

The FDIC's Clawback Regulations

On July 6, 2011, the Board of Directors of the Federal Deposit Insurance Corporation (FDIC) adopted final regulations¹ to implement Section 210(s) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), which authorizes financial regulatory authorities to recoup compensation when a current or former senior executive or director is “**substantially responsible**” for the failed condition of a covered financial company.

- ***When can the FDIC recoup or claw back compensation?***

- When a covered financial company has “failed” and is in receivership under the FDIC regulations, as modified by the Dodd-Frank Act, and the FDIC determines that a current or former senior executive or director is “substantially responsible” for the failed condition of the covered financial company.

- ***Who can the FDIC recoup or claw back compensation from?***

- **Current or former senior executives** who are “**substantially responsible**” for the failed condition of the covered financial institution.

- “Senior executive” means any person who participates or has authority to participate (other than as a director) in major policymaking functions of the company, whether or not: the person has an official title; the title designates the officer as an assistant; or the person is serving without salary or other compensation.

- The chairman of the board, the president, every vice president, the secretary, and the treasurer or chief financial officer, general partner and manager of a company are considered senior executives, unless the person is excluded, by resolution of the board of directors, the bylaws, the operating agreement or the partnership agreement of the company, from participation (other than as a director) in major policymaking functions of the company, and the person does not actually participate therein.

- **Current or former directors** who are “**substantially responsible**” for the failed condition of the covered financial institution.

- “Director” means a member of the board of directors of a company or of a board or committee performing a similar function to a board of directors with authority to vote on matters before the board or committee.

¹ Available at: <http://www.fdic.gov/news/board/06july2011no7.pdf>

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- ***What is considered “compensation” subject to recoupment or clawback?***

— “Compensation” means any direct or indirect financial remuneration received from the covered financial company, including, but not limited to, salary; bonuses; incentives; benefits; severance pay; deferred compensation; golden parachute benefits; benefits derived from an employment contract, or other compensation or benefit arrangement; perquisites; stock option plans; postemployment benefits; profits realized from a sale of securities in the covered financial company; or any cash or noncash payments or benefits granted to or for the benefit of a senior executive or director.

- ***How far back can compensation be recouped or clawed back?***

— **Any** compensation **received** during the **2-year period preceding** the date on which the **FDIC** was **appointed** as the **receiver** of the covered financial company, except that, in the case of **fraud**, **no time limit** shall apply.

- ***When will a current or former senior executive or director be deemed “substantially responsible” for the failed condition of a covered financial company?***

— A current or former senior executive or director will be deemed to be substantially responsible for the failed condition of a covered financial company that is placed into receivership under the orderly authority of the Dodd-Frank Act if:

- He or she **failed** to **conduct** his or her **responsibilities** with the **degree of skill and care an ordinarily prudent person in a like position would exercise under similar circumstances**; and
- As a result, individually or collectively, **caused a loss** to the covered financial company that **materially contributed** to the **failure** of the covered financial company **under the facts and circumstances**.

- ***What presumption will apply when the FDIC is assessing whether a senior executive or director is substantially responsible for the failed condition of a covered financial company?***

— The FDIC shall **presume** that the senior executive or director is **substantially responsible** under any of the following circumstances:

- He or she **served** as the **chairman of the board** of directors, **chief executive officer**, **president**, **chief financial officer**, or in any other similar role regardless of his or her title if in his or her role he or she **had responsibility** for the **strategic**, **policymaking**, or **company-wide operational decisions** of the covered financial company prior to the date that it was placed into receivership;
- He or she is **adjudged liable** by a court or tribunal of competent jurisdiction for having breached his or her duty of loyalty to the covered financial company;
- If a senior executive, he or she was **removed from the management** of the covered financial company under 12 U.S.C. 5386(4), i.e., Section 206 of the Dodd-Frank Act’s requirement to remove executives and directors **responsible for the failed condition**;
- If a director, he or she was **removed from the board of directors** of the covered financial company under 12 U.S.C. 5386(5), i.e., Section 206 of the Dodd-Frank Act’s requirement to remove executives and directors **responsible for the failed condition**.

- **Can these presumptions be rebutted? If so, how?**

- **Yes**, the first of the above presumptions can be rebutted by **evidence** that the senior executive or director **conducted his or her responsibilities with the degree of skill and care an ordinarily prudent person in a like position would exercise under similar circumstances**.

- Additionally, the other presumptions can be rebutted by **evidence** that the senior executive or director **did not cause a loss** to the covered financial company that **materially contributed to the failure** of the covered financial company under the facts and circumstances.

- **Note:** *The commentary to the final regulations makes clear that this will be a negligence standard and that a showing of a more egregious breach of care, such as gross negligence, is not required. The FDIC receiver will undertake an analysis of whether the individual has breached his or her duty of care, including an assessment of whether the individual exercised his or her business judgment.*

- **Are there any senior executives or directors to whom the presumptions will not be applied?**

- Yes, the presumptions will not apply to:

- A **senior executive hired** during the **2 years prior** to the FDIC’s appointment as receiver to assist in preventing further deterioration of the financial condition of the covered financial company; or

- A **director who joined the board of directors** during the **2 years prior** to the FDIC’s appointment as receiver under an agreement or resolution to assist in preventing further deterioration of the financial condition of the covered financial company.

- **What standard will apply when the FDIC tries to recoup or claw back compensation?**

- A **negligence standard** will apply.

- **Will state law “business judgment rules” and “insulating statutes” shift the burden of proof to the FDIC or increase the standard of care applicable to FDIC recoupment or clawback actions?**

- No. The **burden of proof** is on the **senior executive or director** to establish that he or she exercised his or her business judgment.



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