

Private and Confidential

August 19, 2015

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

Subject: File Number S7-12-15

Dear Mr. Fields:

The Securities and Exchange Commission (SEC) has just released new rules and regulations to add Section 10D to the Securities Exchange Act of 1934 which implements the provisions of Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”). Section 10D requires the SEC to adopt rules and regulations directing the national securities exchanges and national securities associations to prohibit the listing of any security of an issuing company that is not in compliance with Section 10D’s requirement to disclose the company’s policy on incentive-based compensation and the recovery of any incentive-based compensation received by an executive officer that is in excess of what would have been received under an accounting restatement.

The SEC has extended a 60-day comment period with respect to the proposed rules and regulations. Pay Governance LLC, a management consulting firm with expertise in executive compensation, would like to submit our comments to the SEC for consideration in clarifying and improving the rules as initially proposed by the SEC.

Initial Comments

During the past four years, an approximate 85 percent of the Fortune 500 companies have already adopted executive clawback policies. Based upon our consulting experience, many of the company clawback policies implemented to date have triggered clawbacks of incentive compensation only if there is evidence of executive misconduct associated with the restatement of financial results. Furthermore, most clawback policies have allowed the Board of Directors to have considerable discretion in terms of the execution of the clawback. The new rules and regulations proposed by the SEC will require substantive changes to such clawback policies, as the SEC proposal requires recovery of incentive compensation without regard to fault, and limited Board discretion in execution. Failure to comply could result in delisting. The proposed new rules and regulations will require many companies to rescind their existing clawback policies and to author new policies to become compliant.

Detailed Comments

In the following paragraphs, we have cited our specific comments about the proposed rules and regulations and potential ways in the rules could be enhanced.

- (1.) **No Fault – Absence of Board Discretion** – The new rules provide very little room, if any, for the Board of Directors to exercise any discretionary judgment regarding the company’s clawback policy and prescribed rules and regulations. The SEC has established strict rules as to how executive officers are subject to incentive compensation recovery regardless of fault. As noted above, many companies have already adopted meaningful clawback policies which grant considerable discretionary authority to their compensation committees and Boards in executing a clawback. The new rules will virtually eliminate this discretionary authority, and Boards of Directors will see their governance authority further diminished. Many of our client companies have expressed concern and disagreement with the proposed combination of “no fault” and the absence of Board discretion in deciding how to execute a clawback.
- (2.) **Lack of Guidance Regarding Share Price Adjustment** – The SEC has provided relatively little guidance on how to estimate the impact of an accounting restatement on a performance award tied to relative total shareholder return (TSR) or stock price. This is not a trivial issue since it is not obvious how a restatement, for example, would affect a performance share award tied to relative TSR. We recommend that the SEC include a couple of examples of how to adjust share price and/or TSR with a restatement of corporate earnings so that listing companies have some guidance regarding this matter.
- (3.) **Recovery of Incentive-Based Awards** – Time-lapse equity (i.e., not subject to financial performance criteria) is not included in recoverable compensation. The SEC fails to recognize that the value of time-lapse restricted stock and other service-based equity awards have value attributed to two factors – satisfaction of the service requirement, and the gain in share price during the service period. Because the only form of equity incentives which is subject to recovery to a clawback policy includes performance-based awards, the exclusion of time-based or service-based awards may be a perverse incentive for companies to grant more time-lapse restricted stock. This potential shift in incentive compensation strategy is counter to most companies who strongly espouse a pay-for-performance theory with respect to incentive pay.
- (4.) **Inclusion of All Section 16 Officers** – The proposed rules will apply to all current and former executive officers on a non-fault basis who served in such a capacity at any time during the applicable look-back period. This could be harsh treatment for a section or division head whose business unit had no influence or basis regarding the financial reporting error which has led to the need for a restatement. Again, the crux of this issue stems from the fact that the Board of Directors will not be able to exercise discretion in the execution of the clawback, as noted above.

(5.) **Added Disclosure Requirement** – The new rules and regulations will require additional disclosure on the part of companies to inform shareholders and the investment community of the details of their clawback policies. This additional disclosure requirement, coupled with the new disclosures required by the SEC with respect to the pay for performance reporting requirement, will add substantially more information for the listing company to disclose and shareholders to absorb. The typical company today provides an approximate 25 pages or more to the reporting of executive compensation policy, practices, and data each year in its proxy. Now, companies will be required to add more executive compensation disclosures each year which will be administratively burdensome.

Final Remarks

Pay Governance LLC sincerely appreciates this opportunity to comment upon the SEC's proposed rules and regulations for the clawback requirements of the Dodd-Frank Act. Should you have questions about our comments, please contact any one of the four Pay Governance LLC Members listed below.

Sincerely,

PAY GOVERNANCE LLC

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