BLACKROCK

May 23, 2011

BY ELECTRONIC SUBMISSION

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

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

RE: Comments on Proposed Rulemaking Regarding Incentive-based Compensation Arrangements (the "Incentive-based Compensation Rule") (File No. S7-12-11) and Proposed Rulemaking Regarding Recoupment of Compensation from Senior Executives and Directors (the "Recoupment of Compensation Rule") (RIN 3064–AD73)

Dear Sir or Madam:

BlackRock, Inc. appreciates the opportunity to comment on the rule proposed jointly by the Department of the Treasury – Office of the Comptroller of the Currency (the "OCC"), the Federal Reserve System (the "Federal Reserve"), the Federal Deposit Insurance Corporation (the "FDIC"), the Department of the Treasury – Office of Thrift Supervision (the "OTS"), the National Credit Union Administration (the "NCUA"), the Securities and Exchange Commission (the "SEC") and the Federal Housing Finance Agency (the "FHFA") (collectively, the "Agencies") regarding incentive-based compensation arrangements at certain financial institutions,[1] as well as the rule proposed by the FDIC regarding recoupment of compensation from senior executives and directors of failed financial companies.[2] The Incentive-based Compensation Rule would require the reporting of incentive-based compensation arrangements by a covered financial institution and prohibit incentive-based compensation arrangements at a covered financial institution that provides excessive compensation or that could expose the institution to inappropriate risks that could lead to material financial loss. The Recoupment of Compensation Rule provides that the FDIC may recover from any current or former senior executive or director who is "substantially responsible for the failed condition" of a financial

[1] Incentive-Based Compensation Arrangements, 76 Fed. Reg. 21,170 (Apr. 14, 2011) (the "Incentive-based Compensation Proposing Release").
[2] Orderly Liquidation Authority, 76 Fed. Reg. 16,324 (Mar. 23, 2011) (the "Recoupment of Compensation Proposing Release").

company any compensation received during the two-year period preceding appointment of the FDIC as receiver, except that there is no time limit in the case of fraud.

BlackRock is an independently-managed public company (NYSE: BLK) that engages solely in providing asset management and risk management services to its clients. We manage over $3.6 trillion on behalf of institutional and individual clients worldwide through a variety of equity, fixed income, cash management, alternative investment, real estate and advisory products. Our client base includes corporate, public and multi-employer pension plans, insurance companies, mutual funds and exchange-traded funds, endowments, foundations, charities, corporations, official institutions, banks and individuals around the world.

BlackRock's primary concerns with the proposed Incentive-based Compensation Rule and Recoupment of Compensation Rule are as follows:

- *The Incentive-based Compensation Rule should take into consideration the limited risk profile of investment advisers*
- *The Recoupment of Compensation Rule would upend established corporate fiduciary duty law*
- *With respect to investment advisers, the Incentive-based Compensation Rule's $1 billion and $50 billion tests should not include client assets that, due to certain accounting rules, may appear on an investment adviser's balance sheet, nor should it include goodwill or intangible assets*
- *The SEC's proposed Incentive-based Compensation Rule should not apply to non-US investment advisers who are not required to be registered with the SEC*
- *The Federal Reserve's proposed Incentive-based Compensation Rule should not apply to non-consolidated bank subsidiaries for which the parent institution has no control over compensation*

Below we elaborate on each of these points further.

The Incentive–based Compensation Rule should take into consideration the limited risk profile of investment advisers.

We are concerned that an Incentive-based Compensation Rule that is appropriate for commercial and investment banks and other types of financial institutions that engage in transactions involving their balance sheets will not be appropriate for investment advisers that do not engage in such activities. Due to the nature of their business, investment advisers, such as BlackRock, are very different from the other institutions included in the definition of a "covered financial institution." First and foremost, investment advisers are distinguishable from most other financial firms because they act as advisors or agents on behalf of clients. In this regard, investment advisers operate as fiduciaries and client assets typically are held by independent custodians under contractual obligation to the clients.

The client-focused activities of an investment adviser are limited to those defined by the client's mandate and, unlike a commercial or an investment bank that acts as principal and uses its own balance sheet, investment advisers generally do not risk their own capital or act as principal. Risk tolerance is defined not by the investment adviser and its employees, but rather is defined by its clients' risk appetite. Risk taking on behalf of a client outside of the scope of client mandates is prohibited, and as such, employees do not have an incentive to take such risks.

Investment advisers compensate staff by reference to actual revenues earned, substantially all of which are recorded as services are performed, as such revenue is not subject to reversal in subsequent periods. The revenues of investment advisers are substantially more stable than those of firms that engage in significant proprietary trading. For example, BlackRock's revenues are derived primarily from advisory fees based on net asset value/market value of client assets and from performance-based fees earned upon exceeding an investment return threshold, which are not subject to reversal. Other financial firms that invest using their own balance sheets may record income from trading activities on a mark-to-market basis, which is subject to reversal.

Due to the nature and significance of the role of investment advisers as fiduciaries, the governance of an investment adviser's compensation policies and the actual amount of compensation paid by an investment adviser are typically reviewed by a committee of the Board of Directors and/or the full Board of Directors and aligned with the interests of the investment adviser's clients and shareholders. For example, all of the compensation programs at BlackRock are overseen by its Management Development and Compensation Committee (the "MDCC"), which is a committee of BlackRock's Board of Directors composed entirely of independent Directors. The MDCC specifically approves all the compensation of BlackRock's named executive officers. Further, as a public company, BlackRock's compensation programs, and the process and decisions of the MDCC, are already fully disclosed annually pursuant to the SEC's detailed executive compensation disclosure regulations.[3]

The Recoupment of Compensation Rule would upend established corporate fiduciary duty law

The Recoupment of Compensation Rule, as proposed, would reverse well-established fiduciary duty presumptions applicable to directors and executive officers. This would create great uncertainty among directors and executive officers and would risk undoing established corporate law precedent that is relied upon by companies in all industries across the United States. We strongly urge the FDIC to propose a revised rule that recognizes the important role played by consistent and predictable fiduciary duty laws to corporations, directors and executive officers.

As a general matter, directors and officers of corporations owe the corporation and its shareholders, the fiduciary duties of care and loyalty.[4] Disinterested directors and officers are entitled to

[3] *See, e.g.*, Item 402 - Executive Compensation, Regulation S-K, 17 C.F.R. 229.402 (2010).
[4] As established by the Delaware courts, the duty of care requires directors and officers to act on an informed basis and consider all reasonable alternatives before deciding on a course of action. The duty of loyalty includes a subsidiary duty to act in the honest belief that the chosen course of action is in the best interests of the company. When a corporation enters the "zone of insolvency" or actually becomes insolvent, these duties still apply.

the protection of the "business judgment rule," which is a presumption that disinterested directors and officers have acted on an informed basis in the good faith interests of the corporation. Further, it is standard for corporations to include exculpation clauses in their corporate charters, which waive any claims the corporation may have against directors for unintentional breaches of the duty of care.

These long-established fiduciary duty standards are necessary to allow directors and officers to make appropriate, risk-adjusted decisions on behalf of their corporations, without fear of being second-guessed. Without the protections afforded by these various standards and presumptions, directors and officers would be at serious risk of being made personal guarantors of the results of their decisions and hence, the obligations of the corporation itself. Accordingly, existing fiduciary duty law focuses on the process and good faith, not on the results, of directors' and officers' actions: so long as directors and officers employ a careful and thoughtful process, devoid of personal interests, they should be shielded from liability, even if their decisions prove, in hindsight, to have been wrong.

However, the proposed Recoupment of Compensation Rule stands in stark contrast to these long-established standards and presumptions. Under the proposed rule, a director or senior executive is presumed to be "substantially responsible for the failed condition of a covered financial company that is placed into receivership" if the "senior executive or director 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 this role he or she had responsibility for the strategic, policymaking, or company-wide operational decisions of the covered financial company."[5] In other words, as proposed, there is a presumption that a senior executive or director is "substantially responsible" for a financial company's failure, and hence, that such senior executive or director must pay back all compensation received by him or her within the two-year period prior to appointment of the FDIC as receiver, based *solely on the fact* that such senior executive or director held one of the enumerated positions with the company, and *regardless* of whether such senior executive or director is alleged to have breached a duty of care or loyalty.

Moreover, the Recoupment of Compensation Rule places the burden on the senior executive or director to affirmatively prove that he or she acted with due care, stating that "[t]he presumption . . . may be rebutted by evidence that the senior executive or director performed his or her duties with the requisite degree of skill and care required by that position."[6] This burden applies *regardless* of whether the senior executives are interested or disinterested, and apparently applies *regardless* of whether the company's charter exculpates directors from unintentional breaches of the duty of care.

In effect, the proposed rule reverses the presumption inherent in the long-established business judgment rule. The import of this proposed rule is clear and potentially dangerous: if promulgated, directors and senior executives of financial companies will be deemed personal guarantors of their companies' results to the extent of two years' compensation. We urge the FDIC not to create a rule that anyone who serves in an official capacity of a financial company is

[5] Recoupment of Compensation Proposed Rule § 380.7(b)(1)-(i), 76 Fed. Reg. 16,324, 16,338 (Mar. 23, 2011).
[6] Recoupment of Compensation Proposed Rule § 380.7(b)(2), 76 Fed. Reg. 16,324, 16,338 (Mar. 23, 2011).

presumptively, *personally* responsible, in an amount equal to two years of his or her compensation, for whatever calamity later results. Such a rule not only will lead to unduly conservative decisions that eschew more healthy, enterprising risk-taking, but it also may cause otherwise highly-qualified business people, including turnaround specialists, to decline to serve as directors or senior executives in the first place. Accordingly, we strongly encourage the FDIC to revise the proposed rule to maintain the presumptions inherent in existing fiduciary duty law.

With respect to investment advisers, the Incentive-based Compensation Rule's $1 billion and $50 billion tests should not include client assets that, due to certain accounting rules, may appear on an investment adviser's balance sheet, nor should it include goodwill or intangible assets.

We request that the SEC confirm that the $1 billion and $50 billion tests do not include client assets that, due to certain accounting rules, may appear on an investment adviser's balance sheet even though the changes in value of the assets do not have an impact on stockholders' equity or cash flows. As discussed above, with the exception of seed money investments for the purpose of establishing a fund or co-investments with clients to align interests, investment advisers generally do not engage in trading activities with their own balance sheets. However, application of accounting rules that require consolidation of separate accounts of an insurance subsidiary under FASB ASC 944, *Financial Services – Separate Accounts* and consolidation of certain private investment funds under FASB ASC 810, *Consolidation*, result in recording client assets under management on the balance sheet of an investment adviser and overstating the adviser's total assets at risk to its stockholders.

Investment advisers frequently offer separate accounts, through an insurance subsidiary, representing segregated funds held for purposes of funding individual and group pension contracts. The separate account assets are not subject to general claims of the creditors of an adviser, yet are consolidated on the adviser's balance sheet, along with an equal and offsetting liability to the policy holders resulting in no net impact to stockholders' equity. The adviser invests the contract holders' funds within the insurance separate accounts as directed by the contract holder in designated investment alternatives or in accordance with specific investment objectives. All investment performance, net of fees, is passed through to the individual contract holder.

BlackRock believes that separate accounts, and the portion of assets of consolidated investment funds to which the company has no economic exposure, should be excluded from the definition of "total consolidated assets" for purposes of the Incentive-based Compensation Rule.

Note also that the Financial Accounting Standards Board is actively developing an exposure draft titled *Agent/Principal Analysis, Consolidation* (Topic 810) (the "Consolidation Draft"). The Consolidation Draft would change the principles that investment advisers use to evaluate whether an advised fund should be consolidated and, if adopted, likely would result in substantially fewer funds being consolidated on their balance sheets because most investment advisers function primarily as an agent and not as a principal. The Consolidation Draft, as proposed, would not change the accounting discussed above for separate account assets managed through an insurance subsidiary. It would be unreasonable for investment advisers to be subject to the requirements noted above because they currently have assets including consolidated funds in excess of the specified $1 billion or $50 billion test, when it is highly likely that they may not meet those criteria upon passage of principles that include those outlined in the Consolidation Draft.[7]

Additionally, investment advisers frequently have significant assets related to capitalized goodwill and intangible assets. These assets increase total assets subject to the $1 billion and $50 billion tests but do not represent financial assets that are fair valued on a recurring basis.

The SEC's proposed Incentive-based Compensation Rule should not apply to non-US advisers who are not required to be registered with the SEC.

The definition of "covered financial institution" in Section 956 of the Dodd-Frank Act includes any firm that meets the definition of an "investment adviser" under the Investment Advisers Act of 1940 (the "Advisers Act"), without regard to whether the firm is or is not registered as an investment adviser under such Act.[8] The Incentive-based Compensation Rule's use of the definition of "investment adviser" in Section 202(a)(11) of the Advisers Act without regard to the exemptions provided in Section 203(b) thereof results in an overly broad application of the proposed rule to many non-US investment advisers.

The exemptions provided in the Advisers Act to certain non-US investment advisers recognize the fact that non-US activities of non-US advisers are less likely to result in US regulatory interest and therefore, in the spirit of international comity, such non-US investment advisers are exempted from registration with the SEC.[9] Non-US advisers with significant contacts to the US generally are required to register under the Advisers Act and therefore still would be covered by the Incentive-based Compensation Rule even with our recommended revision.

Further, many non-US jurisdictions have created or are proposing parallel incentive compensation rules and requirements.[10] In many non-US jurisdictions such rules are already in

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[7] *See* BlackRock, Inc., Quarterly Report (Form 10-Q), at page 73 (May 9, 2011) (providing an analysis of BlackRock's balance sheet excluding client separate account assets, the impact of consolidated sponsored investment funds/vehicles, as well as goodwill and intangible assets).

[8] Incentive-based Compensation Proposing Release 17 C.F.R. § 248.203(c), 76 Fed. Reg. 21,170, 21,215 (Apr. 14, 2011).

[9] *See, e.g.*, Registration Under the Advisers Act of Certain Hedge Fund Advisers, Advisers Act Release No. 2333, 84 SEC Docket 1032 (Dec. 2, 2004) (explaining that the Advisers Act is typically not applied with respect to the non-US clients of a non-US adviser); *see also* American Bar Association Subcommittee on Private Investment Entities, SEC No-Action Letter (Aug. 10, 2006), http://www.sec.gov/divisions/investment/noaction/aba081006.pdf.

[10] *See, e.g.*, Council Directive 2010/76/EU, Amending Directives 2006/48/EC and 2006/49/EC as Regards Capital Requirements for the Trading Book and for Re-Securitisations, and the Supervisory Review of Remuneration Policies, 2010 O.J. (L 329/3), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:329:0003:0035:EN:PDF (adopting guidelines for the review of remuneration policies within the European Union).

operation.[11] The application of the SEC's Incentive-based Compensation Rule to investment advisers in non-US jurisdictions creates potentially conflicting requirements and unnecessary complexity. Accordingly, the imposition of the proposed Incentive-based Compensation Rule on every non-US firm that simply meets the definition of "investment adviser" under the Advisers Act would add little benefit while at the same time be duplicative, burdensome and confusing. In other words, entities that may technically fit within the definition of investment adviser that are not based in the US and are not otherwise required to register with the SEC should not be subject to the Rule, especially if they are subject to regulation by a financial regulator in another jurisdiction. Therefore, consistent with other SEC rulemaking, principles of international comity demand that the SEC adopt a territorial approach and exclude from the scope of the Incentive-based Compensation Rule all non-US advisers who are not required to register with the SEC.[12]

The Federal Reserve's proposed Incentive-based Compensation Rule should not apply to non-consolidated bank subsidiaries for which the parent institution has no control over compensation.

In the Federal Reserve's proposed Incentive-based Compensation Rule the term "covered financial institution" includes the subsidiaries of such institution; however the term "subsidiary" is not defined in the Rule. The Incentive-based Compensation Rule is being proposed as a new regulation of the Federal Reserve and not as an addition to any of its existing regulations, such as Regulation Y, that includes a definition of "subsidiary." The fact that the term is not defined leads us to believe that the Federal Reserve did not intend for the term "subsidiary" to be read so broadly as to include non-consolidated subsidiaries.

This position is supported by the exclusion of the assets of any non-consolidated bank subsidiary in the assets of a "covered financial institution" for purposes of determining whether such institution satisfies the $1 billion or $50 billion thresholds.[13] Accordingly we request confirmation that the application of the term "subsidiary" in the Federal Reserve's proposed Incentive-based Compensation Rule does not apply to non-consolidated bank subsidiaries for which no control over compensation exists.

Further, as a diverse financial services firm, BlackRock and its subsidiaries are subject to the oversight of many different financial regulators, both domestic and international. While we recognize that the proposed Incentive-based Compensation Rule is substantially similar across Agencies, we expect that each Agency will promulgate its own forms and issue its own specialized guidance with respect to the Incentive-based Compensation Rule. Therefore, to avoid potentially conflicting

[11] *See*, *e.g.*, Financial Services Authority, Policy Statement 10/20, *Revising the Remuneration Code*, Dec. 2010, http://www.fsa.gov.uk/pubs/policy/ps10_20.pdf (describing the policy behind the Financial Services Authority's revised remuneration code).
[12] *See*, *e.g.*, Regulation S Adopting Release, Offshore Offers and Sales, Securities Act Release No. 33-6863 (Apr. 24, 1990) (adopting a territorial approach to offers and sales of securities).
[13] Incentive-based Compensation Proposing Release 12 C.F.R. § 236.3(c)(1)(ii), 76 Fed. Reg. 21,170, 21,206 (Apr. 14, 2011).

requirements on covered financial institutions that are under common control, especially in cases where employees are employed by more than one entity within the overall organization, the Agencies should provide guidance on reconciling such conflicts or appoint a primary Agency for such affiliated covered financial institutions.

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We thank the Agencies for providing BlackRock the opportunity to express its views on the proposed Incentive-based Compensation Rule and Recoupment of Compensation Rule. We are prepared to assist the Agencies in any way we can, and we welcome a continued dialogue on these important issues. Please contact the undersigned if you have any questions or comments regarding BlackRock's views.

Sincerely,

Barbara G. Novick
Vice Chairman

Robert P. Connolly
Senior Managing Director
and General Counsel