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VIA EMAIL
Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Subject: Release Nos. 33-9861; 34-75342; IC-31702
File No. S7-12-15
Listing Standards for Recovery of Erroneously Awarded Compensation

Dear Mr. Fields:

I am Vice President of Human Resources of Exxon Mobil Corporation. As discussed below in more detail, provisions for the cancellation and recovery of incentive compensation have long been a key feature of ExxonMobil's executive compensation program. We believe the experience we have gained applying and enforcing these provisions could be useful to the Commission in developing final rules under Section 954 of the Dodd-Frank Act. Accordingly, we are writing to submit the enclosed comments on the rules as proposed in the captioned release (the "Proposed Rules").

Background

In order to place our comments on the Proposed Rules in context, we provide relevant background regarding ExxonMobil's executive compensation program in general and the existing forfeiture and clawback provisions of that program in particular.

ExxonMobil's business is long-term and capital intensive. The kinds of international oil and gas development projects in which we invest typically require billions of dollars of upfront investment and a lead time of five or more years for planning and construction. Once these projects commence operations, they may have useful lives of 20 years or more – sometimes much more.

Our compensation program is designed to support our particular business model by retaining high-performing executives for the duration of their careers, and by aligning the executives' financial interests with the long-term nature of the decisions they are required to make. We do this in part by granting a substantial portion of an executive's pay in the form of restricted stock or units with very long vesting periods. For the most senior executives, equity awards vest 50% in five years and 50% in 10 years or at retirement, whichever is later. Thus an executive's net worth is made highly dependent on the company's performance extending many years after the executive's retirement.

Our annual cash bonus program also includes a delayed payout feature under which half the bonus amount is not paid until a minimum level of future cumulative earnings per share is reached. This feature defers payment of half an executive's annual bonus for up to three years and helps further support the long-term nature of our compensation program.

To support the career orientation and retention objectives of ExxonMobil's incentive program, unvested stock awards as well as unsettled cash-bonus awards automatically expire if an executive leaves the company on an unapproved basis prior to standard retirement time. Importantly, this cancellation feature does not depend on whether the executive has been found guilty of any wrongdoing. A separate provision also provides for cancellation of awards in case an executive acts in a manner contrary to the company's best interest, such as by violating company policies.

We have applied the cancellation provisions described above on many occasions over the years, to employees based in the U.S. and in numerous other jurisdictions around the world. Our enforcement efforts have included litigation to judgment at both the trial and appellate levels in cases where an executive has challenged the cancellation of his or her awards.

Based on ExxonMobil's extensive experience in this area, we believe certain important modifications are necessary in order for the Proposed Rules to be workable in real-world application.

Allow recovery via set-off

The proposing release affirms the Commission is providing flexibility to companies as to the manner in which clawback is achieved. We strongly support this flexibility and urge the Commission, in the final rules or accompanying release, to endorse even more explicitly the recoupment of clawback amounts via set-off -- to the extent legally permitted -- against any legally owing obligation a company may have to the executive. This could include set-off of clawback obligations against other unpaid incentive compensation, non-qualified deferred compensation obligations, future compensation obligations, and/or other amounts, such as dividends on company stock that may be owed to an executive.

Money is fungible. As a practical matter (and often as a legal matter as well), it is easier to cancel or retain amounts that remain within the control of the company than to recover amounts already paid out to an executive. In the absence of recovery via set-off, if the executive resists recovery, litigation to recover compensation already paid can be costly and time consuming. As discussed in more detail below, the success of such efforts can be frustrated by many factors including the inherent vagaries of litigation; local employment laws or public policy; and the fact that an executive may have become judgment proof or otherwise unable to repay the full amount owed to the company. These factors can be especially troublesome where clawback applies to before-tax amounts. It is to the benefit of shareholders for clawback obligations to be satisfied in the most efficient manner. In the vast majority of cases the most efficient means of recovery will be set-off.[1] Set-off is also likely to best serve the Commission's stated goal of prompt recovery.

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[1] Recovery via set-off can also help address exchange control issues in countries such as India where we understand a transfer of funds from a local account to a parent company in another country would require approval by national banking regulators.

Final rules must include greater flexibility to determine that recovery is impractical

Notwithstanding a company's best efforts to enforce a clawback, recovery may be unsuccessful. The Commission partially recognizes this reality in the Proposed Rules by including provisions whereby (i) an issuer may determine that the direct third party expense of recovery would exceed the amount to be recovered and thus recovery would be impractical, or (ii) recovery would be prohibited under a law of the issuer's home country in effect on the date of publication of the Proposed Rules, and the issuer provides an acceptable local legal opinion to that effect to its exchange.

We commend the Commission for acknowledging that both a disproportionate cost of recovery as well as local legal issues may make clawback enforcement impractical. However, we respectfully suggest the Commission has not fully appreciated the many circumstances which may frustrate even the most diligent attempts to enforce a clawback.

Labor and employment law tends to apply locally, and many jurisdictions – including especially jurisdictions in Europe and Latin America – take a relatively pro-employee perspective. If an executive resists clawback and enforcement must be pursued through litigation, the ultimate outcome will depend on a variety of factors including local statutory and case law and decisions made by particular judges or juries in what may be cases of first impression. The following hypothetical represents a not-unlikely scenario in a multi-national environment:

> A U.S. company seeks recoupment of incentive compensation awarded to an executive of the company's non-U.S. affiliate in Country X. The executive refuses repayment and the company must bring suit in a local court in Country X. The executive is a Country X national. While the company's incentive program clearly provides for recoupment under the applicable facts and purports to be governed by U.S. law, the court in Country X determines that, consistent with Country X public policy, the local laws of Country X will apply to the dispute and that recoupment against the Country X national is prohibited even via set-off against other unvested compensation.

Such a decision does not necessarily or even typically depend on the existence of a specific statute in Country X prohibiting clawback, but may turn simply on general labor and public policy principles in Country X which the courts of Country X may deem applicable to a local employment or compensation-related dispute.[2,3] We believe a result such as in the above hypothetical would be even more likely where the executive against whom clawback is sought is not personally at fault.[4]

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[2] While a country-by-country review of global employment laws is beyond the scope of this letter, we note the doctrine of "acquired rights," which exists in varying degrees in a number of European, Latin American, and other countries, may result in certain compensation being deemed non-forfeitable.

[3] Even within the U.S., employment law principles applicable to pay recoupment cases can vary significantly from state to state. Thus the enforceability of an issuer's clawback policy will likely depend on the extent to which the listing standards required by Section 954 and related SEC final rules are deemed to pre-empt state law.

[4] In a number of countries such as, for example, Australia and Singapore, we understand courts are unlikely to enforce a clawback except to the extent of harm resulting from the subject executive's own conduct.

As a result of our experience pursuing incentive pay recoupment and forfeiture claims, we believe it is critical for the final rules to address specifically the situation in which an issuer attempts in good faith to enforce a clawback but is unsuccessful – whether because of local statutes or case law, the rulings of a particular court, or the fact that an executive or former executive may have become judgment proof or the issuer is otherwise unable to collect clawback amounts such as because of exchange controls. In such a case, the rules should make clear the issuer has fully satisfied its obligations under Section 954.

We also believe Boards should be able to determine in good faith that clawback is impractical – and not be forced to waste shareholder funds on a fruitless enforcement attempt – whenever local law, whether in the form of a statute adopted before or after the Proposed Rules or in the form of clear legal precedent, would support an opinion of local counsel to the effect that an attempted clawback is likely to be unsuccessful in a particular case. Such exemption should also not be limited to the home country law of the issuer, which as illustrated in the hypothetical example is often disregarded by local courts when issuers seek local enforcement of pay recoupment provisions. In these cases the laws of the jurisdiction where the executive is located are more likely to be determinative.

As noted above, we also believe the determination of impracticality should not be limited to situations involving laws in effect on the date of the Proposed Rules. We understand the Commission may be concerned that a conflict-of-law exemption would encourage countries to adopt new anti-clawback laws that could undermine the Congressional intent behind Section 954. However, we respectfully suggest the proper way to address such concerns is through government-to-government contacts with such other jurisdictions, not by placing private companies – which likely have little or no ability to influence the development of local labor and employment laws in other countries – in the untenable position of being required by U.S. listing standards to pursue a clawback action that will clearly not succeed.

Proxy statement disclosure

We agree proxy statement disclosure is the appropriate means whereby shareholders and others can verify that an issuer has taken appropriate steps to enforce its clawback policy in case of a material restatement. However, we believe such disclosure can fully serve its intended purpose if provided in a general way – describing the company's determination of clawback amounts resulting from a restatement, recoupment efforts, and any determination of impracticability on an aggregate basis, without including specific, detailed disclosure concerning individual cases. Our concern is that overly specific disclosure, especially where clawback enforcement efforts have proven unsuccessful, could provide a "roadmap" for future executives – including by identifying jurisdictions in which clawback enforcement has been denied by local courts – to structure their affairs so as to frustrate enforcement of a company's recoupment efforts, whether under Section 954 or under other provisions an issuer may choose to include in its incentive compensation program.

We are also concerned that publicly identifying the clawback status of specific individuals in certain EU and other jurisdictions could violate local data privacy laws.

Covered executives

As a technical drafting matter, we recommend the final rules simply provide that the definition of "executive officer" for purposes of clawback is the same as the definition of "officer" under Rule 16a-1(f). We believe this is the Commission's intent since the language of the Proposed Rules tracks the language of Rule 16a-1(f). However, we believe crafting the definition by cross-reference to an existing rule rather than by restating the language of that rule would eliminate any potential ambiguity as to whether the officers subject to Section 16 and the executive officers subject to clawback are the same.

On a more substantive level, we urge that recovery be limited to amounts granted or paid to a person only during such time as such person actually served as an executive officer. As drafted, we understand the Proposed Rules would require recovery of any compensation earned during the three-year look-back window by a person who served as an executive officer at any time during the period. Especially since clawback is to be enforced without regard to fault, it should not apply to pay a person earned prior to becoming an executive officer or after leaving an executive officer position. In fact we believe extending the recovery provisions to such cases would effectively expand the clawback to non-executive officers, which we believe is contrary to the express language of Section 954.

Valuation of shares

We believe issuers should have flexibility to recover either the cash value of share awards or the shares themselves -- including by set-off as the issuer determines would be most efficient under the particular circumstances. Furthermore, we believe the cash value of recovered shares should be based on the value of the shares at the time the shares are "received" within the meaning of the rules, not on the proceeds that may have resulted from a subsequent sale of those shares.

In a case where shares subject to recovery have been sold, the Proposed Rules would require recoupment of the actual sale proceeds. Requiring recovery of proceeds from a later sale, especially in a rising market, will have the perverse effect of incentivizing executives to sell shares immediately on vesting and invest the proceeds in other investments so that future gains are not subject to clawback. Use of sale proceeds to determine clawback amounts would also be inconsistent with the approach taken by the Commission in the proposed pay-versus-performance disclosure rules, in which only the value of shares at vesting of an option or other share award is deemed to be "compensation" and any later gains are deemed to reflect an unrelated investment decision on the part of the executive.

Definition of material restatement triggering clawback

We strongly urge the final rules to make clear that clawback under Section 954 is only triggered by a restatement if there is a substantial likelihood a reasonable investor would view the restatement as having significantly altered the total mix of information available – that is, the U.S. Supreme Court standard for materiality in securities litigation.[5]

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[5] *Basic Inc. v. Levinson,* 485 U.S. 224 (1988)

As drafted, references in the rule to a "material error," to "material noncompliance of the issuer with any financial reporting requirement [emphasis added]," and to "one or more errors that are material to the financial statements" (but without including the words "taken as a whole"), create ambiguity regarding the applicable standard of materiality. In particular, we are concerned these references could be deemed to include a change that is "material" within the context of a specific line item in the financial statements, but is clearly not material to the consolidated financial statements taken as a whole or to a reasonable investor's decision whether to purchase or sell the issuer's stock.

Of course, a change that is material to certain line items such as net income or earnings per share is likely to be material to a reasonable investor in deciding whether to purchase or sell an issuer's stock. However, a change – even a "material" change – in many other particular items included within the financial statements or notes, or in an issuer's other financial disclosures, may well not be material to an overall investment decision.

Besides providing a clear standard of materiality with which companies and investors are familiar, we believe a clear focus on materiality defined by reference to a reasonable investor (taking into account the total mix of information available to the market) would be consistent with the Proposed Rule's coverage of erroneously awarded compensation based on stock price or total shareholder return performance metrics.

Trigger date for applying clawback

We believe the trigger for clawback should be a clear, objectively determinable event over which there can be no ambiguity as to timing: the actual issuance of a material restatement (as defined above), which would typically involve an 8-K filing. In the proposing release, the Commission expresses concern that companies may delay issuance of a restatement in order to avoid clawback. Respectfully, we do not believe this to be a realistic concern. Given the SEC and private litigation liabilities likely to accrue while a material error in a company's financial reporting remains uncorrected -- heightened by the personal certification requirements applicable to the PEO and PFO – together with the fact that an issuer's independent auditors will refuse to give an opinion on financial statements containing an uncorrected material error and the line item requirements of Item 4.02 of Form 8-K, we think it is unrealistic to be concerned that companies may intentionally delay issuance of a material restatement for clawback purposes. Moreover, we believe this negligible risk – which would ultimately compound the liabilities to which an issuer and its executives and directors could be exposed – is far outweighed by the benefits of a clear and discrete trigger event for applying the clawback provisions. We are concerned that use of the date an issuer "should have known" a restatement was necessary as a potential clawback trigger date will likely result in significant uncertainty, leading to disputes and litigation.[6]

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[6] Even if the Commission continues to be concerned that using the actual date of a restatement would allow too much potential for manipulation, the clawback trigger definition should at least parallel the standard used in Item 4.02 of Form 8-K (i.e., the date the Board, or an authorized officer if Board approval is not required, "concludes" a material restatement is required). Such a standard, while not as clear as the actual date a restatement is issued, would still be more clear and less subject to dispute and second-guessing than a "should have known" standard.

Exclusions from definition of "restatement"

We support the specific events such as changes in accounting standards currently listed in the Proposed Rules as being excluded from the definition of "restatement". In addition, we believe the list of exclusions should be expanded to include good faith changes in contingency reserves and changes in fair value estimates (such as in connection with acquisitions) based on new information. In these cases, financial measures may change materially based on changes in circumstances, not because the original reserve or estimate was "wrong" or was not based on management's best judgment under the facts known at the time. Such changes do not reflect any wrongdoing and should not give rise to clawbacks.

Specific exclusion of pension plans

We believe it would be helpful and appropriate for the Commission, either in the final rules or final adopting release, to clarify specifically that pension plans – whether qualified or non-qualified – are not deemed to be "incentive-based compensation" and thus are not subject to the clawback provisions. We believe such clarification is appropriate since the federal law under ERISA generally prohibits any alienation of pension benefits, and since these plans are not generally considered to be incentive compensation in the common understanding of the term.

Please feel free to contact me if you would like additional information on any of these points, or if there are other ways ExxonMobil can be helpful in this rulemaking project.