

Clawback Policies: Next Steps to Prepare Your Public Company

White & Case Public Company Advisory Group Provides Sample Clawback Policy

May 23, 2023

In light of NYSE and Nasdaq's proposed listing standards on clawback policies, it is time to assess your public company's clawback provisions and consider the appropriate policy to put in place. As a reminder, these new listing rules requiring clawback policies will apply to both domestic companies and foreign private issuers ("FPIs"). Once the proposed listing standards are approved by the SEC, companies will have 60 days to adopt clawback policies that are compliant with the new listing rules.¹

To this end, White & Case's Public Company Advisory Group has prepared a sample clawback policy aligned with the proposed listing standards, attached as Annex A to this alert.² Notably, each listed company should assess and tailor its own clawback policy and consider the text of the final listing rules ultimately approved by the SEC, along with any additional guidance that may be provided by the staff of the SEC or the stock exchanges. Following its adoption, a company's clawback policy 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.

When drafting, a key point to keep in mind is that the proposed listing standards will require a clawback policy that generally represents a significant change from most prior policies that companies put in place. In particular, once adopted, the new listing rules will require the mandatory clawback of "erroneously awarded" incentive-based compensation from current and former Section 16 officers (see below for the implication of this on FPIs) in the event of either a "little r" or a "Big R" accounting restatement, whether or not such officers were at fault for the restatement.

The amount that is subject to a clawback under the proposed listing rules, known as "erroneously awarded compensation," is any amount of incentive-based compensation that *exceeds the amount that otherwise would have been received* had it been determined based on the restated amounts. Additional aspects of the proposed listing standards include the following:

- **Whose Compensation Must Be Covered by Policy:** Under the proposed listing standards, 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 filings³ 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). Thus, for FPIs, this will be all "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).

¹ For more background, see our prior client alert, "[SEC \(Finally\) Adopts Clawback Rules.](#)"

² This sample has been prepared based on the proposed listing standards, which have not been approved by the SEC as of the date of this alert.

³ See Rule 3b-7 of the Exchange Act.

- **Trigger Date for Recovery of Compensation under Policy:** The policy’s clawback provisions must 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 must 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. To the extent that the company is required to file an Item 4.02(a) Form 8-K (or presumably, based on the applicable rules for FPIs, a Form 6-K that states the same), this conclusion is expected to coincide with the trigger date for that filing.
- **Type of Compensation Covered by the Policy:** The policy must address the recovery of “incentive-based compensation,” which is defined to mean “any compensation that is granted, earned, or vested based wholly or in part upon the attainment of a financial reporting measure.” The terms “financial reporting measure” and “incentive-based compensation” are intended to be expansive and also include compensation awarded based on stock price and TSR targets. The terms are not, however, intended to cover equity-based awards that vest solely based on the passage of time or continued employment (such as time-based vesting RSU), base salary or discretionary cash bonuses—unless any such compensation is earned based on the attainment of a financial performance goal.
- **Time Period Covered for Recovery Assessment under Policy:** The policy must 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.
- **Recovery Process under 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. The only exception to recovery is if one of three limited conditions is met, as set forth in Section B(2) of our [Sample Clawback Policy](#) in Annex A, and recovery is determined to be impracticable by a fully independent compensation committee (or the independent directors of the board).

Companies that have alternative clawback provisions in their award agreements, compensatory plans or policies should understand and take stock of any other applicable clawback provisions at this time. However, it should generally not be necessary to find creative ways to combine clawback provisions that have significantly different purposes. For example, alternative clawback provisions may relate to employees who are *not* Section 16 officers, have different clawback “triggers” (such as violations of company policies, the code of conduct or reputational harm to the company) and provide a company with broad discretion as to when and whether to actually clawback compensation. Additional clawback provisions that could remain separate include those provisions adopted to align with the Department of Justice’s Criminal Division policy on clawbacks, which differ in terms of their application to all potential corporate wrongdoers (including employees) and the recovery triggers (wrongdoers in the criminal context, rather than for a “Big R” or “little r” restatement).⁴

Likewise, the new proposed listing standards, once adopted, are not intended to alter or otherwise affect the interpretation of other recovery provisions under any foreign recovery regime or under Sarbanes-Oxley Section 304, which is triggered when a restatement is the result of misconduct and only applies to the compensation of CEOs and CFOs (not to other officers).⁵

⁴ On March 2, 2023, Deputy Attorney General Lisa Monaco announced a new Criminal Division policy for Department of Justice prosecutors to consider the implementation of compensation clawback policies as an important factor in corporate criminal resolutions. See [here](#).

⁵ As noted in the SEC’s adopting release: “Rule 10D-1 is not intended to alter or otherwise affect the interpretation of other recovery provisions, such as Sarbanes-Oxley Act Section 304, or the determination by the Commission or the courts of when reimbursement is required under Section 304. To the extent that the application of Rule 10D-1 would provide for recovery of incentive-based compensation that the issuer recovers pursuant to Section 304 or other recovery obligations, it would be appropriate for the amount the executive officer has already reimbursed the issuer to be credited to the required recovery under the issuer’s Rule 10D-1 recovery policy.”

Annex A

WHITE & CASE PUBLIC COMPANY ADVISORY GROUP TEMPLATE AS OF MAY 25, 2023

Explanatory Note: The following template was prepared by the White & Case Public Company Advisory Group (PCAG) and is only intended to serve as a guide for drafting your own Clawback Policy.

[COMPANY NAME]

POLICY FOR THE RECOVERY OF ERRONEOUSLY AWARDED COMPENSATION⁶

A. OVERVIEW

In accordance with the applicable rules of [The New York Stock Exchange Listed Company Manual (the “**NYSE Rules**”)] [The Nasdaq Stock Market (the “**Nasdaq Rules**”)], Section 10D and Rule 10D-1 of the Securities Exchange Act of 1934, as amended (the “**Exchange Act**”) (“**Rule 10D-1**”), the Board of Directors (the “**Board**”) of [COMPANY NAME] (the “**Company**”) has adopted this Policy (the “**Policy**”) to provide for the recovery of erroneously awarded Incentive-based Compensation from Executive Officers. All capitalized terms used and not otherwise defined herein shall have the meanings set forth in Section H, below.

B. RECOVERY OF ERRONEOUSLY AWARDED COMPENSATION

(1) In the event of an Accounting Restatement, the Company will reasonably promptly recover the Erroneously Awarded Compensation Received in accordance with [Nasdaq Rules] [NYSE Rules] and Rule 10D-1 as follows:

- (i) After an Accounting Restatement, the Compensation Committee (if composed entirely of independent directors, or in the absence of such a committee, a majority of independent directors serving on the Board) (the “**Committee**”) shall determine the amount of any Erroneously Awarded Compensation Received by each Executive Officer and shall promptly notify each Executive Officer with a written notice containing the amount of any Erroneously Awarded Compensation and a demand for repayment or return of such compensation, as applicable.
 - (a) For Incentive-based Compensation based on (or derived from) the Company’s stock price or total shareholder return, where the amount of Erroneously Awarded

⁶ **Explanatory Note:** Foreign private issuers are advised to consult with local counsel with respect to any foreign law requirements that might impact this Policy. Care should be taken not to remove any requirements under Rule 10D-1. Unless foreign private issuers are relying on the exemption in Section B(2)(ii) of this Policy, they should generally supplement and not remove or diminish any aspects of this Policy.

⁷ **Explanatory Note:** 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.

Compensation is not subject to mathematical recalculation directly from the information in the applicable Accounting Restatement:

- i. The amount to be repaid or returned shall be determined by the Committee based on a reasonable estimate of the effect of the Accounting Restatement on the Company's stock price or total shareholder return upon which the Incentive-based Compensation was Received; and
 - ii. The Company shall maintain documentation of the determination of such reasonable estimate and provide the relevant documentation as required to the [NYSE][Nasdaq].
- (ii) The Committee shall have discretion to determine the appropriate means of recovering Erroneously Awarded Compensation based on the particular facts and circumstances.⁸ Notwithstanding the foregoing, except as set forth in Section B(2) 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.
- (iii) 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.⁹
- (iv) 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 fees) by the Company in recovering such Erroneously Awarded Compensation in accordance with the immediately preceding sentence.

(2) Notwithstanding anything herein to the contrary, the Company shall not be required to take the actions contemplated by Section B(1) above if the Committee (which, as specified above, is composed entirely of independent directors or in the absence of such a committee, a majority of the independent directors serving on the Board) determines that recovery would be impracticable *and* any of the following [two][three] conditions are met:

- (i) The Committee has determined that the direct expenses paid to a third party to assist in enforcing the Policy would exceed the amount to be recovered. Before making this determination, the Company must make a reasonable attempt to recover the Erroneously Awarded Compensation, documented such attempt(s) and provided such documentation

⁸ **Explanatory Note:** 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 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).

⁹ **Explanatory Note:** See text accompanying Footnote 245 in SEC Release No. 33-11126.

to the [NYSE][Nasdaq];

- (ii) [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 [NYSE][Nasdaq], that recovery would result in such a violation and a copy of the opinion is provided to [NYSE][Nasdaq];¹⁰ or
- (iii) 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.

C. DISCLOSURE REQUIREMENTS

The Company shall file all disclosures with respect to this Policy required by applicable U.S. Securities and Exchange Commission ("**SEC**") filings and rules.¹¹

D. PROHIBITION OF 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 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).

E. ADMINISTRATION AND INTERPRETATION

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

The Committee is authorized to interpret and construe this Policy and to make all determinations necessary, appropriate, or advisable for the administration of this Policy and for the Company's compliance with [Nasdaq][NYSE] Rules, Section 10D, Rule 10D-1 and any other applicable law, regulation, rule or interpretation of the SEC or [Nasdaq][NYSE] promulgated or issued in connection therewith.

F. AMENDMENT; TERMINATION

The Committee may amend this Policy from time to time in its discretion and shall amend this Policy as it deems necessary. Notwithstanding anything in this Section F to the contrary, no amendment or termination of this Policy shall be effective if such amendment or termination would (after taking into

¹⁰ **Explanatory Note:** Include for a foreign private issuer if local counsel determines this to be the case; delete for a domestic company.

¹¹ **Explanatory Note:** Several SEC disclosure requirements have been amended in connection with the adoption of Rule 10D-1, as explained further in our alert, "[SEC \(Finally\) Adopts Clawback Rules](#)." In particular, amended Item 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 FPIs) 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).

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 [Nasdaq][NYSE] rule.

G. OTHER RECOVERY RIGHTS

This Policy shall be binding and enforceable against all Executive Officers and, to the extent required by applicable law or guidance from the SEC or [NYSE][Nasdaq], their beneficiaries, heirs, executors, administrators or other legal representatives. The Committee intends that this Policy will be applied to the fullest extent required by applicable law. Any employment agreement, equity award agreement, compensatory plan or any other agreement or arrangement with an Executive Officer shall be deemed to include, as a condition to the grant of any benefit thereunder, an agreement by the Executive Officer to abide by the terms of this Policy.¹² Any right of recovery under this Policy is in addition to, and not in lieu of, any other remedies or rights of recovery that may be available to the Company under applicable law, regulation or rule or pursuant to the terms of any policy of the Company or any provision in any employment agreement, equity award agreement, compensatory plan, agreement or other arrangement.

H. DEFINITIONS

For purposes of this Policy, the following capitalized terms shall have the meanings set forth below.

(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” 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” restatement).¹³

(2) “**Clawback Eligible Incentive Compensation**” means all Incentive-based Compensation Received by an Executive Officer (i) on or after the effective date of the applicable [Nasdaq][NYSE] rules,¹⁴ (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 any Incentive-based Compensation (whether or not such Executive Officer is serving at the time the Erroneously Awarded Compensation is required to be repaid to the Company), (iv) while the Company has a class of securities listed on a national securities exchange or a national securities association, and (v) during the applicable Clawback Period (as defined below).

(3) “**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),

¹² **Explanatory Note:** 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.

¹³ **Explanatory Note:** 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.”

¹⁴ **Explanatory Note:** 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.”

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.¹⁵

(4) “**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.¹⁶

(5) “**Executive Officer**” means each individual who is currently or was previously designated as an “officer” of the Company as defined in Rule 16a-1(f) under the Exchange Act. 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, as well as the principal financial officer and principal accounting officer (or, if there is no principal accounting officer, the controller).

(6) “**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.

(7) “**Incentive-based Compensation**” means any compensation that is granted, earned or vested based wholly or in part upon the attainment of a Financial Reporting Measure.

(8) [“**Nasdaq**” means The Nasdaq Stock Market.][“**NYSE**” means the New York Stock Exchange.]

(9) “**Received**” means, with respect to any Incentive-based Compensation, actual or deemed receipt, and Incentive-based Compensation shall be deemed received in the Company’s fiscal period during which the Financial Reporting Measure specified in the Incentive-based Compensation award is attained, even if the payment or grant of the Incentive-based Compensation to the Executive Officer occurs after the end of that period.

(10) “**Restatement Date**” means the earlier to occur of (i) the date the Board, a committee of the Board or the officers 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.

Effective as of [DATE]¹⁷.

¹⁵ **Explanatory Note:** A transition period comprising a period of nine to 12 months would be deemed a completed fiscal year.

¹⁶ **Explanatory Note:** For an example of the calculation, see Footnotes 235 and 237 of SEC Release No. 33-11126 (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”). 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.

¹⁷ Insert date that is 60 days following SEC’s adoption of applicable stock exchange (Nasdaq or NYSE) proposed rules.

Exhibit A

ATTESTATION AND ACKNOWLEDGEMENT OF POLICY FOR THE RECOVERY OF ERRONEOUSLY AWARDED COMPENSATION

By my signature below, I acknowledge and agree that:

- I have received and read the attached Policy for 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: _____

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