

SEC Issues Final Rules Requiring Clawbacks of Erroneously Awarded Incentive-Based Compensation

November 2, 2022

PRACTICES Employee Benefits M&A, Employee Benefits and Executive Compensation

The SEC adopted final rules on October 26, 2022, implementing a provision of the Dodd-Frank Act that will require publicly listed companies to establish clawback policies of incentive-based compensation received by current or former executive officers if that compensation is based on erroneously reported financial information (the "**Final Rules**"). The Final Rules apply to all listed issuers, including smaller reporting companies, foreign private issuers, and emerging growth companies. The clawback policy must apply to any incentive-based compensation that is granted, earned, or vested based wholly or in part upon the attainment of any financial reporting measure.

Under the Final Rules, an issuer would be subject to delisting if it does not adopt a written compensation recovery policy and comply with such policy. This policy is triggered in the event the issuer is required to prepare an accounting restatement that corrects an error in a previously issued financial statement that is material to that previously issued financial statement or that would result in a material misstatement if the error was corrected in or left uncorrected in the current report. The issuer's clawback policies must apply to incentive-based compensation awarded during the three-year period preceding the date the issuer concluded (or reasonably should have concluded) that an accounting restatement is required.

A listed issuer will initially be required to file its clawback policy as an exhibit to its annual report. Thereafter, in the event of an accounting restatement that would trigger the clawback policy's recoupment provisions as to any erroneously awarded compensation, the issuer must then make disclosures as required by Item 402 of Regulation S-K for purposes of executive compensation information on a Form 10-K, proxy statement, or other related information statements, including:

- the aggregate dollar amount of erroneously awarded compensation attributable to such accounting restatement, including an analysis of how the amount was calculated;
- if the restatement concerns a stock price or total shareholder return metric, the estimates that were used in determining the erroneously awarded compensation attributable to such accounting restatement and an explanation of the methodology used for such estimates;
- the aggregate dollar amount of erroneously awarded compensation that remains outstanding at the end of the last completed fiscal year;
- if the aggregate dollar amount of erroneously awarded compensation has not yet been determined, a disclosure and explanation of that fact;
- disclosure of the dollar amount of outstanding erroneously awarded compensation due from each current and former named executive officer which remained outstanding for 180 days or longer since the determination of such amount; and
- details about any reliance on any impracticability to recover exceptions and any such erroneously awarded compensation amounts that will not be recovered.

Each national securities exchange must propose rules that comply with the Final Rules ("**Exchange's Rules**") within 90 days after they are published in the Federal Register, and the Exchange's Rules must be effective no later than one year following the publication of the Final

Rules. Thereafter, each listed issuer must adopt a written compensation recovery policy no later than 60 days following the effective date of the applicable Exchange's Rules applying to all incentive-based compensation received by executive officers on or after the effective date of the applicable Exchange's Rules.

The Final Rules are available [here](#).