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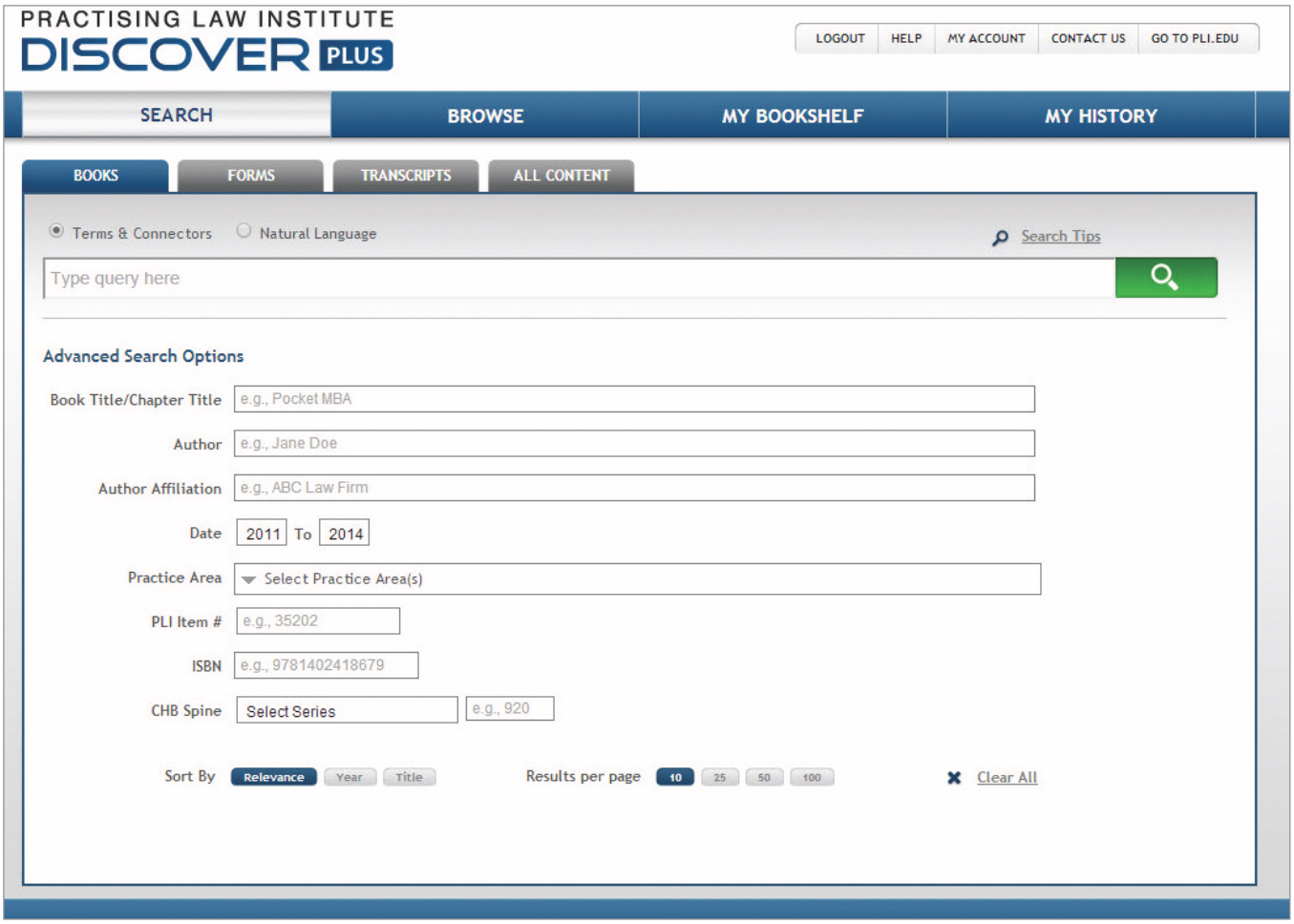

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("compensation recovery" or clawback!) /s "dodd-frank"

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1. CHB Chapter
Shearman & Sterling LLP, SEC Proposes Highly Anticipated Clawback Rules (July 9, 2015)
Title: Understanding the Securities Laws Fall 2015
Author(s): Linda E. Rappaport
Published: 2015
*... requires each issuer to develop its own recovery policy, the recovery right would be a contractual agreement between the issuer and the executive. In contrast, under Section 304 of Sarbanes-Oxley only the government can bring an action to enforce a **clawback**. Further, under **Dodd-Frank**, an issuer would be subject to delisting if it does not adopt, disclose and comply with its **compensation recovery** policy. The proposed rules refer to this excess compensation as "erroneously awarded compensation." A listed issuer would also be required to file the policy as an exhibit to its annual report. ...*
*... Disclosure of a Listed Issuer's Actions to Recover Erroneously Awarded Compensation Although not required by Section 954 of **Dodd-Frank**, the proposed rules add Item 402(w) to Regulation S-K, which would require that, if at any time during a fiscal year an issuer completed a restatement that required recovery of erroneously awarded incentive-based compensation pursuant to the listed issuer's **compensation recovery** ...*
*... Even before the adoption of **Dodd-Frank**, many of the largest US public companies voluntarily implemented **clawback** policies. ...*

2. CHB Chapter
SEC Proposes Compensation Clawback Rules
Title: Hot Issues in Executive Compensation 2015
Author(s): David E. Kahan, Adam J. Shapiro
Published: 2015
*... subject by going to www.pli.edu to view the on demand program or segment for which it was written. The SEC yesterday proposed its long-awaited compensation **clawback** rules under the **Dodd-Frank** Act. The proposed rules would require public companies to adopt and enforce compensation recovery policies that recoup from executive officers incentive compensation resulting from specified accounting restatements. ...*

3. CHB Chapter
Preparing for the 2015 US Proxy and Annual Reporting Season
Title: Annual Disclosure Documents 2014
Author(s): Laura D. Richman
Published: 2014
*... stock exchanges to prohibit the listing of securities if a company does not develop a policy with respect to recovery of incentive-based compensation in certain circumstances. Unlike the comparable Sarbanes-Oxley Act provision, the **clawback** policy under **Dodd-Frank** will need to cover both current and former executive officers, not just the chief executive officer and the chief financial officer. The **Dodd-Frank clawback** ...*
... provision applies to any accounting restatement resulting from material non-compliance, whether or not the

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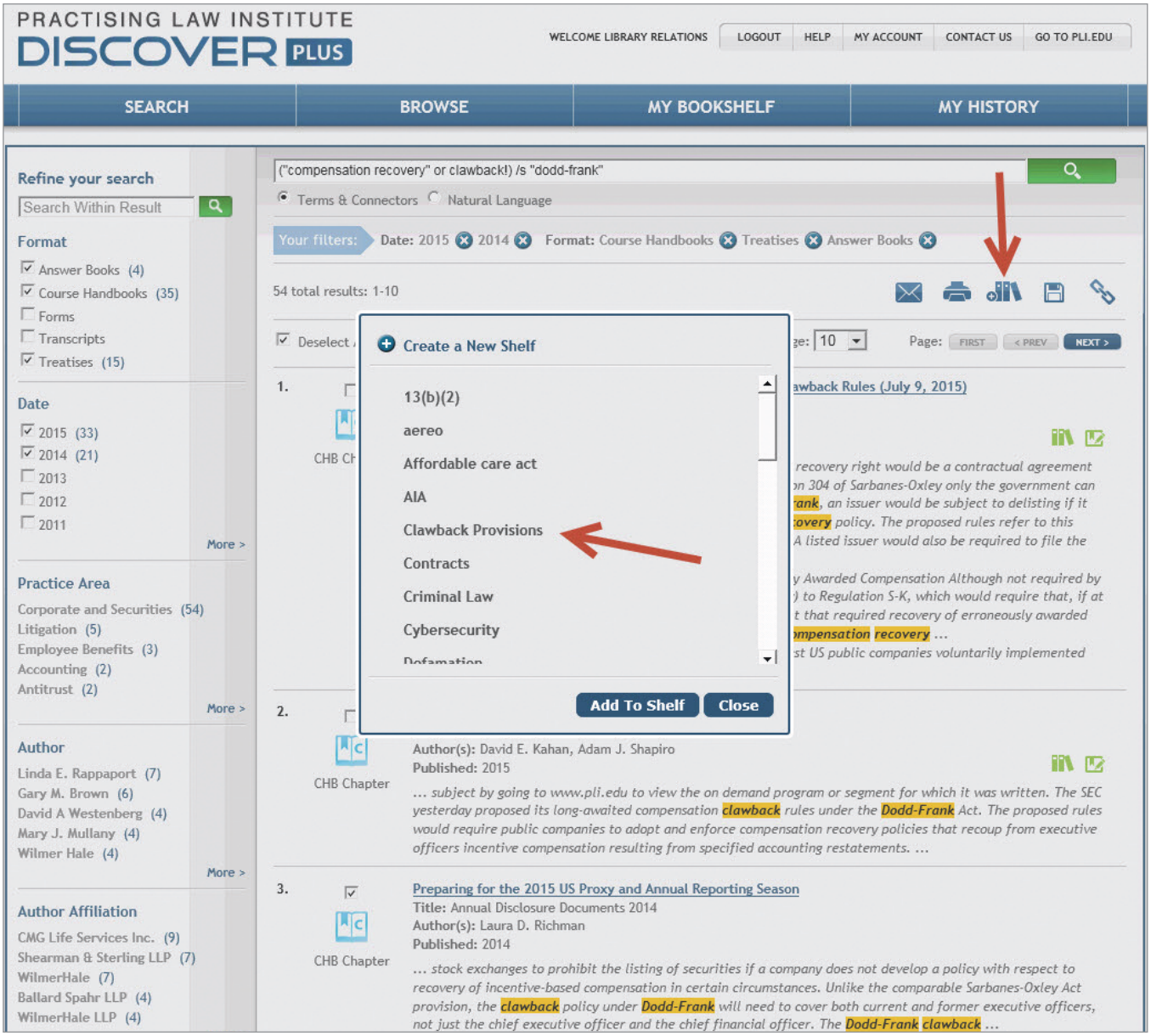

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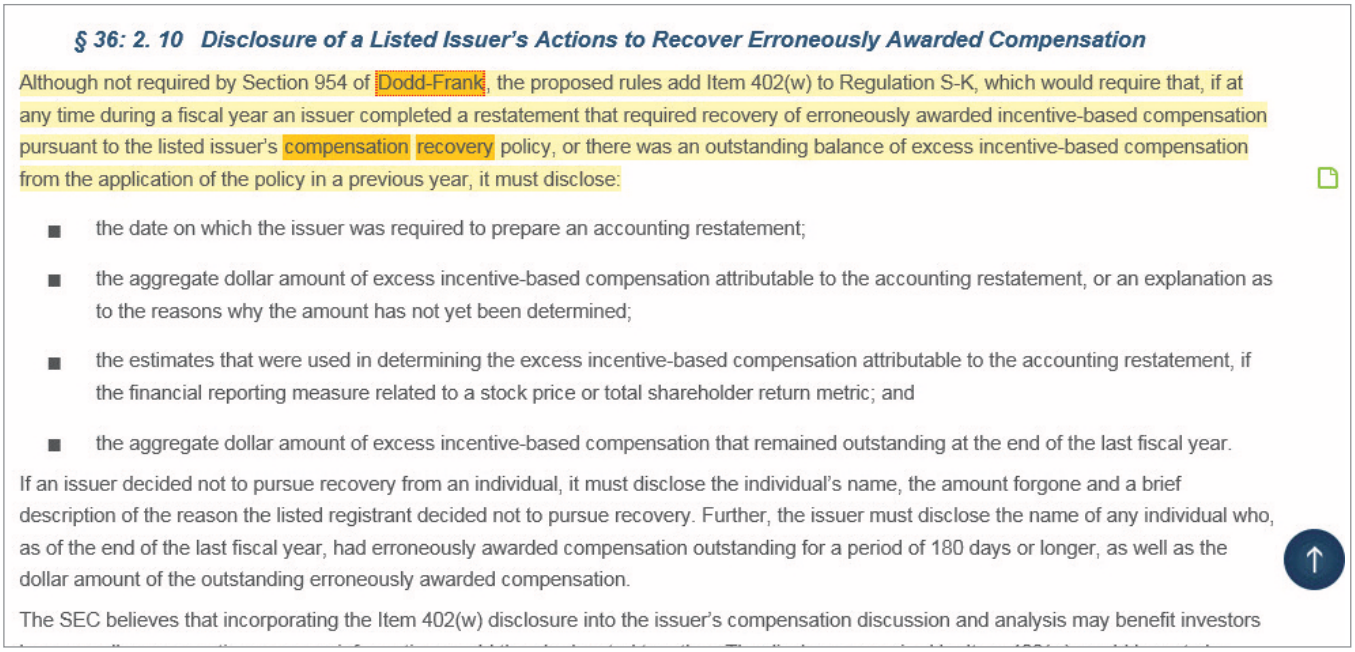

§ 36: 2. 10 Disclosure of a Listed Issuer's Actions to Recover Erroneously Awarded Compensation

Although not required by Section 954 of Dodd-Frank, the proposed rules add Item 402(w) to Regulation S-K, which would require that, if at any time during a fiscal year an issuer completed a restatement that required recovery of erroneously awarded incentive-based compensation pursuant to the listed issuer's compensation recovery policy, or there was an outstanding balance of excess incentive-based compensation from the application of the policy in a previous year, it must disclose:

- the date on which the issuer was required to prepare an accounting restatement;
- the aggregate dollar amount of excess incentive-based compensation attributable to the accounting restatement, or an explanation as to the reasons why the amount has not yet been determined;
- the estimates that were used in determining the excess incentive-based compensation attributable to the accounting restatement, if the financial reporting measure related to a stock price or total shareholder return metric; and
- the aggregate dollar amount of excess incentive-based compensation that remained outstanding at the end of the last fiscal year.

If an issuer decided not to pursue recovery from an individual, it must disclose the individual's name, the amount forgone and a brief description of the reason the listed registrant decided not to pursue recovery. Further, the issuer must disclose the name of any individual who, as of the end of the last fiscal year, had erroneously awarded compensation outstanding for a period of 180 days or longer, as well as the dollar amount of the outstanding erroneously awarded compensation.

The SEC believes that incorporating the Item 402(w) disclosure into the issuer's compensation discussion and analysis may benefit investors

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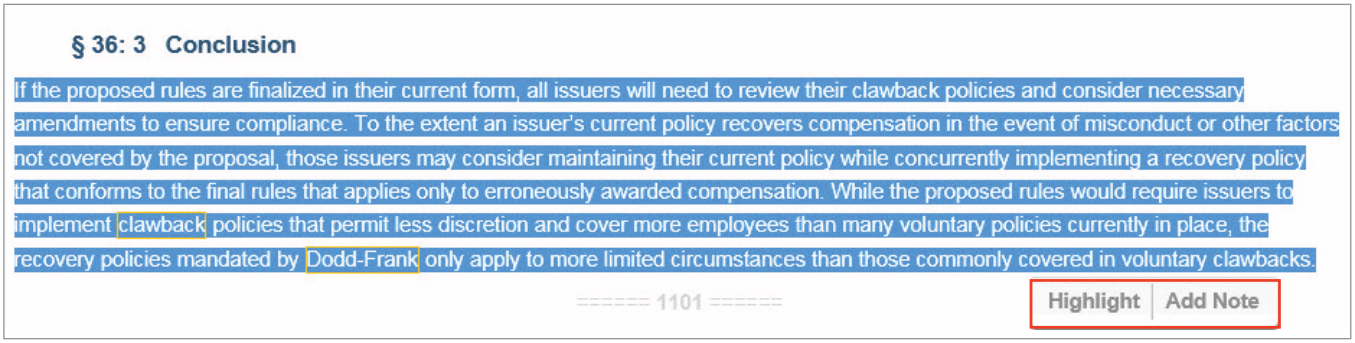

§ 36: 3 Conclusion

If the proposed rules are finalized in their current form, all issuers will need to review their clawback policies and consider necessary amendments to ensure compliance. To the extent an issuer's current policy recovers compensation in the event of misconduct or other factors not covered by the proposal, those issuers may consider maintaining their current policy while concurrently implementing a recovery policy that conforms to the final rules that applies only to erroneously awarded compensation. While the proposed rules would require issuers to implement clawback policies that permit less discretion and cover more employees than many voluntary policies currently in place, the recovery policies mandated by Dodd-Frank only apply to more limited circumstances than those commonly covered in voluntary clawbacks.

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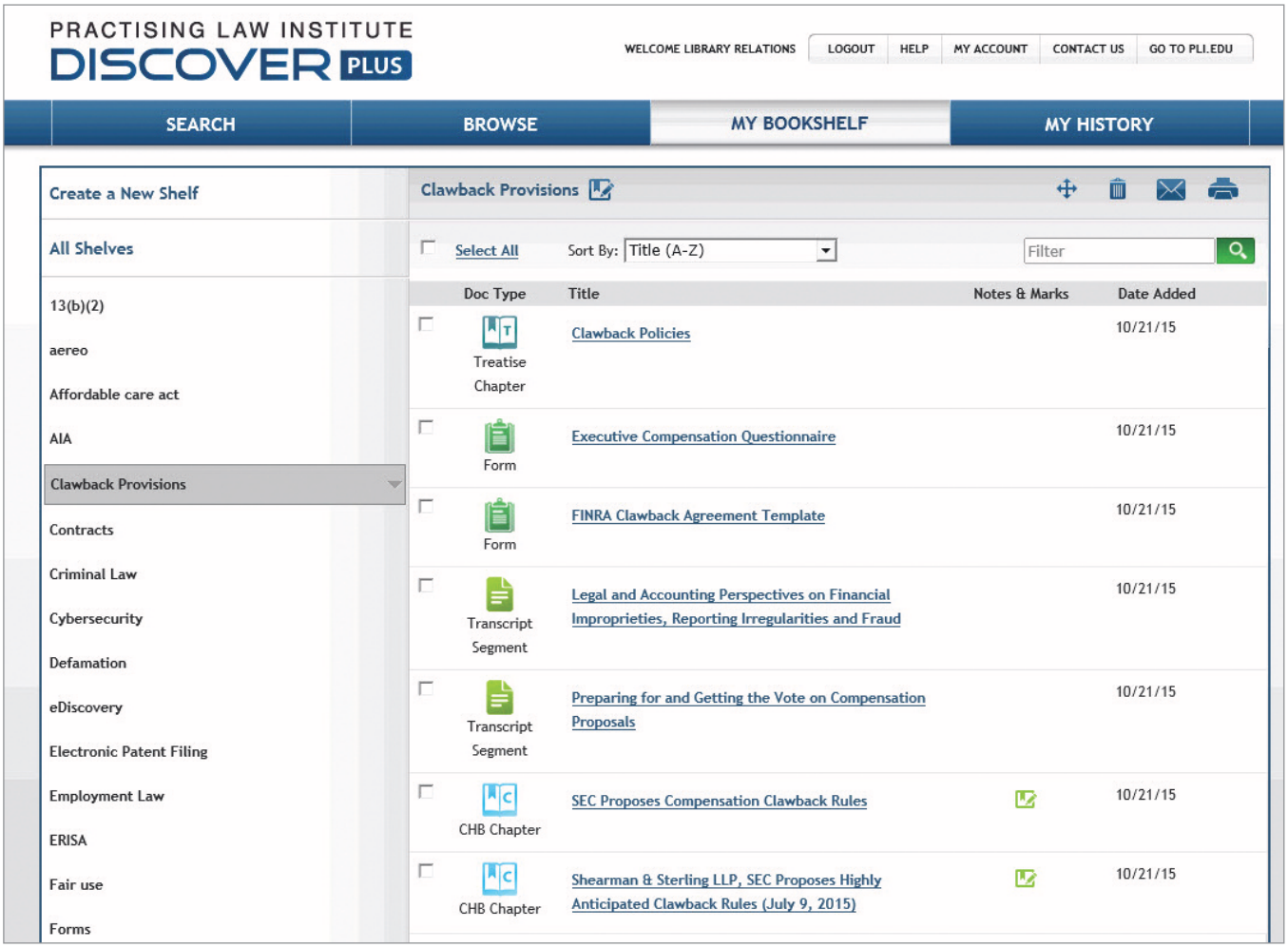

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