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The *WRNewswire* is created exclusively for AALU Members by insurance experts led by Steve Leimberg, Lawrence Brody and Linas Sudzius. *WRNewswire* #15.07.23 was written by Marla Aspinwall.

TOPIC: SEC Proposes Compensation Clawback Rules

CITATION: [17 CFR PARTS 229, 240, 249 and 274 \[RELEASE NOS. 33-9861; 34-75342; IC-31702; File No. S7-12-15\] RIN 3235-AK99.](#)

SUMMARY: The Securities Exchange Commission (“SEC”) on July 1, 2015, issued proposed rules to implement the “clawback” policy enacted by Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The proposed rules would require publicly traded companies, if they correct prior financial statements, to recover (i.e. clawback) from their executive officers previously paid incentive based compensation to the extent it was greater than what *would* have been paid under the corrected financial statements for the preceding three fiscal years.

RELEVANCE: AALU members should advise their publicly-traded clients to consider adopting clawback policies now that amend existing incentive based compensation arrangements to comply with the proposed rules. Though the rules are not yet in effect, if finalized in the current form, the rules will require that the clawback policy apply to financial restatements for all accounting periods ending after the date on which the SEC rules becomes effective.

For example, assume that the new rules become final on December 1, 2015 and the company’s fiscal year ends on December 31, 2015. If it is later determined that the financial statements for 2015 should be restated, the company could be required to recover “excess” incentive based compensation paid for 2015 performance *even* if the company’s existing compensation plans do not give the company the contractual *right* to recover such excess payments. This could be particularly problematic if the executive officers have already left the company.

The penalty for failure to comply with these new rules is the potential for the company to be *delisted* from the stock exchange if it fails to recover the required amounts. Therefore, public companies should consider amending existing compensation arrangements *now* to subject them to a general clawback policy, the details of which may be tied to the final rules.

FACTS: The clawback rules apply whenever there is a determination that a restatement of financial statements is required and mandate that the company recover incentive-based compensation paid to executive officers which exceeds the amount that would have been paid if the financial statements in the preceding three fiscal years had been *correctly* prepared. Recovery is *required* - *unless* the cost of doing

the recovery would exceed the amount recovered or violate applicable foreign law. The rules apply to “any compensation that is granted, earned or vested based wholly or in part upon the attainment of any financial reporting measure.”

Compensation may be considered based upon the attainment of a financial reporting measure even if the measure is not an explicit part of the financial statements and may include compensation linked to stock price or return to shareholders. The rules require a proxy disclosure for each fiscal year there is either a restatement of the financial statements requiring recovery or unrecovered amounts attributable to a prior restatement.

The proposed clawback requirements are to be implemented as follows:

The proposed rules will be subject to a 60 day comment period, after which the final rules will be issued.

Within 90 days of the final SEC rules, stock exchanges will be required to publish implementing rules for companies registered on that exchange – to be effective within one year of the final SEC rules.

Registered companies will have 60 days after the effective date of the stock exchange rules to put in place clawback policies that comply with the rules of the relevant exchange. **Companies that fail to do so could be delisted from the stock exchange.**

Although companies may have many months to put their policies in place, any corrections to financial statements for accounting periods ending after the publication of the final SEC rules will be subject to the SEC clawback requirements. Hence, public companies would be well advised to evaluate their policies *now*, in light of the proposed SEC rules.

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