

ClearBridge

# Market Update

Regulatory Updates:

13 March 2023

Pay vs. Performance Disclosure Clarifications  
and Clawback Policy Update



ClearBridge  
Compensation Group

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## SEC Issues Clarifications to Pay vs. Performance Disclosure Rules

In February 2023, the SEC issued 15 Compliance and Disclosure Interpretations (C&DIs) to address certain questions regarding the new Pay versus Performance (PVP) rules. A summary of the 15 C&DIs is provided below, as well as a link for the [full SEC guidance](#).

Item	Details
<b>Required Filings</b>	PVP disclosure is only required in the proxy statement or any other filing in which the SEC requires executive compensation disclosure.
<b>First Time NEOs</b>	Changes in the value of all relevant equity awards must be included in compensation actually paid (CAP) calculation, even if granted to an executive prior to appointment as a Named Executive Officer (NEO).
<b>Footnotes for First PVP Table</b>	In a company's first PVP table, footnote disclosure is required for each of the amounts deducted and added to calculate CAP for each year in the table. In subsequent years, footnotes are only required for most recent fiscal year (unless footnotes for prior years are material to an investor's understanding of the information).
<b>Pension Footnotes</b>	Companies should provide footnote disclosure of each amount deducted and added for pension value adjustments, rather than simply an aggregate amount.
<b>Peer Group TSR</b>	Companies can use any peer group disclosed in the Compensation Discussion and Analysis (CD&A) as a peer group used to help determine executive pay, even if peer group is not used for "benchmarking" compensation.
<b>Calculation of TSR from IPO</b>	For companies who went public during the earliest year of PVP disclosure, the measurement period for calculating TSR and peer group TSR should begin on the registration date.
<b>Peer Group Changes</b>	If a company changes its peer group during the years covered in the PVP table, the company must present the peer group TSR for the peer group disclosed in its CD&A for each respective year.
<b>Net Income</b>	Net income/loss must be the number disclosed in a company's audited GAAP financial statements.
<b>Acceptable CSM</b>	The Company-Selected Measure (CSM) can be a measure that is derived from or a component of TSR or net income (e.g., relative TSR, EPS).
<b>Stock Price as CSM</b>	Stock price should not be the CSM if the company does not use stock price as a specific incentive plan measure, even if it has significant impact on the amounts reported in the PVP table by nature of the company issuing equity awards. Stock price can be used as the CSM if stock price is used to determine an incentive plan award payout / size of a bonus pool, etc.
<b>CSM Measurement Period</b>	The CSM cannot be measured over a multi-year period; it must be measured for the most recently completed fiscal year.
<b>Disclosure of Bonus Pool Measures</b>	If a company's bonus pool is determined using financial performance measure(s) but is allocated based on discretion and there are no other financial measures in the compensation program, the company is still required to include a tabular list of measures, including at least the bonus pool funding measure(s).
<b>Multiple PEOs in a Fiscal Year</b>	If a company has multiple PEOs in a fiscal year, aggregate compensation can be used for the purpose of comparison between CAP, TSR, net income, and the CSM, to the extent aggregating the compensation will not be misleading to investors.
<b>Fiscal Year Changes</b>	If a company changes its fiscal year during PVP time period, the company is required to disclose compensation for the "stub period", without annualizing or restating.
<b>Bankruptcy</b>	If a company emerges from bankruptcy and issues a new class of stock, the company may measure its TSR and peer group TSR starting post-bankruptcy.

## Clawback Policy Update

In 2022, the SEC announced the adoption of new rules (Rule 10D-1) regarding compensation recovery policies, known as “clawback” policies. In February 2023, the NYSE and Nasdaq released their respective versions of proposed listing standards that implement the SEC’s clawback rule.

The NYSE explicitly states that its proposed rule “is designed to conform closely to the applicable language of Rule 10D-1”, while the Nasdaq also proposed listing standards generally consistent with the SEC rules with some additional detail and clarifications (e.g., specific disclosure requirements in the event of a clawback, ramifications of not being compliant). See the following page for a summary of the proposed rules.

## Next Steps/Deadline for Compliance

- On March 7, the SEC published notices to solicit comments on both the NYSE and Nasdaq proposed listing standards. Public comments will be due 21 days from publication (or March 28), following which the SEC will seek to approve both listing standards.
- In accordance with the SEC’s regulation, both stock exchanges must have their applicable listing standards effective no later than November 28, 2023 (the Effective Date, which can also occur before November 28).
- Companies must adopt a compliant clawback policy no later than 60 days following the Effective Date. For example, if the Effective Date is November 28, 2023, then companies must comply by January 27, 2024.

For more information on clawback policies, see the following page for detail, the SEC’s Fact Sheet, as well as the SEC’s Final Rules.

## Summary of Clawback Rules

Item	Details
<b>Clawback Triggers</b>	<ul style="list-style-type: none"> <li>Triggered in the event an accounting restatement is required that would/will affect an executive's goals for incentive-based compensation <ul style="list-style-type: none"> <li>Applies to "big R" restatements (required restatement and reissue of previously issued financial statements, correcting material errors) and "little r" restatements (update of prior period information in subsequent statement to correct errors in previous financial statement)</li> </ul> </li> </ul>
<b>Covered Individuals</b>	<ul style="list-style-type: none"> <li>Current and former executive officers who received erroneous payment, regardless of who is at fault</li> </ul>
<b>Definition of Incentive-Based Comp</b>	<ul style="list-style-type: none"> <li>Any compensation that is granted, earned, or vested based wholly or in part upon the attainment of a "financial reporting measure," including total shareholder return ("TSR") and stock price <ul style="list-style-type: none"> <li>Excludes time-vested restricted stock/units, time-vested stock options, and bonuses not linked to attainment of financial reporting measures</li> </ul> </li> </ul>
<b>Amount of Recovery</b>	<ul style="list-style-type: none"> <li>Calculated as pre-tax amount of incentive-based compensation actually received that exceeds amount that would have received based on restated financials <ul style="list-style-type: none"> <li>For incentive-based compensation tied to TSR or stock price goals, "reasonable estimates" may be used to determine the impact of the restatement; methodology/rationale for estimate must be disclosed</li> </ul> </li> </ul>
<b>Look-Back Period</b>	<ul style="list-style-type: none"> <li>Look-back period will be three completed fiscal years immediately preceding the date the issuer is required to prepare an accounting restatement for a given reporting period</li> </ul>
<b>Permitted Exceptions</b>	<ul style="list-style-type: none"> <li>The only permitted exceptions include situations where: <ul style="list-style-type: none"> <li>Direct expenses paid to enforce the policy would exceed the amount to be recovered</li> <li>Home country laws existing at time of rule adoption prohibit recovery</li> <li>Recovery would likely cause an otherwise tax-qualified retirement plan to fail to meet requirements of the Internal Revenue Code</li> </ul> </li> </ul>
<b>Required Disclosure</b>	<ul style="list-style-type: none"> <li>Companies are required to disclose a clawback policy as an exhibit to their 10-K</li> <li>If triggered, companies must disclose in their proxy statement how the clawback policy was applied and amend the Summary Compensation Table for any named executive officer impacted by the clawback</li> </ul>
<b>Timing</b>	<ul style="list-style-type: none"> <li>Listing standards must become effective within one year of issuance</li> <li>Companies subject to listing standards must comply within 60 days of listing policies becoming effective</li> </ul>
<b>Ramifications of Non-Compliance</b>	<ul style="list-style-type: none"> <li>NYSE will suspend trading of all listed securities and commence delisting standards</li> <li>If a company is not in compliance by the Effective Date, the company must notify the NYSE within five days and issue a press release disclosing the occurrence of delinquency</li> <li>A company will be subject to delisting on the Nasdaq if it does not adopt a complaint clawback policy, meet Nasdaq disclosure requirements, or comply with the policy's clawback provisions</li> <li>Noncompliant companies listed on the Nasdaq will have 180 days to cure the corporate governance deficiency</li> </ul>

## Contact Us

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