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NYSE and Nasdaq Propose Listing Standards for the Clawback of Erroneously Awarded Executive Compensation

On February 22, 2023, the New York Stock Exchange (“NYSE”) and Nasdaq each proposed listing standards that would require listed companies to adopt and comply with a policy (a “Clawback Policy”) for the recovery of incentive-based executive compensation erroneously awarded—that is, compensation awarded based on a misstated financial reporting measure (such as the stock price or total shareholder return)—to executive officers. When effective, the listing standards, which were mandated by a rule adopted by the Securities and Exchange Commission (the “SEC”) in October 2022 (“Rule 10D-1”), would apply to most listed companies, including emerging growth companies, smaller reporting companies, and foreign private issuers (with exemptions only for the listing of certain security futures products, standardized options, securities issued by unit investment trusts, and securities issued by certain registered investment companies) and would prohibit the initial or continued listing of securities of companies that are not in compliance with the listing standard. Under Rule 10D-1, final listing standards must be effective no later than November 28, 2023.

In accordance with Rule 10D-1, both sets of proposed listing standards require listed companies to:

- adopt a Clawback Policy by the 60th day after the date that the applicable listing standard is approved by the SEC (the “Applicable Effective Date”);
- comply with the Clawback Policy for all incentive-based compensation received by executive officers on or after the Applicable Effective Date—for this purpose, such compensation is deemed received in the company’s fiscal period during which the financial reporting measure specified in the incentive-based compensation award is attained, even if the payment or grant of the incentive-based compensation occurs after the end of that period; and
- provide the compensation recovery policy disclosures required under the federal securities laws and in the applicable SEC filings required on or after the Applicable Effective Date.

The proposed listing standards conform strictly to the provisions of Rule 10D-1 with respect to the scope and content of the Clawback Policy, the obligations of a listed company under its Clawback Policy, and other related parameters (these provisions are discussed in our October 27, 2022 Alert available [here](#)).

Rule 10D-1 states that a listed company is required to recover erroneously awarded incentive-based compensation within the scope of its Clawback Policy reasonably promptly, subject to limited impracticability exceptions. In using the phrase, “reasonably promptly,” the SEC did not specify the time by which a company must complete such recovery. According to their respective proposals, NYSE and Nasdaq will each assess promptness on a “holistic basis.” In evaluating whether a company is recovering erroneously awarded incentive-based compensation “reasonably promptly,” NYSE and Nasdaq will consider whether the company is “pursuing an appropriate balance of cost and speed in determining the appropriate means to seek recovery, and whether the [company] is securing recovery through means that are appropriate based on the particular facts and circumstances of each executive officer that owes a recoverable amount.”

With respect to delisting procedures, while Nasdaq’s proposal takes a one-size-fits-all approach to all forms of noncompliance, the procedures under NYSE’s proposed listing standards vary depending on whether the noncompliance is a failure to adopt a Clawback Policy by the required adoption date (a “Delayed Policy Adoption”). For a Delayed Policy Adoption, NYSE has proposed a procedure that is substantially the same as its procedures for delinquencies in the filing of SEC periodic reports, which require a listed company to issue a press release regarding the delinquency within five days of NYSE’s notification and allow NYSE, in its discretion, to grant the listed company an initial six-month grace period and an additional six-month grace period to adopt its Clawback Policy before suspension and delisting

procedures are commenced. Any other type of noncompliance would result in the immediate suspension of trading in the listed company's securities and the immediate commencement of delisting procedures, subject to the company's right to request a review of the delisting determination by a committee of NYSE's board of directors.

Nasdaq's proposed delisting procedures, on the other hand, would apply generally the same suspension and delisting procedures that apply to corporate governance deficiencies and delinquencies in the filing of SEC periodic reports to all forms of noncompliance with its Clawback Policy listing standards. In general, this procedure would require a listed company to issue a press release regarding the delinquency within four business days of receiving Nasdaq's notice of noncompliance and afford the company the opportunity to provide a plan to regain compliance for Nasdaq's review generally within 45 days of Nasdaq's notice of noncompliance. Upon review of such plan, Nasdaq may, in its discretion, grant the listed company an extension of up to 180 days from the date of Nasdaq's notice of noncompliance to regain compliance before suspension and delisting procedures are commenced. A listed company would have the right to request a review of any Nasdaq staff delisting determination by a Nasdaq hearings panel, which may grant up to an additional 180-day extension from the date of such delisting determination. The decision of a hearings panel may also be subject to further review under Nasdaq's administrative procedures.

Next Steps

Both NYSE and Nasdaq's proposals provide for a 21-day comment period upon publication in the *Federal Register*, after which the final standards will be subject to approval by the SEC. Even though it is possible that final listing standards may not take effect until November 28, 2023, companies should revisit their existing Clawback Policies if they have not already done so or consider adopting a new policy that is compliant with Rule 10D-1 and the final listing standards.