

Update: U.S. Securities and Exchange Commission Approves the Nasdaq, NYSE and NYSE American Executive Compensation Clawback Listing Standards

The following is an update to our October 31, 2022 Legal Currency titled "U.S. Securities and Exchange Commission Adopts Executive Compensation Clawback Rules". Please refer to such Legal Currency for further information regarding the executive compensation clawback rules.

Listing Standards

On June 9, 2023, the U.S. Securities and Exchange Commission approved the Nasdaq, NYSE and NYSE American's proposed listing standards. These listing standards change the effective date of the Securities Exchange Act 1934 Rule 10D-1 (the "**Rule 10D-1**") to October 2, 2023. The listing standards adopted by the Nasdaq (Listing Rule 5608), the NYSE (Section 303A.14 of the Listed Company Manual) and the NYSE American (Section 811 of the Company Guide) are all effectively identical in substance to the Rule 10D-1 (the "**Listing Standards**").

Notable aspects of the Listing Standards include:

- the requirement that clawback policies apply to all incentive compensation received by "executive officers", defined to generally include the "Section 16(b)" executive officers" disclosed in an Annual Report on Form 10-K;
- in the event of an accounting restatement, issuers are required to recover the amount of incentive-based compensation received by an executive officer that exceeds the amount the executive officer would have received had the incentive-based compensation been determined based on the accounting restatement.

This is generally referred to as "erroneously awarded compensation";

- the recovery of erroneously awarded compensation is required on a "no fault" basis, without regard to whether any misconduct occurred or an executive officer's responsibility for the underlying accounting restatement; and
- there is no board or committee discretion on whether to recoup erroneously awarded compensation other than two very limited exceptions included in the Listing Standards where an independent committee or majority of independent directors determine that: (i) the direct expense paid to a third party to enforce the policy would exceed the amount recovered; and (ii) recovery would cause a broad-based retirement plan to fail to meet certain tax-qualification requirements.

Effective Date

The effective date of the Listing Standards is October 2, 2023, and issuers will have to comply with the Listing Standards and adopt compliant executive compensation clawback policies by December 1, 2023. As such, issuers will not have to recover erroneously awarded executive compensation received prior to October 2, 2023.

Non-Compliance

Companies listed on the Nasdaq who are not compliant with Listing Rule 5608, and do not comply within the cure period, may have their listed securities suspended and delisted.

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Issuers listed on the NYSE and NYSE American who are non-compliant with any of the provisions of the Listing Standards and fail to regain

compliance within the relevant cure period may have their listed securities suspended, and delisting procedures commenced.

This communication is intended to provide general information as a service to our clients and should not be construed as legal advice or opinions on specific facts.