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SEC Proposes Highly Anticipated Clawback Rules

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On July 1, 2015, in a 3-2 vote of commissioners cast along party lines, the Securities and Exchange Commission (the "SEC") proposed rules to implement Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank").[1] Proposed Exchange Act Rule 10D-1 would prohibit the national securities associations and exchanges from listing any securities of an issuer that does not develop, implement and disclose a policy requiring the recovery of excess incentive-based compensation received by an executive officer when the issuer needs to correct erroneous financial data by preparing an accounting restatement.

The proposed rules also would: amend Regulation S-K by adding Item 402(w); amend the forms by which both domestic issuers and foreign private issuers file their Exchange Act annual reports and, for certain investment companies, amend Form N-CSR and Schedule 14A. In addition to requiring disclosure regarding listed issuers' recovery policies, these

[1] Release No. 33-9861; File No. S7-12-15. SEC Chair Mary Jo White and Commissioners Luis A. Aguilar and Kara M. Stein voted in favor of the proposal. Commissioners Michael S. Piwowar and Daniel M. Gallagher voted against it. The proposed rules can be found at http://www.sec.gov/rules/proposed/2015/33-9861.pdf. The Dodd-Frank Act adds new Section 10D to the Securities Exchange Act of 1934, as amended (the "Exchange Act").

amendments would require disclosure about actions taken pursuant to a recovery policy.

Key Components of the Proposal

- Applies without regard to whether misconduct was a cause of the restatement.
- Applies to almost all listed issuers, including smaller reporting companies, emerging growth companies, controlled companies, foreign private issuers and issuers that only list debt.
- Covers any current or former employee who was an "officer" under Section 16 of the Exchange Act during the relevant period.
- Applies to incentive compensation based on, or derived from, financial information that must be reported under the securities laws, as well as on total shareholder return and stock price.
- Exempts awards that vest solely on the basis of time, including time-vested options.
- Recovers incentive-based compensation paid in excess of what would have been received had it been determined based on the restated financials.
- Prohibits the indemnification of covered officers against the loss of any recovered compensation.
- Requires the recovery policy be filed as an exhibit to the issuer's annual report.
- Requires disclosure of actions taken pursuant to the policy in the issuer's proxy statement (or annual report if no proxy statement is required).
- Mandates delisting in the event an issuer fails to implement, disclose or adhere to its policy.

Background

Even before the adoption of Dodd-Frank, many of the largest US public companies voluntarily implemented clawback policies.[2] Proxy advisory groups strongly encourage public companies to adopt clawbacks as an element of sound corporate governance and risk mitigation.[3] Issuer policies, however, are not uniform and their application varies as to the events that trigger recovery, culpability standards, the individuals covered, the types of compensation subject to recovery, the level of board discretion as to whether to seek enforcement and the time period covered by the recovery policy.

Additionally, Section 304 of the Sarbanes-Oxley Act ("Sarbanes-Oxley") requires issuers to recover all incentive-based compensation received by their chief executive officer and chief financial officer in the 12-month period following the filing or public issuance of a financial document that is required to be restated as a result of misconduct. Unlike Section 304 of Sarbanes-Oxley, Section 954 of Dodd-Frank applies to compensation that was erroneously awarded due to "no-fault" computational errors in the financial statements. Its purpose is to put the issuer and its executives in the position they would have been in had the financial statements been prepared without any errors.

Finally, Section 111(b)(3)(B) of the Emergency Economic Stabilization Act of 2008 ("EESA"), which applies to financial institutions receiving assistance under the Troubled Asset Relief Program, requires that the institution recover any bonus,

2 The annual Compensation Governance Survey by Shearman & Sterling LLP shows that, in 2014, 88 of the top 100 US companies, by revenue and market capitalization, disclosed in their public filings that they maintain a clawback policy.

3 In 2015, ISS amended its shareholder voting policies relating to approval of equity compensation plans, allotting 35% of the potential score on the basis of grant practices – one factor of which is whether the company maintains a clawback policy.

retention award or incentive compensation paid to a senior executive officer and any of its next 20 most highly compensated employees based on statements of earnings, revenues, gains or other criteria that are later found to be materially inaccurate. Similar to Dodd-Frank, EESA does not require any misconduct to trigger recovery.

Summary of Proposed Clawback Standards and Disclosure Requirements

The proposed rules would add new Exchange Act Rule 10D-1, which would require each national securities exchange and national securities association to adopt standards requiring each listed issuer to develop and implement a policy for the recovery of incentive-based compensation that is received in excess of what would have been received had it been determined based on an accounting restatement.[4] The proposed rules refer to this excess compensation as "erroneously awarded compensation." A listed issuer would also be required to file the policy as an exhibit to its annual report. The issuer's policy would apply to incentive-based compensation received by any of its executive officers during the three completed fiscal years immediately preceding the date on which the issuer is required to prepare a restatement. The erroneously awarded compensation would be determined without regard to any taxes paid. Failure of an issuer to adhere to the recovery policy would cause it to be delisted from any national securities exchange or association until it is in compliance.

The proposed rules also add Item 402(w) to Regulation S-K, which would require disclosure by any issuer that, during the last completed fiscal year: (1) completed a restatement that required recovery of excess incentive-based compensation or (2) had an outstanding balance of excess incentive-based compensation due to the application of the policy in a previous year. In addition, if an issuer decided not to pursue recovery from an individual, it must state the individual's name, the amount forgone and a brief description of the reason it decided not to pursue recovery. As discussed below, these requirements would also apply to foreign private issuers and certain investment management companies that are internally managed. The proposal would require the Summary Compensation Table under Item 402(c) of Regulation S-K be updated as to prior years' compensation to reflect any reductions in compensation due to application of the clawback policy. While not addressed in the proposal, other tables and disclosures – notably pay for performance disclosure – could be impacted, as well.

The "No-Fault" Recovery Mandate of Proposed Rule 10D-1

Unlike Section 304 of Sarbanes Oxley, which requires misconduct to trigger a clawback, the proposed rules interpret Section 954 of Dodd-Frank as requiring unqualified "no-fault" recovery.[5] As discussed below under "Limited Board Discretion," the proposed rules would require an issuer to recover excess compensation except to the extent that it would be impracticable to do so either due to the expense of recovery or because recovery would violate a home country law. The proposed rules would also prohibit an issuer from indemnifying any executive officer or former executive officer against the loss of recovered compensation.

[4] Because Dodd-Frank requires each issuer to develop its own recovery policy, the recovery right would be a contractual agreement between the issuer and the executive. In contrast, under Section 304 of Sarbanes-Oxley only the government can bring an action to enforce a clawback. Further, under Dodd-Frank, an issuer would be subject to delisting if it does not adopt, disclose and comply with its compensation recovery policy.

[5] To the extent Section 954 of Dodd-Frank and Section 304 of Sarbanes-Oxley provide for recovery of the same awards, amounts that a CEO or CFO reimburses an issuer pursuant to Section 304 of Sarbanes-Oxley would reduce the amount the executive officer owes the issuer under Section 954 of Dodd-Frank.

Covered Issuers and Covered Securities

The disclosure and recovery policy requirements would apply to almost all listed issuers with only limited exceptions. The SEC did not exercise its authority to exempt emerging growth companies, smaller reporting companies, foreign private issuers and controlled companies. Further, as Section 954 of Dodd-Frank refers to the listing of "any security" of an issuer, the proposed rules would, with limited exceptions, apply to an issuer regardless of the type of securities it issues, including issuers of debt or preferred securities that do not also have listed equity.[6]

Although it recognized that the listing standards could impose a disproportionate burden on smaller reporting companies and emerging growth companies, the proposal cites studies that show that these issuers, from time to time, restate their financial statements and concludes that therefore their shareholders, and the market generally, would benefit from these issuers being subject to the rules.

Covered Executives

The proposed rules require the recovery of incentive-based compensation from any current or former employee who served as an "*executive officer*" of the issuer at any time during the performance period for that incentive-based compensation. Therefore, awards granted before an individual became an executive officer would be covered by the rule if the individual became an executive officer at any time during the award's performance period.

The proposal's definition of "*executive officer*" mirrors the definition of "officer" in Rule 16a-1(f) of the Exchange Act.[7] This definition is more expansive than both the definition of "named executive officer" found in Item 402 of Regulation S-K and the definition of "executive officer" found in Rule 3b-7 of the Exchange Act. Foreign private issuers, as

[6] Notwithstanding the proposal's broad application of Section 954 of Dodd-Frank, the proposed rules exempt the listing of the following securities from their purview:

- security futures products, as defined in Section 3(a) of the Exchange Act;
- standardized options, as defined in Rule 9b-1(a) of the Exchange Act;
- securities issued by a unit investment trust, as defined in Section 4(2) of the Investment Company Act of 1940 (the "Investment Company Act"); and
- securities issued by a management investment company (as defined in Sections 5(a)(1) and 5(a)(2) of the Investment Company Act) that are registered under Section 8 of the Investment Company Act, if the management company has not awarded incentive-based compensation to any executive officer of the company in any of the last three fiscal years.

[7] Rule 16a-1(f) of the Exchange Act defines "officer" as an issuer's president, principal financial officer, principal accounting officer (or, if there is no principal accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a similar policy-making function or any other person who performs similar policy-making functions for the issuer. Officers of the issuer's parent(s) or subsidiaries are deemed officers of the issuer if they perform similar policy-making functions for the issuer. In addition, when the issuer is a limited partnership, officers or employees of the general partner(s) who perform policy-making functions for the limited partnership are deemed officers of the limited partnership. When the issuer is a trust, officers or employees of the trustee(s) who perform policy-making functions for the trust are deemed officers of the trust. For purposes of Rule 16a-1(f) and the proposed rules, "policy-making function" is not intended to include policy-making functions that are not significant. In addition, a person identified by the issuer as an "executive officer" pursuant to Item 401(b) of Regulation S-K would be deemed an "officer" for purposes of Section 16 of the Exchange Act and an "executive officer" for purposes of the proposed rules.

well as issuers that list only debt, neither of which are subject to Section 16, will need to begin the process of identifying their covered executive officers in anticipation of the final rules.

Going forward, all arrangements that issuers enter into with their executives will need to incorporate provisions enabling the issuer to clawback incentive-based compensation if its recovery policy is triggered. One important question facing issuers will be how to clawback incentive-based compensation paid pursuant to an existing contract or arrangement that does not permit offsets for clawbacks. The SEC appears to recognize that this may be a concern, and invites comment as to whether the recovery policy should only apply to compensation arrangements entered into after the date the exchange's listing standard becomes effective.

Applicable Restatements

Section 954 of Dodd-Frank provides that erroneously awarded incentive-based compensation must be recovered in the event that the issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer with any financial reporting requirement under the securities laws. The proposed rules provide that any error that is material to previously issued financial statements constitutes "material noncompliance" by the issuer with a financial reporting requirement under the securities laws. As a result, an issuer's recovery policy would have to provide that, in the event the issuer is required to prepare a restatement to correct an error that is material to previously issued financial statements, the obligation to prepare the restatement would trigger application of the policy. The proposal states that application of the recovery policy would not be triggered by changes in financial statements due to changes in accounting principles, nor due to certain enumerated corporate events.[8] Further, the SEC advises issuers to consider whether a series of immaterial error corrections, whether or not they resulted in filing amendments to previously filed financial statements, could be considered a material error when viewed in the aggregate.

Incentive-Based Compensation

Section 954 of Dodd-Frank speaks to recovery of incentive-based compensation "that is based on financial information required to be reported under the securities laws." The proposed rules interpret this to mean any compensation that is granted, earned or vested based wholly or in part upon the attainment of a financial reporting measure. Financial reporting measures are measures that are determined and presented in accordance with the accounting principles used in preparing the issuer's financial statements, and any measures that are derived wholly or in part from these measures, regardless of whether they need to be included in a filing with the SEC.[9]

[8] The following types of changes to an issuer's financial statements would not trigger application of the recovery policy:

- retrospective application of a change in accounting principles;
- retrospective revision to reportable segment information due to a change in the internal organization of the issuer;
- retrospective reclassification due to a discontinued operation;
- retrospective application of a change in reporting entity;
- retrospective adjustment to provisional amounts in connection with a prior business combination; and
- retrospective revision for stock splits.

[9] The SEC notes that the proposed definition of "financial reporting measures" is broader than a "non-GAAP financial measure" for purposes of Exchange Act Regulation G and Item 10 of Regulation S-K.

While they are not accounting-based metrics, stock price and total shareholder return are also considered financial reporting measures in the proposal, to the extent that they are impacted by accounting-related information. As discussed below under "Determination of Recovery Amount," issuers may find it difficult to calculate the impact of a financial restatement on stock price or total shareholder return. "Calculating the appropriate amount of a clawback for TSR-based compensation is much more difficult than calculating a clawback for a financial reporting measure, requiring an analysis such as an event study to determine what the share price would have been but for the misstatement at the time the compensation was earned."[10]

Compensation not covered by the proposed rules includes:

- base salary (although an increase in base salary earned due to the attainment of a financial reporting measure would be recoverable);
- discretionary bonuses;
- bonuses paid solely upon satisfying one or more subjective standards (e.g., demonstrated leadership) and/or completion of a specified employment period;
- bonuses earned solely upon satisfying one or more strategic or operational measures; and
- time-vested equity-based awards, the grant of which is not contingent upon the achievement of any financial reporting measures (see below).

It will be interesting to monitor whether the distinction between covered and non-covered awards affects grant practices and how proxy advisory groups react to any shift in these practices.

Time-Vested Equity

To the extent the grant or vesting of stock options or other equity awards is based wholly or in part upon the attainment of financial reporting measures, these awards would be recoverable under the proposed rules. Time-vested equity, the grant of which is not contingent upon the achievement of any financial reporting measures, however, would not be considered incentive-based compensation under Rule 10D-1. In this regard, the proposed rules appear to narrow the plain language of the statute which requires the recovery of "incentive-based compensation (including stock options awarded as compensation)." The SEC acknowledges that time-vested stock options would be considered performance-based compensation for purposes of the exclusion from the deduction limits of Section 162(m) of the Internal Revenue Code and invites comments as to whether time-vested options should be covered by the final rules and how issuers would determine the amount of recovery of those options.

Determination of Recovery Amount

As stated above under "Summary of Proposed Clawback Standards and Disclosure Requirements," the recoverable amount is the amount of incentive-based compensation that exceeds the amount that otherwise would have been received had it been determined based on the accounting restatement. This amount is determined on a pre-tax basis. With respect

[10] Commissioner David M. Gallagher during his dissenting statement at the open meeting on July 1, 2015. Commissioner Gallagher conceded, however, that "excluding TSR-based metrics from the scope of the rule would not have been the right approach either, as it would have shifted compensation packages towards these pay metrics, further entrenching the short-termism that is abetted by the Commission's executive compensation rules."

to cash awards, the recoverable amount is the difference between the amount that was received, and the amount that should have been received applying the restated financials.[11] Special considerations would apply, however, under the following circumstances:

- The Performance Metric is Total Shareholder Return or Stock Price. The proposed rules permit issuers to use reasonable estimates when determining the impact of a restatement on stock price and total shareholder return, provided issuers publicly disclose those estimates. Determining these estimates will likely be challenging and would require considerable attention. Perhaps most troubling, because the issuer is granted latitude to determine the consequences of a restatement on the award, there is the potential that the award would be accounted for on a mark-to-market basis as opposed to fixed accounting.[12]
- The Incentive-Based Award is Equity. If the shares, options or SARs are still held at the time of recovery, the recoverable amount would be the number of shares, options or SARs received in excess of the number that should have been received applying the restated financial reporting measure. If the options or SARs have been exercised, but the underlying shares have not been sold, the recoverable amount would be the number of shares underlying the excess options or SARs (less any exercise price paid). If the shares have been sold, the recoverable amount would be the sale proceeds of the excess shares (less any exercise price paid).[13]
- Incentive-Based Compensation Based Only in Part on a Financial Reporting Measure. Only the portion of the compensation based on or derived from the financial reporting measure that was restated needs to be recalculated.
- Bonus Pools. The size of the aggregate bonus pool from which individual bonuses are paid would be reduced based on applying the restated financial reporting measure. If the reduced bonus pool is less than the aggregate amount of individual bonuses that were received from it, then the excess amount is reduced pro rata among the executive officers. No recovery would be required if the reduced bonus pool is still greater than the aggregate bonus received from it. However, issuers utilizing an umbrella plan to avoid the deduction limits of Section 162(m) of the Internal Revenue Code should assume that amounts paid pursuant to the underlying plan would be recoverable to the extent they are awarded due to the attainment of financial performance metrics. This

[11] If an issuer exercises negative discretion and decreases the award amount, then "received" would mean the amount actually paid, as opposed to the amount owed solely as a result of satisfying the performance measure. If an issuer exercises positive discretion to enhance the award amount, then "received" would mean the amount owed solely as a result of satisfying the performance measure. The SEC invites comment on whether additional amounts should be recovered from the portion of the award derived from a discretionary enhancement.

[12] According to an August 19, 2010 publication by PricewaterhouseCoopers, "Accounting for Clawbacks in Stock Compensation Arrangements, Including the Dodd-Frank Act's Provision on Recovery of Erroneously Awarded Compensation," "[A] grant date can only be achieved when the employer and employee mutually understand the key terms of the award. If the company has discretion to decide when a clawback is triggered, *or what the consequence of the clawback would be*, the employee may not be in a position to understand what is required in order to earn and retain the award." (Emphasis added.)

[13] The SEC invites comment on whether issuers should have discretion as to the order of recovery. The SEC is concerned that a mandate to first clawback shares still held by executive officers (rather than the proceeds of sold shares) may erode company stock holding polices.

is despite the fact that, for purposes of Section 162(m), awards are characterized as paid pursuant to the umbrella bonus plan after the exercise of negative discretion by the compensation committee.

Three-Year Look Back-Period

The proposed rules state that an issuer's recovery policy must apply to any incentive-based compensation received during the three completed fiscal years immediately preceding the date on which the issuer is required to prepare a restatement of its previously issued financial statements to correct a material error.[14] The date on which an issuer is required to prepare an accounting statement under the proposed rules is the *earlier of*:

- the date on which the issuer's board of directors, or authorized officer or officers concludes, or reasonably should have concluded, that the issuer's previously issued financial statements contain a material error;[15] or
- the on which date a court, regulator or other legally authorized body directs the issuer to restate its previously issued financial statements to correct a material error.

In providing that the trigger would be the date the issuer "reasonably should have concluded" that the financial statements contained a material error, the proposal may introduce additional complexity in its application. For example, issuers that initially disagree with a letter from an independent auditor suggesting a restatement may be required, and therefore choose a later date as the trigger, may run the risk of a later determination that receipt of the letter was the date it "reasonably should have concluded" its financial statements required restatement.

Incentive-based compensation would be deemed "received" in the fiscal period (including any transition period) during which the financial reporting measure specified in the incentive-based compensation award is attained, even if the payment or grant occurs after the end of that period. Further, the award would be considered "received" upon satisfaction of the performance goals even if payment is contingent upon an additional service-based vesting requirement.

Limited Board Discretion

Unlike many of the clawback policies implemented by listed issuers, the proposed rules provide boards with almost no discretion in determining whether to pursue recovery of erroneously awarded compensation. As a result, an issuer must recover erroneously awarded compensation except to the extent it would be impracticable to do so. Recovery would be impracticable if the direct expense paid to a third party to assist in enforcement would exceed the amount to be recovered, or if recovery would violate a home country law that was adopted prior to the proposed rule being published in the Federal Register. Prior to concluding that recovery would be too expensive, an issuer must make a reasonable attempt to recover the erroneously awarded compensation and document that attempt to the exchange or association. In addition, before concluding that recovery would violate a home country law, the issuer must obtain and provide to the exchange or association an opinion of home country counsel.[16]

[14] If an issuer changes its fiscal year, the recovery policy would apply to any transition period within or immediately following the three completed fiscal years. A transition period that comprises a period of nine to 12 months, however, would be considered a completed fiscal year.

[15] The proposed rules make clear than an issuer's obligation to recover excess incentive-based compensation is not dependent on if or when the restated financial statements are filed.

[16] It appears that the exception for violations of home country law would be available to foreign private issuers, as well as executives of US companies located abroad.

One area in which the proposed rules permit an issuer to exercise discretion is the means of recovery. So long as recovery is accomplished reasonably promptly, examples of potential means of recovery include:

- recovery over time or from future pay;
- recovery from current compensation owing, and then after-tax funds;
- forfeiture of an award earned but not yet paid;
- forfeiture of unvested awards; and
- offsetting against amounts otherwise payable, such as deferred compensation.[17]

Disclosure of a Listed Issuer's Actions to Recover Erroneously Awarded Compensation

Although not required by Section 954 of Dodd-Frank, the proposed rules add Item 402(w) to Regulation S-K, which would require that, if at any time during a fiscal year an issuer completed a restatement that required recovery of erroneously awarded incentive-based compensation pursuant to the listed issuer's compensation recovery policy, or there was an outstanding balance of excess incentive-based compensation from the application of the policy in a previous year, it must disclose:

- the date on which the issuer was required to prepare an accounting restatement;
- the aggregate dollar amount of excess incentive-based compensation attributable to the accounting restatement, or an explanation as to the reasons why the amount has not yet been determined;
- the estimates that were used in determining the excess incentive-based compensation attributable to the accounting restatement, if the financial reporting measure related to a stock price or total shareholder return metric; and
- the aggregate dollar amount of excess incentive-based compensation that remained outstanding at the end of the last fiscal year.

If an issuer decided not to pursue recovery from an individual, it must disclose the individual's name, the amount forgone and a brief description of the reason the listed registrant decided not to pursue recovery. Further, the issuer must disclose the name of any individual who, as of the end of the last fiscal year, had erroneously awarded compensation outstanding for a period of 180 days or longer, as well as the dollar amount of the outstanding erroneously awarded compensation.

The SEC believes that incorporating the Item 402(w) disclosure into the issuer's compensation discussion and analysis may benefit investors because all compensation recovery information would then be located together. The disclosure required by Item 402(w) would have to be provided in interactive data format using the eXtensible Business Reporting Language ("XBRL"). The XBRL format must be block text tagged and be provided as an exhibit to the issuer's proxy statement and annual report on Form 10-K.

[17] To the extent an issuer decides to recover excess compensation by offsetting against future amounts of deferred compensation, it must ensure that the offset is not deemed an impermissible acceleration of deferred compensation under Section 409A of the Internal Revenue Code.

Items identical to Item 402(w) have been added to Forms 20-F and Form 40-F under the Exchange Act and for investment management companies subject to the proposed rules, Schedule 14A under the Exchange Act and Form N-CSR under the Investment Company Act of 1940.

Revised Proxy Tables

The proposed rules amend Item 402(c) of Regulation S-K by requiring issuers to revise prior years' compensation disclosures in their current proxy to reflect amounts recovered pursuant to a recovery policy by reducing the amount reported in the applicable Summary Compensation Table column for the fiscal year in which the amount recovered initially was reported as compensation, and flagging the change in a footnote. Issuers will not have to file an amended proxy for the year in which amounts were recovered. Although not addressed in the proposed rules, issuers should assume they similarly must reflect the reduced amounts in any other table or graph in the proxy where the affected compensation is reported, including the issuer's "pay for performance" disclosure.

Comment Period and Anticipated Effective Date

The comment period for the proposed rules will end 60 days after publication in the Federal Register.

Each national securities exchange and national securities association must file its proposed listing standards with the SEC no later than 90 days after the publication of the final rules in the Federal Register. These rules must become effective within one year following the publication date of the final rules, and each listed issuer must adopt its recovery policy no later than 60 days from the effective date of the exchanges' rules becoming effective. Although, pursuant to this timeline, it is conceivable that issuers will not have to implement their policies until 2017, those policies will apply to all incentive-based compensation received by executive officers after the SEC's rules become effective, which could be as early as this year.[18] Finally, issuers must provide the required disclosures in their applicable SEC filings made after the effective date of the listing standards.

Conclusion

If the proposed rules are finalized in their current form, all issuers will need to review their clawback policies and consider necessary amendments to ensure compliance. To the extent an issuer's current policy recovers compensation in the event of misconduct or other factors not covered by the proposal, those issuers may consider maintaining their current policy while concurrently implementing a recovery policy that conforms to the final rules that applies only to erroneously awarded compensation. While the proposed rules would require issuers to implement clawback policies that permit less discretion and cover more employees than many voluntary policies currently in place, the recovery policies mandated by Dodd-Frank only apply to more limited circumstances than those commonly covered in voluntary clawbacks.

[18] Please see the section entitled "Three-Year Look-Back Period" for a discussion as to when the proposed rules consider compensation to be "received" by an executive officer

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