March 17, 2015

The Honorable Mary Jo White
Chair
Securities and Exchange Commission

Dear Chair White

We, the undersigned, respectfully request that the Securities and Exchange Commission expeditiously propose a robust rule to implement Section 954 of the Dodd Frank Wall Street Reform and Consumer Protection Act. This statute provides that issuers using a recognized national securities exchange establish mandatory policies to recoup incentive compensation where the company has restated previous financial results.

The premise of this statutory provision involves no controversy. Incentive compensation based on results that are later proven false should be returned. Dodd-Frank Section 954 helps achieve this policy by mandating the SEC to adopt rules requiring all publicly traded companies to adopt a claw back policy that:

*is triggered by an accounting restatement due to material non-compliance with financial reporting under the federal securities laws;

* covers any current or former executive officers who have received incentive compensation based on erroneous statements;

* requires the recovery of incentive compensation paid during the three-year period preceding the date on which the company is required to prepare the restatement.

* does not require misconduct (by the covered executive officers or otherwise) to trigger the claw back obligation.

* Requires that companies must disclose their claw back policies in their public filings.

Claw backs clearly serve the interest of shareholders. And they should be correspondingly enforced with rigor by corporate boards which serve as fiduciaries for shareholders. But the sorry history of claw backs in practice evinces a breakdown in board enforcement.   As esteemed securities law Professor J. Robert

Brown of Colorado University observed, fiduciary duties have proven “anemic” and failed to “compel boards” to recover compensation paid on the basis of materially inaccurate financial statements.[1]

Congress has attempted to bring rigor to claw back enforcement by federalizing this aspect of corporate governance. The first attempt came through Section 304 of the Sarbanes Oxley Public Company Accounting Reform and Investor Protection Act of 2002. Section 304 generally requires public company chief executive officers (CEOs) and chief financial officers (CFOs) to disgorge bonuses and other incentive compensation they receive within the 12-month period following the public release of financial information if there is a subsequent restatement of those results.

On a positive note, the Sarbanes Oxley law seems to have spurred adoption of claw back policies. Prior to 2005, only three Fortune 100 companies disclosed claw back policies.[2] Now, most major companies provide for a basic claw back policy (though stronger policies would be preferred). A recent annual survey found that 76 of the Fortune 100 disclose a claw back provision. (It is possible that some of the other 24 firms also maintain a policy, but do not disclose it.)[3] This constitutes an important improvement.

On a negative note, however, the Sarbanes Oxley statute provides no enforcement mechanism for shareholders and, as noted above, without disclosure they may not even know that such a policy is in place. Only an active SEC could enforce and mandate such transparent policies. There have been 700 to 1,500 restatements a year for the last decade, according to Audit Analytics.[4] But the SEC did not bring its first claw back case until 2007, five years after enactment of the Sarbanes Oxley law. Through 2011, the SEC had only enforced the Sarbanes Oxley claw back provision three times.[5] The pace increased bringing the total to 31 cases through the end of 2013, but only eight executives have actually returned pay. A stronger and more robustly enforced policy is clearly needed. [6][7]

In 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress strengthened the existing claw back policy as detailed above. An important component of this statutory update is that it allows shareholders to enforce the law.

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[1] “Waiting for Dodd-Frank Clawbacks,” by J. Robert Brown, Racetothebottom (Sept 2014), available at: http://www.theracetothebottom.org/home/waiting-for-dodd-frank-clawbacks.html

[2] “Does Voluntary Adoption of Claback Provision Improve financial Reporting Quality,” by Ed DeHaan, et al, (April, 2012), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2049442

[3] “Executive Compensation: Clawbacks,” by PwC (April, 2014); available at: http://www.pwc.com/en_US/us/hr-management/publications/assets/pwc-clawbacks-2013-proxy-disclosure-study.pdf

[4] Clawbacks still a Rare Breed,” by Gretchen Morgenson, New York Times (December 2013), available at: http://www.nytimes.com/2013/12/29/business/clawbacks-theyre-still-a-rare-breed.html?pagewanted=all&_r=0

[5] “Another SEC Clawback Settlement,” by Wayne Carlin et al, Harvard Law School, (December 2011), available at: http://blogs.law.harvard.edu/corpgov/2011/12/13/another-sec-clawback-settlement/

[6] Clawbacks still a Rare Breed,” by Gretchen Morgenson, New York Times (December 2013), available at: http://www.nytimes.com/2013/12/29/business/clawbacks-theyre-still-a-rare-breed.html?pagewanted=all&_r=0

[7] In a recent case involving Babak Yazdani, former CEO of Saba Software Inc., the SEC ordered repayment of $2.5 million following a multi-year fraud that led to an earnings restatement. SEC Order, (September 2014), available at: http://www.sec.gov/litigation/admin/2014/34-73201.pdf

As the Commission drafts its proposed rule, we ask that the following be incorporated.

1. **Empower shareholder oversight of claw back practices by requiring that claw backs be disclosed.**

In addition to disclosing the existence of a claw back policy, the Commission should require firms to declare whether or not a claw back has been initiated and completed, along with the details of the sums recovered and the identity of the executive from whom compensation was clawed back. This can be disclosed in the 8-k. Section 954 does not rely on the SEC to enforce a claw back policy. Shareholders may bring litigation under this statute. Shareholder enforcement will be greatly enhanced if firms must disclose the details of any claw backs. In 2012, JP Morgan Chase clawed back certain compensation from three traders involved in the so-called London Whale fraud. But the firm did not detail the amount of the claw back.[8] WalMart reportedly clawed back certain pay, but it was unclear if this was related to a Mexican bribery case.[9] With disclosure these details would be understood by investors. Requiring disclosure should also provide a prophylactic against firms that restate but do not meet their 954 obligation to recover funds.

Well implemented, with full public disclosure of claw backs, Section 954 can provide a valuable tool to ensure that shareholder funds are recovered from employees where they are previously paid based on erroneously reported results.

2. **Require claw back of proportional incentive compensation where it is not numerically connected to financial results.**

The statute describes a claw back of the "excess" compensation paid due to the "erroneous" statement. Determining what may be "excess" will be a key part of this rulemaking process.

Many firms maintain bonus plans that include qualitative variables, especially for more senior executives. JP Morgan's board notes that it does not depend on "formulaic" measures exclusively, but also on judgment.[10] There may be no one-to-one correspondence between the figures in a restatement and what should be the new bonus figure. In these cases, the SEC should require that a proportionate amount of incentive compensation awarded under qualitative standards be clawed back under a restatement. For example, if a restatement would cause 10 percent of that part of the bonus based on numerical results be clawed back, then 10 percent of the bonus awarded under qualitative methods should also be clawed back.

3. **Identify "executive officers" as those provided under the SEC's rule Rule 16a-1(f).**

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[8] "Whale Clawbacks About Two Years of Compensation," by Dan Fitzpatrick, Wall Street Journal, (July 13, 2012), Available at: http://www.wsj.com/articles/SB10001424052702303740704577524730994899406

[9] UAW Medical Benefits Plan press release, (May 2014) Available at: http://www.prnewswire.com/news-releases/walmart-compliance-overhaul-falls-short-on-transparency-missing-key-element-of-clawback-disclosure-258159351.html

[10] Proxy Statement, JP MorganChase (2014), available at: http://www.sec.gov/Archives/edgar/data/19617/000001961714000321/jpm2014definitiveproxy.htm

This includes the president, any vice president in charge of a principal business unit, division or function, any other officer who performs a policy making function, or any other person who performs similar policy making functions. Executive officers of subsidiaries should also be included in this definition. Section 954 does not require that a firm identifies any particular executive as responsible for the misstatement. It envisions collective responsibility, as a mechanism for more responsible corporate decision making. A broad definition of executive will broaden the pool that can to police for reporting irregularities.

4. **Identify the date triggering the three-year look back as the date of the first accounting misstatement**.

The statute provides for a claw back for the 3-year period "preceding the date on which the issuer is required to prepare" a new statement. The date "on which" a new statement must be prepared is clearly the date of the erroneous statement. Such a date is clear and immutable. It would make no sense to identify the three year look back as the date when the company issues the restatement. Such a date could be more than three years after the accounting fraud or misstatement. For example, in June 2014, Hertz Global Holdings Inc. announced it would restate results for 2011. [11] A recent study found that the average number of days between a misstatement and a restatement is 543, or nearly two years.[12] In fact, establishing a later date may motivate firms to wait three years from an accounting fraud so as protect executive pay. Further, the date cannot be the day in which the preparation for the restatement commences, as such a day is difficult to determine.

We thank the Commission for its consideration, and urge that it issue a proposed rule for this statute in the beginning of 2015. For questions, please contact Bartlett Naylor at bnaylor@citizen.org.

Sincerely,

AFL-CIO

Americans for Financial Reform

As You Sow

Center for Effective Government

Demos

Institute for Policy Studies/Global Economy Project

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[11] "Hertz Restates Results," Wall Street Journal (June 2014), available at: http://online.wsj.com/articles/hertz-global-to-restate-financials-1402052045

[12] From Audit Analytics, (2012), available at: http://www.auditanalytics.com/blog/restatements-where-they-come-from/

International Brotherhood of Teamsters

Other98.org

Public Citizen

Service Employees International Union