assonime

Associazione fra le società
italiane per azioni

Securities and Exchange Commission

July, 12th, 2022

RE: Commission File No. S7-12-15- Listing Standards for Recovery of Erroneously Awarded Compensation

The Securities and Exchange Commission (hereinafter "SEC" or "Commission") reopened the period to solicit input from the public on the compensation claw-back rules it proposed in 2015 to implement Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act); the Dodd Frank Act requires listed companies to implement claw-back policies to recover incentive-based compensation received by current or former executive officers in the event of certain financial restatements.

More specifically the proposed rule demands stock exchanges to adopt listing standards requiring issuers to adopt and comply with a policy to recover incentive-based compensation and provide disclosure about the policy. The Commission proposes to apply the rule to all listed issuers, including foreign ones except in specified circumstances where recovery would violate home country law.

According to the SEC' s consultation in 2015, the claw-back trigger event was limited to material restatements of previously issued financial statements (so-called "Big R" restatements).

At the end of 2021 the SEC reopened the consultation in order to extend the trigger events of the claw- back, including all required restatements made to correct an error in previously issued financial statements, including restatements required to correct errors that were *not* material to previously issued financial statements but would result in a material misstatement if (1) the errors were left uncorrected in the current report or (2) the error correction was recognized in the current period (so-called "Little R" restatements).

The SEC reopened the comment period again on June 8, 2022 in order to receive comments on a memo prepared by the Division of Economic and Risk Analysis which contains some supplemental data; more specifically in the Memo the Division states that the potential inclusion of "Little R" restatements may increase both the benefits and the costs associated with the Proposed rule; for example it may provide additional funds for other productive uses and may increase the quality of financial reporting.

Assonime, who already answered to the consultation in 2015, is the Italian Association of Limited Liability Companies, including listed issuers. Among our members there are some which are listed also on the New York Stock Exchange (notably Eni,) and qualify as foreign private issuers according

to U.S. legislation. Other members listed on NYSE are CNH Industrial and Ferrari who have their registered offices in The Netherlands and qualify as foreign private issuers as well.

Considering all above, we would like to submit some remarks regarding the consultation.

- **A first general remark concerning the Proposed rule regards the fact that it sets forth too strict and burdensome requirements for issuers, as indicated below**

The first remark relates to the qualification of the restatement; according to the SEC Proposed rules the trigger event is not limited to “Big R”, meaning material restatements but also “Little R”, meaning non material events which do not affect the substance of the financial statement.

We do not support a so wide interpretation that would create a new materiality standard for disclosure of financial restatements solely for claw-back purposes; we think that executive compensation recovery policies should apply only when a restatement is required to correct errors that are material to previously issued financial statements and requires disclosure by Item 4.02(a) of Form 8-K, as that is an understood requirement by issuers, accounting firms and investors.

The unintended consequences for companies and officers involved in the restatement would be not proportionate (e.g three years of recovery requirement on a no fault basis, instead of a pro rata portion of incentive-based compensation attributable to the time the individual serves as an executive officer) considering that “Little R” are less likely to negatively impact net income or cause a marked stock price decline than “Big R” restatements.

We also express our concern as the proposed rule would include as incentive-based compensation not only compensation based on financial reporting measures but also compensation based on stock price and total shareholder return. We recommend that incentive-based compensation subject to recovery expressly exclude compensation paid based upon stock price performance or total shareholder return, as it would be very difficult for issuers to accurately and precisely calculate the isolated impact of a financial restatement on stock price. As a result, the calculation will be costly because it will require extensive economic analysis by experts, and it will be subject to challenge by executives and shareholders.

Moreover different experts can arrive at different conclusions, which could motivate executives and shareholders to challenge the claw-back amount as being too high or too low. As such, in addition to the cost of conducting the event study, companies will need to consider the additional expense of litigating the matter in the event the claw-back is challenged. We should also consider that such an approach could push issuers to increase the portion of fixed salary which goes against the worldwide proxy advisors’ recommendations.

In order to avoid an inequitable over-collection, we recommend that incentive-based compensation be recovered on an after-tax basis rather than on a pre-tax basis.

We therefore believe that our suggestions could bring more clarity to the framework and could avoid additional costs for issuers.

- **A second general remark relates to the regime applicable to companies incorporated in EU and whose shares are listed in EU which qualify as foreign private issuers**

All the companies incorporated in EU and whose shares are listed in EU are subject to the EU rules regarding compensation set forth by the EU Directive 2007/36 as amended by the Directive EU 2017/828 which added two more specific provisions on remuneration, respectively on the remuneration policy and on the remuneration report.

Eni, who is incorporated in Italy, is also subject to the Italian framework on compensation, mostly deriving from the EU rules.

According to the EU framework in place, companies must provide full disclosure regarding compensation of directors, both with regard to the remuneration policy and to the remuneration report.

According to the Directive, the vote on remuneration policy must be binding unless the Member State has opted for an advisory one and the vote on the remuneration report is advisory; in Italy the vote on the remuneration policy is a binding one.

With specific regard to the provisions on claw-back, the Directive requires that:

- the remuneration policy provides information on the possibility for the company to reclaim variable remuneration;
- the remuneration report provides information on the use of the possibility to reclaim variable remuneration.

According to the Directive, the remuneration policy must be submitted to the general meeting at least every four years and the remuneration report every year.

The EU provisions have been implemented into domestic law: the Consolidated Act on Finance and Consob Regulation whose provisions on remuneration are applicable to members of the administrative bodies, general managers and executive with strategic responsibilities.

Regarding claw-back, companies:

- must ensure full transparency in the policy on the ex-post correction mechanisms of the variable component (malus or reimbursement of variable components, “claw-back”) and

- provide information, in the remuneration report, on any application of ex-post correction mechanisms of the variable component (malus or reimbursement of variable components, “claw-back”), indicating in summary the reasons, the amount being corrected and the relevant financial year of the compensations subject matter of the measures on an individual basis with regard to the members of the board of directors, general managers and other executives with strategic responsibilities and at aggregate level with regard to other executives[1].

The Italian framework is completed by the recommendations of the Corporate Governance Code for listed companies. The Code urges issuers to adopt remuneration policy provisions that enable the company to recover and/or withhold, in whole or in part, the variable components already paid out or due, where they were based on data which subsequently proved to be manifestly misstated. The company can identify other circumstances in which such provisions are applied.

The Italian Corporate Governance Code is applied by companies according to a comply or explain approach. In addition, according to the Italian Consolidated Act on Finance, mandatory disclosure about the adoption of a corporate governance code of conduct is provided in the companies’ annual report on corporate governance, giving reasons for any decision not to adopt one or more provisions of the Code, together with the description of the corporate governance practices actually applied by the company over and above any legal or regulatory obligations (art. 123-*bis*).

Moreover according to the Italian Consolidated Act on Finance:

- independent auditors must confirm if information above mentioned have been provided;

- the audit committee must check the arrangements for implementing the corporate governance rules provided for in codes of conduct drawn up by regulated stock exchange companies or by trade associations that the company, by means of public disclosures, declares it complies with;

- the lack ok disclosure or the violation of the provisions of art. 123-bis above mentioned are subject to administrative sanctions, unless the fact is a criminal offence and Consob, the National Competent Authority, makes supervision.

In conclusion, we believe that the regime applicable to EU and Italian listed companies regarding remuneration is sound, provides for full transparency and promotes alignment between

[1] The requirement to recover compensation from the executive officers indicated by the Proposed rule is too wide as it includes the Chair of the Board, the CEO, the CFO and any vice-president in charge of a principal business unit; according to the current legislation in Italy, transparency regarding the compensation of top management is provided on an aggregate basis.

management' and shareholders' interests in the field of remuneration. The requirement for transparency also incentivizes issuers to promote internal rules of conduct for fair remuneration.

For all the reasons above mentioned we think that:

- **an exemption from the application of the SEC proposed rules should be ensured for companies incorporated in EU and whose shares are listed in EU or as a second best solution;**

- **a proportionate application should be allowed to all the companies subject to the proposed rule: i) limiting the restatement to material errors; ii) excluding from incentive-based compensation, the one based on stock price and total shareholder return; iii) recovering incentive-based compensation on an after-tax basis rather than on a pre-tax basis; iv) recovering incentive-based compensation on a pro rata portion, taking into consideration the incentive-based compensation attributable to the time the individual serves as an executive officer.**

Il Direttore Generale