

CLIENT ALERT

# NYSE and Nasdaq Propose Clawback Listing Standards and SEC Issues Clawback Compliance and Disclosure Interpretations

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## AUTHORS

Gerri Anne McEvoy | Michael A. Katz | Jordan A. Messinger | Sherrone Torres

I. **Overview.** Both NYSE and Nasdaq (each, an “Exchange”) recently proposed new listing standards in response to rules (the “Rules”) issued by the U.S. Securities and Exchange Commission (the “SEC”) directing exchanges to establish listing standards that require listed issuers to adopt and implement policies providing for mandatory recoupment of erroneously paid incentive-based compensation following an accounting restatement (a “Clawback Policy”). The proposed listed standards closely track the Rules, which we have previously analyzed [here](#). The NYSE proposed listing standards are available [here](#) and the Nasdaq proposed listing standards are available [here](#). The SEC staff also recently released four Compliance and Disclosure Interpretations (“C&DIs”) relating to the Rules, as detailed below.

II. **Effective Timing.** The proposed listing standards will be subject to a 21-day comment period upon publication in the Federal Register, after which they will be subject to SEC approval. Final listing standards will become effective no later than November 28, 2023, and issuers will be required to adopt Clawback Policies within 60 days of such effectiveness (which will be January 27, 2024 if the Exchanges do not make their new listing standard effective prior to November 28, 2023). Further, each issuer will also be required to file its Clawback Policy as an exhibit to any annual report filed on or after the later of (i) the effective date of the issuer’s applicable final listing standards, and (ii) the date on which the issuer is required to adopt a Clawback Policy.

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III. **Listing Standards Closely Track SEC Rules.** The proposed listing standards closely track the Rules. Specifically, the proposed listing standards adopted the following key aspects of the Rules:

**Definitions.** Both Exchanges adopted the definitions of “executive officer,” “incentive-based compensation,” and “financial reporting measures” set forth in the Rules and explained in detail in our prior alert (available [here](#)).

**Triggering Events.** Recoupment will be required when an issuer is required to prepare a “Big R” or “little r” accounting restatement, regardless of whether the restatement results from misconduct or wrongdoing by an executive officer.

**Erroneously Awarded Compensation.** Listed issuers will be required to recoup the amount of any incentive-based compensation paid to each current and former executive officer in excess of the amount that would have been paid had the incentive-based compensation been determined based on the restated amounts (or, if such amount cannot be calculated, the amount subject to recoupment must be based on the issuer’s reasonable estimate of the effect of the accounting restatement on the incentive-based compensation).

**Exception to Recoupment.** A listed issuer will not be required to recoup erroneously awarded compensation following an accounting restatement only if: (i) the direct expenses to third parties of recouping would exceed the amount to be recovered, (ii) recovery would violate the laws of the home country of the issuer and such laws were in effect as of November 28, 2022, or (iii) recovery would cause a tax-qualified retirement plan in the United States to fail to meet the requirements for the applicable tax exemption.

**Indemnification and Insurance.** Listed issuers will be prohibited from indemnifying or insuring any current or former executive officer against the loss of erroneously awarded compensation.

IV. **NYSE - Consequences of Noncompliance.** The NYSE proposed listing standards provide that, in any case where the Exchange determines that an issuer has failed to comply with listing standards or the terms of its Clawback Policy, including by failing to recover erroneously awarded compensation in a “reasonably prompt” manner, trading in the issuer’s listed securities will immediately be suspended, and the Exchange will immediately commence delisting procedures. If an issuer fails to adopt a Clawback Policy within 60 days following the effective date of the NYSE final listing standards, the issuer will be required to notify the Exchange in writing within five days of the delinquency, contact the Exchange to discuss the delay, and issue a press release disclosing the delinquency, after which the issuer would then have six months to cure the delinquency. If the issuer fails to cure the delinquency during the initial cure period, the Exchange may offer the issuer a one-time, six-month extension, or may commence delisting procedures.

V. **Nasdaq - Consequences of Noncompliance.** The Nasdaq proposed listing standards provide that if an issuer fails to adopt a compliant Clawback Policy, fails to disclose the Clawback Policy, fails to make “reasonably prompt” recovery of erroneously awarded compensation, or fails to comply with its adopted Clawback Policy, then the issuer’s

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securities will be subject to delisting. An issuer that fails to comply with the listing standards may submit a compliance plan to Nasdaq staff and seek to correct the deficiency under Nasdaq's administrative processes. Issuers may have up to 180 days to cure Clawback Policy-related deficiencies, as determined by the Exchange; however, if the issuer fails to cure the deficiency during the cure period, the Exchange will be required to issue a delisting letter.

VI. **SEC C&DIs.** The SEC staff recently released four C&DIs relating to the Rules, which provide the following clarifications and confirmations:

- The SEC does not expect issuers to disclose Clawback Policies until they are required to have Clawback Policies in place under applicable final listing standards;
- Individualized disclosure with respect to the outstanding amount of any erroneously awarded compensation attributable to a named executive officer following an accounting restatement is required for any such named executive officer of a foreign private issuer that files on domestic forms and provides executive compensation disclosure under Item 402 of Regulation S-K on Form 20-F to the extent required by Form 20-F;
- Individualized disclosure with respect to the outstanding amount of any erroneously awarded compensation attributable to a named executive officer following an accounting restatement is required on Form 40-F for any such named executive officer of an issuer to the same extent the issuer is otherwise required to provide individualized compensation disclosure in such filing with respect to its named executive officers; and
- The Rules are intended to apply broadly, and to extend to compensation that is determined based or otherwise taking into account incentive-based compensation (e.g., amounts contributed to a notional account based on erroneously awarded incentive-based compensation, plus any earnings accrued in respect of such that notional amount).

VII. **Next Steps.** Pending comments on the proposed listing standards and approval of the final listing standards by the SEC, issuers should continue to evaluate their existing policies, or, in the absence of an existing policy, design a policy that complies with the Rules and applicable proposed listing standards. As noted in our prior alert, issuers should consider whether their Clawback Policies should be drafted to (i) create binding obligations on the part of each executive officer to promptly repay amounts that the issuer is required to recoup pursuant to its Clawback Policy, and (ii) require each executive officer to reimburse the issuer for any costs and expenses incurred by the issuer in recouping incentive compensation from the executive officer after the issuer has formally requested repayment.

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If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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**Geri Anne McEvoy**

212 728-8877

gmcevoy@willkie.com

**Michael A. Katz**

212 728-8204

mkatz@willkie.com

**Jordan A. Messinger**

212 728-8799

jmessinger@willkie.com

**Sherrone Torres**

212 728-8560

storres@willkie.com

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