MAYER | BROWN

June 13, 2023

Legal Update

SEC Approves Dodd-Frank Clawback Listing Standards with October 2, 2023 Effective Date

Executive Summary

On June 9, 2023, the U.S. Securities and Exchange Commission (the "SEC") approved the clawback listing standards proposed by the New York Stock Exchange ("NYSE") and The Nasdaq Stock Market ("Nasdaq"), each as required by SEC Rule 10D-1 in accordance with the Dodd-Frank Wall Street Reform and Consumer Protection Act.[1] Earlier in June 2023, both the NYSE and Nasdaq amended their proposed listing standards to provide for an October 2, 2023 effective date. Listed companies have 60 days after the effective date of the clawback listing standards (*i.e.,* until Friday, December 1, 2023) to adopt and implement a compliant clawback policy. In approving these listing standards, the SEC observed that the effective date is consistent with Rule 10D-1 and language in the Rule 10D-1 adopting release, as well as being responsive to comments stating that listed companies anticipated an effective date of November 28, 2023.

Even with an extension of time provided by a later effective date, listed companies should now be preparing for implementation of this new clawback policy requirement. This Legal Update discusses examples of steps companies should consider taking now to be ready.

Background

The SEC adopted Rule 10D-1 in October 2022, directing national securities exchanges to establish listing standards that prohibit the listing of any security of a company that does not adopt and implement a written policy requiring the recovery, or "clawback," of certain incentive-based executive compensation. For more information on Rule 10D-1, see our Legal Update, "Compensation Clawback Listing Standards Requirement: US Securities and Exchange Commission adopts Final Rules," dated November 3, 2022.[2] In keeping with the schedule required by the SEC, the NYSE and Nasdaq proposed clawback listing standards closely tracking Rule 10D-1 in February 2023, which they respectively amended in June 2023 to provide for the October 2, 2023 effective date. The NYSE and Nasdaq clawback listing standards will be set forth in Section 303A.14 of the NYSE Listed Company Manual and Rule 5608 of the Nasdaq Rulebook, respectively.

Other NYSE Amendments

The NYSE's amendment also revised cure period provisions so that they apply to all incidents of noncompliance with Section 303A.14 clawback listing standards and not just delayed adoption of recovery policies. In addition, the NYSE's amendment modified the text of Section 303A.00 of the NYSE Listed Company Manual to clarify that the following categories of listed issuers are required to comply with the requirements of Section 303A.14:

- closed-end and open-end funds;
- passive business organization, listed derivative or special purpose securities;
- foreign private issuers; and
- all companies listing only preferred or debt securities on the NYSE (including securities listed under Rule 5.2(j)).

Practical Considerations

Board Considerations, Review and Approval. Listed companies should determine the schedule for presentation of clawback materials to their respective boards of directors. For example, a company may want to give an initial or updated presentation to its compensation committee and/or board of directors at an upcoming meeting, followed by the compensation committee's approval of, or recommendation that the full board of directors approve, a final policy at a subsequent meeting closer in time to the required date for compliance.

Companies may also want to consider updating their compensation committee charters to address clawback responsibilities.

Companies should assess whether they need any new or revised controls and procedures to track compensation of current and former executive officers that may be subject to clawback under the new listing standards, as well as maintaining current addresses and contact information for former executive officers whose incentive compensation remains subject to recoupment.

Disclosure controls and procedures should also be reviewed to determine if updates are needed for the disclosure requirements related to clawback of incentive-based executive compensation.

Treatment of Existing Clawback Policies. If a company already has a clawback policy in place that was not designed to be compliant with the new listing standards, it will need to determine whether to prepare an amendment and restatement of the pre-existing policy to add the provisions required by the listing standards or to maintain a separate clawback policy to satisfy the listing standards. In either situation, drafting needs to be sufficiently precise to make clear that only compensation required, or voluntarily intended, to be subject to recoupment under the listing standards is covered by the policy (or portion of the policy) that meets the requirements of the listing standards and Rule 10D-1. In deciding whether to modify an existing clawback policy or create a new standalone policy to satisfy the listing standards, companies should keep in mind the new requirement to file the policy as an exhibit to the company's annual report.

Treatment of Existing Compensation Arrangements. Companies need to review existing compensation agreements to determine if there are any provisions that are inconsistent with the requirements of the listing standards and, if so, to implement appropriate amendments. Such inconsistencies could include provisions prohibiting clawbacks, requiring clawbacks only in the event of misconduct, allowing board/committee discretion in applying clawbacks, indemnifying executive officers from clawbacks, requiring company-paid insurance with respect to recovered compensation or reducing clawback recovery for amounts paid in taxes.

Companies should take an inventory of all existing compensation arrangements that are subject to clawback under the new listing standards and then seek consents from recipients to the recoupment of such compensation when required by the listing standards and the company's policies and procedures adopted thereunder.

Treatment of Future Compensation Arrangements. Companies should begin clearly documenting when awards are granted as incentive-based executive compensation. For example, this can be done in the board or committee resolutions, as well as in the award agreement and communications with recipients of the awards. On a going forward basis, incentive-based compensation arrangements for executive officers should include consent from such individuals to recoupment when required by the listing standards and the company's policies and procedures.

Foreign Private Issuers. The clawback listing standards apply to foreign private issuers, including issuers filing under the multijurisdictional disclosure system, to the extent they have securities listed on the NYSE or Nasdaq. Foreign private issuers that have not designated officers as executive officers for SEC purposes will need to assess which of their officers fall within the Rule 10D-1 definition of "executive officer." These companies may also have additional considerations, including analyzing whether recoupment as required by the listing standards could violate home country law.

Other Considerations. For the purposes of Rule 10D-1 and the listing standards, the executive officer group must include the president, principal financial officer and principal accounting officer. In addition, there are other individuals who may be deemed executive officers based on function, such as any vice-president in charge of a principal business function and any other officer or individual who performs a policy-making function and, in some cases executive officers of parent or subsidiary companies, which may require a company-specific facts and circumstances analysis. In light of the fact that status as an executive officer makes an individual's incentive-based compensation subject to clawback under the listing standards, companies may want to re-examine past determinations of the officers treated as executive officers to assess if there is flexibility to justify a smaller group of officers as being designated as the executive officers of the company for SEC purposes.

Company disclosure, such as the compensation disclosure and analysis and footnotes to compensation tables, should be consistent with the treatment of awards and other compensation arrangements as incentive-based executive compensation when that is the intended characterization.

Companies should consider other factors that could impact the language of their final clawback policies. For example, companies may want to consider expanding their policies consistent with a Department of Justice ("DOJ") pilot program that provides for reduced penalties for companies that recoup compensation for corporate criminal activity. For more information on the DOJ's pilot program, see our Legal Update, "DOJ's Criminal Division Announces Further Updates to DOJ Policy on Key Topics: Ephemeral Messaging, Compensation Clawbacks, and Selection of Corporate Monitors," dated March 3, 2023.[3] Company investors may also feel strongly about maintaining (or adding) clawback requirements for misconduct, reputational harm or other behavior that does not result in a financial restatement.

Finally, companies need to consider workable mechanics for recovering compensation that is subject to clawback, taking into account any issues under applicable employment law.

For more information about the topics discussed in this Legal Update, please contact the author of this Legal Update, Laura D. Richman, at +1 312 701 7304, any of the following lawyers or any other member of our Corporate & Securities practice.

Laura D. Richman	**Jennifer Carlson**	**David A. Schuette**	**Ryan J. Liebl**
+1 312 701 7304	+1 801 907 2720	+1 312 701 7363	+1 312 701 8392
lrichman@mayerbrown.com	jennifer.carlson@mayerbrown.com	dschuette@mayerbrown.com	rliebl@mayerbrown.com

ENDNOTES

[1] With respect to the SEC's approval of the NYSE's clawback listing standards, see https://www.sec.gov/rules/sro/nyse/2023/34-97688.pdf. For the text of the NYSE's clawback listing standards and related material, see

https://www.sec.gov/rules/sro/nyse/2023/34-97688-ex5.pdf. With respect to the SEC's approval of Nasdaq's clawback listing standards, see https://www.sec.gov/rules/sro/nasdaq/2023/34-97687.pdf. For the text of the Nasdaq clawback listing standards and related material, see https://www.sec.gov/rules/sro/nasdaq/2023/34-97687-ex5.pdf.

[2] Compensation Clawback Listing Standards Requirement US Securities and Exchange Commission Adopts Final Rules | Perspectives & Events | Mayer Brown

[3] DOJ's Criminal Division Announces Further Updates to DOJ Policy on Key Topics: Ephemeral Messaging, Compensation Clawbacks, and Selection of Corporate Monitors | Perspectives & Events | Mayer Brown