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Re: Listing Standards for Recovery of Erroneously Awarded Compensation
File No. S7-12-15

September 11, 2015

VIA E-MAIL: rule-comments@sec.gov

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Dear Mr. Fields:

We are submitting this letter in response to the solicitation by the Securities and Exchange Commission (the "**Commission**") for comments on the Commission's proposed new Rule 10D (the "**Proposed Rule**") of the Securities Exchange Act of 1934, as amended. Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "**Dodd-Frank Act**") directs the Commission to amend Rule 10 to direct national securities exchanges and national securities associations to require issuers to "develop and implement a policy providing (1) for disclosure of the issuer's policy on incentive-based compensation that is based on financial information required to be reported under the securities laws; and (2) that, in the event that the issuer is required to prepare an accounting restatement due to the issuer's material noncompliance with any financial reporting requirement under the securities laws, the issuer will recover from any of the issuer's current or former executive officers who received incentive-based compensation (including stock options awarded as compensation) during the three-year period preceding the date the issuer is required to prepare an accounting restatement, based on the erroneous data, in excess of what would have been paid to the executive officer under the accounting restatement." On July 1, 2015, the Commission released the Proposed Rule implementing Section 954 of the Dodd-Frank Act, which was published in the Federal Register on July 14, 2015.[1]

We appreciate the Commission's efforts in implementing Section 954 of the Dodd-Frank Act, and we think certain aspects of the Proposed Rule are helpful in clarifying implementation for issuers; however, we respectfully request that the Commission consider the following recommendations for several changes and clarifications to the version of the Proposed Rule that will ultimately be adopted (such rule, the "**Final Rule**").

[1] Listing Standards for Recovery of Erroneously Awarded Compensation, 80 Fed. Reg. 41144 (proposed July 1, 2015) (to be codified at 17 C.F.R. pts. 229, 249, and 274) (the "**Release**").

1. Inclusion of compensation based on stock price and total shareholder return as incentive-based compensation.

The Proposed Rule would include as incentive-based compensation not only compensation based on financial reporting measures but also compensation based on stock price and total shareholder return.

The Release asks: *"Should compensation that is based upon stock price performance or total shareholder return be considered incentive-based compensation subject to recovery? If not, please explain why not. If compensation that is based on stock price performance or total shareholder return is included as incentive-based compensation subject to recovery, what calculations would need to be made to determine the recoverable amount? What are the costs and technical expertise required to prepare these calculations? Who would make these calculations for issuers? Would the costs be greater than for calculations tied to other financial reporting measures, which would be subject to mathematical recalculation directly from the information in an accounting restatement? Would the exchanges be able to efficiently assess these calculations for purposes of enforcing compliance with their listing standards? Why or why not? Should we require an independent third party to assess management's calculations?"* (Question 29)

We recommend that incentive-based compensation subject to recovery expressly exclude compensation paid based upon stock price performance or total shareholder return, as it would be very difficult for issuers to accurately and precisely calculate the isolated impact of a financial restatement on stock price. As a result, the calculation will be costly because it will require extensive economic analysis by experts, and it will be subject to challenge by executives and shareholders.

It is not possible to accurately measure the effect of a restatement on a company's stock price simply by measuring the market price of the company's stock both before and after financial statements were restated, because by the time the restatement actually occurs, the market price may already have absorbed the impact, either based on previous announcements or on unofficial leaks and rumors. At best, issuers will need to undergo a complex analysis to identify and isolate the impact of the restatement on their stock price, which would likely require an event study similar to those conducted in the context of securities litigation. Event studies are expensive. According to a study conducted by Marsh & McLennan Companies, an event study can cost between $100,000 and $200,000.[2] In addition, when conducted with respect to one company (*i.e.*, as a "single-firm event study" as opposed to a "multi-firm event study" that examines the statistical impact of a global market event on the market as a whole), an event study cannot isolate with precision the impact of a single event *(i.e.*, a financial restatement) on a company's stock price from other factors that impact stock price.[3] This difficulty is recognized by courts and is referred to as the presence of "confounding factors."[4] In fact, the Release acknowledges that "[d]ue to the presence of confounding factors, it sometimes may be difficult to establish the relationship between an accounting error and the stock price."[5]

Because of the assumptions involved and confounding factors, different experts can arrive at conflicting conclusions, which could motivate executives and shareholders to challenge the clawback amount as being too high or too low. As such, in addition to the cost of conducting the event study, companies will need to consider the additional expense of litigating the matter in the event the clawback is challenged.

The Proposed Rule provides that the only exception available for the recovery of incentive-based compensation for domestic issuers is if it would be impracticable to recover the excess compensation based on enforcement costs, as determined after making a reasonable attempt to recover that incentive-based

[2] *See* Eleni Petros & Hema Mistry, *The Halliburton Decision*, Marsh News & Insights (2014), http://uk.marsh.com/Portals/18/Documents/ Marsh%20Insights%20The%20Halliburton%20Decision.pdf.

[3] *See* Alon Brav & J.B. Heaton, *Event Studies in Securities Litigation: Low Power, Confounding Effects, and Bias* (Mar. 19, 2015), http://ssrn.com/abstract=2581202.

[4] *Id*.

[5] Release at 41155.

compensation.[6] This exception does not account for the cost of determining and defending from challenge the recoverable amount in the first place.

In addition to increasing the cost of compliance, including stock price-based compensation in the definition of incentive-based compensation is also inequitable given the no-fault nature of the Proposed Rule. Section 954 of the Dodd-Frank Act is intended to deny executives the benefit of unearned compensation that was erroneously paid to them based on faulty financial statements. For payments based on erroneous financial statement measures, the calculation of the recoverable amount is an objective, formulaic process. On the other hand, in the case of stock price-based compensation, the calculation of recoverable amounts is a subjective process that is based on a variety of assumptions. It would be inequitable to impose mandatory automatic penalties on executives on a no-fault basis when those penalties are determined subjectively based on estimates and assumptions that can be reasonably challenged.

For these reasons, we recommend excluding compensation based on stock price and total shareholder return from the definition of incentive-based compensation in the Final Rule.

If compensation based on stock price and total shareholder return is included, we recommend that issuers be given latitude to take into account the potential cost of conducting an event study and defending the resulting recovery amount calculations from potential challenges in determining whether or not it would be impracticable to recover the compensation, without being required to actually undertake an event study or attempt recovery before making such a determination.

We also note that we agree with the Commission's decision to exclude stock and stock-based compensation (including restricted stock, stock options, restricted stock units and stock appreciation rights) that vests solely based on continued service, the passage of time or upon the satisfaction of non-financial measures.

2. Coverage of certain categories of issuers.

The Proposed Rule would apply to nearly all issuers of all listed securities with very few exceptions, and does not exclude certain issuers that are excluded from many of the Commission's other rules relating to executive compensation, such as foreign private issuers and debt-only issuers.

The Release asks: "*Should the listing standards and other requirements of the Proposed Rule and rule amendments apply generally to all listed issuers, as proposed? If not, what types of issuers should be exempted, and why? Please explain the rationale that justifies exempting any particular category of issuer.*" (Question 1)

We acknowledge that Section 954 of the Dodd-Frank Act does not direct the Commission to consider exempting certain categories of issuers or to direct the exchanges to do so, but we believe that it would be appropriate for the Commission to use its general authority to exempt foreign private issuers and debt-only issuers from the Final Rule for the following reasons:

A. Foreign Private Issuers

We recommend that the Commission exclude foreign private issuers from coverage under the Final Rule. The Commission has repeatedly expressed a desire to exempt foreign private issuers from onerous governance and executive compensation disclosure requirements that are not required under those issuers' home country laws. For example, foreign private issuers are not subject to the same extensive disclosure regime under Item 402 of Regulation S-K as U.S. issuers, and instead, the Commission requires only that executive compensation information be reported on an aggregate basis. Foreign private issuers are also exempt from Section 16 of the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"). Additionally, foreign private issuers are exempt from Items 401 and 407 of Regulation S-K, and are exempt

[6] *Id*. at 41162.

from requirements to provide corporate governance information under the NYSE and NASDAQ rules, provided that they maintain an audit committee and disclose any significant ways in which their corporate governance practices diverge from that of U.S. issuers following the exchange rules. The Commission's rationale for these exemptions is based on deference to the issuer's home country law.[7] The rule regarding compensation committee independence, which was also implemented through stock exchange listing standards, also exempted foreign private issuers by statute. Additionally, all of the other corporate governance regulations promulgated under the Dodd-Frank Act exempt foreign private issuers. For example, the Commission's rules regarding pay versus performance, pay ratio disclosure, hedging disclosure and the non-binding shareholder say-on-pay and say-on-golden parachutes have exempted foreign private issuers due to their lack of a requirement to file proxy statements.

Given that foreign private issuers have traditionally been permitted to follow their home country practice on executive compensation matters, subjecting them to the Final Rule will be extremely burdensome and costly. Foreign private issuers report their financial information under international financial reporting standards ("**IFRS**"), in contrast to the generally accepted accounting principles ("**GAAP**") used by U.S. issuers, which could itself result in inconsistencies in how the Final Rule is applied to U.S. issuers and foreign private issuers and possible confusion in the Final Rule's application under different accounting regimes.[8] In addition, since they are exempt from Section 16 of the Exchange Act, foreign private issuers would have to determine as a matter of first impression who their executive officers are in order to comply with the Final Rule.

In the event that foreign private issuers are subject to the Final Rule, it is possible that a substantial number of issuers may choose to delist from the exchanges. We note that a study issued by the Commission indicates that the adoption of Section 404 of the Sarbanes-Oxley Act of 2002 led 51.6% of foreign firms to consider delisting from U.S. exchanges, and led 76.8% of small foreign firms to consider delisting.[9] In fact, 98 foreign firms delisted from NYSE, NASDAQ and AMEX in 2002, the year that Sarbanes Oxley was enacted.[10] Delisting by foreign private issuers is detrimental to investor protection, since when foreign private issuers delist from a U.S. exchange, investors no longer receive the benefit of the U.S. disclosure regime.

B. Debt-Only Issuers

We also recommend excluding debt-only issuers from coverage under the Final Rule. Similar to foreign private issuers, debt-only issuers (and particularly those that are wholly-owned by a reporting company) are

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[7] *See* Executive Compensation and Related Person Disclosure, 71 Fed. Reg. 53158 at 53193 (codified at 17 C.F.R. pts. 228, 229, 232, 239, 240, 245, 249, and 274) ("In the same way that executive compensation disclosure under Form 20-F largely mirrors the disclosure that a foreign private issuer makes under home country requirements or voluntarily, so too the public filing of management employment agreements as an exhibit to Form 20-F under our amendments will mirror the public availability of such agreements under home country requirements or otherwise. In addition, we believe that the amendments may encourage foreign private issuers to provide more compensation disclosure in their filings with the Commission by eliminating privacy concerns associated with filing an individual's employment agreement when such agreement is not required to be made public by a home country exchange or securities regulator."); *see also* International Disclosure Standards, 64 Fed. Reg. 53900, 53907 (Oct. 5, 1999) (to be codified at 17 C.F.R. pts. 210, 228, 229, 230, 239, 240, 249 and 260) ("In [instances in which disclosure requirements are based on foreign requirements], disclosure will not be required under the amended Form unless a foreign private issuer is required to disclosure information in another jurisdiction or makes the requested information public on a voluntary basis.")

[8] One implication of this difference is that foreign private issuers are able to correct errors in the financial statements for their current financial statement without having to issue a restatement. This difference could lead to disparate treatment between U.S. and foreign private issuers, as there could be identical situations involving the misstatement of financial information in which a foreign private issuer would not have to recover incentive-based compensation, while a U.S. issuer would be required to recover the compensation. 11 Accounting Policy & Practice Report 669, 670 (2015).

[9] SEC Office of Economic Analysis, Study of the Sarbanes-Oxley Act of 2002 Section 404 Internal Control over Financial Reporting Requirements (2009), *available at* https://www.sec.gov/news/studies/2009/sox-404_study.pdf.

[10] Elizabeth F. Brown, *The Tyranny of the Multitude Is A Multiplied Tyranny: Is the United States Financial Regulatory Structure Undermining U.S. Competitiveness?*, 2 Brook. J. Corp. Fin. & Com. L. 369, 369 (2008).

exempt from many of the executive compensation rules applicable to U.S. equity issuers, and in fact, debt-only issuers that are wholly-owned subsidiaries of equity issuers are not required to provide any executive compensation disclosure in their annual reports. In the case of debt-only issuers, the Commission has indicated the exemption stems from the fact that holders of debt securities are adequately protected by other mechanisms.[11] Debt-only issuers are also not subject to Section 16 of the Exchange Act, which will create the same challenges that would be faced by foreign private issuers in determining their executive officers for purposes of complying with the Final Rule.

Debt-only issuers are not subject to the same market scrutiny as equity issuers with regard to the focus on total shareholder return, and so the concern that the Proposed Rule purports to address in guarding against accounting irregularities and manipulation by executive officers do not apply to the same extent. Investors in debt securities have different expectations when they purchase debt securities, and are not investing on the premise that the investment represents an ownership stake in the company. Further, investors in debt securities have protections from additional sources, including the indenture contract and the Trust Indenture Act, and those investors also have the ability to negotiate for covenants with issuers of debt securities.[12] Accordingly, we believe it would be appropriate to exclude debt-only issuers from the Final Rule.

3. Board discretion regarding the recovery of incentive-based compensation.

Under the Proposed Rule, the board of directors of an issuer has very limited discretion over whether to recover excess incentive-based compensation.

The Release asks: *"Should the standard for exercising discretion not to recover be limited to the extent to which that recovery is impracticable? Should direct costs of recovery be a basis for exercising discretion not to recover? If so, what specific costs of recovery should be considered? For example, should only direct expenditures to third-parties be considered, as proposed? Should we further define what constitutes "direct costs"? Should an issuer be permitted to consider indirect costs, such as opportunity costs or reputational costs? Should the issuer disclose the cost estimates in its Exchange Act annual reports? If the cost estimates are not disclosed in the issuer's annual reports, should those costs be independently verified?"* (Question 52)

We recommend that the Commission provide the issuer's board of directors with additional discretion as to whether to seek recovery of incentive compensation in the event of a financial restatement. If the board determines in good faith that it is in the best interests of stockholders not to recover excess incentive-based compensation, it should not be required to do so. The board can be required to explain why it had used its discretion to forgo recovery in its next proxy statement. We expect that boards will be judicious in making this determination, because they recognize that there could be shareholder criticism, and even stockholder litigation, regarding their judgment.

There are certain circumstances under which recovery may not serve the best interests of the issuer, for instance, when the recovery of incentive-based compensation could be considered an admission against interest by the company and could result in litigation exposure of the company. A board may also determine that recovery of incentive compensation would cause reputational harm or would make recruiting and retaining key executive officers more difficult or more costly. In some cases, recovering incentive-based

[11] *See* Listing Standards for Compensation Committees, 76 Fed. Reg. 18966, 18975 (Apr. 6, 2012) (to be codified at 17 C.F.R. pts. 229 and 240) ("In adopting this rule, the Commission determined that debt holders would receive sufficient protection from the indenture, the Trust Indenture Act, the proxy rules' antifraud proscriptions, and the Exchange Act rules that facilitate the transmission of materials to beneficial owners.")

[12] *See* Exemptive Relief and Simplification of Filing Requirements for Debt Securities To Be Listed on a National Securities Exchange, Release No. 34-34922 (Nov. 1, 1994) (to be codified at 17 C.F.R. pts. 240 and 249). *See also* Listing Standards for Compensation Committees, 76 Fed. Reg. 18966, 18975 (Apr. 6, 2012) (to be codified at 17 C.F.R. pts. 229 and 240) ("Commenters who supported the exemption noted that debtholders often negotiate specific provisions governing the amendment of the indenture contract, and therefore, unlike shareholders, debtholders do not need the protection of the proxy rules.")

compensation from a particular executive who was not involved or culpable in the restatement might be particularly inequitable, and the board may find non-recovery appropriate. For example, the board may find such non-recovery appropriate in the event of an unexpected or severe personal financial hardship of an executive, a death or serious illness of an executive or an executive's close family member or if more incentive compensation is subject to recovery than was actually received by an executive.

Given that boards of directors are already charged with exercising their fiduciary duties on behalf of shareholders, we believe it would be appropriate to provide them with the discretion to act in the best interests of shareholders in this regard, rather than mandating a clawback in all instances.

4. Exception for circumstances where recovery would violate home country law.

Under the Proposed Rule, the only narrow exception for recovery under circumstances where recovery would violate non-U.S. law is if the issuer's board determines recovery is impracticable because it would violate the issuer's home country law in effect before the date of publication of the Proposed Rule in the Federal Register. The use of this exception requires that the issuer provide the exchange with an acceptable opinion of local legal counsel stating that recovery would violate local law.

The Release asks: "*Should a listed issuer be permitted to forego recovering incentive-based compensation if doing so would violate home country law? In this circumstance, should the issuer first be required to obtain a legal opinion from home country counsel, as proposed? If not, why not? Are there any other conditions that should be met beyond a legal opinion from home country counsel before an issuer should be permitted to forego recovering incentive-based compensation in these circumstances? Should the proposed accommodation apply only to the extent that recovery would conflict with home country laws in effect before the date of publication of proposed Rule 10D-1 in the Federal Register, as proposed? If not, please explain why not. In addition, as proposed, the listed issuer would need to provide such opinion to the exchange upon request. Should a copy of this opinion be filed with the Commission as an exhibit? Why or why not?*" (Question 54)

While, as described above, we believe boards should have discretion not to enforce a clawback in any circumstance where non-enforcement would be in the best interests of the issuer, if this general discretion is not included in the Final Rule, we recommend that the flexibility provided in the Proposed Rule permitting non-recovery when recovery would violate local law be expanded in three respects:

A. Recovery should not be required if it would violate any applicable local law—not just home country law.

An issuer should not be required to recover incentive compensation from an executive officer under any circumstance where recovery would violate applicable local law, regardless of whether it is the issuer's home country law or any other non-U.S. law in a jurisdiction in which the applicable executive officer is located. In most cases, employment law is governed by the location of the employee, and limiting the exception to home country law issues will not address the issues that will be encountered by many other companies with internationally located executive officers. For example, if a U.S. issuer has an executive who received incentive-based compensation that would be subject to recovery, but the executive is located in a jurisdiction in which it would be illegal to recover such compensation, the issuer should not be required to violate laws in order to comply with the Final Rule.

In France, for instance, clawbacks of incentive compensation are permitted only under limited circumstances where there is misconduct by an executive, or if the compensation was not properly approved by the company in the first place. A no-fault clawback like that in the Proposed Rule has not been tested in French courts and such a clawback would likely not be enforceable or would be subject to legal challenge. According to a 2011 survey conducted across 40 jurisdictions, the recovery of incentive-based compensation would generally be legal in 19 jurisdictions, illegal in eight jurisdictions and the legality is uncertain in 13 jurisdictions.[13] In a jurisdiction where clawbacks of the type mandated by the Proposed Rule are illegal or unenforceable, executives may bring claims against the company for attempting recovery of compensation, increasing the cost and litigation exposure for issuers.

B. Applicable non-U.S. law should not be limited to laws in effect as of the date of the Proposed Rule.

We think that the exception should apply to any non-U.S. law in effect at any time, and should not be limited to laws in existence when the Proposed Rule was released. If non-U.S. jurisdictions pass laws prohibiting the clawback of previously paid compensation, it seems untenable that the Commission would ask issuers to contravene those laws in order to retain their listing status. It would put issuers in a position of having to choose between complying with local employment laws and being subject to delisting or violating local laws and exposing themselves to penalties and litigation.

C. Issuers should not be required to submit a legal opinion regarding the illegality of recovery under local law.

We do not think an issuer should be required to provide a legal opinion as to the illegality of recovery in order to use the exception. Legal opinions can be costly, and particularly in situations where local law on the enforceability of clawbacks is undeveloped or uncertain, law firms may be reluctant to provide written legal opinions. In addition, even in jurisdictions in which a clawback is generally not thought to be enforceable, a company may prefer not to create a documented record of the legal position that it is unenforceable, as such a position could be used as precedent in more egregious scenarios in which an issuer may have a stronger argument for the enforcing a clawback.

In each of these scenarios, we think the best approach is to give the boards of issuers full discretion not to recover incentive compensation from executive officers in circumstances where the board reasonably determines, after consultation with counsel, that recovery would be unenforceable under local law.

5. Three-year look back period for executive officers.

The Proposed Rule would require recovery of all excess incentive-based compensation earned by any person who served an executive officer during any time during any performance period that falls within the applicable three-year look back period.

The Release asks, in part: "*Is it consistent with the purposes of Section 10D to apply recovery to any incentive-based compensation earned during the three completed fiscal years immediately preceding the date that the issuer is required to prepare a restatement if that person served as an executive officer at any time during the performance period? Alternatively, should an individual be subject to recovery only for incentive-based compensation earned during the portion of the performance period during which the individual was serving as an executive officer?*" (Question 25)

We believe that an issuer should only be required to recover incentive-based compensation from any person with respect to a pro rata portion of their incentive-based compensation attributable to the time the individual serves as an executive officer. Under the Proposed Rule, an individual serving as an interim executive officer for only a short period during a performance period relating to incentive compensation that is subject to recovery will be subject to clawback for all of her incentive compensation earned with respect to that performance period.

For example, assume a non-executive employee is awarded a long-term incentive award that will be determined based on financial reporting measures with a performance period from January 1, 2016 through December 31, 2018. The employee is elevated on an interim basis to the position of vice president of an

[13] Baker & McKenzie, *International Implications of Clawbacks of Equity Compensation* (Mar. 2011).

important business unit for three months in May, June and July of 2017, after which the employee returns to her position as a non-executive officer. Also assume that in May 2019, the company is required to issue a financial restatement for its 2018 financial statements, and as a result, the company is required to recover excess incentive-based compensation from its executive officers, including under long-term incentive awards in respect of the performance period ending December 2018. Despite the fact that the employee was not an executive officer at the time that the financials were restated, nor at the time that the long-term incentive award was granted, the employee's entire 2016-2018 long-term incentive award would be subject to recovery because she was an executive officer at some point during the award's performance period. Under our recommended approach, the employee would be subject to recovery for only 1/12 of the amount, representing the portion of the performance period during which she served as an executive officer.

The Proposed Rule is intended to apply only to executive officers, but in its current form, as demonstrated by the above example, individuals could have incentive compensation subject to recovery that was earned while serving in a non-executive officer role. This could have the effect of discouraging individuals from serving as interim executive officers—particularly in circumstances in which the issuer is not providing additional compensation to the interim officer—which could have a detrimental impact on corporate governance and an issuer's ability to provide for smooth transitions in the context of sudden executive departures and other unexpected circumstances.

We believe that it would be more appropriate to recover only a portion of excess incentive-based compensation from each individual, pro-rated based on the amount of time during the applicable performance period during which the individual served as an executive officer.

6. Recovery of incentive-based compensation on a pre-tax basis.

Under the Proposed Rule, recovery of incentive-based compensation must be collected on a pre-tax basis.

The Release asks: "*Do the proposed rule and rule amendments articulate an appropriate standard for calculating the amount of excess incentive-based compensation that listed issuers must recover? Why or why not?*" (Question 43)

We would recommend that incentive-based compensation be recovered on an after-tax basis rather than on a pre-tax basis. Since the executive officers may have already paid tax on the compensation as if they had earned it, they could potentially end up in a position where they are left with less money than they had before receiving the incentive-based compensation. An employee's ability to recover or reverse the taxes that he or she has paid on the compensation recouped is unclear and may be limited to claiming an itemized deduction in the year of repayment, which would be subject to the two percent floor and the alternative minimum tax. While the employee may be able to obtain additional relief under Section 1341 of the Internal Revenue Code of 1986, as amended (the "**Code**"), this treatment is unclear under current tax rulings.

In order to avoid an undue hardship for and an inequitable over-collection from executives, we believe the Final Rule should require companies to recover only from the executive officer's after-tax proceeds.

7. Use of deferred payment plans to recover excess incentive-based compensation.

Under the Proposed Rule, an issuer's board of directors would not have the discretion to allow an executive officer to repay any excess incentive-based compensation in installments under a payment plan.

The Release asks, in part: *"Should deferred payment arrangements be permitted when an executive officer otherwise is unable to repay excess incentive-based compensation? If so, should the time period over which repayment may be deferred be limited?"* (Question 64)

We recommend that boards have the option to allow executive officers to defer payment of incentive-based compensation subject to recovery. Given that the recovery program is intended to operate on a no-fault basis, there may be circumstances in which certain executive officers who are not expecting a restatement would not expect their compensation to be recovered at a time of up to three years in the future, in which case immediate recovery could result in significant economic hardship. The purpose of the statute is to recover compensation that was not earned, and we think that allowing for deferred payments is consistent with the spirit of the Dodd-Frank rule and would give boards the ability to mitigate some of the reputational and other risks to the company that may result from the mandatory nature of the recovery. Permitting executive officers to be provided with a deferred payment plan could also increase the likelihood of collecting the recovery amounts and avoiding or minimizing the cost of possible litigation.

8. The obligation to recover compensation should be triggered upon the filing of a Form 8-K disclosing the restatement.

Under the Proposed Rule, the obligation to recover compensation is triggered upon the earlier of (i) the date the issuer's board concludes, or reasonably should have concluded, that the issuer's previously issued financial statements contain a material error or (ii) the date a court, regulator or other legally authorized body directs the issuer to restate such financial statements.

The Release asks: "*Is it appropriate to treat the earlier of the two proposed dates as "the date on which an issuer is required to prepare an accounting restatement" for purposes of triggering the Section 10D recovery obligation? If not, why not? Would using these dates provide sufficient certainty and transparency for issuers, investors and exchanges to determine when recovery would be triggered for purposes of compliance with the proposed listing standards? Are there additional triggers we should consider including?*" (Question 17)

In order to provide clarity to issuers, we recommend imposing a bright-line rule for when the obligation to recover compensation is triggered. Accordingly, we believe that it would be appropriate to use the date that the 8-K is filed rather than the date on which an issuer should have reasonably concluded that a restatement should have been issued. We do not believe that there are additional triggers that should be included.

In addition, in the Release, the Commission states that "issuers should consider whether a series of immaterial error corrections, whether or not they resulted in filing amendments to previously filed financial statements, could be considered a material error when viewed in the aggregate."[14] We do not believe that the rule intends to require the aggregation of a number of immaterial misstatements in order to find a material misstatement, but we would recommend clarifying this point.

9. Timing of rule effectiveness.

The Proposed Rule would require issuers to adopt a recovery policy within 60 days following the effective date of stock exchanges' listing rules.

The Release asks: "*Is the proposed schedule for exchanges to file their proposed listing rules and have them effective following the effective date of proposed Rule 10D-1 workable and appropriate? Similarly, is the proposal to require each listed issuer to adopt the required recovery policy within 60 days following the effective date of the exchanges' listing rules workable and appropriate? If not, what other schedule should apply?*" (Question 97)

We recommend that issuers be provided at least six months following the effective date of the exchanges' listing rules to adopt the required recovery policy. Given that the scope of the clawback policy required by the Proposed Rule is quite broad and prescriptive, providing additional time would allow issuers to educate their boards and executives and develop compliant policies.

[14] Release at 41150.

10. XBRL formatting.

The Proposed Rule would require that disclosure relating to the recovery of incentive-based compensation due to a financial restatement be tagged in XBRL format.

The Release asks: "*Should we require that the disclosure required by proposed Item 402(w) be tagged in XBRL format, as proposed? Should we require a different format, such as, for example, eXtensible Markup Language (XML)? Would tagging these disclosures enhance the ability of shareholders and exchanges to assess issuers' compliance with their recovery policies? Alternatively, instead of requiring that either of these disclosures be tagged, should tagging this disclosure be optional?*" (Question 85)

We would recommend that the Final Rule not require that the disclosure about the recovery of incentive-based compensation due to a financial statement be tagged in XBRL format. Given that disclosure about recovery of incentive-based compensation is only required in the event of a financial restatement, and the implementation of such a recovery will vary widely among different issuers depending on the structure and type of their compensation programs, we do not think the XBRL format would be useful to investors in this context. For this reason, requiring XBRL tagging would unduly burden registrants when they should be implementing the recovery and focusing on finalizing the substance of their disclosure regarding their recovery efforts in time to meet their filing deadlines.

We believe that the XBRL-tagged information likely would not be used by most investors. For example, a study conducted by Columbia Business School found that most issuers surveyed doubted that their investors were using the XBRL data in their filings.[15] If this were the case for quantitative information that is easier to standardize, such as information required to comply with U.S. generally accepted accounting principles, it is even more likely in the case of the highly tailored and infrequently-required disclosure around recovery in the event of a financial restatement.

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We appreciate the opportunity to participate in this process, and would be pleased to discuss our comments or any questions the Commission or its staff may have, which may be directed to Ning Chiu, Joseph Hall, Michael Kaplan, Kyoko Takahashi Lin or Veronica M. Wissel of this firm at 212-450-4000.

Very truly yours,

Davis Polk & Wardwell LLP.

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[15] Trevor S. Harris & Suzanne G. Morsfield, *An Evaluation of the Current State and Future of XBRL and Interactive Data for Investors and Analysis* (Columbia Bus. Sch. Ctr. for Excellence in Acct. and Sec. Analysis, White Paper No. 3, 2012), *available at* http://www4.gsb.columbia.edu/filemgr?&file_id=7313146.