
SEWARD & KISSEL LLP

MEMORANDUM

TO: Seward & Kissel Capital Markets Clients

SUBJECT: Implementation of Clawback Policy

DATE: September 18, 2023

Introduction

The Securities and Exchange Commission (the “SEC”) has approved the New York Stock Exchange (“NYSE”) and The Nasdaq Stock Market (“Nasdaq,” and together with NYSE, the “Exchanges”) amended proposed clawback listing standards, which become effective on October 2, 2023. This means that all U.S. domestic companies and foreign private issuers listed on the Exchanges will be required to adopt compliant clawback policies no later than December 1, 2023. Set forth below is a summary of the applicable rules, a sample clawback policy and other related information.

Background

On October 26, 2022, the SEC, implementing a requirement of Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), adopted a final rule requiring the recovery of erroneously awarded incentive-based executive compensation. Rule 10D-1 of the Securities Exchange Act of 1934, as amended (“Rule 10D-1”) directs national securities exchanges and associations to establish listing standards that require a listed issuer to:

- adopt and comply with a written policy for the recovery of erroneously awarded incentive-based compensation received by current or former executive officers in the event the issuer is required to prepare an accounting restatement; and
- file the clawback policy as an exhibit to its annual report, indicate whether any restatements require a recovery analysis and disclose any actions it has taken to pursue any such recoveries.

A clawback may be triggered by either of the two types of accounting restatements: (1) “Big R” or “reissuance” restatements, which restate historical financial statements to update or correct material errors or omissions from prior periods, or (2) “little r” or “revision” restatements, where companies correct errors from prior periods that are immaterial to previously issued financial statements, but would result in a material misstatement if left uncorrected or if the correction were to be recognized in a current financial statement. By contrast, when an error is considered immaterial both to the previously issued financial statements and the current period, and it is recorded as an “out-of-period adjustment” in the current financial statements, the clawback would not apply.

The Exchanges filed amendments with the SEC to provide a delayed effective date for the Exchanges’ proposed listing standards requiring listed companies to adopt a clawback policy. Pursuant to the amendments to their respective proposed listing standards, the clawback rules are scheduled to become effective on October 2, 2023 and issuers are required to adopt compliant policies no later than December 1, 2023 (60 days after the effective date). For a summary of the relevant NYSE and Nasdaq rules, please see Schedule I.

Who is Covered by the Clawback Policy?

For U.S. domestic companies, under the listing standards of the Exchanges, the required clawback policy will only need to apply to current and former Section 16 officers. The only technical difference between the definition of a Section 16 officer and the definition of “executive officer” used for other SEC filings is that the definition of Section 16 officer also specifically includes both the principal financial officer and principal accounting officer (or if there is no principal accounting officer, the controller).

For foreign private issuers, who are not subject to Section 16 of the Exchange Act, this will apply to all current or former “executive officers” (also known as “members of senior management”) for purposes of the Form 20-F plus the principal financial officer and principal accounting officer (or, if there is no principal accounting officer, the controller).

Trigger Date for Recovery of Compensation under the Clawback Policy

The policy’s clawback provisions are required to be triggered when the issuer is “required to prepare an accounting restatement due to the material noncompliance with any financial reporting requirement under the securities laws”—meaning a “Big R” or a “little r” restatement. The precise date of this trigger is required to be the date that the company’s board of directors or a committee of the board “concludes or reasonably should have concluded” that the company is required to prepare such an accounting restatement or, if earlier, the date a court, regulator or other legally authorized body directs the issuer to prepare an accounting restatement. In the case of a “Big R” restatement, U.S. domestic companies are required to file the accounting restatement in an Item 4.02(a) Form 8-K and foreign private issuers are required to file the accounting restatement on a Form 6-K, and such accounting restatement is expected to coincide with the trigger date for that filing.

In the case of a “little r” restatement, U.S. domestic companies are not required to make an Item 4.02(a) Form 8-K filing, but instead may make the corrections at the next time the registrant files the prior year financial statements in the company’s annual report on Form 10-K for U.S. domestic companies and Form 20-F for foreign private issuers.

Type of Compensation Covered by the Clawback Policy

Stock options and other equity compensation awards are to be treated as incentive-based compensation only if the granting, vesting, or earning of the award is based (in whole or in part) on the attainment of any financial reporting measures, including, but not limited to, stock price and total shareholder return. Therefore, stock options, stock appreciation rights (SARs), restricted stock, and restricted stock units (“RSUs”) that are granted irrespective of achieving any financial reporting measure and that vest solely on the basis of continued service would not be considered incentive-based compensation. The final rule notes that the following types of compensation (not all-inclusive) would be subject to the recovery policy if they are granted, earned, or vested on the basis of whether a financial reporting measure was attained including, but not limited to, (i) non-equity incentive plan awards, including cash-based incentive awards; (ii) bonuses paid from a “bonus pool”; (iii) restricted stock, RSUs, performance share units, stock options and SARs; and (iv) proceeds received upon the sale of shares acquired through an incentive plan.

Amount of Recovery

The amount of incentive-based compensation that must be recovered under the clawback policy (“erroneously awarded compensation”) is the amount of incentive-based compensation received that exceeds the amount of incentive-based compensation that otherwise would have been received had it been determined based on the restated amounts, and the full pre-tax amount must be recovered without any reduction for any taxes paid.

Time Period Covered for Recovery Assessment

The clawback policy is required to apply to incentive-based compensation “received” during the three completed fiscal years immediately preceding the trigger date (i.e., the date that the company is required to prepare the accounting statement, as noted above). Incentive-based compensation is “received” in the fiscal period during which an applicable financial reporting measure is attained, even if the payment or grant occurs after the end of that period. The final rule gives the following examples illustrating how the date on which compensation is deemed received may vary depending on the terms of an award:

- “If the grant of an award is based, either wholly or in part, on satisfaction of a financial reporting measure performance goal, the award would be deemed received in the fiscal period when that measure was satisfied.”
- “If an equity award vests only upon satisfaction of a financial reporting measure performance condition, the award would be deemed received in the fiscal period when it vests.”

- A cash incentive or other nonequity incentive plan award earned upon attainment of a financial reporting measure is deemed received in the period in which the goal is achieved, rather than upon a later date on which it is paid.

The date on which the award is received may differ from the award's vesting date; for example, an award might be received upon the attainment of the applicable financial reporting measure, even though an applicable additional service-based vesting requirement had not yet been satisfied, such that the grantee had only a contingent right to the award at the time it was "received" for purposes of the clawback rules. Furthermore, any "ministerial" actions or other conditions required to effect issuance or payment (e.g., calculating the amount earned or obtaining compensation committee approval for payment) would not affect the determination of the date on which compensation is deemed received.

Importantly, incentive-based compensation received by an executive officer (1) before the company's securities become listed or (2) before October 2, 2023 would not be subject to the recovery policy. Furthermore, recovery of incentive-based compensation is only required if received (1) after beginning service as an executive officer and (2) if that person served as an executive officer at any time incentive-based compensation is "received." Therefore, recovery of compensation would not be required if received (1) while an individual was serving in a non-executive capacity prior to becoming an executive officer or (2) by an individual who is an executive officer at the time recovery is required if that individual was not an executive officer at any time during the period for which the incentive-based compensation is subject to recovery.

Recovery Process under the Clawback Policy

The policy can allow for discretion with respect to how to pursue the recovery of the compensation, as long as this is done "reasonably promptly", but not whether to pursue recovery of the compensation.

In a number of limited circumstances, subject to satisfying a number of requirements in this regard, recovery may not be required if a compensation committee of independent directors (or, in the absence of such a committee, a majority of the board's independent directors) determines that it would be impracticable to do so. Those circumstances are limited to the following: (1) where the direct expense paid to a third party to assist in enforcing the policy would exceed the amount to be recovered; (2) where recovery would violate home country law adopted prior to the publication of the SEC's final rule; and (3) where recovery could cause tax-qualified retirement plans broadly available to company employees to become disqualified under the U.S. Internal Revenue Code.

Who Needs to Approve the Clawback Policy?

Neither of the Exchanges specify what corporate actions need to be taken or by whom to adopt a Rule 10D-1 policy. Generally, a clawback policy is adopted through a resolution of the board of directors. For many companies, the authority to administer the clawback policy will rest with the board's compensation committee, either through express language in the committee's charter or through a more general allocation of responsibility to the committee for oversight of executive compensation matters. However, some companies may determine that the matter is better handled by a different or an additional board committee (e.g., audit committee or governance committee) or, after a review of applicable committee charter language, may determine that the full board of directors should approve or ratify approval of the Rule 10D-1 policy. After its adoption, the clawback policy may be incorporated into the operative documents including, but not limited to, the following: (i) shareholder-approved equity incentive plans and arrangements and corresponding award agreements; (ii) employment agreements and severance agreements; (iii) cash bonus plans or other plans and arrangements; and (iv) governance policies of the board of directors (or committee thereof). The documents may include specific clawback provisions or incorporate an external clawback policy by reference. Companies may wish to include forward-looking provisions in incentive documentation that provide that the compensation under that arrangement is subject to future clawback policies. The SEC lists clawback policies as an example of an item that should be described in a company's Compensation Discussion & Analysis in its annual proxy statement for U.S. domestic issuers and in its annual report on Form 20-F for foreign private issuers.

Next Steps

In view of the Exchanges' proposed listing standards on clawback policies, Seward & Kissel LLP has prepared a sample clawback policy aligned with such standards, which is attached in Annex A to this memorandum. Each listed company should assess and tailor its own clawback policy and consider the text of the final listing rules, along with any additional guidance that may be provided by the staff of the SEC or the Exchanges. Following its adoption, a company's clawback policy that is compliant with the new listing standards will need to be filed as an exhibit to annual reports on Form 10-K or Form 20-F, as applicable.

Additionally, issuers should consider amending their existing incentive-based compensation plans and/or award agreements to enhance the enforceability of their clawback policy once it is adopted and to permit clawbacks going forward, to the extent necessary under applicable law. See Annex B for proposed language.

Issuers should also review governing documents, including bylaws and committee charters, and other statements of board policy or operations, to determine the need for adding provisions in regard to the new clawback requirements and procedures to implement the policy. See Annex C for proposed language. While not required by Exchange rules, companies should consider posting such clawback policy on its website.

If you have any questions or would like additional information regarding these new rules, please let us know.

Annex A
[COMPANY]

POLICY REGARDING THE RECOVERY OF ERRONEOUSLY AWARDED COMPENSATION

I. Introduction

The Board of [COMPANY], a [●] company incorporated under the laws of [●] (the “Company”), is dedicated to maintaining and enhancing a culture that emphasizes integrity and accountability and that reinforces the Company’s pay-for-performance compensation philosophy. In accordance with the applicable rules of [The New York Stock Exchange Listed Company][The Nasdaq Stock Market](the “Exchange Rules”), and Section 10D and Rule 10D-1 of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), the Board has therefore adopted this Policy, which provides for the recoupment, otherwise referred to as “clawback”, of certain erroneously awarded Incentive-Based Compensation from Executive Officers in the event of an Accounting Restatement resulting from material noncompliance with financial reporting requirements under the federal securities laws, and which is intended to comply with Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. All capitalized terms used and not otherwise defined herein shall have the meanings set forth in this Section II.

II. Definitions

- (1) “**Accounting Restatement**” means an accounting restatement due to the material noncompliance of the Company with any financial reporting requirement under the securities laws, including any required accounting restatement to correct an error in previously issued financial statements that is material to the previously issued financial statements (a “Big R” or reissuance restatement), or that would result in a material misstatement if the error were corrected in the current period or left uncorrected in the current period (a “little r” or revision restatement).¹ For the avoidance of doubt, in no event will a restatement of the Company’s financial statements that is not due in whole or in part to the Company’s material noncompliance with any financial reporting requirement under applicable law (including any rule or regulation promulgated thereunder) be considered an Accounting Restatement under this Policy. For example, a restatement due exclusively to a retrospective application of any one or more of the following will not be considered an Accounting Restatement under this Policy: (i) a change in accounting principles; (ii) revision to reportable segment information due to a change in the structure of the Company’s internal organization; (iii) reclassification due to a discontinued operation; (iv) application of a change in reporting entity, such as from a reorganization of entities under common control; (v) adjustment to provisional amounts in connection with a prior business combination (but only if the Company is an International Financial Reporting Standards (“IFRS”) filer); and (vi) revision for stock splits, reverse stock splits, stock dividends or other changes in capital structure.
- (2) “**Board**” means the Board of Directors of the Company.
- (3) “**Clawback Eligible Incentive Compensation**” means all Incentive-Based Compensation Received by an Executive Officer (i) on or after the effective date of the applicable Exchange rules adopted in order to comply with Rule 10D-1,² (ii) after beginning service as an Executive Officer, (iii) who served as an Executive Officer at any time during the applicable performance period relating to the applicable Incentive-Based Compensation (whether or not such Executive Officer is serving as such at the time the Erroneously Awarded Compensation is required to be repaid to the Company), (iv) while the Company has a class of securities

¹ The SEC explicitly noted in Release No. 33-11126 that the final clawback rules reflect a broader construction of the phrase ‘accounting restatement’ due to the material noncompliance of the company with any financial reporting requirement under the securities laws based upon the fact that “both types of restatements are caused by *material* misstatements that either already exist or would exist in the current period.” However, an out-of-period of adjustment – when the error is immaterial to the previously issued financial statements, and the correction of the error is *also immaterial* to the current period – does not trigger a compensation recovery under this Policy because it is not an “accounting restatement.”

² Page 124 of SEC Release No. 11196 states that each company is required to comply with the recovery policy for all incentive-based compensation received “on or after the effective date of the applicable listing standard.”

listed on a national securities exchange or a national securities association, and (v) during the applicable Clawback Period (as defined below).

- (4) “**Clawback Period**” means, with respect to any Accounting Restatement, the three completed fiscal years of the Company immediately preceding the Restatement Date (as defined below), and if the Company changes its fiscal year, any transition period of less than nine months within or immediately following those three completed fiscal years.³
- (5) “**Committee**” means the Compensation Committee of the Company (if composed entirely of independent directors, or in the absence of such a committee, a majority of independent directors serving on the Board⁴).
- (6) “**Erroneously Awarded Compensation**” means, with respect to each Executive Officer in connection with an Accounting Restatement, the amount of Clawback Eligible Incentive Compensation that exceeds the amount of Incentive-Based Compensation that otherwise would have been Received had it been determined based on the restated amounts, computed without regard to any taxes paid.⁵
- (7) [“**Exchange**” means [The Nasdaq Stock Market][the New York Stock Exchange].]
- (8) “**Executive Officer**” means each individual who is (a) a current or former executive officer, as determined by the Committee (as defined below) in accordance with Section 10D and Rule 10D-1 of the Exchange Act and the listing standards of the Exchange, (b) a current or former employee who is classified by the Committee as an executive officer of the Company, which includes without limitation any of the Company’s president, principal financial officer, principal accounting officer (or if there is no such accounting officer, the controller), vice president in charge of a principal business unit, division or function (such as sales, administration or finance), and any other person who performs policy-making functions for the Company (including executive officers of a parent or subsidiary if they perform policy-making functions for the Company), and (3) an employee who may from time to time be deemed subject to the Policy by the Committee. For the avoidance of doubt, the identification of an executive officer for purposes of this Policy shall include each executive officer who is or was identified pursuant to Item 401(b) of Regulation S-K or Item 6.A of Form 20-F, as applicable.
- (9) “**Financial Reporting Measures**” means measures that are determined and presented in accordance with the accounting principles used in preparing the Company’s financial statements, and all other measures that are derived wholly or in part from such measures. Stock price and total shareholder return (and any measures that are derived wholly or in part from stock price or total shareholder return) shall, for purposes of this Policy, be considered Financial Reporting Measures. For the avoidance of doubt, a Financial Reporting Measure need not be presented in the Company’s financial statements or included in a filing with the SEC.
- (10) “**Incentive-Based Compensation**” shall have the meaning set forth in Section III below.

³ A transition period comprising a period of nine to 12 months would be deemed a completed fiscal year. The Company’s obligation to recover Erroneously Awarded Compensation is not dependent on if or when the Accounting Restatement is filed.

⁴ Following its adoption by the Board, we generally recommend that this Policy be overseen by a fully independent compensation committee or a majority of independent directors serving on the Board. This is because, as specified on page 95 of SEC Release No. 33-11126, any determination that recovery would be impracticable must be made by a fully independent compensation committee, or in the absence of such a compensation committee, the determination must be made by a majority of the independent directors serving on the board.

⁵ For an example of the calculation, see Footnotes 235 (e.g., “assume a situation in which, based on the financial reporting measure as originally reported, the amount of the award was \$3,000. However, the company exercised negative discretion to pay out only \$2,000. Following the restatement, the amount of the award based on the corrected financial reporting measure is \$1,800. Taking into account the company’s exercise of negative discretion, the amount of recoverable erroneously awarded compensation would be \$200 (i.e., \$2,000 - \$1,800)”) and 237 (e.g., “assume a situation in which, based on the financial reporting measure as originally reported, the amount of the award was \$3,000. The issuer exercised positive discretion to increase the amount by \$1,000, paying out a total of \$4,000. Following the restatement, the amount of the award based on the corrected financial reporting measure is \$1,800. Taking into account the issuer’s exercise of positive discretion, the amount of erroneously awarded compensation that would be recoverable would be \$1,200, provided that based on the revised measurement, the exercise of positive discretion to increase the amount by \$1,000 was still permitted under the terms of the plan (i.e., \$4,000 - (\$1,800 + \$1,000)”) of SEC Release No. 33- 11126. For further guidance on the calculation, see text accompanying Footnotes 243 and 244 of SEC Release No. 33- 11126 regarding cash awards, pool plans and equity awards.

- (11) “*Exchange Effective Date*” means October 2, 2023.
- (12) “*Policy*” means this Clawback Policy, as the same may be amended and/or restated from time to time.
- (13) Incentive-Based Compensation will be deemed “*Received*” in the Company’s fiscal period during which the Financial Reporting Measure specified in the Incentive-Based Compensation documentation is attained, even if (a) the payment or grant of the Incentive-Based Compensation to the Executive Officer occurs after the end of that period or (b) the Incentive-Based Compensation remains contingent and subject to further conditions thereafter, such as time-based vesting.
- (14) “*Restatement Date*” means the earlier to occur of (i) the date the Board, a committee of the Board, or the officer(s) of the Company authorized to take such action if Board action is not required, concludes, or reasonably should have concluded, that the Company is required to prepare an Accounting Restatement, or (ii) the date a court, regulator or other legally authorized body directs the Company to prepare an Accounting Restatement.
- (15) “*SARs*” means shareholder appreciate rights.
- (16) “*SEC*” means the U.S. Securities and Exchange Commission.

III. Incentive-Based Compensation⁶

“Incentive-Based Compensation” shall mean any compensation that is granted, earned or vested wholly or in part upon the attainment of a Financial Reporting Measure.

For purposes of this Policy, specific examples of Incentive-Based Compensation include, but are not limited to:

- Non-equity incentive plan awards that are earned based, wholly or in part, based on satisfaction of a Financial Reporting Measure performance goal;
- Bonuses paid from a “bonus pool,” the size of which is determined, wholly or in part, based on satisfaction of a Financial Reporting Measure performance goal;
- Other cash awards based on satisfaction of a Financial Reporting Measure performance goal;
- Restricted stock, restricted stock units, performance share units, stock options and SARs that are granted or become vested, wholly or in part, on satisfaction of a Financial Reporting Measure performance goal; and
- Proceeds received upon the sale of shares acquired through an incentive plan that were granted or vested based, wholly or in part, on satisfaction of a Financial Reporting Measure performance goal.

For purposes of this Policy, Incentive-Based Compensation excludes:

- Any base salaries (except with respect to any salary increases earned, wholly or in part, based on satisfaction of a Financial Reporting Measure performance goal);
- Bonuses paid solely at the discretion of the Committee or Board that are not paid from a “bonus pool” that is determined by satisfying a Financial Reporting Measure performance goal;
- Bonuses paid solely upon satisfying one or more subjective standards and/or completion of a specified employment period;
- Non-equity incentive plan awards earned solely upon satisfying one or more strategic measures (e.g., consummating a merger or divestiture) or operational measures (e.g., completion of a project, [acquiring a specified number of vessels,] attainment of a certain market share); and
- Equity awards that vest solely based on the passage of time and/or satisfaction of one or more non-Financial Reporting Measures (e.g., a time-vested award, including time-vesting stock options or restricted share rights).

IV. Administration and Interpretation

This Policy shall be administered by the Committee and/or the Board, and any determinations made by the Committee and the Board shall be final and binding on all affected individuals. The Committee and/or the Board shall determine

⁶ Please see examples page 64 and 65 of SEC Release.

the amount of any Erroneously Awarded Compensation Received by each Executive Officer and shall promptly deliver written notice to each Executive Officer containing the amount of any Erroneously Awarded Compensation and a demand for repayment or return of such compensation, as applicable. For the avoidance of doubt, recovery of Erroneously Awarded Compensation is on a “no fault” basis, meaning that it will occur regardless of whether the Executive Officer engaged in misconduct or was otherwise directly or indirectly responsible, in whole or in part, for the Accounting Restatement.

The Committee is authorized to interpret and construe this Policy and to make all determinations and to take such actions as may be necessary, appropriate, or advisable for the administration of this Policy and for the Company’s compliance with the Exchange Rules, Section 10D, Rule 10D-1 and any other applicable law, regulation, rule or interpretation of the SEC or the Exchange promulgated or issued in connection therewith.

V. Recovery of Erroneously Awarded Compensation⁷

- (1) In the event of an Accounting Restatement, the Committee shall promptly determine in good faith the amount of any Erroneously Awarded Compensation Received in accordance with the Exchange Rules and Rule 10D-1 for each Executive Officer in connection with such Accounting Restatement and shall promptly thereafter provide each Executive Officer with a written notice containing the amount of Erroneously Awarded Compensation (without regard to any taxes paid thereon by the Executive Officer) and a demand for repayment or return, as applicable.
 - a. Cash Awards. With respect to cash awards, the Erroneously Awarded Compensation is the difference between the amount of the cash award (whether payable as a lump sum or over time) that was Received and the amount that should have been received applying the restated Financial Reporting Measure.
 - b. Cash Awards Paid from Bonus Pools. With respect to cash awards paid from bonus pools, the Erroneously Awarded Compensation is the pro rata portion of any deficiency that results from the aggregate bonus pool that is reduced based on applying the restated Financial Reporting Measure.
 - c. Equity Awards. With respect to equity awards, if the shares, options or SARs are still held at the time of recovery, the Erroneously Awarded Compensation is the number of such securities Received in excess of the number that should have been received applying the restated Financial Reporting Measure (or the value in excess of that number). If the options or SARs have been exercised, but the underlying shares have not been sold, the Erroneously Awarded Compensation is the number of shares underlying the excess options or SARs (or the value thereof). If the underlying shares have already been sold, then the Committee and/or Board shall determine the amount which most reasonably estimates the Erroneously Awarded Compensation.
 - d. Compensation Based on Stock Price or Total Shareholder Return⁸. For Incentive-Based Compensation based on (or derived from) stock price or total shareholder return, where the amount of Erroneously Awarded Compensation is not subject to mathematical recalculation directly from the information in the applicable Accounting Restatement, (i) the amount shall be determined by the Committee and/or Board based on a reasonable estimate of the effect of the Accounting Restatement on the stock price or total shareholder return upon which the Incentive-Based Compensation was Received; and (ii) the Committee and/or Board shall maintain documentation of such determination of that reasonable estimate and provide such documentation to the Exchange in accordance with applicable listing standards.
- (2) The Committee shall have discretion to determine the appropriate means of recovering Erroneously Awarded Compensation based on the particular facts and circumstances.⁹ Notwithstanding the

⁷ Please see Page 79 of SEC Release.

⁸ Please see page 71 of SEC Release.

⁹ The Company must pursue the recovery of the compensation subject to this Policy “reasonably promptly.” The rule does not adopt a definition of “reasonably promptly.” However, the SEC expects that companies and their officers and directors, in the exercise of their fiduciary duty to safeguard the assets of the company (including the time value of any potentially recoverable compensation), will pursue the most appropriate balance of cost and speed in determining the appropriate means to seek recovery. Moreover, the rules do not prevent a company from securing recovery through means that are appropriate based on the particular facts and circumstances of each executive officer that owes a recoverable amount. For example, a company may be acting reasonably promptly in establishing a deferred payment plan that allows the Executive Officer to repay owed erroneous

foregoing, except as set forth in Section VI below, in no event may the Company accept an amount that is less than the amount of Erroneously Awarded Compensation in satisfaction of an Executive Officer's obligations hereunder.

- (3) To the extent that the Executive Officer has already reimbursed the Company for any Erroneously Awarded Compensation Received under any duplicative recovery obligations established by the Company or applicable law, it shall be appropriate for any such reimbursed amount to be credited to the amount of Erroneously Awarded Compensation that is subject to recovery under this Policy. To the extent that the Erroneously Awarded Compensation is recovered under a foreign recovery regime, the recovery would meet the obligations of Rule 10D-1.
- (4) To the extent that an Executive Officer fails to repay all Erroneously Awarded Compensation to the Company when due, the Company shall take all actions reasonable and appropriate to recover such Erroneously Awarded Compensation from the applicable Executive Officer. The applicable Executive Officer shall be required to reimburse the Company for any and all expenses reasonably incurred (including legal and other collection related fees) by the Company in recovering such Erroneously Awarded Compensation.

VI. Discretionary Recovery

Notwithstanding anything herein to the contrary, the Company shall not be required to take the actions contemplated by Section V above if the Committee determines that recovery would be impracticable and any of the following [two][three] conditions are met.

- (1) The Committee has determined that the direct expenses, such as reasonable legal expenses and consulting fees, paid to a third party to assist in enforcing the Policy would exceed the amount to be recovered. In order for the Committee to make this determination, the Company must make a reasonable attempt to recover the Erroneously Awarded Compensation, document such attempt(s) to recover, and provide such documentation to the Exchange;
- (2) [Recovery would violate home country law where that law was adopted prior to November 28, 2022, provided that, before determining that it would be impracticable to recover any amount of Erroneously Awarded Compensation based on violation of home country law, the Company has obtained an opinion of home country counsel, acceptable to the Exchange, that recovery would result in such a violation and a copy of the opinion is provided to Exchange;]¹⁰
- (3) Recovery would likely cause an otherwise tax-qualified retirement plan, under which benefits are broadly available to employees of the Company, to fail to meet the requirements of Section 401(a)(13) or Section 411(a) of the Internal Revenue Code of 1986, as amended, and regulations thereunder.

In the event that an Executive Officer engages in Detrimental Conduct (as defined below) that, in the sole discretion of the Committee, is likely to cause or has caused material financial, operational, or reputational harm to the Company or one or more of its affiliates, the Committee may recover or cause to be forfeited up to 100% of the Incentive-Based Compensation (without regard to any taxes paid thereon by the Executive Officer) received by or payable to the Executive Officer, and not just the recovery amounts described in Section V. "Detrimental Conduct"¹¹ consists of:

- (1) The commission of an act of fraud, misappropriation or embezzlement in the course of employment;
- (2) The commission of a criminal act, whether or not in the course of employment or in the workplace, that constitutes a felony (or substantial equivalent thereof in a non-US jurisdiction) or other serious crime involving moral turpitude, dishonesty, or fraud;
- (3) The material violation of a non-compete, non-solicitation, or confidentiality agreement;

compensation as soon as possible without unreasonable economic hardship to the Executive Officer, depending on the particular facts and circumstances. See Footnotes and text accompanying Footnotes 303 and 304 in SEC Release No. 33-11126 (which footnotes also specify that a deferred repayment plan would generally not be a prohibited personal loan, but that unpaid amounts would be subject to disclosure under Item 402 of Regulation S-K).

¹⁰ Include for foreign private issuers if local counsel determines this to be the case. Delete for a U.S. domestic company.

¹¹ Company to consider whether it might want a more expansive recovery capacity in respect to case of Detrimental Conduct, so as to be able to recover beyond just the limited amounts within the Incentive-Based Compensation definition (e.g., discretionary bonuses, equity-compensation with time-based vesting only).

- (4) The material breach of the Company’s Code of Ethics that could give rise to dismissal thereunder; or
- (5) Any act or omission that resulted in such Executive Officer’s termination for [Cause (as defined below)].

For the purposes of this Policy, “Cause” shall, as of any applicable date of determination, have the meaning ascribed to such term in the agreement and/or plan governing the most recent equity (or other long-term incentive) award granted to the applicable Executive Officer.]

VII. Recoupment Period Covered and Amount

If an Accounting Restatement occurs, the Committee shall review all Incentive-Based Compensation that was granted, vested or earned on the basis of having met or exceeded Financial Reporting Measures and that was Received by an Executive Officer during the Clawback Period. With respect to each Executive Officer, the Committee shall, as provided under this Policy, seek to require the forfeiture or repayment of (1) the Erroneously Awarded Compensation, whether vested or unvested and including proceeds received upon the sale of shares acquired through an incentive plan that were granted or vested based wholly or in part on satisfying a Financial Reporting Measure, Received during the Clawback Period in the event of an Accounting Restatement, and (2) to the extent the Executive Officer engages in Detrimental Conduct, applicable Incentive-Based Compensation received thereafter.

Compensation shall be deemed to have been Received in the fiscal period in which the Financial Reporting Measure is attained, even if the Incentive-Based Compensation is not actually paid until a later date or where the compensation is subject to additional service-based or non-financial goal-based vesting conditions after the period ends. The amount to be recovered will be as provided for in this Policy.

VIII. Method of Recovery of Erroneously Awarded Compensation

The Committee will determine, in its sole discretion, the method for recovering Erroneously Awarded Compensation hereunder, which may include, without limitation:

- (1) Requiring reimbursement of cash Incentive-Based Compensation previously paid;
- (2) Seeking recovery of any gain realized on the granting, vesting, exercise, settlement, sale, transfer or other disposition of any equity or equity-based awards;
- (3) Offsetting the recouped amount from any compensation otherwise owed by the Company or its affiliates to the Executive Officer;
- (4) Cancelling outstanding vested or unvested equity or equity-based awards and/or reducing outstanding future payments due or possibly due in respect of amounts already Received; and/or
- (5) Taking any other remedial and recovery action permitted by law, as determined by the Committee.

IX. Disclosure Requirements

The Company shall file all disclosures with respect to this Policy in accordance with the requirements of the federal securities laws, including the disclosure required by the rules and applicable filings required to be made with the SEC.¹²

X. No Indemnification

The Company shall not be permitted to insure or indemnify any Executive Officer against (i) the loss of any Erroneously Awarded Compensation that is repaid, returned or recovered pursuant to the terms of this Policy, or (ii) any claims relating to the Company’s enforcement of its rights under this Policy. Further, the Company shall not enter

¹² Several SEC disclosure requirements have been amended in connection with the adoption of Rule 10D-1, 601(b) of Regulation S-K (and the amended Form 20-F for foreign private issuers) requires this Policy to be filed as an exhibit to the Form 10-K (or Form 20-F). Amended Item 402(w) of Regulation S-K (and Item 6.F of Form 20-F) requires disclosure if at any time the company was required to prepare an Accounting Restatement. However, the amendment to Item 404(a) of Regulation S-K (and Item 7.B of Form 20-F for foreign private issuers) provides that a company complying with its Item 402(w) of Regulation S-K disclosure (or Item 6.F of Form 20-F, as applicable) requirements need *not* disclose any incentive-based compensation recovery pursuant to Item 404(a) of Regulation S-K (or Item 7.B of Form 20-F, as applicable).

into any agreement that exempts any Incentive-Based Compensation that is granted, paid or awarded to an Executive Officer from the application of this Policy or that waives the Company's right to recovery of any Erroneously Awarded Compensation, and this Policy shall supersede any such agreement (whether entered into before, on or after the Effective Date of this Policy). While an Executive Officer may purchase a third-party insurance policy to fund potential recovery obligations under this Policy, the Company may not pay or reimburse the Executive Officer for premiums for such an insurance policy.

XI. Effective Date

This Policy shall be effective as of the Exchange Effective Date.

XII. Amendment; Termination

The Committee and thereafter, the Board, may amend this Policy from time to time in its discretion and shall amend this Policy as it deems necessary to comply with the requirements of any federal securities laws, SEC rule or the rules of any national securities exchange or national securities association on which the Company's securities are then listed. Notwithstanding anything in this Section XII to the contrary, no amendment or termination of this Policy shall be effective if such amendment or termination would (after taking into account any actions taken by the Company contemporaneously with such amendment or termination) cause the Company to violate any federal securities laws, SEC rule, or the rules of any national securities exchange or national securities association on which the Company's securities are then listed.

XIII. Other Recovery Rights

This Policy will be applied to the fullest extent of the law.¹³ The Board and/or the Committee may, to the fullest extent of the law, require that any employment agreement, equity award agreement, or other plan, agreement or arrangement providing for incentive compensation shall, as a condition to the grant, receipt or vesting of any benefit thereunder, require an Executive Officer to agree to abide by the terms of this Policy, including requiring the execution of the attestation and acknowledgement set forth in Exhibit A to this Policy. Any right of recoupment under this Policy is in addition to, and not in lieu of, any other remedies or rights of recoupment that may be available to the Company pursuant to the terms of any similar policy in any employment agreement, equity or equity-based plan or award agreement, or other plan, agreement or arrangement providing for incentive compensation and any other legal remedies available to the Company. However, this Policy shall not provide for recovery of Incentive-Based Compensation that the Company has already recovered pursuant to Section 304 of the Sarbanes-Oxley Act or other recovery obligations.

XIV. Successors

This Policy shall be binding and enforceable against all Executive Officers and their beneficiaries, heirs, executors, administrators, permitted transferees, permitted assignees or other legal representatives, and shall inure to the benefit of any successor[or assignee] of the Company.

¹³ It is already common for compensatory agreements and plans to include language providing that certain compensation may be subject to clawback policies adopted by a company from time to time. Accordingly, companies should review their compensatory agreements and plans to confirm the existing language on this point in place and any appropriate adjustments in the future.

Exhibit A

**ATTESTATION AND ACKNOWLEDGEMENT OF POLICY REGARDING THE RECOVERY OF
ERRONEOUSLY AWARDED COMPENSATION**

By my signature below, I acknowledge and agree that:

- I have received and read the attached Policy Regarding the Recovery of Erroneously Awarded Compensation (this "*Policy*").
- I hereby agree to abide by all of the terms of this Policy both during and after my employment with the Company, including, without limitation, by promptly repaying or returning any Erroneously Awarded Compensation to the Company as determined in accordance with this Policy.

Signature: _____

Printed Name: _____

Date: _____

Annex B

Sample Proposed Language to Include in Executive Incentive-Based Compensation Arrangements¹⁴

Clawback Policy: The Company has adopted[one or more policies, including] a policy in accordance with the listing standards of the national securities exchange or association on which the Company’s securities are listed, or as is otherwise required by the Dodd-Frank Wall Street Reform and Consumer Protection Act, as amended, the Securities Exchange Act of 1934, as amended, and rules promulgated thereunder by the U.S. Securities Exchange Commission or any other applicable law, providing that, in the event the Company is required to prepare an accounting restatement due to material noncompliance with any financial reporting requirements under the securities laws or otherwise erroneous data or the Company determines there has been a significant misconduct that causes material financial, operational or reputational harm¹⁵, the Company shall be entitled to recover a portion or all of any incentive-based compensation provided to certain individuals ([any and all such policies, collectively,]the “**Clawback Policy**”). Notwithstanding any other provision of this [Plan][Award[Agreement]][Agreement] to the contrary, any[incentive-based]¹⁶ compensation granted, earned or vested hereunder, including any[cash incentive-based compensation granted to or received by the [participant][award recipient/grantee][employee]¹⁷ hereunder, equity or equity-based awards granted and/or shares issued or cash received in connection therewith to the [participant][award recipient/grantee][employee] hereunder, and/or any amount received with respect to any sale of any such shares]¹⁸, shall be subject to potential cancellation, recoupment, rescission, payback or other action in accordance with the terms of the Company’s Clawback Policy, as it may be amended from time to time. By accepting[an award under this Plan][the grant of this [Award[Agreement]]][the terms of this Agreement], the [participant][award recipient/grantee][employee] agrees and consents to the Company’s application, implementation and enforcement of: (a) the Clawback Policy and/or any similar policy established by the Company that may apply to the [participant][award recipient/grantee][employee] and (b) any provision of applicable law relating to the cancellation, rescission, payback or recoupment of compensation, and expressly agrees that the Company may take such actions as are necessary to effectuate the Clawback Policy, any similar policy (as applicable to the [participant][award recipient/grantee][employee]) or applicable law without further consent or action being required by the [participant][award recipient/grantee][employee]. To the extent that the terms of this [Plan][Award[Agreement]][Agreement] and the Clawback Policy or any similar policy conflict, then the terms of such policy shall prevail.

¹⁴ Depending upon other possible applicable clawback policies in place, and the type of plan, award or agreement, consider conferring with legal counsel to ensure applicable coverage and terms are included herein.

¹⁵ Consider whether the Company already has a separate and more expansive clawback policy in place in respect of detrimental actions, or if the Company might want to add such an additional policy in the future, and if so, whether the language herein might require any modification to reflect such other, more expansive policies.

¹⁶ If the clawback policies were to be more expansive than just the Rule 10D-1 required policy, such that eligible compensation for clawback may be more expansive than just “incentive-based compensation”, then it may be appropriate to delete the bracketed language here (i.e., “incentive-based”).

¹⁷ Consider if using applicable defined terms may be appropriate.

¹⁸ Company to consider only including certain references within the bracketed language here. For instance, reference to stock may seem out of place in the context of a cash-only bonus plan.

Annex C

Proposed Language to Include in Compensation Committee Charters

To the extent it deems necessary, [the Compensation Committee shall] review and approve the terms of any compensation “clawback” or similar policy or agreement between the Company and the Company’s executive officers or other employees [subject to Section 16 of the Exchange Act]¹⁹.

¹⁹ To be included for U.S. domestic companies only.

NYSE and Nasdaq Comparison

The following table provides a summary of certain relevant aspects of the NYSE and Nasdaq rules regarding the recovery of erroneously awarded compensation, both of which follow the SEC’s final rule:

<u>Question</u>	<u>NYSE</u>	<u>Nasdaq</u>
<p>What rule did the listing exchanges adopt?</p>	<ul style="list-style-type: none"> • New Section 303A.14 prohibits the initial or continued listing of any security of a company that is not in compliance with the clawback rule. • New Section 802.01F would result in the immediate suspension of trading and immediate commencement of delisting procedures for any company that has not recovered erroneously awarded compensation reasonably promptly after a clawback obligation is incurred. 	<ul style="list-style-type: none"> • New Listing Rule 5608 requires companies to adopt a clawback policy, comply with the policy and provide the related disclosures required by the rule and applicable SEC filings. • Amended Listing Rule 5810(c)(2)(A)(iii) would provide that a company that failed to comply with Listing Rule 5608 is required to submit to Nasdaq Staff a plan to regain compliance.
<p>What happens if the company does not comply?</p>	<ul style="list-style-type: none"> • If the NYSE determines that a company has not clawed back erroneously awarded compensation, as required by its policy, reasonably promptly after such obligation is incurred, trading in all listed securities of the company would be immediately suspended and the NYSE would immediately commence delisting procedures. The NYSE will determine whether the steps a company is taking constitute compliance with its clawback policy. • If a company fails to adopt its required clawback policy by the effective date, the company would be required to notify the NYSE in writing within five days. The NYSE will then promptly send written notification to the company of 	<ul style="list-style-type: none"> • If a company does not adopt a compliant clawback policy, disclose the policy as required or comply with the policy’s clawback provisions, then it will be subject to delisting. • Nasdaq will determine whether the steps a company is taking constitute compliance with its clawback policy. The company’s obligation to claw back compensation reasonably promptly will be assessed on a holistic basis with respect to each accounting restatement prepared by the company. Nasdaq will consider whether the company is pursuing an appropriate balance of cost and speed in determining the appropriate means to seek recovery, and whether the company is securing recovery through means that are

	<p>certain procedures, including contacting the NYSE to discuss the status of the policy and issuing a press release disclosing the occurrence of the delinquency.</p>	<p>appropriate based on the particular facts and circumstances of each executive officer who owes a recoverable amount.</p> <ul style="list-style-type: none"> • A noncompliant company is required to submit to Nasdaq Staff a plan to regain compliance, and the administrative process for such deficiencies will follow the established pattern used for similar corporate governance deficiencies and would allow Nasdaq Staff to provide the issuer up to 180 days to cure the deficiency; thereafter, Nasdaq Staff will be required to issue a delisting letter.
<p>What SEC disclosures are required?</p>	<ul style="list-style-type: none"> • Companies must file all disclosures with respect to their clawback policy in accordance with the SEC’s requirements. 	<ul style="list-style-type: none"> • Companies must file all disclosures with respect to their clawback policy in accordance with the SEC’s requirements. In the “purpose” section preceding the proposed rule, Nasdaq expressly provides that each company is required to file its clawback policy as an exhibit to its Exchange Act annual report. In addition, the SEC’s rules under Item 402 of Regulation S-K require additional company disclosure. Please see our client alert here.
<p>What is the notification process for failure to comply with a clawback requirement?</p>	<ul style="list-style-type: none"> • If a company fails to comply with any clawback requirement, it must notify the NYSE within five days. • When the NYSE determines a failure has occurred, the NYSE will promptly notify the company. 	<ul style="list-style-type: none"> • When Nasdaq determines a failure has occurred, it will immediately notify the company.
<p>How long does the company have to issue a press release?</p>	<ul style="list-style-type: none"> • Within five days of receiving notice from the NYSE, the company must issue a press release 	<ul style="list-style-type: none"> • Within four business days of receiving notice from Nasdaq, the company must

	<p>disclosing the failure to comply.</p> <ul style="list-style-type: none"> The press release must disclose the reason for the failure and, if known, the anticipated date by which the failure will be cured. 	<p>issue a press release disclosing the failure.</p> <ul style="list-style-type: none"> The press release must address the specific basis and concern identified by Nasdaq and identify the rule upon which the failure is based.
Is a plan to regain compliance with listing standards required?	<ul style="list-style-type: none"> Within five days of notification from the NYSE, the company must contact the NYSE to discuss the status of curing the failure. 	<ul style="list-style-type: none"> Within 45 days of receiving notice from Nasdaq, the company must submit to Nasdaq a plan for regaining compliance.
How long does the company have to cure the failure?	<ul style="list-style-type: none"> During a period of up to six months from the date of the failure, the NYSE will monitor the company's status of curing the failure. The NYSE, in its sole discretion, may impose a shorter cure period or allow no cure period at all and commence immediate suspension and delisting procedures. 	<ul style="list-style-type: none"> Nasdaq will review the company's plan to regain compliance and may grant an extension of up to 180 days to cure the failure.
Can the exchange grant an extension to cure the failure?	<ul style="list-style-type: none"> If the company fails to cure within the initial cure period, the NYSE may, in its sole discretion, allow the company's securities to be traded for up to an additional six-month period before commencing the suspension and delisting procedures. 	<ul style="list-style-type: none"> After the extension period (if any) of up to 180 days (described immediately above), if the company has not cured the failure, Nasdaq will be required to issue a delisting letter.
Can the decision of the exchange be appealed?	<ul style="list-style-type: none"> No appeals process is outlined. 	<ul style="list-style-type: none"> The company may appeal the delisting letter by requesting a hearing before the Hearings Panel within

		<p>seven days of receiving the delisting letter.</p> <ul style="list-style-type: none">• The Hearings Panel will then review the failure and can grant an extension of up to 180 days from the date of the delisting letter to cure the failure.
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