.

As you may be aware, during the development of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) the Council actively advocated for the inclusion of several key corporate governance improvements, among them federal clawback provisions on unearned executive pay. Our support for legislation to recoup unearned senior executive compensation was based on the Council's long-standing policy<sup>3</sup> and belief that "a tough clawback policy is an essential element of meaningful 'pay for performance' philosophy. If executives are rewarded for 'hitting their numbers'—and it turns out they failed to do so—they should not profit."<sup>4</sup> Examples of strong clawback policies include performance-based policies in which clawbacks apply to all executives in the event of a restatement, regardless of who was responsible, and policies requiring clawbacks if executives fail to identify material risks or operate outside the firm's risk parameters.<sup>5</sup>

The global financial crisis represents a massive failure of oversight. It is well recognized that poor corporate governance helped contribute to the market turmoil. As described in the July 2009 report of the Investors' Working Group (IWG), poorly structured pay plans rewarded short-term but unsustainable performance and encouraged executives to pursue excessively risky

<sup>1</sup> Orderly Liquidation Authority, 76 Fed. Reg. 16324 (proposed Mar. 23, 2011) (to be codified at 12 C.F.R. pt. 380), <http://edocket.access.gpo.gov/2011/pdf/2011-6705.pdf>.

<sup>2</sup> For more information about the Council of Institutional Investors (Council) and its members, please visit the Council's website at <http://www.cii.org>.

<sup>3</sup> Council, Corporate Governance Policies, §5.5d Pay for Performance (last updated Sep. 29, 2010), <http://www.cii.org/UserFiles/file/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%2009-29-10%20FINAL.pdf>.

<sup>4</sup> *Protecting Shareholders and Enhancing Public Confidence by Improving Corporate Governance: Hearing Before the Subcomm. on Securities, Insurance, and Investment of the S. Comm. on Banking, Housing, and Urban Affairs, 111<sup>th</sup> Cong. 13* (full text July 29, 2009) (testimony of Ann Yerger, Executive Director, Council of Institutional Investors), [http://www.cii.org/UserFiles/file/testimony/07-29-09%20Ann%20Testimony%20FINAL%20\(with%20all%20attachments\).pdf](http://www.cii.org/UserFiles/file/testimony/07-29-09%20Ann%20Testimony%20FINAL%20(with%20all%20attachments).pdf).

<sup>5</sup> Paul Hodgson et al., Wall Street Pay: Size, Structure and Significance for Shareowners 16, (Nov. 2010), <http://www.cii.org/UserFiles/file/CII%20White%20Paper%20-%20Wall%20Street%20Pay%20FINAL%20Nov%202010.pdf>.

activities that not only hobbled their companies, but also tarnished the credibility of the U.S. financial markets.<sup>6</sup> Those findings led the IWG to offer the following recommendation:

Federal clawback provisions on unearned executive pay should be strengthened. Clawback policies discourage executives from taking questionable actions that temporarily lift share prices but ultimately result in financial restatements. Senior executives should be required to return unearned bonus and incentive payments that were awarded as a result of fraudulent activity, incorrectly stated financial results or some other cause. The Sarbanes–Oxley Act of 2002 required boards to go after unearned CEO income, but the Act’s language is too narrow. It applies only in cases where misconduct is proven—which occurs rarely because most cases result in settlements where charges are neither admitted nor denied—and only covers CEO and CFO compensation. Many courts, moreover, have refused to allow this provision to be enforced via private rights of action.<sup>7</sup>

To counter the perverse incentives brought on by excessive pay packages, executives must face a credible threat of lost compensation. The Council respectfully encourages the FDIC to exercise fully its new regulatory authority by adopting a robust clawback rule. The application of the rule should be comprehensive with respect to the individuals and actions (or inactions) covered. More specifically, the FDIC should take a broad approach in determining whether a senior executive is “substantially responsible” for the failure of a covered financial institution and should avoid narrowly defining the “requisite degree of skill and care” required of that executive.

We appreciate the opportunity to share our views with you. If you should have any additional questions or comments, please feel free to contact me at 202.261.7086 or [laurel@cii.org](mailto:laurel@cii.org), or General Counsel Jeff Mahoney at 202.261.7081 or [jeff@cii.org](mailto:jeff@cii.org).

Sincerely,



Laurel Leitner  
Senior Analyst  
Council of Institutional Investors

---

<sup>6</sup> Investors’ Working Group, U.S. Financial Regulatory Reform: The Investors’ Perspective 22 (July 2009), [http://www.cii.org/UserFiles/file/resource%20center/investment%20issues/Investors'%20Working%20Group%20Report%20\(July%202009\).pdf](http://www.cii.org/UserFiles/file/resource%20center/investment%20issues/Investors'%20Working%20Group%20Report%20(July%202009).pdf). [Following its issuance, the IWG Report was reviewed and subsequently endorsed by the Council board and membership. For more information about the Investors’ Working Group, please visit the Council’s website at <http://www.cii.org/iwgInfo>.]

<sup>7</sup> *Id.* at 23.