

CLAWBACK POLICIES: YOU DO HAVE A FEW OPTIONS

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NEW NYSE AND NASDAQ RULE DEADLINE

As discussed in our [February 27, 2023 post](#), the NYSE and Nasdaq previously issued their proposed listing rules (the “Proposed Listing Rules”) mandating that most companies with listed securities adopt clawback policies in response to Exchange Act Rule 10D-1.

On April 24, 2023, the SEC determined that it would extend the deadline by which it will take action on the Proposed Listing Rules to June 11, 2023. At that point (or sooner, if it so decides), it will either approve or disapprove, or institute proceedings to determine whether to disapprove, the Proposed Listing Rules. If the SEC does approve them on the latest date, then companies will likely be required to have policies in place by August 8, 2023 (the date that is 60 days after June 9, 2023, the last business day before June 11).

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OPTIONS FOR YOUR CLAWBACK POLICIES

While the Proposed Listing Rules have stringent requirements (and closely track the mandates of Exchange Act Rule 10D-1), companies do have several alternative approaches they can consider for their policies:

SINGLE OR MULTIPLE POLICIES?

Many companies have already adopted clawback policies in response to investor or proxy advisor pressures. As these clawback policies pre-date the Proposed Listing Rules, they likely contain significant differences from the mandated requirements, including:

- **Who the policy covers** – a company’s existing clawback policy may include a broader group of executives subject to potential recovery of their compensation than those covered by the Proposed Listing Rules, which only require that executive officers be subject to the policy;

- **Basis for recovery** - a company's existing clawback policy may allow for recovery of a covered employee's incentive compensation for a broader set of reasons, such as misconduct. By contrast, the Proposed Listing Rules require recovery only in the event of "Big R" and "little r" restatements, without a finding of employee fault; and
- **Discretion** – many companies' existing clawback policies grant the board or committee administering the policy (the administrator) discretion in determining to exercise their right to recover compensation in the event of a triggering event. By contrast, the Proposed Listing Rules allow only a narrow exception for impracticality.

Companies could elect to maintain, but exclude executive officers from coverage under, their existing policy, so as to maintain greater flexibility or different treatment for the broader employee population – and limit their new clawback policy to the requirements of the Proposed Listing Rules.

Reasons for maintaining a second policy may include:

- The desire to allow discretion in determining whether to recover compensation from non-executive officers.
- The ability to maintain the confidentiality of the policy that applies to non-executive officers, in contrast to the SEC requirement to file the policy required under the Proposed Listing Rules as an exhibit to an Annual Report on Form 10-K or 20-F.

TIMING AND PROCEDURES TO RECOVER ERRONEOUSLY AWARDED COMPENSATION

The Proposed Listing Rules require that a company must recover erroneously awarded incentive compensation reasonably promptly. However, they don't specify a precise time period or provide guidance on how recovery should be accomplished. Companies could consider establishing a specific deadline for the policy administrator to act to recover compensation after determining recovery is required and/or potential methods of recovery, such as a repayment agreement (possibly subject to certain parameters).

ADMINISTRATION

The Proposed Listing Rules call for oversight of the clawback policy (including any determination that recovery of erroneously awarded compensation is impractical) by a compensation committee (or another committee of independent directors that are responsible for executive compensation decisions), or in the absence of any such committee, a majority of independent directors serving on the board. However, a company's board may determine to reserve for itself the ability to make certain decisions, such as to amend the policy.

MEET THE TEAM



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