American Vanguard Corporation

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Securities Exchange Commission
http://www.regulations.gov

RE: Listing Standards for Recovery of Erroneously Awarded Compensation
File # S7-12-15

I am submitting the following comments relating to the above-referenced proposal. Thank you for your consideration.

Let me start by saying that it is obvious that the Commission has given this matter a great deal of thought. The description of the proposed rule, analysis and requests for comment runs for nearly 200 pages. Despite the amount of material being presented, however, it is difficult to comment on specific questions, because the questions arise from a rule that has fundamental deficiencies. As drafted, the proposed rule has three primary flaws: first, it is unfair to those who bear no fault; second, it violates the Due Process clause of the Fourteenth Amendment; and third, the recovery mechanism will not work in the real world.

On the first point, the proposed rules purport to require the recovery of compensation from certain officers in the event of a material restatement of an issuer's financial statements. The Commission goes on to ask how best to define that group of officers. The answer is that we should not be focusing on some pre-defined group of officers; rather, we should be focusing those who are at fault. This is a penalty. Only those who have done wrong should be hit with a penalty.

By pre-ordaining the group-to-be-penalized by rank and/or duties rather than by fault, the rule is both overinclusive and underinclusive in effect. On the one hand, it is possible that only a few executive officers might be involved in wrongful conduct leading to erroneous financial statements. In that case, it is unfair to penalize those who were not complicit in the bad acts. This reminds me of my fifth grade teacher who would threaten to keep the entire class from recess if one person talked out of turn. I argued with her that that approach was unfair – we didn't control our fellow classmates. The same logic holds true here. Typically, few of the executive officers have control over financial statements. In many cases, non-finance executives have neither the expertise (in accounting and disclosure regulations) nor the information necessary to make an informed judgment as to whether financial statements were prepared erroneously. To hold such people accountable for such errors is to impose a CFO standard on the entire senior management team.

On the other hand, it is possible that numerous executive officers, including the CFO as well as a slew of managers below that level are complicit in intentionally generating erroneous financial statements. Indeed, it would be reasonable to imagine a case in which one or more controllers and financial analysts were involved in such a scheme. As drafted, the rule would not touch the bad actors below the level of CFO. Not punishing the guilty is just as unfair as punishing the innocent. In short, unless the Commission focuses on a culpability standard (e.g., scienter) as opposed to contrived job categories, this rule will be inherently unfair in nearly all cases.

Second, as proposed, the rule requires that incentive compensation be recovered upon the finding of a restatement. There is no hearing as to the officers' knowledge or fault; rather, the officer is deemed to be guilty by virtue of his membership in a class. Further, as drafted, the rule anticipates that, in certain circumstances, the board should have no choice in the matter; thus, in effect, the State is requiring that this deprivation take place. This seems like a plain violation of the Fourteenth Amendment of the U.S. Constitution which prohibits "depriving a person of property without due process."

Perhaps the Commission is of the opinion that incentive compensation is not "property" and that, therefore, recouping such compensation is not a deprivation of property under the Fourteenth Amendment. This view of compensation is problematic for two reasons. First, it is inconsistent with state labor and employment law. Under applicable laws in the State of California and, to my knowledge, in most other states, compensation, once made, becomes the property of the employee. It is subject neither to offset nor to recoupment unless the employee consents thereto. The inconsistency between the proposed federal rule and state labor and employment law would diminish the prospects that the board could obtain a judgment against any executive who refused to pay the clawback amount.

Second, making incentive compensation revocable makes it undesirable in the eyes of key executives. At present, there is no element of compensation in which the company has a reversionary interest. This would be the first. Practically speaking, no executive will embrace the risk of having the equivalent of his or her annual salary recouped. To avoid this risk, executives will likely tend either to flee from public companies and join privately held ones (where there is no such risk) or insist that cash incentive compensation be eliminated and that their annual wage (which is not revocable) be increased in some fashion to make up for that elimination.

Timothy J. Donnelly ~ Chief Administrative Officer, General Counsel & Secretary ~ American Vanguard Corporation
4695 MacArthur Court, Suite 1200, Newport Beach, CA 92660 ~ (949) 221-6115 ~ timd@amvac-chemical.com

Third, as proposed, the rule would not likely work in real life. Assume for a minute that there is a material restatement and the board goes after incentive compensation of executive officers. At this point the executive officers have a decision to make – should they stick around and face the music or leave? If they choose to stay, then they will be subject to sanctions from the board, and those sanctions could be significant. Thus, those who stay behind will, as a price of their continued employment, either pay a lump sum or have future compensation offset by the amount of the penalty. Those who leave, however, will effectively remove themselves from the control of the board and, even if pursued, can defnd their interests before an impartial tribunal.

Not only will many executive officers (whether culpable or not) likely leave the company in the face of incentive compensation recoupment, but the board will likely find it difficult to recover the money from those who have left. After calculating the value of erroneously paid compensation, the company, having no security interest in its employees' (or ex-employees') assets, will be compelled to file an action with a local court, get a judgment (which could take two to three years) and then attempt to enforce that judgment. It is far from certain that the board could get a judgment based upon its implementation of the proposed rule, as the local court may choose to follow labor and employment laws, rules of equity and/or constitutional due process considerations that are inconsistent with that rule.

Bottom line: recovery of incentive compensation should be limited to those who are complicit in the bad acts that give rise to a material restatement, and those accused of wrongdoing should be entitled to a hearing. Unless these elements are included in it, the proposed rule is likely unconstitutional and will result in the loss of key executives (both good and bad). In addition, it is far from clear that making compensation revocable is consistent with state labor and employment law and, at any rate, such an arrangement would likely lead to issuers eliminating this element of compensation entirely. Further, even if the rule is changed to include both a fault-basis and due process, it is unlikely that the company will

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actually collect the penalty money from ex-employees without litigation. Finally, if the proposed rule is to lead ineluctably to litigation, then perhaps it is best to dispense with the rule and, instead, using currently-existing legal theories (like unjust enrichment, fraud and securities violations) before impartial courts to exact damages from culpable executives and managers.

Regards,

Timothy J. Donnelly
Chief Administrative Officer,
General Counsel & Secretary
American Vanguard Corporation

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