American Federation of Labor and Congress of Industrial Organizations

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September 14, 2015

Sent via Electronic Mail: rule-comments@sec.gov

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

Re: File Number S7-12-15 Listing Standards for Recovery of Erroneously Awarded Compensation

Dear Mr. Fields:

On behalf of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), I am writing to comment in support of the U.S. Securities and Exchange Commission ("SEC") proposed rule to establish stock exchange listing standards to require the recovery of erroneously awarded executive compensation. We urge the SEC to strengthen the final rule by requiring the application of clawback forfeiture provisions to senior executives' deferred compensation, and to expand the required use of clawbacks to cover executive wrongdoing, financial statement revisions, and the value of equity awards that have been artificially inflated.

The AFL-CIO is the umbrella federation for U.S. labor unions, including 56 unions, representing 12.5 million union members. Union-sponsored and Taft-Hartley pension plans hold $587 billion in assets. Union members also participate directly in the capital markets as individual investors and as participants in pension plans sponsored by corporate and public-sector employers. The retirement savings of America's working families depend, in part, on companies having responsible executive pay practices.

Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires the establishment of clawback provisions for erroneously awarded executive compensation in the event of an accounting restatement. As the SEC has noted, Congress intended this provision to go beyond Section 304 of the Sarbanes-Oxley Act that requires executive pay clawbacks after a material restatement due to CEO or CFO misconduct. In contrast, Section 954 of the Dodd-Frank Act intends for all executives to be subject to clawback irrespective of the individual fault of executives.

The scope of the SEC's proposed clawback rule is in accordance with the legislative intent of Section 954 of the Dodd-Frank Act. Specifically, the SEC's proposed rule requires that companies to clawback compensation regardless misconduct or fault. Dodd-Frank Section 954 requires – and common sense suggests – that executives should be required to repay compensation that they did not actually earn. It does not matter if a restatement was caused by the executive, all that matters is whether the executive actually met the performance requirements in question.

Likewise, the SEC's proposed clawback rule appropriately covers all Section 16 executive officers, including the principal financial officer and the principal accounting officer. Section 954 of the Dodd-Frank Act simply refers to executive officers, and it makes sense for the SEC to apply the clawback rule to a clearly identified group of executives under existing securities regulations. Any narrower definition of executives who are subject to clawback (such as the top five highest compensated "named executive officers" in proxy statements) would be contrary to the interests of investors.

We support the SEC's proposed application of the clawback rule to all publicly listed companies including emerging growth companies, smaller reporting companies, foreign private issuers, and controlled companies. Investors in these categories of issuers deserve the same protections as investors in large publicly traded companies. Likewise, we support the SEC's proposed ban on indemnification agreements for clawbacks. As the SEC proposal notes, permitting companies to indemnify their executives would fundamentally undermine the purpose of Dodd-Frank Section 954.

We support the SEC's proposed requirement that companies disclose the aggregate dollar amounts of executive compensation that was erroneously awarded and the status of recovery. We urge the SEC to improve the final rule by requiring that when a clawback is triggered, the identities of named executive officers and their dollar amounts of compensation subject to clawback should be disclosed in the proxy statement. Such disclosure should be required because shareholders regularly evaluate named executive officer compensation as part of their say-on-pay vote determination.

In our view, boards of directors should not be given discretion to decline to seek recovery of erroneously awarded compensation. Dodd-Frank Section 954 explicitly states that "the issuer will recover" improperly awarded compensation. To effectuate this legislative intent and to facilitate recovery, companies should be required establish a clawback forfeiture provision in their executives' nonqualified deferred compensation plans. Given the fungibility of assets, the assets subject to clawback do not necessarily have to be the same assets that were erroneously awarded as compensation.

For equity awards, clawbacks should not be limited to such awards that are granted based on satisfaction of a financial reporting measure. Time-vested stock options and restricted stock are still the predominate form of equity-based incentive pay. Dodd-Frank Section 954 explicitly requires recovery of “stock options awarded as compensation,” and this phrase should be interpreted to include the value of stock option exercises that are artificially inflated due to erroneous financial statements. To effectuate such a clawback, boards of directors should be permitted to make reasonable estimates of the effect of the accounting restatement on the stock price.

We also believe that clawbacks should not be limited to material restatements of previously issued financial statements. In recent years, an increasing percentage of restatements have been “revision restatements” that do not require an Item 4.02 Form 8-K disclosure. These “stealth restatements” should also be subject to clawback provisions. Executives should not be permitted to retain erroneously awarded compensation just because the board of directors has determined that the amendment is not sufficiently material to make the prior financial restatement unreliable.

Finally, we urge the SEC to expand the clawback rule to address instances of misconduct by executives that does not result in a financial restatement. While such a provision goes beyond the legislative requirements of Dodd-Frank Section 954, investors will benefit from robust clawback provisions that cover wrongdoing by individual executives. While the triggering of such clawbacks is likely be infrequent, having clawback policies in place for misconduct will provide further incentive for executives to comply with the law. The SEC should also require disclosure of any board of directors’ determination that a clawback for misconduct is required.

Thank you for the opportunity to comment on the SEC’s proposed rule to establish stock exchange listing standards for the recovery of erroneously awarded compensation. Executives of publicly traded companies simply should not be permitted to retain compensation that they did not actually earn, and the SEC’s proposed clawback rule will go a long way to make this a reality. If we can provide any additional information on the AFL-CIO’s views, please contact Brandon Rees at [redacted].

Sincerely,

Heather Slavkin Corzo, Director
Office of Investment

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opeiu #2, afl-cio