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<td>1. Shearman &amp; Sterling LLP, SEC Proposes Highly Anticipated Clawback Rules (July 9, 2015)</td>
<td>Linda E. Rappaport</td>
<td>2015</td>
<td>.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 distilling 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(l) to Regulation S-K, which would require that, 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. ... Even before the adoption of Dodd-Frank, many of the largest U.S. public companies voluntarily implemented clawback policies. ...</td>
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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 foregone 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.

§ 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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