



Executive Compensation and Benefits Alert

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December 1 Deadline Approaches for Listed Companies To Adopt a Dodd-Frank Compliant Clawback Policy

By Friday, December 1, 2023, listed companies must adopt a Dodd-Frank-compliant clawback policy. As background, on February 22, 2023, the New York Stock Exchange (NYSE) and Nasdaq Stock Market (Nasdaq) proposed listing standards implementing the Securities and Exchange Commission's (SEC's) Dodd-Frank rules for recovery of erroneously awarded compensation. Under those policies, listed companies must seek to recover erroneously awarded incentive-based compensation received by covered executives on or after October 2, 2023. The proposed listing standards became effective on October 2, 2023, and listed companies have 60 days following that date, until December 1, 2023, to adopt a compliant policy.

Almost all listed companies, including domestic issuers, foreign private issuers (which also include Canadian multijurisdictional disclosure system (MJDS) filers), emerging growth companies, smaller reporting companies, controlled companies and issuers of listed debt, are subject to the final rules. Certain registered investment companies are excluded to the extent they do not provide incentive-based compensation to their employees.

Each listed company must file its clawback policy as an exhibit to its annual report on Form 10-K, 20-F or 40-F (as applicable). In addition, by December 31, 2023, NYSE-listed companies must confirm via NYSE's online Listing Manager either that the company has adopted a policy by December 1, 2023, or that the company is relying on an applicable exemption.

Companies that fail to adopt a compliant policy by December 1, 2023, are required to promptly notify the applicable exchange of the failure (no later than five days after the failure in the case of NYSE-listed companies). If the exchanges determine that a failure has occurred, the affected company must issue a press release describing the failure and, for NYSE companies, a plan to adopt a compliant policy. Both NYSE and Nasdaq may provide an initial cure period of up to six months (NYSE) or 180 days (Nasdaq) before commencing delisting procedures.

Below is a comparison of the NYSE and Nasdaq notice and cure provisions for failure to adopt a compliant policy or to comply with the clawback requirements:

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	NYSE	Nasdaq
When must a company notify the exchanges of a failure to adopt a compliant policy or to comply with clawback requirements?	<ul style="list-style-type: none"> - Within five (5) days of the failure. - NYSE will promptly notify the company if the exchange determines that a failure to comply has occurred. 	<ul style="list-style-type: none"> - Promptly after the failure. - Nasdaq will immediately notify the company if the exchange determines that a failure to comply has occurred.
When must a company issue a press release disclosing the failure?	Within five (5) days after receipt of the NYSE notice.	Within four (4) business days after receipt of the Nasdaq notice.
What must the press release disclose?	The occurrence of and reason for the failure and the anticipated cure date.	The specific Nasdaq basis, concern and rule upon which the failure is based.
When must a company respond to the exchanges with a plan to restore compliance?	Within five (5) days after receipt of the NYSE notice.	Within 45 days after receipt of the Nasdaq notice.
What is the cure period?	Up to six (6) months, at the discretion of NYSE.	Up to 180 days, at the discretion of Nasdaq.
Can the exchanges grant an extension?	Yes: up to an additional six (6) months, at the discretion of NYSE.	No: Nasdaq will issue a delisting letter following the 180-day cure period (but see appeals process below).
Is there an appeals process?	<ul style="list-style-type: none"> - None has been specified 	<ul style="list-style-type: none"> - Within seven (7) days of receiving a delisting letter, the company may request a hearing before the Hearings Panel. - The Hearings Panel may grant up to 180 days from the date of the delisting letter to cure the failure.

To avoid these consequences, including the issuance of a press release regarding noncompliance, listed companies should prepare to adopt a final Dodd-Frank compliant clawback policy by December 1, 2023.

For more information about the clawback rules and related disclosure requirements, see our previous client alerts “[SEC Adopts Final](#)

[Clawback Rules and Disclosure Requirements](#)” (November 2, 2022) and “[NYSE and Nasdaq Postpone Effective Date of Dodd-Frank Clawback Requirements](#)” (June 9, 2023). Also, recent SEC guidance about the clawback rules is available in the form of [Compliance & Disclosure Interpretations](#) (Section 121H).

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