ALERT

Viewpoint on Executive Compensation

Clawback Rule Effective Date Extension – Time to Prepare is Now

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On April 24, 2023, the Securities and Exchange Commission (SEC) extended the approval date of the stock exchange's clawback listing requirements from April 27, 2023 to June 9, 2023 (the SEC's 45 day extension was to June 11, 2023, but because it is a Sunday, the SEC must act by June 9, 2023). Unless the SEC further extends the approval date, companies will be required to have a compliant clawback policy in place by August 8, 2023 (60 days following the approval date).

When the SEC issued the final clawback rule in October 2022, it gave the impression that the clawback rules would become effective November 28, 2023, and the end of the 60-day compliance period would therefore be February 27, 2024. Here is a brief excerpt from the final Rule:

> *While we acknowledge commenter concerns about the need for adequate time to prepare for the application of the listing standards and the development of appropriate recovery policies, including in some cases the renegotiation of certain contracts,* ***we believe the final rules provide ample time for such preparations. In that regard, we note that issuers will have more than a year from the date the final rules are published in the Federal Register to prepare and adopt compliant recovery policies.*** *We believe the prescriptive nature of Rule 10D-1 provides issuers with sufficient notice to begin such preparations concurrently with listing standards being finalized.*

At a recent meeting of the American Bar Association's Joint Committee on Employee Benefits with the SEC staff, the staff provided some indications that a further 45-day extension may not be forthcoming. Thus, it is highly advisable that companies prepare updated clawback policies and revise or amend clawback provisions included in employment agreements and incentive plans to ensure consistency across all affected plans, and adherence to the new requirements, in anticipation of the earlier compliance date.

Given the potential timing of the effective date, some companies may need to schedule a special compensation committee meeting or update existing meeting agendas to allow sufficient time to discuss and approve the new clawback policy.

The earlier effective date subjects annual and performance-based long-term incentives earned at companies with fiscal years ending between June 30, 2023, and October 31, 2023, a full fiscal year sooner if the effective date was November 28, 2023. In addition, all performance-based awards granted on or after June 9, 2023, are subject to the clawback rules, rather than awards granted on or after November 28, 2023.

General questions about this Viewpoint can be directed to Mike Kesner (mike.kesner@paygovernance.com).

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