Davis Polk

NYSE and Nasdaq delay effective date of clawback rule to October 2, 2023

June 10, 2023 | Client Update | 5-minute read

The NYSE and Nasdaq have amended their proposed listing standards relating to clawbacks to provide that October 2, 2023 will be the effective date, which means that listed companies will have until December 1, 2023 to adopt a compliant clawback policy.

The New York Stock Exchange and the Nasdaq Stock Market have amended their proposed listing standards[1] on the clawback rule mandated by the Dodd-Frank Act to provide that the listing standards will become effective on **October 2, 2023**, which means that listed companies will have until **December 1, 2023** to adopt a compliant clawback policy. We expect that both the NYSE and Nasdaq will monitor compliance of listed companies after this date.

By way of background, on February 22, 2023, the NYSE and Nasdaq released their respective versions of proposed listing standards that implement the SEC's clawback rule mandated by Section 954 of the Dodd-Frank Act. The SEC staff had previously conveyed informally that listed companies should expect the effective date of the listing standards to be June 9, 2023, which would have required companies to adopt their clawback policies no later than August 8, 2023. Davis Polk led the submission of a multi-law firm comment letter requesting that the SEC delay the effective date of the listing standards to allow companies more time to adopt their clawback policies. Now that the NYSE and Nasdaq have delayed the effective date to October 2, 2023, companies will have until December 1, 2023 to adopt their policies.

Some companies may be far along in the process of adopting, or may have already adopted, their clawback policies. The amendments do not change the listing standards in a manner that would affect the substantive terms of a compliant clawback policy. Furthermore, even if a company adopts its policy earlier than required, unless its policy states otherwise, it will only apply to compensation "received" (i.e., based on goals attained) from and after the October 2, 2023 effective date.

In addition to delaying the effective date, the amended NYSE listing standards include new notice and cure provisions in the event of noncompliance with the clawback-related requirements, which was already an element of Nasdaq's proposed listing standards. The amended listing standards are otherwise consistent with the proposed listing standards released by the NYSE and Nasdaq on February 22, 2023.

The following table provides a side-by-side comparison of the notice and cure provisions in the NYSE and Nasdaq listing standards:

	NYSE	Nasdaq

What is the notification process for failure to comply with a clawback requirement?	— If a company fails to comply with any clawback requirement, it must notify the NYSE within five days. — When the NYSE determines a failure has occurred, the NYSE will promptly notify the company.	— When Nasdaq determines a failure has occurred, it will immediately notify the company.
How long does the company have to issue a press release?	— Within five days of receiving notice from the NYSE, the company must issue a press release disclosing the failure to comply. — The press release must disclose the reason for the failure and, if known, the anticipated date by which the failure will be cured.	— Within four business days of receiving notice from Nasdaq, the company must issue a press release disclosing the failure. — The press release must address the specific basis and concern identified by Nasdaq and identify the rule upon which the failure is based.
Is a plan to regain compliance with listing standards required?	— Within five days of notification from the NYSE, the company must contact the NYSE to discuss the status of curing the failure.	— Within 45 days of receiving notice from Nasdaq, the company must submit to Nasdaq a plan for regaining compliance.
How long does the company have to cure the failure?	— During a period of up to six months from the date of the failure, the NYSE will monitor the company's status of curing the failure. The NYSE, in its sole discretion, may impose a shorter cure period or allow no cure period at all and commence immediate suspension and delisting procedures.	— Nasdaq will review the company's plan to regain compliance and may grant an extension of up to 180 days to cure the failure.
Can the exchange grant an extension to cure the failure?	— If the company fails to cure within the initial cure period, the NYSE may, in its sole discretion, allow the company's securities to be traded for up to an additional six-month period before commencing the suspension and delisting procedures.	— After the extension period (if any) of up to 180 days (described immediately above), if the company has not cured the failure, Nasdaq will be required to issue a delisting letter.

Can the decision of the exchange be appealed?	— No appeals process is outlined.	— The company may appeal the delisting letter by requesting a hearing before the Hearings Panel within seven days of receiving the delisting letter. — The Hearings Panel will then review the failure and can grant an extension of up to 180 days from the date of the delisting letter to cure the failure.

Additional resources

Our client update on the SEC's final clawback rule can be found here.

Our client update on the February 22, 2023 proposed listing standards of the NYSE and Nasdaq, including a side-by-side comparison of the proposals, can be found here.

Separately, the U.S. Department of Justice recently announced guidance on compensation clawbacks, including that companies facing a criminal resolution can secure credit for clawbacks against fines imposed by the DOJ and will have additional compliance obligations related to clawbacks. See our client update here.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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[1] On June 9, 2023, the SEC approved the delay. A link to the SEC orders approving the delays can be found here (NYSE) and here (Nasdaq).