assonime

Associazione fra le società italiane per azioni

CDN/PS/AV

Securities and Exchange Commission

rule-comments@sec.gov

September 14th, 2015

RE: Listing standards for recovery of erroneously awarded compensation; proposed rule – File Number S7-12-15

The Securities and Exchange Commission (hereinafter "SEC" or "Commission") proposes a rule implementing Section 954 of the Dodd Frank Act, which requires listed companies to implement claw-back policies to recover incentive-based compensation received by current or former executive officers in the event of certain financial restatements.

More specifically the proposed rule demands stock exchanges to adopt listing standards requiring issuers to adopt and comply with a policy to recover incentive-based compensation and provide disclosure about the policy. The Commission proposes to apply the rule to all listed issuers, including foreign ones. The Commission has extended a 60-day comment period with respect to the proposed rule.

Assonime is the Italian Association of Limited Liability Companies, including listed issuers. Among our members there are some which are listed also on the New York Stock Exchange (notably Eni, Luxottica and Telecom Italia) and qualify as foreign private issuers according to U.S. legislation.

As representative of our issuers members, we are submitting our comments to the SEC proposed rules, prepared in close consultation with our members.

First of all, we would like to state that the topic of remuneration of directors and key management personnel is a key issue for Italian legislator and is addressed in several legislative instruments. The framework in place provides several measures to ensure adequate transparency of the remuneration of directors and the possibility for shareholders to express their views on the remuneration policy by an advisory vote (binding for financial institutions) in the general meeting; this framework largely reflects the one defined at

European level. The specific issue of recovery is addressed both at legal and self-regulation level, as described below in more detail.

As the SEC recognizes in the release, some aspects of the proposed rule may conflict with home-country's laws, stock exchange requirements and corporate governance arrangements of some foreign issuers. In effect, directors' and officers' compensation, like other items of corporate governance, are regulated by the laws of the foreign private issuer's home jurisdiction.

For these reasons, the proposal allows exchanges to permit foreign private issuers to forgo recovery as impracticable if the recovery of erroneously awarded compensation would violate the home country's laws and certain specific conditions are met.

In addition, in the request for comments, the Commission explicitly envisages the possibility for a private foreign issuers to comply with its home country law instead of complying with the listing standard of the U.S. exchange, in the event that such law requires the issuer to disclose its policies on incentive-based compensation and recover erroneously awarded incentive-based compensation from current of former executive officers.

To this end, we would like to briefly describe the Italian legal framework on executive remuneration.

Art. 123-*ter* of the Italian Consolidated Act on Finance[1] requires listed issuers to publish annually a remuneration report composed of two parts. The first part includes the remuneration policy and the procedure for the adoption of the policy and its fulfilment, subject to the advisory vote of the general meeting. The second part includes a description of the remuneration awarded to each single component of the board of directors and of the statutory board, to general managers, directors and, in an aggregated form, to executives with strategic responsibilities; the report has to highlight the coherence of the remuneration awarded with the policy approved the previous year.

The Italian Financial Authority Regulation[2] foresees the detailed information to be provided as to the remuneration policy and to the remuneration awarded (the latter with a graphic representation similarly as required by the Dodd-Frank Act).

In addition, compensation plans based on financial instruments have to be approved by the general meeting and full disclosure must be ensured on those plans (art. 114-*bis* of the Consolidated Act on Finance).

[1] Legislative Decree n. 58/1998 as amended
[2] Consob Regulation n. 11971/99 as amended

The criteria to be followed to adopt the remuneration policy - whose goal is to align the interests of directors with pursuing the priority objective of the creation of value for the shareholders in a medium-long term timeframe - are set forth by the Italian Corporate Governance Code[3] and are applicable to every executive director and to directors covering particular offices (art. 6). These criteria are applicable, *mutatis mutandis*, also for the adoption – by the bodies entrusted with that task – of the remuneration of key management personnel. These criteria have been transposed in the Italian Corporate Governance Code, in coherence with the requirements of the EU Recommendation of 2009 on remuneration of directors of listed companies[4].

The Italian Corporate Governance Code also requires full and detailed disclosure in case of the end of office and/or the termination of the employment relationship with an executive director or a general manager. Moreover, it requires companies to set up a Remuneration Committee made up of independent directors (alternatively, the committee may be made up of non-executive directors, the majority of which to be independent; in this case, the chairman of the committee is selected among the independent directors). At least one committee member shall have an adequate knowledge and experience in finance or remuneration policies, to be assessed by the board of directors at the time of his/her appointment. The Remuneration Committee is called to submit proposals to the board of directors for the remuneration of executive directors and other directors who cover particular offices and to evaluate the adequacy, overall consistency and actual application of the policy for the remuneration.

The Italian Corporate Governance Code is applied by companies according a comply or explain approach. In addition, according to the Italian Consolidated Act on Finance, mandatory disclosure about the adoption of a corporate governance code of conduct is provided in the companies' annual report on corporate governance, giving reasons for any decision not to adopt one or more provisions of the Code, together with the description of the corporate governance practices actually applied by the company over and above any legal or regulatory obligations (art. 123-*bis*).

With specific reference to the recovery of incentive-based compensation awarded in excess erroneously or by misconduct, both the company (by general meeting decision) and minority shareholders (holding, individually or jointly, at least 1/40 of the share capital) are entitled to claim damages for breach of directors' duties (Articles 2393 and 2393-*bis* of the Civil Code). The company is also entitled to claim the recovery of overpayment under the general rules provided by Articles 2033 and 2041 of the Civil Code.

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[3] Italian Corporate Governance Code, July 2015

[4] European Commission Recommendation of 30 April 2009 (2009/385/EC)

Beside these legal instruments, one of the criteria for the adoption of the remuneration policy set forth in the Italian Corporate Governance Code explicitly recommends that the policy should foresee contractual arrangements in order to permit the company to reclaim, in whole or in part, the variable components of remuneration that were awarded (or to hold deferred payments), as defined on the basis of data which subsequently proved to be manifestly misstated. This criteria addresses the same concerns considered by the SEC in its proposed rule and follow a consistent approach as to claw back policy.

We are convinced that the Italian legal and self regulatory framework already provides an environment which ensures full disclosure about remuneration in general and provides criteria to align interests of companies with those of directors, included recovery provisions. Moreover, the Italian legal framework is to be considered in strict connection with the European one. To this end, we would like to mention that the current revision of the Shareholders' Rights Directive (Directive 2007/36/EC) tackles many issues on remuneration; the revised text was approved by the European Parliament on 8th July 2015 and is currently under negotiations with the European Council[5].

We thus believe that the Commission's rules should recognize that foreign private issuers operate under different legal regimes and are subject to corporate governance requirements that are designed to address the same issues targeted by the proposed rules.

In light of the above, we think that the Commission should allow foreign issuers to comply with their home country law instead of complying with the listing standard of the U.S. exchange. This position would be consistent with the approach already followed by the SEC with reference to other provisions implementing the Dodd-Frank Act, also referring to the topic of executive remuneration.

We would also like to underline that a strict application of the rule proposed by SEC to foreign issuers would create several conflicts with the national requirements which, as already anticipated, have been introduced according to the overall European legal framework.

In particular, we would like to point out the following main areas of conflicts with provisions of law and corporate governance arrangements: the concrete definition of executive officers subject to recovery policy, which may also engender conflicts with the applicable labour law; the concrete definition of incentive-based compensation; the nominative disclosure of each person subject to recovery of excess incentive-based compensation attributable to an

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[5] See press release:
http://www.europarl.europa.eu/news/en/news-room/content/20150703IPR73902/html/Corporate-governance-MEPs-vote-to-enforce-tax-transparency

accounting restatement; the whole procedure for the recovery which is required by the proposed rule, including the role of the issuer's committee of independent directors. Another sensible issue is the timing for the application of the new rules. The proposed rules should apply to new incentive-based plans; a retroactive application would likely affect existing compensation contracts and agreement and new areas of conflict would arise.

Considering these conflicts, even if the Commission decided not to allow foreign private issuers to comply with their home country law instead of complying with the listing standard of the U.S., it should nonetheless consider the opportunity to exempt or to adopt a flexible approach with reference to specific provisions when applied by foreign private issuer.

We remain at your disposal for any further information or clarification.

Sincerely

S. Micossi

Stefano Micossi

We may be contacted by e-mail at the following address:
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