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U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington D.C. 20549-1090

Attention: Brent J. Fields, Secretary

Re: File No. S7-12-15
Release Nos. 33-9861; 34-75342, IC-31702
Listing Standards for Recovery of Erroneously Awarded Compensation

Thank you for the opportunity to comment on the Securities and Exchange Commission's (the "Commission" or "SEC") proposed rule on Listing Standards for Recovery of Erroneously Awarded Compensation (the "Proposed Rule").

TELUS Corporation ("TELUS") is Canada's fastest-growing national telecommunications company, with $12.3 billion of annual revenue and 13.9 million customer connections, providing a wide range of communications products and services, including wireless, data, Internet protocol (IP), voice, television, entertainment and video, and is Canada's largest healthcare IT provider. TELUS common shares are listed on the Toronto Stock Exchange ("TSX") and the New York Stock Exchange ("NYSE"). TELUS is subject to continuous disclosure reporting obligations under Canadian securities laws, regulations and rules and the listing requirements of the TSX and, as a "foreign private issuer" ("FPI") in the U.S., is also subject to those U.S. continuous disclosure reporting obligations and NYSE listing standards applicable to FPIs.

Executive Summary

We respectfully submit that FPIs domiciled in Canada need greater flexibility than is contemplated in the Proposed Rule in making determinations with respect to the application and enforcement of clawback provisions to their executive officers and disclosure of their conclusions on the application of their clawback policies. As further detailed below, we submit that:

- The Commission should use its general exemptive authority under the Securities Exchange Act of 1934 (the "Exchange Act") to exempt FPIs from the Proposed Rule, subject to the FPI disclosing its policies and the actions taken to effect recoupment (or the reasons why no such action was taken) in their Exchange Act reports).

However, if the Commission determines not to generally exempt FPIs in the final rule, then:

- the Commission should recognize that home country law related to the enforceability/legality of compensation clawbacks includes the common law as it may develop over time;

- it is neither appropriate nor practical to seek to limit an exemption based on home country law in effect or as interpreted as of the date the Proposed Rule was published in the Federal Register (or any other date);

- FPIs should be permitted to adopt clawback arrangements that apply solely to compensation awarded or earned subsequent to the date the FPI has adopted a clawback policy which conforms to the Proposed Rule as finalized by the Commission to avoid risks, including potential damage awards against the issuer, associated with making fundamental or significant changes to existing employment arrangements; and

- it is impractical to require delivery of a legal opinion as a condition to forgoing recovery of compensation, and potentially disadvantageous to the FPI's compensation recovery efforts.

We also respectfully submit that:

- an issuer should be permitted to forgo recovery if doing so would violate the laws of any applicable jurisdiction, including the laws of a jurisdiction outside its home country, if applicable, to the employment of the executive officer;

- the Commission should provide that calculation of the recovery amount is to be determined by the issuer's board of directors, in its reasonable judgment, after consideration of all relevant circumstances and, in any event, an issuer should not be required to deliver documentation regarding its determination to the relevant exchange; and

- the issuer should be afforded greater discretion with respect to the extent to which an issuer should be required to pursue recovery and, in particular, the independent directors should be permitted to weigh all the benefits and drawbacks of pursuing recovery, not just the direct costs of enforcement, and to consider the tax implications of different recovery methods both to the issuer as well as to the affected executive officer. Investor interests are adequately served by the proposed requirement to disclose the extent to which the issuer has recovered amounts.

TELUS' Approach to Clawbacks for Financial Restatement

TELUS' board of directors approved a clawback policy which became effective January 1, 2013. The policy allows TELUS to recover or cancel certain incentives or deferred compensation to executive officers in circumstances where there has been a material misrepresentation or material error resulting in a financial restatement, an executive officer would have received less incentive compensation based on the restated financials, and the executive officer's misconduct (such as an act of fraud, dishonesty or willful negligence or material non-compliance with legal requirements) contributed to the obligation to restate the financial statements. TELUS has not had to clawback any compensation pursuant to this policy, nor has TELUS ever encountered a situation where a compensation recoupment or adjustment would have been required had TELUS' clawback policy been in place.

Under Canadian securities laws, TELUS is required to provide executive compensation disclosure in accordance with National Instrument 51-102 Continuous Disclosure Obligations and, in particular, as prescribed by Form 51-102F6. Under Form 51-102F6, TELUS is required, among other things, to disclose in the compensation discussion and analysis included in its annual proxy circular:

- any practices the company uses to identify and mitigate compensation policies and practices that could encourage a named executive officer or individual at a principal business unit or division to take inappropriate or excessive risks; and

- policies and decisions about the adjustment or recovery of awards, earnings, payments, or payables if the performance goal or similar condition on which they are based are restated or adjusted to reduce the award, earning, payment or payable.

Consistent with these requirements, TELUS annually discloses a summary of its clawback policy in its proxy circular.

Application of Proposed Rule to FPIs

The Proposed Rule contemplates that FPIs would be permitted to forgo recovery if it would violate applicable home country law, but only if the home country law was in effect prior to the date the Proposed Rule was published in the Federal Register and only if the issuer has obtained and provided to the U.S. exchange a legal opinion from home country counsel that recovery would violate home country law and such opinion is acceptable to the U.S. exchange.

Out of deference to home country law and local custom, the Commission has historically exempted FPIs from many of its corporate governance and executive compensation requirements and FPIs are also exempt from many of the corporate governance listing requirements of the NYSE and other U.S. stock exchanges provided they disclose any significant ways in which their corporate governance practices differ from those applicable to domestic U.S. issuers listed on the exchanges.[1] We submit that it is appropriate to take a consistent approach and similarly exempt FPIs from the Proposed Rule pursuant to the SEC's general exemptive authority under the Exchange Act.

While the Proposed Rule does include an exemptive provision for FPIs, we respectfully submit that, as written, the exemptive provision fails to appropriately recognize as matters of comity Canadian common law and statutory developments and requirements. It also fails to take into consideration the application of the laws of jurisdictions outside the home country which apply

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[1] For example, the Commission proposed rules on pay-versus-performance and its final rules on pay ratio disclosure, say-on-pay and say-on-golden parachutes and most NYSE and Nasdaq corporate governance listing requirements all exempt FPIs from their requirements. Such historical deference to the home country requirements and principles of international comity extends even further to FPIs being exempted from, among other things, U.S. proxy statement requirements, Section 16 reporting and short-swing profit recovery requirements (which in the case of short swing profit recovery, like Section 10D of the Exchange Act, covers amounts recoverable by issuers, is not based on fault or misconduct, generally prohibits settling for less than the entire amount owed, and prohibits issuers from entering into indemnification agreements for amounts recovered) and executive compensation disclosures required under Section 402 of Regulation S-K. Such recognition of international comity should be extended to the Proposed Rule. We submit that the language of Section 954 of the Dodd-Frank Act ("Dodd-Frank") which added Section 10D to the Exchange Act is not definitive as to whether FPIs should be subject to the Proposed Rule and is open to interpretation and thus permits the Commission to exercise its discretionary authority to exempt FPIs subject to their making the suggested disclosure requirements discussed herein.

to our employees who work internationally. Moreover, as set out in more detail below, the requirement to deliver a legal opinion as a condition to forgoing recovery of compensation is impractical and potentially disadvantageous to an issuer and its compensation recovery efforts.

Enforceability of Compensation Recovery Arrangements Under Canadian Laws

There is no statutory provision in Canada requiring employers to include clawback provisions in employment contracts or to establish clawback policies. As a result, the enforceability of clawback provisions will depend on interpretation of the terms of the employment arrangement. The terms of the employment arrangement are governed by a mixture of:

- statutory laws, including applicable federal, provincial or territorial employment standards legislation, depending on the jurisdiction governing the employment relationship;
- common law, as developed by Canadian courts;[2] and
- contractual provisions, which may be written, oral or based on developed practice. Canadian law does not recognize the concept of "employment at will"; instead all Canadian employees are employed pursuant to an employment contract. This contract contains both express terms as well as implied terms, and in all cases needs to conform to the applicable statutory requirements.

The enforceability of clawback arrangements is a developing area in Canadian jurisprudence, where decisions reflect individual facts and circumstances rather than broad principles. What little caselaw exists involves the application of clawbacks for breach of non-competition covenants, where the focus was on whether the clawback constituted a restraint on trade and, therefore was unenforceable under common law. Courts in different Canadian jurisdictions have reached different conclusions on the enforceability of clawbacks for breach of non-competition covenants.[3] In all of these cases, express provisions relating to forfeiture were included in written agreements signed by the employee and the clawback was triggered by an act taken by the employee in contravention of the express provision. Under the Proposed Rule,

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[2] In this connection we note that Proposed Rule 10D-1(b)(iv) specifically states that "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." [Emphasis added] Use of the term "adopted" could suggest that only home country statutory provisions are contemplated under the Proposed Rule as only statutes are "adopted" and would thus not allow consideration of home country common law. Use of the term "adopted" also suggests a static, individual point in time which may not allow for continuing jurisprudence to develop as to how an existing statute is to be interpreted under different factual scenarios. For the reasons hereafter discussed we do not believe that such limitations are intended or appropriate.

[3] In *Deghenghi v. Ayerst, McKenna & Harrison Ltd.*, [1998] J.Q. no 1252 (C.A.) the Quebec Court of Appeal concluded that a clause in a management incentive plan making a distribution thereunder conditional upon non-competition unenforceable. In *Woodward v Stelco Inc.*, [1998] 80 CPR (3d) 319 (Stelco) the Ontario Court of Appeal ruled that a promise not to compete in exchange for continued payment of supplementary executive retirement benefits was not a contract in restraint of trade because the executive could have competed, except that by doing so he would lose the right to the supplementary retirement benefits. In *Nortel Networks v Jervis* [2002], 33 CPB 71, OJ No. 12 (QL) (Ont Sup Ct) (Nortel) another Ontario court enforced a non-competition promise in connection with stock option awards, concluding that the clawback of the option benefit did constitute a penalty, but not one which was oppressive in the circumstances. The British Columbia Court of Appeal in *Rhebergen v. Creston Veterinary Clinic Ltd.*, [2014] BCCA 97 adopted a hybrid or "functionalist" approach requiring the court to look to the effect of the provision to determine if the burden on the former employee has the effect of constituting a restraint of trade and, if it does, the common law requirements of reasonableness must be satisfied.

listed issuers will be required to adopt clawback policies providing for recoupment upon a financial restatement, whether or not the executive officer engaged in any misconduct contributing to the financial restatement. We are not aware of any Canadian caselaw permitting clawback of compensation pursuant to a policy adopted by the employer, nor any where the clawback was triggered in the absence of any fraud or misconduct, or knowledge thereof, by an employee.

As home country common law is not a static body of precedent and develops over time, it may, in the future, be interpreted by courts in the employment area to limit or find unenforceable the clawback provisions contemplated by the Proposed Rule. As a result, we respectfully submit that in crafting the final rule, the Commission specifically acknowledge that home country law specifically includes the common law *as it may develop over time* and that such common law is not limited to that in effect, or as interpreted, as of the date the Proposed Rule was published in the Federal Register.

Furthermore, we recommend that the final rule should not contain any limitation as to the date any home country law regarding clawbacks is adopted. We submit that such a limitation is an improper intrusion by the Commission into the laws, and public policy determinations, of Canadian lawmakers.[4] Moreover, any such limit on the availability of the exemptive relief set forth in the Proposed Rule does not prohibit a foreign sovereign jurisdiction like Canada from mandating clawback mechanisms in the future by any combination of laws, regulations, rules, policies or guidelines that could prohibit clawback recovery policies generally or permit them under different conditions. If such requirements were to be adopted in the future, we submit that a FPI which has experienced a financial restatement should not be required to choose between violating its home country requirements or violating the Commission's final rule and related exchange rule and thus face potential delisting.

Other Employment Law Implications of Clawback Provisions

We have noted above that in Canada, in contrast to the United States, there is no employment "at will" and all employment relationships (whether or not a written contract exists) are deemed contractual. Under Canadian legal principles, when an employer makes a fundamental or significant change to an essential term of an employee's terms and/or conditions of employment without notice, the employee may choose to treat the employment relationship as terminated and the employer will be liable for damages in lieu of reasonable notice. These damages can be quite substantial and it is not unusual for a very senior executive to be awarded between 18 and 24 months total compensation (salary, incentive compensation, benefits, etc.). As the application of a clawback provision to compensation awarded or earned prior to the adoption of the clawback provision might in some circumstances constitute a fundamental or significant change, clawback provisions are typically adopted by Canadian issuers to apply solely with respect to compensation earned subsequent to the adoption. For example, TELUS' clawback policy is effective with respect to financial years beginning on and after January 1, 2013 - the date the policy became effective. For the same reason, we recommend that the Commission adopt a similar approach and only require FPIs to adopt clawback arrangements that apply to compensation awarded or earned with respect to financial periods subsequent to the date the issuer has adopted a clawback policy which conforms to the Proposed Rule as finalized by the Commission, rather than requiring that

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[4] In the proposing release, the Commission states that the proposal to set a limitation as to the date the home country law is adopted is intended to minimize any incentive countries may have to change their laws in response to the provision. See Proposing Release at pages 69-70.

recoupment apply to compensation that is granted, earned or vested on or after the effective date of Rule 10D-1.[5]

Requirement to Deliver a Legal Opinion

As noted above, the exemption available to FPIs under the Proposed Rule is available only if the issuer has obtained and provided to the U.S. exchange a legal opinion from home country counsel that recovery would violate home country law in effect prior to the date the Proposed Rule was published in the Federal Register, and such opinion is acceptable to the U.S. exchange.

The proposal to make the availability of an exemption conditional upon delivery of a legal opinion could, we submit, be extremely disadvantageous to the issuer and its shareholders.[6]

Even if the opinion were to be delivered to the exchange in confidence and the exchange undertook to maintain confidentiality, it would not be possible to protect against the subsequent disclosure of the opinion in any legal proceedings between the FPI and an executive officer whose compensation is subject to clawback pursuant to a policy adopted pursuant to the Proposed Rule. As delivery of the opinion would be voluntary and not compelled by statute, the FPI would not be entitled to assert privilege over its disclosure or production in such proceedings under Canadian law as the disclosure to the exchange would waive any applicable attorney-client privilege. Disclosure of the opinion could, in turn, compromise efforts of FPIs to recoup incentive compensation where certain means of recovery is possible, but not assured, if any such opinion became available to an executive officer.

Accordingly, we submit that in finalizing the Proposed Rule, the Commission should eliminate the requirement that a legal opinion be delivered to the applicable exchange.

Application to International Employees

Under the Proposed Rule, FPIs would be permitted to forgo recovery only if recovery would violate applicable home country law. Enforceability of clawback provisions against executive officers located in other jurisdictions, however, will depend the laws of the jurisdiction in which the individual is employed, in addition to or in lieu of the laws of British Columbia, TELUS' jurisdiction of incorporation. We therefore also submit that an issuer should be permitted to forgo recovery if doing so would violate the laws of any applicable jurisdiction.

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[5] Proposed Rule 10D-1(a)(2)(ii).

[6] It is also a novel approach. For example, NASDAQ Listing Rule 5615(a)(3) requires delivery of a written statement from an independent counsel in a foreign private issuer's home country certifying that the Company's corporate governance practices are not prohibited by the home country's laws. But it does not condition the availability of the exemption from compliance with NASDAQ corporate governance requirements on delivery of an opinion that compliance would violate home country law.

Need for Discretion

Calculation of the Recoverable Amount

There is general support for the principle that recovery should be with respect to "the amount of incentive-based compensation received by the executive officer or former executive officer that exceeds the amount of incentive-based compensation that otherwise would have been received had it been determined based on the accounting restatement." However, there are many practical challenges in calculating the "recoverable amount" under the Proposed Rule.

Incentive compensation award amounts are rarely a function of a formulaic calculation that would make recalculation of amounts possible without the exercise of judgment and estimation. At TELUS, for example, incentive compensation awards are performance-differentiated and granted and based on corporate and individual performance measures. As recognized by the Commission in the proposing release, determining the recoverable amount is especially challenging in incentive-based compensation that is based on stock price or total shareholder return, but the challenge is not limited to such circumstances. Flexibility is needed for the issuer to reach its conclusions on the recoverable amount. For this reason, TELUS' policy gives discretion to TELUS' board of directors to make such determinations and TELUS decides the extent to which documentation is needed in support of the board's determination. We submit that there is a similar need to rely on the reasonable judgment of a FPI in determining the recoverable amount and the need for any supporting documentation for its determination. We further submit that it should not be necessary to provide any supporting documentation for the issuer's determinations to the relevant exchange.

Discretion With Respect to Pursuit of Recovery

Under the Proposed Rule, the issuer must pursue recovery unless it would be impracticable because the direct costs of enforcing recovery would exceed recoverable amounts (or, in the case of a FPI, would violate home country law). Moreover, before concluding that it would be impracticable to recover amounts, the issuer would first need to make a "reasonable attempt" to recover such compensation and would be required to document its attempt to recover and provide such documentation to the relevant exchange.

We submit that FPIs should be permitted greater discretion to forgo recovery. In particular, the independent directors should be permitted to weigh all the benefits and drawbacks when pursuing recovery under the issuer's policy, not just the direct costs of enforcement. Moreover, in determining the extent to which amounts should be recovered from any executive officers the issuer should have discretion to consider the tax implications of different recovery methods both to the issuer as well as to the affected executive officer. In that connection, we submit that:

(i) in deciding whether it should or should not pursue recovery, the issuer should be able to consider the costs of determining what the recoverable amount would be rather than being required to incur those costs before making its decision as they may include the substantial costs of outside consultants or experts; and

(ii) the need to make a "reasonable attempt" to recover such compensation is too open ended a standard and subject to unnecessary second guessing. The business judgment of the issuer's board of directors (or Compensation Committee) is a more appropriate standard.

We submit that investor interests are adequately served by the proposed requirement to disclose the extent to which the FPI has been successful (or not) in effecting compensation recovery. Furthermore, many issuers, including TELUS, provide shareholders with an annual

say on pay vote affording shareholders who are dissatisfied with an issuer's compensation recovery efforts an opportunity to express their views through such vote.

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We thank you again for the opportunity to comment on the Proposed Rule and respectfully request that the Commission consider our recommendations and suggestions in finalizing the listing standards rule. We would be happy to discuss this submission with you in greater detail.

Yours truly,

Maria Preovolos

Associate General Counsel and Assistant Corporate Secretary
Member of the TELUS team