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**September 14, 2015**

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

**RE: Listing Standards for Recovery of Erroneously Awarded Compensation – File Number S7-12-15**

Dear Mr. Fields:

We respectfully submit these comments on behalf of UBS Group AG ("UBS") in response to the request for comment on the proposed rules implementing the provisions of Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act").<sup>1</sup> We appreciate the difficult task facing the SEC in implementing Section 954 of the Dodd-Frank Act and the great deal of work that has gone into the Proposed Rulemaking.

While we do not argue against the value that clawbacks may provide, we think that a regulatory "one-size fits all" approach that does not distinguish among issuers or types of securities will result in a complex, inefficient, and duplicative compliance regime that is not workable for either issuers or the SEC. While we believe that a number of important modifications must be made to the Proposed Rulemaking as currently drafted, we focus our comment letter on the burdens imposed on foreign private issuers and recommend that the SEC use its exemptive authority to unconditionally exempt foreign private issuers from Section 954 of the Dodd-Frank Act.

### **Discussion**

The SEC has general exemptive authority to conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions from any provision or provisions of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and the Securities Act of 1933, as amended (the "Securities Act"), to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.<sup>2</sup>

Throughout its rules, the SEC has recognized a difference between US issuers and foreign private issuers and has adopted specific rules and exemptions applicable to foreign private issuers that are designed to recognize international and home jurisdiction standards. In general, some of these rules provide that:

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<sup>1</sup> See [Listing Standards for Recovery of Erroneously Awarded Compensation](#), Release No. 33-9861 (July 1, 2015) [80 Fed. Reg. 134, July 14, 2015] the "Proposed Rulemaking").

<sup>2</sup> See Section 36(a) of the Exchange Act and Section 28 of the Securities Act.

- foreign private issuers are exempt from the proxy rules under Rule 3a12-3(b) of the Exchange Act;
- insiders of private issuers are exempt from filing beneficial ownership reports under Section 16(a) of the Exchange Act and are not subject to the short-swing trading rules under Section 16(b) of the Exchange Act; and
- foreign private issuers may use particular registration and reporting forms designed specifically for them.

Further recognizing that foreign private issuers are already subject to their home country listing standards, the NYSE exempts these issuers from many of the NYSE's applicable listing standards. Specifically, listed companies that are foreign private issuers are permitted to follow home country practice in lieu of the provisions of Section 303A of the NYSE's Corporate Governance Standards except for 303A.06 (Audit Committee independence), 303A.11 (foreign private issuer disclosure), and 303A.12(b) and (c) (certification requirements). Foreign private issuers are therefore exempt from most of the NYSE's listing standards, including, for example, those standards governing independent directors, compensation committees, and shareholder approval of equity compensation plans.

Foreign private issuers such as UBS are already subject to strict home country rules and regulations governing incentive compensation. In Switzerland, the Financial Market Supervisory Authority ("FINMA") is heavily involved in regulating compensation arrangements of banking entity employees. In this respect, on January 1, 2010, a FINMA-issued circular setting forth ten minimum standards for remuneration schemes of financial institutions came into effect.<sup>3</sup> These standards emphasize risk/performance-related compensation, transparency, and a long-term view for incentive compensation.

One FINMA standard provides that a company's board of directors shall design the remuneration policy of the company and shall be responsible for its implementation. The Proposed Rulemaking imposes "an unqualified 'no-fault'" recovery mandate and requires a listed company's board of directors to recover compensation in compliance with its recovery policy except to the extent that pursuit of recovery would impose undue costs on the issuer or its shareholders or would violate home country law so long as the relevant home country law was adopted in such home country prior to July 14, 2015 (the date of publication in the Federal Register of proposed Rule 10D-1). The mandate of an "unqualified no-fault" recovery and the requirement that home country law must have been adopted prior to July 14, 2015 both usurps UBS's board of director's authority over the design and implementation of its remuneration policy as required under the FINMA standards and places UBS's board of directors in the potential position of having to choose between potential de-listing in the United States or ignoring home country law.

In compliance with other FINMA standards on remuneration schemes, at least 80% of incentive-based compensation paid to UBS's executive officers (within the meaning of the Section 954 rules) is subject to deferral and risk of forfeiture for periods of up to five years from the date of grant. In addition to performance conditions, the deferred compensation granted to these executive officers is subject to forfeiture prior to vesting if, among other things, the executive officer's performance is deemed to contribute substantially to a significant downward restatement of any published results of the UBS Group or any business division of the UBS Group. Accordingly, when UBS's current compensation framework is combined with the Proposed Rulemaking, an executive officer is subject to much more than a three-year clawback. Such executive officer is also at risk of forfeiting incentive-based compensation under its compensation framework that would not yet be considered "received" under the Proposed

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<sup>3</sup> FINMA Circular 2010/1, Remuneration Schemes, Minimum standards for remuneration schemes of financial institutions.

Rulemaking. That puts UBS at a distinct disadvantage to similarly-situated US issuers who would be subject only to the clawback under the Dodd-Frank Act.

FINMA's standards also require, as part of the annual reporting process, the board of directors to prepare a remuneration report that explains the implementation of its remuneration policy. The disclosure of the remuneration report must be made in accordance with the Swiss rules governing publication of the annual report and must also be made to FINMA. Therefore, complying with the Proposed Rulemaking will result in a duplication of efforts and expense and require UBS to make separate disclosures about the clawback policy and its implementation in UBS's annual report under Swiss standards and to FINMA, as well as disclosures in its applicable securities filings in the United States.

In addition to the supervision by and the mandates on incentive-based compensation from the Swiss regulatory authority as described above, UBS is subject to the Swiss Ordinance against Excessive Compensation (the "Ordinance")<sup>4</sup> governing compensation. In compliance with this Ordinance, UBS's Articles of Association provide its shareholders with a binding vote on the amount of incentive-compensation paid in the aggregate to its executive officers.

The Ordinance is much stricter than the U.S. say-on-pay rules under Section 951 of the Dodd-Frank Act which require public companies subject to the US proxy rules to provide their shareholders with an advisory, non-binding vote, on executive compensation. Subjecting a foreign private issuer such as UBS, that is already subject to a binding say-on-pay shareholder vote on incentive-compensation under its home country laws, to the recovery rules under Section 954 of the Dodd-Frank Act, places UBS at a distinct disadvantage to US issuers who are not subject to both recovery requirements and a binding say-on-pay shareholder vote.

Further, as a foreign private issuer, many of UBS's executive officers are domiciled outside of the United States and are already subject to foreign regulatory requirements on their incentive-based compensation, which, as described above, include forfeiture of unvested awards in the case of a downward restatement. Subjecting foreign-based senior executives to no-fault recovery rules, with the threat of de-listing in the United States for noncompliance, places an unfair burden on the foreign private issuer.

As a firm with a global workforce, UBS may lose attractiveness as an employer as senior managers who are domiciled in a foreign country but find themselves subject to strict US rules on incentive-compensation may consider moving to non-US listed companies. US-based issuers do not face this same issue as an executive based in the United States is less likely to move to a foreign country than a foreign based executive is to move to another employer in the same country.

As described above, we believe that Section 954 of the Dodd-Frank Act unnecessarily adds complexity and duplicative burdens on foreign private issuers and their executives. Furthermore, it creates an uneven playing field between US-based and foreign private issuers. Therefore, we respectfully recommend that the SEC use its general exemptive authority to unconditionally exempt foreign private issuers from Section 954 of the Dodd-Frank Act.

If the SEC decides not to exempt foreign private issuers from Section 954 of the Dodd-Frank Act, we have numerous concerns about the application of the Proposed Rulemaking to foreign private issuers.

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<sup>4</sup> The Swiss Ordinance against Excessive Compensation entered into effect on 1 January 2014. The Ordinance implements the key elements of the "Minder Initiative", a constitutional amendment approved by the Swiss electorate in March 2013.

### Interaction with Foreign Law

The Proposed Rulemaking provides that an issuer must recover erroneously awarded compensation except to the extent that pursuit of recovery would be impracticable because it would impose undue costs on the issuer or its shareholders or would violate home country law and certain conditions are met. Before concluding that it would be impracticable to recover because doing so would violate home country law, the issuer first would need to obtain an opinion of home country counsel, not unacceptable to the applicable national securities exchange or association, that recovery would result in such a violation. As part of this requirement, the listed issuer would need to provide the legal opinion to the exchange or association (see footnote 186 of the Proposed Rulemaking). In addition, the Proposed Rulemaking provides that to minimize any incentive countries may have to change their laws in response to the recovery rules, the relevant home country law must have been adopted in such home country prior to July 14, 2015 (the date of publication in the Federal Register of proposed Rule 10D-1). We have several concerns about this provision.

First, the SEC should clarify that the term "law" includes any legal or regulatory requirements or any interpretations thereof by any regulator, agency or tribunal of competent jurisdiction.

Second, it should be the "law" (as clarified above) of the home country and any other countries whose laws otherwise apply to the executive officer. In a global marketplace, the laws and regulations of several different countries may apply to any one executive officer and the SEC rules should not limit the exemption for violation of home country law to the law of only one home country.

Third, we believe that it is inappropriate to require listed issuers to share their legal opinions with the national securities exchanges or associations and give those exchanges or associations veto power over the opinion. Sharing legal opinions would most likely cause listed issuers to waive any attorney-client privilege that exists with respect to the opinion and may cause added expense to listed issuers as legal counsel will need to add disclaimers and other caveats to their opinions as a third party will now be privy to those opinions.

Lastly, we believe that it is inappropriate to provide that the relevant home country law must have been adopted prior to July 14, 2015. A country may decide to enact a law for legitimate domestic purposes unrelated to the SEC's rulemaking. In such a case, a listed issuer's board of directors would be placed in a position of choosing between ignoring home country law that is adopted after July 14, 2015 and de-listing on the US securities exchange. In addition, if such an issuer did pursue recovery against an executive officer when such action violates or could potentially violate home country law, the issuer will undoubtedly be faced with costly and time consuming litigation with the executive officer or a relevant regulatory authority over the compensation. We do not think that it is proper for the SEC to place any issuer in such a situation. Therefore, any time constraints on when home country law, as clarified above, must be adopted for purposes of the exemption should be removed.

### Disclosure Requirements

The Proposed Rulemaking requires issuers to disclose the names of each executive officer from whom the listed issuer has decided not to pursue recovery, the amount foregone and the reason the listed issuer in each decided not to pursue recovery. In addition, the Proposed Rulemaking requires issuers to disclose the name of each executive officer from whom, as of the end of the last completed fiscal year, excess incentive-based compensation has been outstanding for 180 days or long since the date the issuer determined the amount the person owed.

Because the executive officers have no say in whether incentive compensation is recovered and because recovery may not occur due to impracticability or violation of applicable home country law or regulation, we do not see any value in naming the specific officers from whom recovery has been foregone or for whom there is any outstanding recovery. For example, if the issuer has decided not to pursue recovery against an executive officer who is based in a foreign country because such recovery would violate applicable home country law, the name of that executive is irrelevant and shareholders receive no benefit by knowing the name of that executive.

In addition to the concerns above, there are data privacy concerns over disclosing the names of executive officers as set forth in the Proposed Rulemaking. In formulating its recent Pay Ratio Disclosure Rules, the SEC recognized the impact of foreign jurisdiction's laws or regulations governing data privacy and provided for appropriate exemptions. Similar concerns apply to disclosures relating to the recovery of incentive-based compensation. Data privacy laws or regulations in various foreign jurisdictions could affect a listed issuer's ability to disclose personal information such as the name of an individual for whom recovery has not been sought.

Therefore, we respectfully recommend that you revise the rules to remove any requirement to name each executive officer from whom the listed issuer has decided not to pursue recovery and any requirement to name each executive from whom any excess-incentive based compensation has been outstanding for any period of time.

### Conclusion

As explained above, we believe that regulation of compensation arrangements is important, however, we believe that regulation under Section 954 of the Dodd-Frank Act unnecessarily adds complexity and duplicative burdens on foreign private issuers and their executives. Therefore, we respectfully recommend that the SEC use its general exemptive authority to unconditionally exempt foreign private issuers from Section 954 of the Dodd-Frank Act. In addition, to the extent foreign private issuers are not exempted from the Section 954 requirements, we have recommended other changes to the Proposed Rulemaking as they relate to foreign private issuers. We have numerous other concerns about the Proposed Rulemaking as currently drafted, but we believe they have been addressed at length in other comment letters. In particular, we generally support the comments of the U.S. Chamber of Commerce in this regard.

We appreciate the difficulty of the task facing the SEC and hope that we can be helpful to the SEC's efforts to implement Section 954 of the Dodd-Frank Act in a workable and effective manner. We appreciate the consideration of our comments and concerns. Please do not hesitate to contact the undersigned if you have any questions regarding our comments or if we can be of any further assistance.

Very truly yours,

UBS AG

/s/ Michael Crowl

/s/ David Kelly

Michael Crowl  
Group Managing Director and  
Americas Region General Counsel

David Kelly  
Head, Transactions, Governance and  
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