

April 3, 2023

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

RE: Comments on Notices of Filing of Proposed Listing Standards Related to
Recovery of Erroneously Awarded Executive Compensation
File No. SR-NASDAQ2023-005 and SR-NYSE-2023-12

Dear Ms. Countryman:

The undersigned law firms are pleased to submit this letter to the Securities and Exchange Commission (the "Commission") in response to the Commission's solicitation of comments on the above-captioned proposed listing standards (together, the "Proposed Listing Standards"). In the Final Rule: Listing Standards for Recovery of Erroneously Awarded Compensation (Release Nos. 33-11126; 34-96159; IC-34732; File No. S7-12-15) that the Commission approved, the Listing Standards must be effective no later than one year from publication in the Federal Register (November 28, 2023) (the "Final Rule").¹

In order to give issuers adequate time to develop and adopt a compensation recovery policy, along with the necessary controls and procedures to administer the policy, we respectfully request that issuers are provided a satisfactory amount of time for compliance, and that the Commission not approve the adoption and effectiveness of the Listing Standards earlier than November 28, 2023.

Issuers are carefully reviewing the Listing Standards, and the implementation of a compliant clawback policy has substantial complexity, with each issuer having its own unique challenges. For example, if issuers have an existing compensation recovery policy, they must evaluate whether and how to integrate the two policies, including whether to combine them into one policy or have separate stand-alone policies. Further, they must review and, as needed, modify the terms of any individual agreements, compensation plans and award agreements under which incentive compensation is contractually granted to incorporate additional provisions to permit and facilitate the issuer's ability to enforce the recovery of compensation in the event of a restatement. Issuers must also address operational challenges related to implementing a compliant clawback policy that affects their controls and procedures, including tracking incentive compensation received by current and former executive officers and establishing policies to aid in recovery efforts that, as best as possible, accord with the laws of the jurisdictions in which they operate, including state wage payment laws, those governing non-qualified deferred compensation and foreign laws. As these processes also affect corporate governance functions, each will inevitably involve amendments to committee charters alongside requisite board approvals.

¹ The adopting release stated that "issuers will have more than a year from the date the final rules are published in the Federal Register to prepare and adopt compliant recovery policies." Listing Standards for Recovery of Erroneously Awarded Compensation, 87 Fed. Reg. 73,076, 73,111 (Nov. 28, 2022).

In addition, a number of disclosure and governance requirements are more stringent and demanding for United States equity issuers than for foreign private issuers (“FPIs”) and debt-only issuers. Accordingly, many such issuers will be required to identify *de novo* the individuals who would be appropriately classified as Section 16 “officers” and therefore subject to the Listing Standards. Further, FPIs and debt-only issuers without dedicated compensation committees or independent board members will be required to design and execute a new executive compensation governance structure for the sole purpose of complying with the Listing Standards. Finally, FPIs in jurisdictions in which shareholders are required to approve covered incentive compensation arrangements will need sufficient time to convene special shareholder meetings for approval of the issuer’s compensation recovery policy.

For many companies, if there is a possibility that the Listing Standards will go into effect well before November 28, 2023, they will effectively be required to quickly convene a meeting of their board of directors or compensation committee (and, as noted above for some FPIs, of their shareholders). This is the case even with the additional 60 days that the Commission has provided after the effectiveness of the Listing Standards to adopt a compliant clawback policy. Issuers should be afforded the opportunity to discuss the matter with their boards over more than one meeting if they view it appropriate in order to give due weight to the subject’s myriad substantive and practical complexities.

The complications involved in complying with the Listing Standards are compounded by issuers’ concurrent efforts to comply with other new regulatory obligations. For example, changes to Rule 10b5-1 under the Securities Exchange Act mandate operational changes to Rule 10b5-1 trading plans, extensive new disclosure obligations and certifications by company officers and directors relating to trading plan administration. Simultaneously, issuers have been contending with the new pay versus performance rules, a highly complicated and labor-intensive augmentation to the familiar executive compensation disclosure regime.

All of the above (and other challenges) have involved and will continue to involve expending a significant number of hours and substantial resources for implementation, as well as extensive participation of boards and compensation committees, their advisors and management. The time and effort required for complying with each of these new regulations should not be understated. Accordingly, satisfactory implementation of the Listing Standards on anything other than a timeline that permits adequate review and consideration will be unnecessarily onerous.

Furthermore, for issuers with a calendar year fiscal year, accelerating the effectiveness of the Listing Standards to a date before November 28, 2023 would have an insignificant impact on the scope of compensation potentially subject to recovery under a compliant policy, since any compensation based on a 2023 financial reporting measure would typically be earned based on year-end results. Accordingly, for purposes of the Listing Standards, this compensation would be “received” on December 31, 2023, and thus would be subject to the issuer’s clawback policy regardless of whether the Listing Standards become effective on November 28, 2023, or an earlier date.

The significant burdens associated with hastening issuers’ good faith efforts to adopt and implement compliant compensation recovery policies substantially outweigh the

limited practical benefits to be obtained by providing issuers any time less than the maximum allowable schedule permitted by the Final Rule. For the benefit of issuers, their investors and other stakeholders, we respectfully request that the Commission not approve the adoption and effectiveness of the Listing Standards earlier than November 28, 2023.

Respectfully,

Baker Botts L.L.P.

Milbank LLP

Ballard Spahr LLP

Paul, Weiss, Rifkind, Wharton &
Garrison LLP

Blank Rome LLP

Perkins Coie LLP

Cleary Gottlieb Steen & Hamilton LLP

Pillsbury Winthrop Shaw Pittman LLP

Cooley LLP

Proskauer Rose LLP

Covington & Burling LLP

Ropes & Gray LLP

Cozen O'Connor

Shearman & Sterling LLP

Cravath, Swaine & Moore LLP

Sidley Austin LLP

Davis Polk & Wardwell LLP

Simpson Thacher & Bartlett LLP

Debevoise & Plimpton LLP

Skadden, Arps, Slate, Meagher & Flom
LLP

Dechert LLP

Sullivan & Cromwell LLP

Eversheds Sutherland (US) LLP

Faegre Drinker Biddle & Reath LLP

Troutman Pepper Hamilton Sanders
LLP

Fenwick & West LLP

Wachtell, Lipton, Rosen & Katz

Freshfields Bruckhaus Deringer LLP

Weil, Gotshal & Manges LLP

Hughes Hubbard & Reed LLP

White & Case LLP

Jenner & Block LLP

Willkie Farr & Gallagher LLP

Kirkland & Ellis LLP

Wilmer Cutler Pickering Hale and Dorr
LLP

Kramer Levin Naftalis & Frankel LLP

Latham & Watkins LLP

Wilson Sonsini Goodrich & Rosati,
Professional Corporation

Lowenstein Sandler LLP