

U.S. Senate Takes Up the RECOUP Act

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The Senate Banking Committee has not taken up the [previously discussed](#) Senator Warren (D-MA) and Senator Hawley (R-MO) claw back legislation, but has instead, by a bipartisan vote, cleared to the full Senate new bipartisan legislation from Senate Banking Committee Chair Senator Brown (D-OH) and Senator Scott (R-SC) titled the [Recovering Executive Compensation Obtained from Unacceptable Practices \(RECOUP\) Act](#). Senator Warren backed the RECOUP Act during the committee's markup, noting that it was a "reasonable compromise" and that it was a "very significant improvement over current law." Senator Hawley expressed frustration that his and Warren's bill was not taken up, indicating that the RECOUP Act is "watered down." Notably, the Warren/Hawley bill imposed clawback risk to a much broader group of parties, including all executives, inside and outside directors, controlling shareholders and certain agents. The Warren/Hawley bill also covered more forms of compensation, including base salary. While certainly the RECOUP Act takes a more measured approach to potential clawbacks, it is broader in overall coverage, including application outside of the realm of failed banks.

The RECOUP Act provides clawback authority for the board of directors of a failed depository institution or its holding company, or the FDIC as receiver, to recover from a senior executive (which would include the chairman of the board) of the failed depository institution or its holding company "who is responsible for the failed condition" (i) "any bonus, other incentive-based or equity-based compensation, severance pay, or golden parachute benefits received by that senior executive" and (ii) profits realized from the sale of securities, each during the 24-month period preceding the failure. Senior executives serving for not more than 18 months before the date of failure and whose conduct did not contribute to the bank failure would be exempt from any clawback, and it would only apply to institutions with consolidated assets of more than \$10 billion. Institutions with more than \$10 billion in assets would also be required adopt governance and accountability standards in their bylaws "that promote safety and soundness, responsiveness to supervisory matters, and responsible management."

The RECOUP Act continues to apply a broad definition of compensation (albeit with a two year rather than three year lookback timeframe). Unlike the previously proposed legislation, the RECOUP Act requires a determination that the senior executive is “responsible for the failed condition.” No additional statutory language is provided to interpret the standard for assessing such responsibility, although the standard for a civil money penalty for senior executives, in all cases including outside of the failed bank context, is proposed to be revised to include recklessly as an alternative to requiring the action to be knowingly.

The RECOUP Act also proposes to add four additional grounds by which the federal banking agencies could remove from office a senior executive of any insured depository institution, regardless of its size, including for failure to appropriately implement financial, risk, or supervisory reporting or information system or controls or for having implemented such a system or controls, having failed to oversee its operations. These new grounds will likely draw loud objections from the banking industry given their lack of specificity.

The RECOUP Act also contains a few other revisions to the banking laws, including increasing the maximum daily civil money penalty amount for institution affiliated parties from \$1 million to \$3 million, and an obligation for the appropriate federal banking agency to provide a complete public review of the management, supervision and regulation of the failure of any institution with more than \$10 billion in assets.

Are these additional regulatory risks and burdens necessary in such a highly regulated space with significant existing enforcement risk to senior executives of banks? If this bill is passed, will this have a further chilling effect on the ability of banks to recruit and hire talented individuals?

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