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SEC Proposes Rules Relating to Clawbacks of Incentive-Based Compensation

July 2, 2015

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On July 1, 2015, the Securities and Exchange Commission proposed rules that would require stock exchanges to adopt listing standards relating to the clawback of incentive-based compensation for certain executive officers where the compensation was based on financial performance for periods requiring an accounting restatement. Listed companies would be required to recover incentive-based compensation in excess of what certain executives would have been entitled to under the restated financials—essentially, any money they would not have received had the accounting been done properly. The proposed rules specifically note that clawback amounts are to be calculated without regard to any taxes paid by the executives. The rules would also require listed companies to file written policies relating to clawbacks with their annual reports and describe any actions taken pursuant to such policies during the subject fiscal year. As proposed, emerging growth companies, smaller reporting companies and foreign private issuers would not be exempt from the rules.

Recovery would be required from any current or former executive officer who received incentive-based compensation during the three fiscal years preceding the date on which the issuer is required to prepare an accounting restatement to correct a material error. The recovery would be required regardless of whether any misconduct occurred or whether an executive officer had responsibility for the error in the financial statements.

The proposed rules are required by Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Once the proposed rules are published in the Federal Register, the SEC will solicit comments for 60 days. The SEC has specifically requested comments on a number of aspects of the proposed rules, including (i) the proposed definition of accounting restatement, (ii) whether certain types of issuers should be exempt from, or treated differently under, the rule and (iii) whether chief legal officers, chief information officers and others should be included as officers subject to the clawback policies.

The rules are not expected to be in place for next year’s annual meeting proxy season. Nevertheless, we recommend that issuers take this opportunity to review their current executive compensation policies and incentive-based compensation plans to determine how the proposed rules could impact them.

The full text of the proposed rule may be found ***here***.