



Client Alert: SEC Approves Listing Exchange Rules to Adopt Clawback Policies by December 1, 2023

By: [Joilene Wood](#)

October 9, 2023

Summary

Effective as of October 2, 2023, the U.S. Securities and Exchange Commission (the “SEC”) has approved amendments to the NYSE’s and Nasdaq’s proposed listing rules on clawback compensation. Publicly listed companies will have to adopt compensation clawback policies to comply with the new rules by December 1, 2023.

Under the amended NYSE¹ and Nasdaq² rules:

- Listed companies must have compensation clawback policies in place by December 1, 2023;
- All incentive-based compensation received on and after October 2, 2023 is subject to clawback; and
- Companies must make compensation clawback disclosures in annual reports and proxy and information statements filed on or after October 2, 2023.

Companies must file their clawback policy as an exhibit to their annual report (Form 10-K or 20-F) and indicate via a checkmark whether the financial statements included in the filing reflect the correction of an error and requisite restatement. Companies must also disclose details of any clawback actions taken pursuant to their clawback policy.³

Incentive-Based Compensation

Incentive-based compensation, or “IBC,” is defined as any compensation that is granted, earned or vested based wholly or in part upon the attainment of any financial reporting measure. A “financial reporting measure” is a measure determined and presented in accordance with the accounting principles used in preparing the company’s financial statements (i.e. GAAP for a domestic company), any measures that are derived wholly or in part from such measures, and stock price or total shareholder return (“TSR”). This would include cash, options or restricted

¹ Section 303A.14 of the NYSE Listed Company Manual

² Nasdaq Listing Rule 5608

³ Foreign private issuers with a December 31 year end will be subject to the compensation clawback disclosure requirements in their annual reports on Form 20-F for the financial year ended December 31, 2023, and those with a June 30 year end will be subject in their annual reports on Form 20-F for the financial year ended June 30, 2023.



stock whose grant or vesting is based wholly or in part on the attainment of financial reporting measures. Cash or equity awards that are granted or vest based solely on continued employment and that are not contingent upon achieving a measure performance goal, such as salaries, cash bonuses and incentive plan awards, will not be subject to the policy.

Restatements Triggering the Clawback of IBC

Clawback of IBC is triggered when a company is required to prepare an accounting restatement that corrects an error in previously issued financial statements that is material to the previously issued financial statements, or that would result in a material misstatement if the error were corrected in the current period or left uncorrected in the current period. Therefore, both a so-called “big R” or a “little r” restatement may trigger clawback for any affected IBC.

Upon the occurrence of either type of restatement, a company will need to undertake a materiality assessment in order to determine applicability of a clawback of IBC. The SEC states that companies may continue to rely on its existing guidance regarding the definitions of “accounting restatement” or “material noncompliance,” and that the rules are not intended to affect that guidance. The SEC specifies that one factor to include in the materiality analysis is whether the misstatement has the effect of increasing management’s compensation. Companies should seek guidance of their accountants and counsel when making a determination of materiality that may trigger clawback of IBC.

Clawback Policy Requirements

The clawback policy must provide a mechanism for the company’s clawback of erroneously awarded IBC of past or current executive officers awarded during the three full fiscal years preceding the date on which the company is required to prepare an accounting restatement. Clawback is required without a determination or assessment of fault so it is irrelevant whether there is any fault on the part of the executive officer who received the compensation or whether the officer was involved in preparing the financial statements subject to the restatement.

The clawback policy applies to IBC received by current or former executive officers during the three completed fiscal years immediately preceding the date on which the company is required to prepare the accounting restatement.

Executive Officers Subject to Clawback

The listing rules apply to “executive officers,” which definition closely aligns to the definition used in Rule 16a-1(f) used to determine which company’s officers must file Section 16 reports. This means a company’s president, principal financial officer, principal accounting officer (or, if there is no such accounting officer, the controller), any vice president in charge of a principal business unit, division or function, any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the company are covered and their IBC is subject to potential clawback.



Limited Exceptions

There are three narrowly defined exceptions when a company will not be required to enforce the clawback policy, as follows:

- the direct expense paid to a third party to enforce the policy would exceed the amount of the recovery;
- the recovery would be illegal under home country law; or
- the recovery would likely cause an otherwise tax-qualified, broad-based retirement plan to fail to meet certain tax qualification requirements.

No Indemnification

Companies are prohibited from indemnifying covered officers from clawback, or for reimbursing covered executives for insurance that they may obtain to cover potential clawback.

About TroyGould

Celebrating over 50 years of success as one of Southern California's leading business law firms, TroyGould is recognized in the U.S. and abroad for its success in helping both U.S. and non-U.S. entities and individuals achieve their business goals. The firm's transactional and litigation clients range from emerging companies to middle-market and Fortune 500 companies across a diverse set of industries including life sciences, technology, entertainment/media, manufacturing, food and beverage, real estate, consumer products and health care. For more information, visit [TroyGould.com](https://www.troygould.com).