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Kirkland Alert

NYSE and Nasdaq Propose Listing Standards to Implement the SEC's Clawback Rules

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Overview

In October 2022, the U.S. Securities and Exchange Commission (the "SEC") released its final compensation clawback rules (the "SEC Clawback Rules"), described in detail in our *Alert* linked [here](#). The SEC Clawback Rules require that the New York Stock Exchange ("NYSE") and the Nasdaq Stock Market ("Nasdaq") adopt listing standards requiring listed issuers (with limited exceptions) to (i) develop and implement a clawback policy, (ii) file the clawback policy as an exhibit to their annual report and (iii) include disclosures in their SEC filings if recovery is triggered under their clawback policy. Both exchanges submitted their proposed listing standards to the SEC on February 22, 2023. The NYSE's proposed listing standards are [here](#). The Nasdaq's proposed listing standards are linked [here](#).

The proposed listing standards closely align with the SEC Clawback Rules. Below are some key takeaways from the proposed listing standards and guidance on next steps for issuers.

Timing

- **Comment Period:** There will be a 21-day public comment period once the NYSE and Nasdaq proposed listing standards are published in the Federal Register.
- **SEC Approval:** Following the public comment period, the SEC must approve both proposed listing standards.
- **Effective Date:** The SEC Clawback Rules require the listing standards to be effective *no later than* November 28, 2023.

- Compliance Deadline:
 - Issuers must adopt compliant clawback policies within 60 days of the effective date of the applicable listing standards (which will be *no later than* January 28, 2024, but may be earlier if listing standards are in effect before November 28, 2023).
 - The proposed listing standards would require an issuer to apply its clawback policy to incentive-based compensation received on or after the effective date of the applicable listing standards.

Consequences of Noncompliance

NYSE

If a listed issuer does not adopt a compliant clawback policy within 60 days following the effective date of the NYSE's listing standards, the issuer will be required to notify the NYSE in writing within five days. The NYSE will then notify the issuer of certain procedures, including contacting the NYSE to discuss the status of the issuer's clawback policy and issuing a press release disclosing the delinquency. Failure to cure the delinquency will eventually result in suspension of trading and delisting.

The NYSE's proposed listing standards also provide that in the event the NYSE determines that a listed issuer has not "reasonably promptly" recovered erroneously awarded compensation as required by the listed issuer's clawback policy, trading in all of the issuer's listed securities will be immediately suspended and the NYSE will immediately begin the process to delist the issuer.

Nasdaq

A listed issuer that fails to comply with Nasdaq's proposed listing standards (including timely adoption of a compliant clawback policy and "reasonably prompt" recovery of erroneously awarded compensation) will be required to submit a plan to regain compliance to Nasdaq staff. Nasdaq's proposed listing standards allow Nasdaq staff to provide the issuer up to 180 days to cure the deficiency. After the expiration of such cure period, Nasdaq staff will be required to issue a delisting letter. The issuer can appeal to Nasdaq's Hearings Panel, who can allow up to an additional 180 days for the issuer to cure.

Interpreting “Reasonably Promptly”

The SEC Clawback Rules require that an issuer must pursue recovery “reasonably promptly,” but do not provide a definition of this timing requirement. While the proposed listing standards similarly do not provide any definition or specific timeframes, the exchanges provide additional guidance regarding how each will assess whether a recovery is “reasonably promptly” made.

In evaluating whether an issuer is recovering erroneously awarded incentive-based compensation “reasonably promptly,” both the NYSE and Nasdaq 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.

Compliance and Disclosure Interpretations

On January 27, 2023, the SEC staff published Compliance and Disclosure Interpretations (“C&DIs”) on the SEC Clawback Rules issued under Rule 10D-1. Below is a summary of those C&DIs, which can be read in full at the links below :

- [C&DI 121H.01](#). Although Form 10-K, Form 20-F and Form 40-F each now contain check boxes on the cover page to indicate whether the form includes the correction of an error in previously issued financial statements and a related recovery analysis, issuers are not required to provide such disclosure until they are required to have a clawback policy under the applicable listing standard.
- [C&DI 121H.02](#). Foreign private issuers that file on domestic forms and provide executive compensation disclosure under Item 402 should provide individualized disclosure for their named executive officers to the extent required by Form 20-F. For foreign private issuers that use Form 20-F, individualized reporting is not required for Item 10D-1 if individualized compensation disclosure is not otherwise provided in the 20-F filing.
- [C&DI 121H.03](#). Similarly, individualized disclosure pursuant to Item B.(19) of Form 40-F (captioned “Recovery of erroneously awarded compensation”) is only required for executive officers for whom the issuer otherwise provides individualized compensation disclosure in the filing.

- [C&DI121H.04](#). The SEC Clawback Rules are intended to apply broadly. For plans that take into account incentive-based compensation (other than tax-qualified retirement plans), including long term disability, life insurance, supplemental executive retirement plans, or any other compensation that is based on incentive-based compensation, issuers are expected to claw back the amount contributed to the notional account based on erroneously awarded incentive-based compensation and any earnings accrued to date on such notional amount.

Action Items for Issuers

- Adopt a compliant clawback policy (or amend existing policy for compliance) no later than 60 days following the effective date of the applicable listing standards.
- Prepare to file the clawback policy as an exhibit to the annual report covering fiscal year 2023.
- Review existing arrangements or plans that take into account incentive-based compensation (other than tax-qualified retirement plans) and consider incorporating language that specifically subjects incentive compensation awards to the issuer's clawback policy.
- Review internal processes to ensure that the compensation committee clearly documents instances where it is exercising discretion and awarding incentive compensation that is not based on financial results (and thus would not be subject to the SEC Clawback Rules).
- If a financial restatement is required, the individuals responsible for the process of recoupment and related disclosures should be timely made aware of the need to take action.

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Suggested Reading

- 03 November 2022 Kirkland Alert SEC Adopts Final Rules Regarding Clawback Policies for Public Companies

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