

June 12, 2023

SEC Approves NYSE and Nasdaq Listing Standards for Compensation Clawbacks; Compliance Deadline Extended until December 1, 2023

On June 9, 2023, the Securities and Exchange Commission (“SEC”) approved new listing standards that were proposed by the New York Stock Exchange (“NYSE”) and Nasdaq. The new listing standards require listed companies to adopt and comply with a written policy providing for the recovery, in the event of a required accounting restatement, of incentive-based compensation received by current or former executive officers where that compensation is based on erroneously reported financial information (a “Recovery Policy”). The listing standards will take effect on October 2, 2023 (the “Effective Date”) and companies will have until December 1, 2023 (60 days after the Effective Date) to adopt their Recovery Policies. The Recovery Policies must, however, apply to erroneously awarded incentive-based compensation received (as defined in the listing standards) after the Effective Date.

Mandated by a rule adopted by the SEC in October 2022 (“Rule 10D-1”), the NYSE and Nasdaq listing standards apply to most listed companies, including emerging growth companies, smaller reporting companies, and foreign private issuers (with certain limited exemptions). The standards conform to Rule 10D-1 (which is summarized in our October 27, 2022 [Alert](#)) by requiring companies to adopt and comply with a Recovery Policy that provides that the company will recover reasonably promptly the amount of erroneously awarded incentive-based compensation in the event that it is required to prepare an accounting restatement due to the company’s material noncompliance with any financial reporting requirement under the securities laws, including any required accounting restatement to correct 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.

Additionally, listed companies must file their Recovery Policies as exhibits to their annual reports; indicate by check boxes on their annual reports whether the financial statements included in the filings reflect correction of an error to previously issued financial statements and whether any of those error corrections are restatements that required a recovery analysis; and disclose any actions they have taken pursuant to such Recovery Policies.

Companies that do not comply with these listing standards (which include the corresponding notice-and-cure procedures) will be subject to immediate suspension and delisting of their securities from the exchanges.

The SEC’s approval comes just days after the NYSE and Nasdaq amended the proposals they originally submitted to the SEC at the end of February (see our March 6, 2023 [Alert](#)). While the NYSE and Nasdaq amendments both extend the Effective Date to October 2, 2023, the NYSE amendment also modifies its suspension and delisting procedures for a noncompliance other than the delayed adoption of a Recovery Policy. While the original NYSE proposal established a cure period in the event of a listed company’s failure to adopt a Recovery Policy within the required time period, it did not establish cure periods for other incidents of noncompliance with the new listing standards. Under the amended standards, the cure period and other suspension and delisting provisions that apply to the delayed adoption of Recovery Policies will now apply to all other incidents of noncompliance with the new listing standards.

Key Takeaways

Prior to the amendments last week, NYSE and Nasdaq’s clawback listing standards were originally drafted to take effect upon the SEC’s approval (which would have meant a compliance deadline of early August for companies). While this extension may come as welcome news, if boards and compensation committees of listed companies have not already taken steps to revise and update their existing Recovery Policies or to adopt new standalone Recovery Policies to comply with the listing standards, they should be doing so in the near term. Moreover, they should familiarize all responsible parties at the company who may have a role to play in the event of a restatement and clawback scenario (such as

employees in HR and total rewards, as well as those in finance and accounting), and finally, all Section 16 executive officers to whom the Recovery Policy will apply with the new requirements.

* * *

If you would like to follow up regarding any of the matters covered by this Alert, please contact your usual Ropes & Gray attorney.