MARCH 17, 2023

NYSE and Nasdaq Propose Listing Standards Requiring Issuers to Adopt Clawback Policies to Recover Erroneously Awarded Incentive-Based Executive Compensation

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The New York Stock Exchange (NYSE) and the Nasdaq Stock Market (Nasdaq) recently proposed new listing standards to implement the U.S. Securities and Exchange Commission (SEC) rules regarding the recovery of erroneously awarded incentive-based executive compensation (SEC Rules). As described in our earlier bulletin, the SEC Rules require U.S. national securities exchanges and securities associations to adopt listing standards requiring all issuers listed on a U.S. stock exchange to adopt, implement and disclose policies mandating the recovery of erroneously awarded incentive-based executive compensation in the event that a listed issuer is required to prepare an accounting restatement. The SEC Rules also apply to foreign private issuers and Canadian multijurisdictional disclosure system (MJDS) issuers.

The proposed listing standards of the NYSE and Nasdaq, which were released on February 22, 2023, are substantially similar with respect to the requirement to adopt and implement clawback policies. They differ with respect to the consequences to listed issuers that fail to comply with the listing standards (once they become effective).

- An NYSE-listed issuer that fails to adopt a clawback policy will be required to (i) notify the NYSE of such delinquency within five days of the effective date and (ii) issue a press release disclosing such delinquency, the reason for the delinquency and, if known, the anticipated date by which the delinquency will be cured. The delinquent issuer will be granted six months to cure the delinquency, which the NYSE may extend by a maximum of an additional six months. However, the NYSE may decide not to provide a cure period to a delinquent issuer and instead elect to commence suspension and delisting procedures, including during any cure period provided to the issuer. In addition, upon a delinquent issuer's failure to recover any erroneously awarded compensation as required by its clawback policy, the NYSE will immediately suspend trading in all the issuer's listed securities and immediately commence delisting procedures with respect to those securities.
- A Nasdaq-listed issuer that fails to adopt a clawback policy or comply with its clawback policy must submit a compliance plan to the Nasdaq staff to regain compliance. Nasdaq staff would give the delinquent issuer up to 180 days to cure the deficiency, after which the staff will be required to issue a delisting letter. The delinquent issuer may appeal to the Nasdaq Hearings Panel, which may allow the issuer up to an additional 180 days to cure the deficiency.

The SEC Rules require an issuer to recover erroneously awarded incentive-based compensation "reasonably promptly," but do not specify a time frame to complete the recovery. The proposed listing standards of the NYSE and Nasdaq do not define the term "reasonably promptly." Instead, they provide that a listed issuer's compliance with the recovery obligation will be assessed on a "holistic basis" – including by considering whether the issuer is pursuing an appropriate balance of cost and speed in determining the appropriate means to seek recovery, and whether the issuer is securing recovery through means that are appropriate based on the particular facts and circumstances of each executive officer who owes a recoverable amount.

SEC Staff Compliance and Disclosure Interpretations on the Final Rules

The SEC staff has recently published the following Compliance and Disclosure Interpretations (C&DIs) related to the SEC Rules:

- Form 10-K, Form 20-F and Form 40-F were already amended to include check boxes and other disclosure items concerning the SEC Rules. However, the SEC is not expecting issuers to provide such disclosure until they are required to adopt a recovery policy under the applicable listing standards.[1]
- Forms 20-F and 40-F require foreign private issuers to provide individualized clawback-related disclosure for each of their named executive officers. Canadian MJDS issuers that use Form 40-F to file their annual reports should provide individualized disclosure about executive officers for whom the issuer otherwise provides individualized compensation disclosure in the 40-F filing.[2]
- Because the SEC Rules apply broadly to erroneously awarded incentive-based executive compensation, the clawback rule applies to plans that take into account such incentive-based compensation (other than tax-qualified retirement plans), including long-term disability plans, life insurance plans, supplemental executive retirement plans or any other compensation based on the incentive-based compensation. Listed issuers will be expected to recover the amount contributed to the notional account based on the erroneously awarded incentive-based compensation and any earnings accrued on such notional amount.[3]

Next Steps: Preparing for Compliance

Once the proposed listing standards are published in the *Federal Register*, a 21-day public comment period will follow, after which they will be subject to SEC approval. The SEC Rules provide that the final listing standards must be effective no later than November 28, 2023. Listed issuers must adopt compliant clawback policies within 60 days of the effective date of the final listing standards, which will be January 27, 2024, at the latest.

NYSE- and Nasdaq-listed issuers should review their existing clawback policies and prepare to comply with SEC Rules and the final listing standards applicable to them by the compliance date. These issuers may have to adopt revisions to their existing policies and ensure that appropriate internal controls and other procedures are in place to comply with their clawback policies.

[1] Exchange Act Rules C&DI 121H.01; Exchange Act Form C&DIs 104.19, 110.09 and 112.04.
[2] Exchange Act Rules C&DIs 121H.02 and 121H.03; Exchange Act Form C&DIs 110.08 and 112.03.
[3] Exchange Act Rules C&DI 121H.04.

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