Cooley

NYSE and Nasdaq Delay Effectiveness of Clawback Listing Standards

June 8, 2023

On Tuesday and Wednesday of this week, the New York Stock Exchange (NYSE) and the Nasdaq Stock Market filed amendments to their proposed clawback policy listing standards. The Securities and Exchange Commission (SEC) has issued an order approving and soliciting public comments on the amendments. Critically, among other revisions, the amendments **delay the effective date of the listing standards** by nearly four months, from June 11, 2023, to October 2, 2023. This means that issuers will have until **December 1, 2023** – 60 days from the new effective date – to adopt and begin enforcing policies regarding the recovery of erroneously awarded, incentive-based compensation received by current and former executive officers. The text of the proposed listing standards, as amended, can be found here: NYSE and Nasdaq.

In their discussions of the amendments, both exchanges stated that the decision to push out the effective date of the listing standards was consistent with the goal of prompt implementation of the final clawback rule, and it also was more in line with issuers' expectations that the proposed standards would take effect one year after the SEC's adoption of the final rule. SEC staff had stated in the adopting release for the final clawback rule that "issuers [would] have more than a year from the date the final rules [were] published in the Federal Register" – i.e., November 28, 2022 – "to prepare and adopt compliant recovery policies."

In addition to delaying the effectiveness of the listing standards and the deadline for policy adoption, the NYSE amendment includes the following updates and clarifications:

- **Cure period for other noncompliance.** The original proposed listing standard (Section 303A.14 of the Listed Company Manual) established a cure period in the event that a listed issuer failed to adopt a clawback policy within the required time period. The amendment also provides for a cure period in the event of other instances of noncompliance with the listing standard, including when the listed issuer has not recovered erroneously awarded compensation reasonably promptly.
- **Clarification regarding covered issuers.** The amendment revises Section 303A.00 of the Listed Company Manual to make it clear that certain categories of listed issuers, including foreign private issuers, are required to comply with the clawback listing standards.

The Nasdaq amendment is more limited in scope and only provides for the delay in the effective date. Both sets of proposed listing standards, as amended, are otherwise substantively unchanged from the original NYSE and Nasdaq proposals.

Issuers will now have adequate time to prepare for the application of the listing standards and the development of recovery policies, including – in some cases – the renegotiation of certain contracts and review of equity grant documentation. Although companies now have more breathing room to adopt clawback policies, the additional time should be used to thoughtfully evaluate the appropriate go-forward approach for compliance with the rules. Delayed effectiveness also means that it may be easier to present a compliant policy to the board or compensation committee for adoption at a regularly scheduled board or committee meeting in the fall, rather than being forced to convene an off-cycle board or committee meeting.

For more information about the final clawback rule, related disclosure requirements and applicable SEC Compliance and Disclosure Interpretations, please refer to our October 2022 client alert on the final clawback rule and these PubCo blog posts – SEC adopts final rules on compensation clawbacks in the event of financial restatements – 'Big R' and 'little r' (October 2022), Corp Fin issues new CDIs regarding the clawback rules (January 2023) and SEC posts NYSE and Nasdaq proposals for clawback listing standards (March 2023).

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a

substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our legal notices.

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.