3/15/2023

Subject: File Number SR-NYSE-2023-12

I have reviewed both the NYSE and Nasdaq proposed listing standards. Neither have raised any questions or comments regarding apparent problems with the SEC's Exchange Act Rule 10D-1 and the related rule amendments that require disclosure (i.e., Regulation S-K, Item 402(w) and the parallel requirements in Form 20-F, Item 6.F and Form 40-F, General Instruction B, Paragraph (19)).

Given the role the national securities exchanges are to play with respect to their listed issuers should any such issuer have to apply the rule and rule amendments, it would seem advisable for the SEC staff to address the matters raised in the attached prior to proposed listing standards being adopted and taking effect.

Don Meiers

Questions/Comments re Exchange Act Rule 10D-1 and Related Disclosure Requirements

1. *Exchange Act Rule 10D-1(a)(3)*. Exchange Act Rule 10D-1(a)(3) uses the "no later than 60 days..." verbiage only in subsection (a)(3)(i), and not subsections (a)(3)(ii) or (iii). As written, Exchange Act Rule 10D-1(a)(3) would seem to require an Exchange-listed company to comply with, and provide disclosures with respect to, its Exchange-mandated compensation recovery policy as much as 60 days *prior* to the company adopting such policy.

It appears that the "no later than 60 days" verbiage in Exchange Act Rule 10D-1(a)(3)(i) should have been positioned in Exchange Act Rule 10D-1(a)(3), so that this timing would apply to *each* of subsections (a)(3)(i), (ii) and (iii). However, even with the relocation of the "no later than 60 days" text in this manner, the phrasing of subsections (a)(3)(ii) and (a)(3)(iii) would still be problematic, since in both cases the text includes "on or after the effective date of the applicable exchange's/association's listing standards."

In contrast, footnote 385 of SEC Release No. 33-11126 seems to reflect how the timing of each subsection should work. That footnote reads as follows:

> ... A listed issuer subject to such Exchange listing standards will be required to adopt an Exchange-mandated compensation recovery policy no later than 60 days following the date on which the applicable Exchange's listing standards become effective and must begin to comply with these **disclosure** requirements in the issuer's proxy statements and information statements, and in the issuer's annual report on Form 10-K, on or after the issuer timely adopts such compensation recovery policy.

2. *Exchange Act Rule 10D-1(b)(1) "Reasonably Promptly" Requirement*. Note that SEC Release No. 33-11126 states that if any erroneously awarded incentive-based compensation was contributed by the company, or deferred by an executive officer, into a company non-qualified deferred compensation plan, the Exchange-mandated compensation recovery policy would require that the company reduce the executive officer's account balance or distributions under the plan by:

- the erroneously awarded incentive-based compensation contributed to/deferred into the plan, plus
- the interest or other earnings accrued on such compensation.

See SEC Release No. 33-11126, Section II.C.3.a.iii, footnote 243.

The reference to a reduction in the "distributions" under the non-qualified deferred compensation plan makes questionable whether this would translate into recovery of the erroneous awarded incentive-based compensation on a *reasonably prompt* basis, as is required under Exchange Act Rule 10D-1(b)(1).

3. *Exchange Act Rule 10D-1(b)(1)(iv)(A)*. There are several uncertainties with respect to the application of Exchange Act Rule 10D-1(b)(1)(iv)(A):

- Neither Exchange Act Rule 10D-1(b)(1)(iv)(A) nor SEC Release No. 33-1116 expressly state whether the availability of the exception is to be analyzed on an individual executive officer and

individual incentive-based compensation award basis. However, since it is necessary to calculate the amount of erroneously awarded incentive-based compensation on an individual executive officer and award basis, it is logical to conclude that such is the case. As a consequence, a company would seem to be precluded from making use of the exception on the basis of a determination that the *aggregate* direct costs/expenses of enforcing the company's Exchange-mandated compensation recovery policy (i.e., with respect to all executive officers and all awards subject to the policy) exceed the aggregate amount to be recovered under the policy.

- If a company opts not to recover erroneously awarded incentive-based compensation from one or more executive officers based on Exchange Act Rule 10D-1(b)(1)(iv)(A) (i.e., because the direct expenses, in theory, exceed the amounts to be recovered), does Regulation S-K, Item 402(w)(1)(ii) require the company to disclose why ***set-off arrangements*** were not considered/implemented? Such arrangements would seemingly entail minimal expense.

- If a company 'recovers' erroneously awarded incentive-based compensation through ***set-off arrangements***, should the company disclose the specifics of those set-off arrangements (including, for example, when providing Regulation S-K, Item 402(d) Grants of Plan-Based Awards Table information – with respect to minimum, target, and maximum amounts of equity and non-equity incentive plan awards). If the awards were reflected in a prior year Grant of Plan-Based Awards Table, should the company provide disclosure with revived #s for that table? There is nothing in Regulation S-K, Item 402(w) that expressly requires the company to provide such disclosure. But the standard Regulation S-K, Item 402 executive compensation disclosure would seem incomplete/inaccurate without such information. In addition, the non-revision of the Grants of Plan-Based Awards Table would seem at odds with Instruction 5 to Regulation S-K, Item 402(c)/Item 402(n), which requires "correction" of previously disclosed #s in the Summary Compensation Table.

4. *Regulation S-K, Item 402(w)(1)*. With respect to Regulation S-K, Item 402(w)(1), it is unclear whether a company needs to provide the disclosure in the event of a prior period accounting restatement for which there remains an outstanding balance to be recovered if:

- the company and an executive officer from whom the company is in the process of recovering erroneously awarded incentive-based compensation under a payment plan, and
- the executive officer has been, and is, making all payments in the time and manner specified under the payment plan, but the payment plan calls for payments beyond the end of the company's most recently completed fiscal year/transition period.

Stated another way, under such circumstances, is there an outstanding balance of erroneously awarded incentive-based compensated to be recovered as of the end of the company's most recently completed fiscal year/transition period?

5. *Instruction 5 to Regulation S-K, Item 402(c)/(n)*. Instruction 5 to each of Regulation S-K, Item 402(c) and Item 402(n) (each of which pertains to the Summary Compensation Table (**SCT**)) requires – with respect to a company's ***named executive officers*** in the applicable SEC filing that:

- any amount(s) recovered under the company's Exchange-mandated compensation recovery policy from such named executive officers reduce the aggregate amount

reported in the applicable column of the SCT, as well as the "Total Compensation" of the SCT, ***for the fiscal year in which the amount(s) recovered was/were initially reported***; and

- such amount(s) be identified in a footnote to the SCT.

Presumably Item 402(w) would not require that a company include information with respect to:

- any fiscal year or transition period in the Regulation S-K, Item 402(c)/Item 402 Summary Compensation Table that would not otherwise be included in the Summary Compensation Table (e.g., if the company had not been an SEC-reporting company in a prior fiscal year), or

- any named executive officer whose compensation information was not reflected in any fiscal year/period prior to the company's most recently completed fiscal year/transition period if such named executive officer was not a named executive officer in such prior fiscal year/transition period and, accordingly, his/her compensation information for that prior fiscal year/period was not previously included in a Summary Compensation Table.

Is this the intent?

6. *Regulation S-K, Item 402(w)(1)(i)(D)*. If a company enters into a deferred payment plan with an executive officer to recover erroneously awarded incentive-based compensation and the plan provides for the accrual of interest on the deferred payments, it is unclear whether the accrued interest should be included in the amounts that remain outstanding (under Regulation S-K, Item 402(w)(1)(i)(D)) as of the end of the company's most recently completed fiscal year given that such interest is not included in the aggregate amount of erroneously awarded incentive-based compensation (under Regulation S-K, Item 402(w)(1)(i)(B)).

7. *Regulation S-K, Item 402(w)(1)(ii) and (iii)*. Note that, unlike the disclosure requirements specified in Regulation S-K, Item 402(w)(1)(i), Regulation S-K, Items 402(w)(1)(ii) and (iii) do not provide that the disclosure be provided on an *individual* accounting restatement basis. This would appear to be a scrivener's error. If the issuer does not provide the disclosure on an individual accounting restatement basis, the disclosure under Regulation S-K, Item 402(w)(1)(ii) and (iii) would be essentially impossible to follow when read in conjunction with the disclosure provided in response to Regulation S-K, Item 402(w)(1)(i). In any event, Exchange Act Rule 10D-1 requires that a company determine the amounts on an individual accounting restatement basis.