

NYSE AND NASDAQ RELEASE THEIR PROPOSED CLAWBACK RULE FOR LISTED COMPANIES

Feb 27, 2023

What happened

On February 22, both the [NYSE](#) and [Nasdaq](#) posted their proposals for new listing rules in response to the SEC's final clawback rules. The proposals would establish the following compliance schedule:

- Each listed company must adopt the recovery policy required by the proposed rule ("Recovery Policy") within 60 days after approval of the final rule by the SEC ("Effective Date").
- Each listed company must comply with its Recovery Policy for all incentive-based compensation received by executive officers on or after the Effective Date that results from attainment of a financial reporting measure based on or derived from financial information for any fiscal period ending on or after the Effective Date.
- Each listed issuer must provide the required disclosures in the applicable SEC filings required on or after the Effective Date.

Takeaways

The listing standards must be effective no later than November 28, 2023, the first anniversary of the publication date.

Listed companies will be required to adopt a recovery policy no later than 60 days following the effective date of the listing standards, which could be as early as April 28, 2023 or as late as January 27, 2024 depending on the timing of stock exchange and SEC approvals.

As discussed in [our December 22, 2022 post](#), companies should take steps to comply with the SEC's new clawback rules, including:

- Begin preparation of required clawback policies; consider whether the scope of any existing policy conforms to SEC requirements and/or whether to extend new or existing policies beyond covered employees and/or the mandated recovery period;

- Review existing employment and compensation agreements, awards and other arrangements with covered officers to determine if any amendments may be needed in view of the new Clawback Rules and company policies; and
- Evaluate the impact of the Clawback Rules and company policies and their effect on executive motivation; consider whether to adjust performance metrics or the mix of incentive and non-incentive based compensation.

Deeper dive

As discussed in [our October 27, 2022 post](#), the SEC approved final rules directing the NYSE, Nasdaq and other stock exchanges to adopt requirements for listed companies to develop and implement clawback, or recovery, policies that provide for the recovery of incentive-based compensation erroneously awarded to current or former executive officers based on a misstated financial reporting measure. A company will need to file the policy with the SEC as an exhibit to its annual report and provide detailed disclosures related to the policy and a recovery analysis where a recovery is triggered.

The requirements of proposed Section 303A.14 of the NYSE Listed Company Manual and proposed Listing Rule 5608 of the Nasdaq Stock Market are as follows:

- **Adoption of Recovery Policy.** The company must adopt and comply with a written Recovery Policy providing that it will recover reasonably promptly the amount of erroneously awarded incentive-based compensation in the event that the company is required to prepare an accounting restatement due to the material noncompliance of the company with any financial reporting requirement under the securities laws, including any required accounting restatement to correct an error in previously issued financial statements that is material to the previously issued financial statements, or that would result in a material misstatement if the error were corrected in the current period or left uncorrected in the current period.
- **Scope of Recovery Policy.** The Recovery Policy must apply to all incentive-based compensation received by a person:
 - After beginning service as an executive officer;
 - Who served as an executive officer at any time during the performance period for that incentive-based compensation;
 - While the issuer has a class of securities listed on a national securities exchange or a national securities association; and
 - During the three completed fiscal years immediately preceding the date that the company is required to prepare an accounting restatement. In addition, the Recovery Policy must apply

to certain transition periods that result from a change in fiscal year. The obligation to recover erroneously awarded compensation is not dependent on whether the restated financial statements are filed.

- **Calculation of Recovery Period.** The date that a company is required to prepare an accounting restatement is the earlier to occur of:
 - The date the board of directors, one of its committees or an officer authorized to take such action concludes, or reasonably should have concluded, that the company is required to prepare an accounting restatement; or
 - The date a court, regulator or other legally authorized body directs the company to prepare an accounting restatement.
- **Calculation of Recoverable Compensation.** The amount of incentive-based compensation that must be subject to the Recovery Policy (“erroneously awarded compensation”) is the amount of incentive-based compensation received that exceeds the amount that otherwise would have been received had it been determined based on the restated amounts, without regard to any taxes paid. For incentive-based compensation based on stock price or total shareholder return, where the amount of erroneously awarded compensation is not subject to mathematical recalculation directly from the information in an accounting restatement:
 - The amount must be based on a reasonable estimate of the effect of the restatement on the stock price or total shareholder return; and
 - The company must maintain documentation of the determination of that estimate and provide such documentation to the NYSE or Nasdaq, as applicable.
- **Exceptions for Impracticability.** The company must recover erroneously awarded compensation in compliance with its Recovery Policy unless one of the following three conditions are met, and the compensation committee, or in its absence, a majority of the independent directors, has made a determination that recovery would be impracticable:
 - The direct expense paid to a third party to assist in enforcing the policy would exceed the amount to be recovered. Before so concluding, the company must make a reasonable attempt to recover such erroneously awarded compensation, document such reasonable attempt(s) to recover, and provide that documentation to the NYSE or Nasdaq, as applicable.
 - Recovery would violate home country law where that law was adopted prior to November 28, 2022. Before so concluding, the company must obtain an opinion of home country counsel,

acceptable to the NYSE or Nasdaq, as applicable, that recovery would result in such a violation, and must provide such opinion to the NYSE or Nasdaq, as applicable.

- Recovery would likely cause an otherwise tax-qualified retirement plan, under which benefits are broadly available to employees of the registrant, to fail to meet certain requirements of the Internal Revenue Code.
- **Indemnification Prohibited.** The company is prohibited from indemnifying any current or former executive officer against the loss of erroneously awarded compensation.

The company must file all disclosures with respect to such Recovery Policy in accordance with the requirements of the Federal securities laws, including the disclosure required by the applicable Commission filings.

The proposed rules would not apply to issuers of certain types of securities, such as security futures products or standardized options, in the case of the NYSE, or unit investment trusts or certain investment management companies.

The proposed rules also address the notice and procedural requirements for delisting securities of listed companies for non-compliance with the requirements.

RELATED CAPABILITIES

- Securities & Corporate Governance
- Employee Benefits & Executive Compensation

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