

# Technical Compensation Advisors, Inc.

September 14, 2015

Via Internet Comment Form

Mr. Brent J. Fields  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20546-1090

Re: File Number S7-12-15

Dear Mr. Fields:

I am writing this letter to provide comments on the Commission's proposed Exchange Act Rule 10D-1 and amendments to Regulation S-K to implement Section 954 of the Dodd-Frank Wall Street and Consumer Protection Act.

Technical Compensation Advisors is a boutique compensation consulting firm that focuses on complex compensation matters including regulatory issues, disclosure, accounting, valuation, tax as well as anything quantitative, financial or statistical. A number of the clients I assist would be expected to comply with the proposed rule. I am providing the following comments based in part on my discussions with these issuers.

The proposed rule and amendments would require listed companies to adopt policies to recover incentive-based compensation that is received in excess of what would have been received under an accounting restatement – colloquially referred to as “clawback” policies. Conceptually, clawback policies are good for company owners – if an employee received compensation he or she did not deserve, the employee should return the portion not earned. However, applying a clawback policy might not be simple and unintended consequences may result. Some concerns are:

- The potential impacts on executive compensation that may harm shareholders, including:
  - Reduction in the use of incentive compensation with a corresponding increase in salary and discretionary compensation (especially at smaller reporting companies)
  - Market demands to increase compensation to offset the risk associated with having compensation clawed back (especially due to someone else's fault)
    - Executive purchase of insurance with the increased compensation makes any express prohibition on reimbursement for insurance premiums futile
- Determining the impact of an accounting restatement on stock price and/or total shareholder return (“TSR”) would be very difficult, costly and may subject companies to legal challenges
  - Expert fees are considerably higher than the average of \$337 per hour mentioned in the economic analysis section of the proposal; closer to the top of the range (\$800)
  - Ability to use “reasonable estimates” is vague
  - Consider providing safe-harbor approaches that may be used to determine a reasonable estimate

- Possible inability to establish a grant date for share-based awards under ASC 718 if clawback policy makes the terms subjective or discretionary
  - Delay in grant date determination would have a substantial and material impact on the disclosure timing for these awards in the Summary compensation Table and Grants of Plan-Based Awards Table
- Reduction of amounts reported in the Stock Awards column and Option Awards column of the Summary Compensation Table may be inconsistent with reporting of other modifications
  - An adjustment to an equity incentive plan as a result of a clawback might be considered a modification under ASC 718
    - Incremental compensation cost would be \$0 (not negative) under ASC 718
    - A similar modification unrelated to an accounting restatement would not result in a reduction in the amount reported in the Summary Compensation Table

Those charged with overseeing the company (i.e. the directors) should be provided with as much flexibility as possible to carry out their fiduciary responsibilities. Accordingly, I would encourage the Commission to adopt rules and/or amendments to allow directors broader discretion in applying clawback policies than those proposed. A more flexible rule could be combined with robust disclosure requirements to allow shareholders to evaluate the actions taken by directors with respect to applying a clawback policy. More specifically:

- Rules should provide the board with discretion on applying clawback policies for each specific circumstance, allowing for the flexibility to determine:
  - Which executives would be impacted
  - The amount of compensation to be recovered from each executive impacted
    - Including ability to recover disproportionately (i.e., not pro rata)
  - The timing of repayment (e.g., allow time to recover taxes)
  - The form of repayment (e.g., netting against current or future compensation)
- Robust disclosure of clawback policies and actions taken by the board could be provided to allow shareholders the opportunity to react by:
  - Voting on say-on-pay proposal and/or election of individual directors
  - Taking appropriate legal action (e.g., derivative suit)
  - Other communication with the board

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I hope that the Commission finds these comments helpful. If anyone at the Commission would like to discuss any of these comments with me, I would be delighted to do so.

Sincerely,



Andy Restaino  
Managing Director