Cooley LLP

September 15, 2015

VIA E-MAIL

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

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

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 rule proposal intended to implement Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, set forth in Release No. 34-75342, Listing Standards for Recovery of Erroneously Awarded Compensation.

Proposed Rule 10D-1 (the "Rule") requires exchange-listed companies to recover from current and former executive officers the amount of erroneously awarded incentive-based compensation received during the three years preceding the date of an accounting restatement that results from the company's material noncompliance with any financial reporting requirement under the securities laws. The proposal directs national securities exchanges and associations to establish listing standards requiring companies to adopt, disclose and enforce clawback policies that comply with requirements of the proposed Rule.

Our comments are focused in particular on Subsection (iv) of proposed Rule 10D-1(b)(1), which provides in part as follows:

"The issuer must recover erroneously awarded compensation in compliance with its recovery policy except to the extent that it would be impracticable to do so. Recovery would be impracticable only if the direct expense paid to a third party to assist in enforcing the policy would exceed the amount to be recovered, or if recovery would violate home country law…." Before concluding that it would be impracticable to recover any amount of erroneously awarded compensation based on violation of home country law, the issuer must obtain an opinion of home country counsel, not unacceptable to the applicable national securities exchange or association, that recovery would result in such a violation, and shall provide such opinion to the exchange or association. In addition, the home country law must have been adopted in such home country prior to the date of publication in the Federal Register of proposed Rule 10D-1. In either case, the issuer's committee of independent directors responsible for executive compensation decisions, or in the absence of such a committee, a majority of the independent directors serving on the board, shall make any determination that recovery would be impracticable."

While we appreciate the accommodation the Commission has proposed in connection with potential violations of non-U.S. laws, we note that there are labor laws and regulations in many

states that may also preclude recovery of some or all of the compensation subject to clawback. However, the Commission's proposed clawback provision does not address the obstacles to recovery posed by these potentially conflicting state wage and hour laws. Nor does Section 954 or the Commission's proposed rule expressly provide that proposed Rule 10D-1 preempts all state laws that may conflict with its provisions, and it is not known how a court would view the question of federal preemption in this context.

The SEC's silence on the issue of potentially conflicting state laws raises significant uncertainty for public companies attempting to develop and implement a lawful recovery policy, as would be required under Rule 10D-1, with regard to whether state law will allow recovery of "erroneously awarded incentive-based compensation" and what effective mechanisms are available to employers to lawfully recoup the compensation. Absent additional guidance from the Commission, listed companies will find themselves caught between Scylla and Charybdis: risking claims for potential violations of state law in seeking recoveries, and/or facing delisting for noncompliance with the applicable exchange's (and the Commission's) clawback requirements.

For example, California laws are generally highly protective of an employee's entitlement to retain paid wages. California Labor Code §221 provides that it is "unlawful for any employer to collect or receive from an employee ***any part of wages theretofore paid*** by said employer to said employee" (emphasis added). It is unclear whether the California Labor Commissioner or the courts would view recovery to be lawful in each circumstance where it would be required under the proposed Rule. And, if a violation were to occur, both civil and criminal penalties could apply, depending on the nature of the violation. See, e.g., Cal. Labor Code §225 ("violation of any provision of Section[ ] 221… is a misdemeanor"); Cal. Labor Code §225.5 (civil penalties for unlawfully withholding wages, which, for a second violation, can impose penalties of 25 percent of the amount unlawfully withheld).

Although the precise language may vary, other statutes in other states may impose similar disabilities on employers attempting to recoup compensation from executives in compliance with the proposed Rule. For example, the New York Labor Code, in §193, contains a provision similar to that of California: "No employer shall make any charge against wages, or require an employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction from wages under the provisions of subdivision one of this section."

In addition, companies may be required to seek recovery through civil actions, for example, in the event that deductions from future wages were precluded as a mechanism of enforcement either by law or because the executives were no longer employees. Given the proposed Rule's three-year lookback period, state statutes of limitations may bar the employer from recovering simply due to the lapse of time between payment of the incentive compensation and the filing of a civil complaint to enforce the clawback recovery. For example, the California Code of Civil Procedure contains various limitations periods, including §338(d), which prescribes a three-year statute of limitations for "[a]n action for relief on the ground of fraud or mistake." I

In light of the untenable position in which listed companies may find themselves in seeking to comply with both state law and applicable listing standards, we encourage the Commission to

allow listed companies to exercise discretion not to seek recovery of erroneously awarded compensation in the event that recovery were reasonably likely to violate applicable state law or regulation.

We note, in addition, that the scarcity of applicable caselaw interpreting the relevant state law provisions in this or similar contexts may make it impossible to render legal opinions to the effect that recovery would, or would be reasonably likely to, result in a violation of state law, even though the listed company may still be at serious risk of state law violation. Further, a legal opinion to that effect could state a position and provide an analysis or roadmap for plaintiffs that could prove to be unfavorable to the listed company at a future time in a different setting. As a result, we urge the Commission, in lieu of requiring that the listed company provide an opinion of counsel, to allow the exercise of discretion if the compensation committee or majority of independent directors, following consultation with counsel, concludes that recovery under the Rule would not be in the best interests of the listed company because it puts the company at serious risk of violating state law. If the Commission finds that alternative unacceptable, we urge the Commission to consider allowing the exercise of discretion in the event that the applicable state Labor Commissioner, Attorney General or other similar state agency or department with appropriate authority has issued an opinion or ruling addressing the issue of whether recovery under the Rule would violate applicable state law.

We appreciate the opportunity to provide these comments on the proposed Rule. If the staff has any questions with respect to these comments, please feel free to contact the undersigned at [redacted].

Very truly yours,

Cooley LLP

By: /s/ Cydney S. Posner

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