The Securities and Exchange Commission adopted final rules requiring the recovery of erroneously awarded compensation as required by Congress in the Dodd-Frank Act.

The rules will, among other things, require national securities exchanges to establish listing standards that would require listed issuers to adopt and comply with a compensation recovery policy, often known as a clawback policy, and require listed issuers to provide disclosure about such policies and how they are being implemented.

**Background**

The Dodd-Frank Wall Street Reform and Consumer Protection Act added Section 10D to the Securities Exchange Act of 1934. Section 10D requires the SEC to direct the national securities exchanges and associations that list securities to establish listing standards that require each issuer to develop and implement a clawback policy. That policy must provide that, in the event the issuer is required to prepare an accounting restatement, the issuer will recover incentive-based compensation paid to its current or former executive officers based on any misstated financial reporting measure. The policy must apply to compensation received during the three-year period preceding the date the issuer is required to prepare the accounting restatement.

In July 2015, the SEC proposed rules and rule amendments to implement the recovery of erroneously awarded compensation requirement. In October 2021 and again in June 2022, the SEC reopened the comment period for the 2015 proposed rules and provided the public with the opportunity to comment further and address certain additional requirements the Commission was considering in connection with the proposed rule.

**What’s Required**

New Rule 10D-1 will require exchanges to adopt listing standards that will apply the disclosure and compensation recovery policy requirements to all listed issuers, with only limited exceptions. Each listed issuer will be required to adopt a compensation recovery policy, comply with that policy, and provide the required compensation recovery policy disclosures. An issuer will be subject to delisting if it does not adopt and comply with a compensation recovery policy that meets the requirements of the listing standards.
If an issuer is required to prepare an accounting restatement, including to correct an error that
would result in a material misstatement if the error were corrected in the current period or left
uncorrected in the current period, the issuer must recover from any current or former executive
officers incentive-based compensation that was erroneously awarded during the three years
preceding the date such a restatement was required. The recoverable amount is the amount of
incentive-based compensation received in excess of the amount that otherwise would have been
received had it been determined based on the restated financial measure.

The listing standards will require an issuer to recover erroneously awarded compensation,
subject to limited impracticability exceptions available only in circumstances where:

- Direct expenses paid to third parties to assist in enforcing the policy would exceed
  the amount to be recovered and the issuer has made a reasonable attempt to
  recover;

- Recovery would violate home country law that existed at the time of adoption of the
  rule, and the issuer provides an opinion of counsel to that effect to the exchange; or

- Recovery would likely cause an otherwise tax-qualified retirement plan to fail to meet
  the requirements of the Internal Revenue Code.

The Commission also adopted amendments to Item 402 of Regulation S-K, Form 40-F, and Form
20-F (and for listed funds, Form N-CSR) to include new disclosure requirements related to the
required policies. Under the new rules, a listed issuer must file its policy as an exhibit to its annual
report and disclose how it has applied the policy, including, as relevant: (1) The date it was
required to prepare an accounting restatement and the aggregate dollar amount of erroneously
awarded compensation attributable to such accounting restatement (including the estimates used
in calculating the recoverable amount in the case of awards based on stock price or total
shareholder return); (2) the aggregate amount that remains outstanding and any outstanding
amounts due from any current or former named executive officer for 180 days or more; and (3)
details regarding any reliance on the impracticability exceptions. Issuers will be required to use
Inline XBRL to tag their compensation recovery disclosure.

What’s Next

The rules and amendments will become effective 60 days following publication of the release
in the Federal Register. Exchanges will be required to file proposed listing standards no later
than 90 days following publication of the release in the Federal Register, and the listing
standards must be effective no later than one year following such publication. Issuers subject
to such listing standards will be required to adopt a recovery policy no later than 60 days
following the date on which the applicable listing standards become effective and must begin
to comply with these disclosure requirements in proxy and information statements and the
issuer’s annual report filed on or after the issuer adopts its recovery policy.