



## Time for NYSE and Nasdaq Listed Companies to Prepare for Clawback Policy Requirements

Looming in the near future, all public companies (including Smaller Reporting Companies) listed on the New York Stock Exchange and Nasdaq Stock Market will be required to adopt and adhere to a written executive compensation clawback policy, and to publicly disclose any compensation clawbacks they initiate. The clawback policy will be required by impending NYSE and Nasdaq listing standards mandated by the Securities and Exchange Commission in its “clawback rule” (Securities Exchange Act Rule 10D-1) required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Listed companies who fail to comply with these requirements could be subject to delisting from their exchange.

Generally, the written clawback policy will require a listed company to recover incentive compensation (including cash or equity) granted to executives based on financial performance metrics, if the company is required to prepare an accounting restatement due to financial misstatements which result in the non-attainment of the performance thresholds upon which the incentive compensation was paid.

The clawback policies which will be required under the coming NYSE and Nasdaq listing rules have broader application than the clawback provisions under Section 304 of Sarbanes-Oxley Act (SOX 304) which set forth recovery provisions when an accounting restatement results from issuer misconduct. SOX 304 targets only CEOs and CFOs and limits the amount recoverable to compensation received in a 12 month period prior to the initial public disclosure or SEC filing that included the misstated financials. Generally, the NYSE and Nasdaq written clawback policies will require the recovery of incentive-based compensation erroneously granted to any former or current executive officer during the three fiscal years preceding the date that a company is required to prepare the accounting restatement. Additionally, unlike SOX 304, a listed company’s clawback policy would apply to both so-called “Big R” restatements to correct material errors in previously issued financial statements, and to so-called “little r” restatements to restate prior period information in current period comparative financial statements, irrespective of issuer misconduct. The incentive compensation subject to recovery is the amount that exceeds the compensation which should have otherwise been paid pursuant to the restated financial metric.

Furthermore, a listed company will be required to file a copy of its written clawback policy as an exhibit to its annual report and if a clawback is triggered, disclose how it has applied its clawback policy, including, if relevant:

- the date it was required to prepare an accounting restatement and the aggregate dollar amount of the erroneously awarded incentive-based compensation attributable to that restatement;
- the aggregate amount of the clawback outstanding, and any outstanding amounts from any current or former executive officer of 180 days or more; and
- details regarding reliance on exceptions of pursuing a clawback due to impracticability.

SEC Rule 10D-1 provides that both exchanges must finalize their respective listing standards by November 28, 2023. The SEC Rule also states that listed companies will have 60 days from the effective date of their exchange's listing standards to adopt a compliant clawback policy. On February 22, 2023, the NYSE and Nasdaq filed their proposed listing standards that mirror the criteria set forth in Rule 10D-1. Following the submission of these proposed listing standards, on April 24, 2023 the SEC stated that June 11, 2023, is the final date by which it "shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change[s]". This significantly reduces the time that a listed company has to implement a compliant clawback policy from the originally anticipated timeline. With these new listing standards on the horizon and uncertainty surrounding the definitive deadline for compliance, it is imperative that listed companies use this critical window to prepare accordingly and address several clawback considerations.

Whether companies are revising previously adopted clawback policies or implementing new policies from scratch, it is important to recognize that compliant policies must be carefully tailored to account for the new listing rules. Therefore, NYSE and Nasdaq listed companies should review the proposed listing rule changes and ensure that its management, board, and its compensation committee are apprised of the latest requirements and their responsibilities going forward. It is also worth noting that these clawback policies do not exist in a vacuum. Documents ranging from committee charters to executive employment agreements, and incentive based compensation plans may include clawback provisions that warrant amending or may require review to mitigate potential risk. Additionally, newly drafted documents may require the addition of provisions consistent with the clawback policies that will be required. Listed companies should also evaluate their current internal controls and ensure they are adequate when considering the latest disclosure requirements.

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