

NYSE and Nasdaq Propose Clawback Listing Standards

As we previously [noted](#), on October 26, 2022, the U.S. Securities and Exchange Commission (the “[SEC](#)”) adopted final rules (the “[Final Rules](#)”) implementing the clawback provisions of the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010. The Final Rules require, in part, that national securities exchanges establish listing standards that require listed companies to develop and implement policies providing for the recovery of erroneously awarded incentive-based compensation received by current or former executive officers where such compensation is based on erroneously reported financial information and an accounting restatement is required (a “[clawback policy](#)”).

NYSE AND NASDAQ LISTING STANDARDS

On February 22, 2023, the New York Stock Exchange (“[NYSE](#)”) filed a rule proposal to adopt new sections 303A.14 and 802.01F of the NYSE Listed Company Manual and the Nasdaq Stock Market filed a rule proposal to adopt new listing rule 5608 and amend certain listing rules in the 5800 series.¹

The Final Rules require that the listing standards be effective no later than November 28, 2023.

Listed companies must adopt a compliant clawback policy no later than 60 days following the effective date of the applicable listing standards (the current outside date is January 27, 2024) (the “[Adoption Deadline](#)”).

Clawback Policies and Procedures

The NYSE’s proposed section 303A.14 and Nasdaq’s proposed listing rule 5608 are materially consistent with the Final Rules.

Failures To Comply with and Adopt Clawback Policies

NYSE

A NYSE listed company’s failure to [comply](#) with its clawback policy “reasonably promptly”² after a clawback obligation arises, will result in:

- Immediate suspension of trading; and
- Immediate commencement of the delisting procedure set forth in section 804 of the NYSE Listed Company Manual (the ameliorative procedures in sections 802.02 and 802.03 of the NYSE Listed Company Manual will be unavailable).

A listed company’s failure to [adopt](#) a compliant clawback policy by the Adoption Deadline will trigger various notice requirements and a requirement that the listed company issue a press release disclosing the failure to timely adopt a clawback policy, the reason for such failure and, if known, the anticipated date on which a clawback policy will be adopted. If such press release is not timely filed, NYSE will issue a press release.

Proposed section 802.01F of the NYSE Listed Company Manual provides for two, consecutive six-month cure periods during which the listed

company's securities may continue to be traded despite failure to adopt a compliant clawback policy.

Nevertheless, the NYSE retains discretion to initiate suspension and delisting procedures under section 804 (the ameliorative procedures in sections 802.02 and 802.03 will be unavailable) at any time following a listed company's failure to timely adopt a compliant clawback policy.

The NYSE must, in all cases, initiate suspension and delisting procedures on the first anniversary of the Adoption Deadline if the listed company has not yet adopted a compliant clawback policy.

NASDAQ

A Nasdaq listed company that fails to (i) comply with its clawback policy "reasonably promptly" after a clawback obligation arises or (ii) adopt a compliant clawback policy by the Adoption Deadline must submit a compliance plan to Nasdaq, generally in accordance with Nasdaq's administrative processes and deadlines for similar corporate governance deficiencies, which provide for a 180-day cure period. Nasdaq must issue a delisting letter immediately following such 180-day cure period if the listed company remains non-compliant (the ameliorative procedures in listing rule 5815 will be available to the listed company, however).

PUBLIC COMMENTS REGARDING THE PROPOSED LISTING STANDARDS

Interested persons may submit comments to the SEC regarding the proposed listing standards within

21 days of publication of the proposed listing standards in the Federal Register.

NEXT STEPS

There are a number of aspects of the rules where further guidance may be helpful and the NYSE and Nasdaq may provide interpretations or other FAQs before the rules are effective.

If they have not done so already, companies should quickly commence work with counsel to prepare new draft clawback policies or updates to existing clawback policies. We expect many companies to wait until they are required to do so to officially adopt clawback policies that comply with the listing standards, but work can commence based on the proposed listing standards. We also recommend that companies review existing contracts and forms (*e.g.*, employment agreements, separation agreements, bonus plans and equity award agreements) and consider updates addressing the company's clawback policy. Members of management should expect to engage with both their nominating and governance committees as well as compensation committees on efforts to comply with the listing standards. Since new clawback policies that will comply with the rules will likely be significantly more punitive than current market-standard policies, in-house legal teams should also plan to use the pendency of the listing standards to educate executive officers who will be subject to the new policies of the scope and requirements of the new rules to avoid unpleasant surprises.

1 See <https://www.nyse.com/publicdocs/nyse/markets/nyse/rule-filings/filings/2023/SR-NYSE-2023-12.pdf> and <https://listingcenter.nasdaq.com/assets/rulebook/NASDAQ/filings/SR-NASDAQ-2023-005.pdf>.

2 Like the Final Rules, neither the NYSE nor NASDAQ initial proposals define "reasonably promptly". Both proposals, however, provide the following: "[t]he issuer's obligation to recover erroneously awarded incentive-based compensation reasonably promptly will be assessed on a holistic basis with respect to each such accounting restatement prepared by the issuer. In evaluating whether an issuer is recovering erroneously awarded incentive-based compensation reasonably promptly, the Exchange will consider 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 that owes a recoverable amount."

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