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Americans for Financial Reform
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September 14, 2015

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

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:

Americans for Financial Reform ("AFR") appreciates this opportunity to comment on the above-referenced proposed rule (the "Proposed Rule") by the Securities and Exchange Commission (the "Commission" or "SEC"). AFR is a coalition of more than 200 national, state, and local groups who have come together to advocate for reform of the financial industry. Members of AFR include consumer, civil rights, investor, retiree, community, labor, faith based, and business groups.[1]

AFR supports this proposal to require the recovery of erroneously awarded executive compensation as a condition for exchange listing. Failures in corporate governance have been singled out by many observers, including the Financial Crisis Inquiry Commission, as a significant cause of the global financial crisis. By ensuring that companies recover erroneously awarded compensation when a financial restatement takes place, we believe that the proper implementation of Section 954 of the Dodd-Frank Act will improve incentives for honest and transparent corporate governance.

We urge the SEC to maintain core aspects of the rule proposal. Particular strengths of the rule proposal that should be preserved in the final rule include:

- The mandatory requirement to recover erroneously awarded compensation, unless such recovery is documented to be highly impractical or illegal under the laws of the home country. This accords with the statutory language in Section 954 of the Dodd-Frank Act which specifies that the issuer *will* recover such compensation.

[1] A list of AFR member organizations is available at http://ourfinancialsecurity.org/about/our-coalition/.

- The no-fault nature of the recovery requirement. Clawback is required not because the executive is at fault, but because the compensation was awarded erroneously. In addition to being more fair and effective, we believe the no-fault nature of the recovery will act to eliminate any inappropriate personal stigma on executives subject to the requirement. Finally, this provision was clearly intended to go beyond Section 304 of Sarbanes-Oxley, which already requires clawback due to top executive misconduct.

- The application of the clawback requirement to all Section 16 executive officers. The Section 16 definition of executive officer appropriately captures all executives with a significant role in generating financial results. A narrower definition of executive officer would result in individuals with a significant executive role within a company being excluded from clawback requirements.

- The prohibition on indemnification of executive officers subject to clawback. Permitting indemnification would effectively nullify the mandatory nature of the clawback.

- The application of clawback requirements to all companies that are publicly listed as issuers, including emerging growth companies, foreign private companies, and issuers of debt and other non-equity securities. The statutory requirement does not provide for exempted classes of companies and the Proposed Rule properly reflects this.

- The application of the clawback requirement to incentive-based compensation tied to stock price metrics. Even if stock prices do not have a simple one-to-one relationship to accounting measures, the proposal correctly notes that stock price is based on investor expectation of cash flows which are in turn deeply informed by accounting metrics.

We also urge the SEC to strengthen the final rule by requiring the application of forfeiture provisions to senior executive deferred compensation.

In addition, we believe that the Commission should expand the required use of clawbacks to address instances of misconduct by executives that does not result in a formal financial restatement. In recent years, the number of formal accounting restatements has declined to less than half of its 2006 level. Most remarkably of all, accounting restatements during the 2008 to 2010 period of the global financial crisis were lower than they were during the previous three-year period, and restatements at banks also declined during the 2008-2010 period.[2] It appears that many banks were taking large writedowns in asset values without doing a formal accounting restatement, or claiming that any restatement for previous years was de minimis. However, since profits from securitizations were often booked at the close of the initial deal, executives at

[2] http://www.bloomberg.com/news/articles/2011-03-03/honesty-for-banks-is-still-such-a-lonely-word-commentary-by-jonathan-weil

financial firms had already received bonus payments based on transactions that were later linked to unexpected write downs in asset value.[3]

This was in part an issue of excessive discretion permitted in accounting rules for projected future valuation of opaque assets, and likely also in part an enforcement issue on the part of standard setters. Regulators have attempted to address some of these issues in accounting rules changes that took place post-crisis. However, this experience highlights the ways in which discretion in accounting rules and lax enforcement can create large-scale changes in firm balance sheets, including changes that should affect past year bonuses, without any formal accounting restatement. The SEC should ensure that claw back rules properly address such cases.

Thank you for the opportunity to comment on these Proposed Rules. Should you have any questions, please contact Marcus Stanley, AFR's Policy Director, at [redacted] or [redacted].

Sincerely,

Americans for Financial Reform

[3] http://www8.gsb.columbia.edu/programs/sites/programs/files/accounting/DECHOW.pdf
http://www.journalofaccountancy.com/issues/2008/may/securitizedprofits.html