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WHITE PAPER

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SEC Adopts Final Dodd-Frank Act Clawback Rules: An A-to-Z Explanation

As required by the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, on October 26, 2022, the Securities and Exchange Commission adopted final rules directing the national securities exchanges and national securities associations that list securities to establish clawback listing standards. These clawback listing standards will require each listed issuer to adopt a written compensation recovery (clawback) policy providing for the recovery, in the event of a required accounting restatement, of incentive-based compensation received by current or former executive officers (generally Section 16 officers) that is based on erroneously reported financial information. The final rules also require disclosure regarding the clawback policy, including filing it as an exhibit to the listed issuer's annual report and providing (where applicable) certain disclosure regarding the operation of the clawback policy.

Importantly, the SEC's final rules do not permit listed issuers to condition clawback in any way on the fault or culpability of an affected executive officer regarding the accounting restatement, to implement *de minimis* thresholds for clawbacks or recoverable amounts of erroneously awarded incentive compensation, or allow for boards of directors to exercise broad discretion in connection with determining whether certain compensation should be clawed back in light of the circumstances.

REQUIREMENTS UNDER THE FINAL RULES

The final clawback rules ("Final Rules") adopt new Rule 10D-1 (the "Clawback Rule") under the Securities Exchange Act of 1934, as amended. Under the Clawback Rule, the national securities exchanges and national securities associations that list securities (each, a "Stock Exchange") must adopt clawback listing standards (the "Clawback Listing Standards") prohibiting the initial or continued listing of any security of an issuer that fails to timely develop and adopt—and provide required disclosure regarding—a written compensation recovery policy (a "Clawback Policy"). In turn, the Clawback Policy must require the listed issuer to recover, or claw back, in a reasonably prompt manner, when triggered by certain accounting restatements as described in the Clawback Listing Standards, incentive-based compensation received by certain current or former executive officers that is in excess of what such executive officers should have otherwise received, subject to narrow exceptions described in the Clawback Listing Standards. In addition, a listed issuer must provide certain disclosures related to its Clawback Policy and its operation after it is adopted, in accordance with the Final Rules (the "Clawback Disclosure").

Public companies and their advisers have been waiting since 2010 for the SEC to implement the clawback policy requirements under the Dodd-Frank Act. The SEC provided a first look at its intended approach when it published proposed Dodd-Frank Act clawback rules in July 2015 but took no further action until it reopened the comment period on those proposed rules in October 2021 and June 2022. The Final Rules are now here, and generally reflect adoption of the proposed rules substantially as proposed, but with certain modifications primarily to broaden the scope of covered accounting restatements to include so-called "Little r" accounting restatements (as more fully described below) and to clarify the applicable rules.

Despite these changes, the Final Rules remain very convoluted, and the SEC's approach on Clawback Policies continues to remain out of step with the approach that much of corporate America has taken to adopt appropriate and practical clawback arrangements during the past 12 years. Importantly, the Final Rules do not permit listed issuers to condition clawback in any way on the fault or culpability of an affected executive officer regarding the accounting restatement, to implement *de minimis* thresholds for clawbacks or recoverable amounts of erroneously received compensation, or allow for boards of directors to exercise broad discretion in connection with determining whether certain compensation should be clawed back in light of the circumstances.

EFFECTIVENESS

The Stock Exchanges must file their proposed Clawback Listing Standards with the SEC no later than 90 days after the Final Rules are published in the Federal Register, and the Clawback Listing Standards must become effective no later than one year following such publication. Affected issuers then must: (i) adopt a Clawback Policy no later than 60 days after the applicable Clawback Listing Standards become effective (such date, the "Clawback Deadline"); and (ii) comply with new clawback disclosure requirements under the Final Rules on and after the Clawback Deadline. Under this timetable, the Clawback Deadline for issuers to adopt Compliant Clawback Policies will likely occur during late 2023 or early 2024.

A-TO-Z EXPLANATION OF THE FINAL RULES

The following questions and answers explain the key elements or operation of the Final Rules:

A. Which Issuers Will Need to Comply with the Clawback Listing Standards?

Almost every issuer listed on one of the Stock Exchanges (including, in particular, emerging growth companies, smaller reporting companies, foreign private issuers, controlled companies, and issuers of only debt or preferred securities) must comply with the Clawback Listing Standards.

B. Which Issuers Are Exempt from Complying with the Clawback Listing Standards?

The only issuers excluded from complying with the Clawback Listing Standards are: (i) those that list only certain securities futures products cleared by a registered (or Exchange Act-exempt) clearing agency, standardized options issued by a registered clearing agency, securities issued by unit investment trusts, and securities issued by certain registered investment companies; and (ii) registered management companies

that have not awarded incentive-based compensation to any Executive Officer (as explained below) of the management company in any of the three previously completed fiscal years (or, if a shorter period, since the initial listing of the management company).

C. In General, What Is the Clawback Process Under a Clawback Policy?

If a listed issuer operating a Clawback Policy is required to prepare an Accounting Restatement, the issuer must claw back:

- Within a reasonably prompt period of time;
- From each Executive Officer;
- All Excess Incentive-Based Compensation;
- Received by the Executive Officer;
- During the Recovery Period;
- Provided that a Clawback Exception does not apply; and
- Provide required Clawback Disclosure, including information about the clawback.

Each of these elements or steps is further explained or described below.

D. What Kinds of "Accounting Restatements" Will Trigger the Clawback?

Under the Clawback Listing Standards, a clawback ("Clawback") will be triggered under a Clawback Policy when the listed issuer becomes required to prepare either a "Big R" accounting restatement or a "Little r" accounting restatement.

E. What Is a "Big R" Accounting Restatement?

A "Big R" accounting restatement is an accounting restatement that corrects errors that are material to previously issued financial statements, as considered under U.S. Generally Accepted Accounting Principles or International Financial Reporting Standards, as applicable (a "Big R Restatement").

F. What Is a "Little r" Accounting Restatement?

A "Little r" accounting restatement is an accounting restatement that corrects errors that are not material to issued financial statements, but that would result in a material misstatement if: (i) the errors were left uncorrected in the current period; or (ii) the error correction was recognized in the current period (a "Little r Restatement" and, together with the Big R Restatement, "Accounting Restatements"), as considered under U.S. GAAP or IFRS, as applicable. The SEC's determination that the kinds of Accounting Restatements that will trigger Clawback under a Clawback Policy will include Little r Restatements represents a significant change from the proposed rules.

In including Little r Restatements in the kinds of Accounting Restatements that trigger Clawback under a Clawback Policy, the SEC specifically acknowledges that certain errors immaterial to previously issued financial statements may compound over time and become material due to their cumulative effect over multiple reporting periods. However, the SEC declined to provide formal, separate definitions of the terms "accounting restatement" or "material noncompliance" for purposes of the Final Rules and related matters—instead, listed issuers are encouraged to look to existing accounting standards, guidance, literature, and definitions to understand these terms and whether a Clawback Policy has been triggered.

G. Are There Any Accounting Restatements or Events that Will Not Trigger the Clawback?

Yes. Accounting Restatements that trigger Clawback will not include so-called "out-of-period adjustments," where an error is corrected in the current reporting period but both: (i) the error is immaterial to the previously issued financial statements (not a Big R Restatement); and (ii) correction of the error is immaterial to the current period (not a Little r Restatement). In addition, the following events will not trigger Clawback under a Clawback Policy:

- Retrospective application of a change in accounting principle;
- Retrospective revision to reportable segment information due to a change in the structure of an issuer's internal organization;
- Retrospective reclassification due to a discontinued operation;
- Retrospective application of a change in reporting entity, such as from a reorganization of entities under common control;
- Retrospective adjustment to provisional amounts in connection with a prior business combination (IFRS filers only); and

- Retrospective revision for stock splits, reverse stock splits, stock dividends, or other changes in capital structure.

H. Who Are the "Executive Officers" Subject to the Clawback Policy?

The Clawback Policy will need to cover former and current "officers" of the issuer within the meaning of Rule 16a-1(f) under the Exchange Act and will include officers identified by the issuer pursuant to Item 401(b) of Regulation S-K ("Executive Officers").

I. What Is the "Recovery Period" for the Clawback?

To determine the applicable Clawback recovery period, the issuer must first determine the date on which it is required to prepare the Accounting Restatement (the "Trigger Date"), which date is the earlier to occur of:

- The date on which the issuer's board of directors (or one of its committees) or one or more authorized officers (if board action is not required) concludes (or reasonably should have concluded) that the issuer is required to prepare the Accounting Restatement; and
- The date of any initial action by a court, regulator, or legally authorized body directing the issuer to prepare the Accounting Restatement (even if such action is subject to subsequent finalization and non-appealability).

The SEC's view is that the Trigger Date: (i) may occur before the precise amount of the applicable accounting error is known; (ii) should coincide with the timing of any event triggering the filing of a Current Report on Form 8-K under Item 4.02(a); and (iii) should be determined by considering any notice received from an independent auditor that a previously issued financial statement contained a material error.

Once the Trigger Date is determined, the applicable Clawback recovery period will be the three completed fiscal years immediately preceding the Trigger Date (the "Recovery Period"). For example, if a Trigger Date occurs in November 2024 and the issuer files its restated financial statements in January 2025, the Recovery Period consists of 2021, 2022, and 2023. Importantly, we note that the SEC did not define this Recovery Period to include the portion of the fiscal year in which the Trigger Date occurs that is subsequent to such three completed fiscal years but prior to the Trigger Date. The Recovery Period also includes any transition period of less than nine months resulting from a change in the issuer's fiscal year within or immediately following such three completed fiscal years (for a total of three full fiscal years plus the transition period).

J. What Is "Incentive-Based Compensation" Under the Clawback Rule?

Incentive-based compensation will consist of any compensation granted, earned, or vested based wholly or in part upon the attainment of a financial reporting measure, including where final payout is modified through the exercise of positive or negative discretion ("Incentive-Based Compensation"). Under this definition, Incentive-Based Compensation must be determined by issuers in a principles-based manner.

K. Are There Examples of What Should be Considered "Incentive-Based Compensation"?

Yes. The following elements of compensation should be considered Incentive-Based Compensation under the Final Rules:

- Non-equity incentive plan awards earned at least in part based on financial reporting measures;
- Bonuses paid from a "bonus pool," the size of which is determined at least in part based on financial reporting measures;
- Other cash awards based on financial reporting measures;
- Restricted stock, restricted stock units, performance share units, stock options, and stock appreciation rights that are granted or become vested at least in part based on financial reporting measures; and
- Proceeds received upon the sale of shares acquired through an incentive plan that were granted or vested at least in part based on financial reporting measures.

L. Are There Examples of What Should Not be Considered "Incentive-Based Compensation"?

Yes. The following elements of compensation should not be considered Incentive-Based Compensation under the Final Rules:

- Base salaries;

- Pure discretionary bonuses (other than those paid from a "bonus pool" determined based on financial reporting measures);
- Bonuses paid based solely on subjective standards (e.g., demonstrated leadership) and/or completion of a specified employment period;
- Non-equity incentive plan awards earned solely based on strategic measures (e.g., consummating a merger or divestiture) or operational measures (e.g., opening a specified number of stores, completion of a project, increase in market share); and
- Equity awards where the grant is not contingent on achieving any financial reporting measures and vesting is based solely on completion of a specified employment period and/or attaining one or more non-financial reporting measures.

M. What Are "Financial Performance Measures" for Purposes of Determining Incentive-Based Compensation?

Financial reporting measures will consist of all performance measures determined and presented in accordance with the accounting principles used to prepare the issuer's financial statements (and other measures derived wholly or in part from such measures), plus stock price and total shareholder return measures.

In the Final Rules, the SEC provided some examples of accounting-based financial reporting measures (financial reporting measures may also be derived from these measures): revenues; net income; operating income; profitability of one or more reportable segments; financial ratios (e.g., accounts receivable turnover and inventory turnover rates); net assets or net asset value per share; earnings before interest, taxes, depreciation, and amortization; funds from operations and adjusted funds from operations; liquidity measures (e.g., working capital, operating cash flow); return measures (e.g., return on invested capital, return on assets); earnings measures (e.g., earnings per share); sales per square foot or same store sales, where sales are subject to an Accounting Restatement; revenue per user, or average revenue per user, where revenue is subject to an Accounting Restatement; cost per employee, where cost is subject to an Accounting Restatement; any of such financial reporting measures relative to a peer group, where the issuer's financial reporting measure is subject to an Accounting Restatement; and tax basis income.

Financial reporting measures may include non-U.S. GAAP financial measures as described under Regulation G or Item 10 of Regulation S-K, and do not necessarily need to be included in the issuer's SEC filings or financial statements (for example, same store sales, accounts receivable turnover, EBITDA, or sales per square foot, etc.). Financial reporting measures will not include measures that are not derived from financial information (for example, opening a specified number of stores or obtaining regulatory approval of a product, etc.).

N. What Does "Received" Mean When Determining Incentive-Based Compensation?

This is a tricky part of the Final Rules.

Incentive-Based Compensation is considered "received" by an Executive Officer ("Received") during a particular fiscal year in the Recovery Period if the financial reporting measure relevant to the Incentive-Based Compensation is attained during such fiscal year (even if the payment or actual grant of the Incentive-Based Compensation occurs after such fiscal year, and even if such earned Incentive-Based Compensation is then otherwise forfeitable or such attainment has not yet been calculated or approved) (the "Attainment Year"). For these purposes, ministerial acts or other contingencies to grant, issuance, or payment of the Incentive-Based Compensation—including calculation of an earned amount or director approval of payment—do not affect the determination of the Attainment Year.

In particular, under the Final Rules, if the Incentive-Based Compensation in question:

- Is the grant of an equity award based in whole or in part on the satisfaction of a financial reporting measure, the Attainment Year for the award is the fiscal year in which such financial reporting measure is attained;
- Is the earning/vesting of an equity award based only on the satisfaction of a financial reporting measure, the Attainment Year for the award is the fiscal year in which such financial reporting measure is attained;

- Is the earning of an equity award based on the satisfaction of a financial reporting measure, and then vesting based on the satisfaction of a service requirement, the Attainment Year for the award is the fiscal year in which such financial reporting measure is attained (regardless of the subsequent service requirement); and
- Is the earning of a non-equity incentive plan or other cash award based in whole or in part on the satisfaction of a financial reporting measure, the Attainment Year for the award is the fiscal year in which such financial reporting measure is attained (regardless of the later payment of the award).

Despite the definition and explanation of "Received" provided above, Incentive-Based Compensation will not be considered Received by an Executive Officer if: (i) the Attainment Year occurs before the Executive Officer began service as an Executive Officer; (ii) the Executive Officer did not serve as an Executive Officer during any portion of the performance period for such Incentive-Based Compensation; (iii) the Attainment Year occurs at a time when the issuer was not listed on any Stock Exchange; or (iv) the Attainment Year occurs before the effective date of the applicable Clawback Listing Standards.

O. What Is "Excess Incentive-Based Compensation" Under the Clawback Rule?

As described above, in order to effect a Clawback, a listed issuer must engage in a multi-step determination process regarding each Executive Officer:

- First, the issuer must determine the amount of Incentive-Based Compensation that has been Received by the Executive Officer during the Recovery Period, and regardless of any taxes incurred or paid by such Executive Officer (the "Originally Received Incentive-Based Compensation");
- Second, the issuer must determine the amount of Incentive-Based Compensation that otherwise would have been Received by such Executive Officer during the Recovery Period based on the restated financial statements resulting from the Accounting Restatement, again on a pre-tax basis (the "Corrected Incentive-Based Compensation"); and
- Third, the issuer must determine the excess, if any, between these two amounts (the difference (if a positive value) between the Originally-Received Incentive-Based Compensation, minus the Corrected Incentive-Based Compensation), again on a pre-tax basis (such difference, the "Excess Incentive-Based Compensation").

P. How Should an Issuer Determine "Excess Incentive-Based Compensation"?

Effectively, the Final Rules require an issuer to conduct a principles-based mathematical recalculation and reanalysis of applicable financial reporting measures, taking into account any discretion exercised by the issuer.

Importantly, we note that the SEC implies in the Final Rules footnotes that any discretion exercised by the issuer regarding the Originally-Received Incentive-Based Compensation would need to be applied on a consistent basis regarding the Corrected Incentive-Based Compensation in order to determine the Excess Incentive-Based Compensation, but we could see where an issuer might have wanted to exercise a lesser amount of discretion in a situation where there is Excess Incentive-Based Compensation.

For example, assume a financial reporting measure results in the above-target payout of a cash incentive award to an Executive Officer, but, in recognition of an otherwise "down" year for the issuer, the issuer's compensation committee uses negative discretion to reduce the actual payout by $50,000. The SEC appears to assume that, if the restated financial statements resulting from an Accounting Restatement would have resulted in a lower formulaic payout under the financial reporting measure (such as a below-target payout), the issuer's compensation committee would have applied the same $50,000 reduction dollar-for-dollar (which might not always be the case).

In the Final Rules, the SEC provided specific guidance for determining Excess Incentive-Based Compensation for certain types of Incentive-Based Compensation:

- For cash awards, the applicable Excess Incentive-Based Compensation is to be determined similarly regardless of whether the cash award is paid as a lump sum or over time;

- For non-qualified deferred compensation Received by an Executive Officer, Excess Incentive-Based Compensation will include the interest or other earnings accrued on such Excess Incentive-Based Compensation under the applicable non-qualified deferred compensation plan, and the Executive Officer's account balance or distributions under such plan must be reduced by the aggregate amount of such Excess Incentive-Based Compensation;
- For cash awards paid from a bonus pool, the applicable Excess Incentive-Based Compensation for an Executive Officer is that Executive Officer's pro-rata portion of the total Excess Incentive-Based Compensation determined in the aggregate for the bonus pool (the issuer may not pursue non-ratable Clawback among the Executive Officers regarding such Excess Incentive-Based Compensation if discretion was exercised in determining this element of Originally Received Incentive-Based Compensation);
- For equity awards, if Received shares, stock options, or stock appreciation rights are still held by an Executive Officer at the time of Clawback, then the applicable Excess Incentive-Based Compensation is the difference (if a positive value) between: (i) the number of such shares, stock options, or stock appreciation rights representing the Originally-Received Incentive-Based Compensation, minus (ii) the number of shares, stock options, or stock appreciation rights representing the Corrected Incentive-Based Compensation; and
- For equity awards, if Received stock options or stock appreciation rights have been exercised, but the shares received upon exercise are still held by an Executive Officer at the time of Clawback, then the applicable Excess Incentive-Based Compensation is the number of such shares received upon exercise of the number of such stock options or stock appreciation rights determined to constitute, as applicable, Excess Incentive-Based Compensation (or the value thereof).

Issuers should otherwise have reasonable flexibility and discretion under the Clawback Listing Standards to determine Excess Incentive-Based Compensation in particular situations, as long as they keep in mind the Clawback Rule's goal to return erroneously awarded compensation to issuers and their shareholders, and each issuer's directors keep in mind their fiduciary duties to the issuer's shareholders, in making such determinations. For example, for any Incentive-Based Compensation that is based on stock price and total shareholder return measures, if this determination cannot be made directly from mathematical recalculation based on the Accounting Restatement information, then the issuer must base the excess determination on a reasonable estimate (again, subject to reasonable flexibility and discretion) of the effect of the Accounting Restatement on the applicable stock price and total shareholder return measures ("Reasonable Estimate"), and maintain and provide to the Stock Exchange documentation of the determination of the Reasonable Estimate. Further, issuers are permitted to take into account, when determining Excess Incentive-Based Compensation, any amounts an Executive Officer has already reimbursed to the issuer under application of the clawback provisions of the Sarbanes-Oxley Act of 2002.

Q. Are There Any Exceptions to Mandatory Clawback?

Yes. Although the listed issuer will not have general discretion to determine whether to claw back Excess Incentive-Based Compensation from the Executive Officers, the issuer may forgo such Clawback regarding an Executive Officer in the following instances, provided that the issuer's independent compensation committee or (in its absence) a majority of the independent directors, determines under the particular circumstances that such Clawback would be impracticable and (the "Clawback Exceptions"):

- The direct expense paid to a third party to assist in enforcing the Clawback Policy would exceed amounts to be recovered;
- Clawback would violate so-called "home country" law in existence as of the publication date of the Final Rules (and the issuer has obtained a supporting legal opinion of "home country" counsel acceptable to the Stock Exchange (and on which the Stock Exchange may explicitly rely) regarding this position and delivers such legal opinion to the Stock Exchange); or
- Clawback would likely cause an otherwise tax-qualified retirement plan, under which benefits are broadly available to the issuer's employees (but specifically excluding plans limited only to certain officers, supplemental executive retirement plans and other non-qualified plans), to fail to

meet certain applicable tax law requirements, as described in the Clawback Listing Standards.

However, before an issuer may determine in the situation described in the first bullet above that the Clawback Exception applies, the issuer must make a reasonable attempt to claw back Excess Incentive-Based Compensation from the particular Executive Officer, must document its attempted Clawback, and must provide such documentation to the Stock Exchange.

Importantly, we note that the Final Rules do not permit issuers to condition Clawback or Excess Incentive-Based Compensation in any way on the fault or culpability of an Executive Officer regarding the Accounting Restatement, limit Clawback or Excess Incentive-Based Compensation to situations involving only amounts in excess of any kind of *de minimis* threshold, or allow for boards of directors to exercise broad discretion in connection with determining whether certain compensation should be clawed back in light of the circumstances.

R. What Are the Limitations on the Means by Which Issuers Clawback Excess Incentive-Based Compensation?

Issuers should have reasonable flexibility and discretion for the means by which they claw back Excess Incentive-Based Compensation from Executive Officers, subject to a few limitations. First, the issuer should act reasonably promptly to claw back Excess Incentive-Based Compensation. While this term is not defined for purposes of the Final Rules, the expectation is that issuers will pursue an appropriate balance of cost and speed, while being mindful of applicable fiduciary duties, in seeking Clawback. Further, it may be reasonably prompt for an issuer to pursue Clawback from different Executive Officers using different means and on different timetables. Second, the issuer is not permitted to claw back (or settle with an Executive Officer for) less than the applicable amount of Excess Incentive-Based Compensation, unless a Clawback Exception applies. Third, the issuer should pursue Clawback using means that are consistent with the Clawback Rule's goal to return erroneously awarded compensation to issuers and their shareholders, and each issuer's directors should keep in mind their fiduciary duties to the issuer's shareholders.

S. Can an Issuer Insure or Indemnify Executive Officers Regarding Clawbacks?

No. Issuers are prohibited under the Final Rules from insuring or indemnifying Executive Officers against the loss of Excess Incentive-Based Compensation, and from paying or reimbursing Executive Officers for premiums on a third-party insurance policy (obtained by the Executive Officer) to fund potential Clawback obligations. An Executive Officer may, however, obtain and pay for such insurance policy on his or her own.

T. Will the Clawback Rule or the Clawback Listing Standards Have Any Retroactive Effect?

Yes, in a limited manner. We note that the SEC acknowledges in the Final Rules that an issuer may be a party to a compensatory plan, contract, or arrangement in existence prior to the announcement or effectiveness of the Final Rules ("Predecessor Arrangement") that does not permit (or is silent regarding) Clawback under the Clawback Listing Standards, but that nonetheless will be subject to potential Clawback under the Clawback Listing Standards as a result of providing Incentive-Based Compensation that has the potential to be Received during a Recovery Period (a "Retroactive Effect"). While the SEC states in the Final Rules that it views the Clawback Rule as appropriately applied to such Predecessor Arrangements, and that Executive Officers should not have a reasonable expectation of being protected from the Retroactive Effect, we anticipate that issuers will be concerned. We expect that issuers will act in the coming months to take stock of all of their Predecessor Arrangements to identify where the Final Rules will have a Retroactive Effect, and consider whether any modifications to the Predecessor Arrangements may need to be made, other understandings with such Executive Officers may need to be reached, or other actions may need to be taken ahead of the effectiveness of the Clawback Listing Standards.

U. What Disclosure Will a Listed Issuer Need to Provide (Regardless of Whether the Issuer Effects a Clawback in a Particular Year)?

Once the Clawback Listing Standards are effective, an SEC registrant who had at least one class of securities listed on a Stock Exchange during its most recently completed fiscal year must file its Clawback Policy as an exhibit to its annual report on the applicable SEC form. Further, two check-box disclosures

will be added to the cover page of the registrant's annual report (Form 10-K, Form 20-F, and Form 40-F) requiring the registrant to indicate whether its financial statements included in the annual report reflect the correction of an error to previously issued financial statements, and whether any of such error corrections (if applicable) are Accounting Restatements requiring Clawback analysis under the Clawback Policy.

V. What Disclosure Will a Listed Issuer Need to Provide if the Issuer Effects a Clawback?

In general, detailed Clawback information must be disclosed (and XBRL tagged) by the issuer ("Detailed Clawback Results Information") once the Clawback Listing Standards are effective, if:

- The listed issuer prepared an Accounting Restatement since the beginning of its most recently completed fiscal year, and Clawback of Excess Incentive-Based Compensation was triggered by the Accounting Restatement; or
- If the issuer prepared an Accounting Restatement prior to the beginning of its most recently completed fiscal year, and Clawback of Excess Incentive-Based Compensation was triggered by the Accounting Restatement, but there was an outstanding balance of Excess Incentive-Based Compensation yet to be recovered under such Clawback as of the end of the issuer's most recently completed fiscal year.

This Detailed Clawback Results Information consists of, for each applicable Accounting Restatement:

- The Trigger Date;
- The aggregate value of Excess Incentive-Based Compensation resulting from the Accounting Restatement (plus analysis of how the aggregate value was calculated);
- If any Excess Incentive-Based Compensation involved stock price or total shareholder return as the applicable financial reporting measure, the Reasonable Estimate determined regarding such Excess Incentive-Based Compensation (plus explanation of the methodology used to determine such Reasonable Estimate);
- The aggregate value of Excess Incentive-Based Compensation resulting from the Accounting Restatement that remained outstanding and unrecovered as of the end of the issuer's most recently completed fiscal year;
- If the aggregate value of Excess Incentive-Based Compensation resulting from the Accounting Restatement has not yet been determined, this disclosure must mention that fact and reasons for such non-determination (and the previous items in this bullet point list (other than the Trigger Date) must then be disclosed in the issuer's next SEC filing in which Item 402 of Regulation S-K disclosure is required);
- If the issuer is relying on a Clawback Exception regarding the Accounting Restatement, the issuer must disclose (for each current and former Named Executive Officer (as defined under Items 402(a) or 402(m) of Regulation S-K, as applicable ("Current/Former NEO")) and for the Executive Officers as a group) the amount of Excess Incentive-Based Compensation not being recovered and a brief description of the issuer's reasons for invoking one or more Clawback Exceptions; and
- The dollar amount, as of the end of the issuer's most recently completed fiscal year, of any outstanding and unrecovered Excess Incentive-Based Compensation due from any Current/Former NEO, if such Excess Incentive-Based Compensation was outstanding for at least 180 days since such amount was determined by the issuer for such Current/Former NEO.

Further, where an issuer is required to provide a brief description of the issuer's reasons for invoking one or more Clawback Exceptions, such disclosure should include citation of the particular Clawback Exception that the issuer is invoking, and context for the decision to invoke one or more Clawback Exceptions, including (as applicable) description of the types of direct third-party expenses needed to be paid, the non-U.S. law provisions that would be violated by Clawback, and how Clawback would cause an otherwise tax-qualified retirement plan to fail to meet applicable tax law requirements.

W. Where Will a Listed Issuer Need to Provide the Detailed Clawback Results Information?

Detailed Clawback Results Information should be provided generally with, and in the same format as, the issuer's other disclosure pursuant to Item 402 of Regulation S-K. We anticipate that such disclosure will be provided separate and apart

from any Compensation Discussion and Analysis disclosure. The Detailed Clawback Results Information will be required only in proxy statements or information statements requiring Item 402 of Regulation S-K disclosure and in a registrant's annual report on Form 10-K (and will not be deemed incorporated by reference into filings under the Securities Act of 1933, as amended, unless specifically incorporated by reference therein). We note that particular disclosure requirements regarding the Detailed Clawback Results Information may differ among listed issuers, depending on the particular filings that they are required to make with the SEC.

X. What Disclosure Will a Listed Issuer Need to Provide if the Issuer Prepares an Accounting Restatement, but Determines a Clawback is Not Required under the Clawback Policy?

If the listed issuer prepared an Accounting Restatement since the beginning of its most recently completed fiscal year, but the issuer determined that Clawback of Excess Incentive-Based Compensation was not required under the Clawback Policy, then the issuer must provide (and XBRL tag) a brief explanation, generally along with its other executive compensation disclosure pursuant to Item 402 of Regulation S-K, of why operation of the Clawback Policy resulted in such outcome.

Y. Will Incentive-Based Compensation that Is Actually Recovered by a Listed Issuer be Reflected in the Issuer's Summary Compensation Table?

Yes. Assume that, in accordance with the Clawback Listing Standards, a listed issuer effects a Clawback of Excess Incentive-Based Compensation under a Clawback Policy from an Executive Officer, and such Excess Incentive-Based Compensation was (or is to be) included in one or more particular years as compensation for such Executive Officer in a Summary Compensation Table included pursuant to Items 402(c) or 402(n) of Regulation S-K in the issuer's SEC filings. In that case, in subsequent Summary Compensation Tables, the issuer should reduce the Executive Officer's compensation for the fiscal year in which the Excess Incentive-Based Compensation initially was reported by the value of such recovered Excess Incentive-Based Compensation. The issuer should also identify the amount of such reductions by footnote to the Summary Compensation Table.

Z. Will Clawbacks Need to be Disclosed as Related Person Transactions?

No. Item 404 of Regulation S-K (the related person transactions disclosure rule) has been modified to provide that issuers complying with the Clawback Rule disclosure requirements under Item 402(w) of Regulation S-K do not need to disclose Clawbacks pursuant to Item 404.

OTHER CONSIDERATIONS, AND PREPARING FOR COMPLIANCE

Preparing a Compliant Clawback Policy and Clawback Disclosures Will Take Time

The Clawback Listing Standards and Clawback Disclosure requirements will be effective likely during late 2023 or early 2024. Many affected issuers will need to review their currently effective clawback policies or provisions to see how they compare to the Final Rules, and prepare and approve new compliant Clawback Policies if required. Further, it will take time for affected issuers to understand what disclosures are required under the Final Rules and to prepare such disclosures. The content of and format for the Clawback Disclosures will need to be prepared significantly in advance to be reviewed with management and directors ahead of filing. The Final Rules may also require affected issuers to perform significant additional work for subsequent years in which Accounting Restatements are prepared. For many companies, this work has not previously been conducted. Finally, the Inline XBRL requirements for the Clawback Disclosures create yet an additional cost and could impact timing of preparing applicable filings.

Socialization With and Education of Impacted Executive Officers Will Be Critical

Clawback from the Executive Officers essentially hinges on the interpretation/definition of when Incentive-Based Compensation is "Received," and it may not be easy for affected Executive Officers to clearly understand the circumstances and time periods under which they may be subject to "no-fault" Clawback. For example, due to the definitions of Executive Officers and "Received" compensation, the list of persons who will be subject to potential Clawback under the Clawback Policy will essentially change from year to year (particularly as the issuer's Executive Officer list may change,

as performance periods may end, and as the applicable Recovery Period changes from year to year). This aspect of the Final Rules will make for a non-static list of affected Executive Officers and compensation. Affected issuers will likely need to prepare and periodically update a list of the then-current Clawback Recovery Period, the Executive Officers subject to potential Clawback, and the specific incentive-based compensation awards subject to potential Clawback.

The full release detailing the new rules can be found on the SEC's website.

SIGNIFICANT TAKEAWAYS

1. Depending on when the Clawback Listing Standards are adopted by the Stock Exchanges, affected issuers will likely need to adopt (and start complying with) a compliant Clawback Policy (plus applicable disclosure requirements) during late 2023 or early 2024.
2. The Final Rules are in many cases substantially similar to the proposed rules from 2015, with certain modifications primarily to broaden the scope of covered Accounting Restatements and to clarify the applicable requirements.
3. The Final Rules expand the scope of covered Accounting Restatements to cover so-called "Little r" Accounting Restatements, which will likely lead to significantly more triggering of Clawback Policies than was originally anticipated.
4. The Final Rules do not permit issuers to condition Clawback or Excess Incentive-Based Compensation in any way on the fault or culpability of an Executive Officer regarding the Accounting Restatement, to implement *de minimis* thresholds for Clawbacks or recoverable amounts of Excess Incentive-Based Compensation, or allow for boards of directors to exercise broad discretion in connection with determining whether certain compensation should be clawed back in light of the circumstances.
5. Affected issuers will need to start reviewing their existing clawback policies and provisions to determine whether an updated, compliant Clawback Policy needs to be prepared and adopted.
6. Affected issuers sensitive to the potential financial and disclosure implications of the Clawback Listing Rules may want to consider changes to their executive compensation programs starting in 2023, including the balance between elements of executive compensation considered and not considered to be Incentive-Based Compensation (being mindful of expectations of proxy advisory and investor views relating to executive compensation arrangements being predominantly performance-based and aligned with corporate strategy).
7. The Final Rules don't clearly address certain topics that may be of importance for affected Executive Officers, including whether Executive Officers affected by Clawback will be able to obtain relief from the Internal Revenue Service with respect to income and other taxes paid or due with respect to compensation that is clawed back, or potential Retroactive Effect of the Final Rules on Predecessor Arrangements that may not permit (or are silent regarding) Clawback.

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