

SEC CLAWBACK RULES: A SNAPSHOT

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This Snapshot summarizes the SEC's clawback rules and includes SEC staff guidance on the checkboxes found on the cover pages of annual reports and the clawback disclosure requirements in Item 402(w) of Regulation S-K ("S-K").

OVERVIEW

Registrants listed on the New York Stock Exchange (NYSE) or Nasdaq Stock Market (Nasdaq) ("issuers") must have policies in place to provide for the recovery of erroneously awarded incentive compensation (the "clawback" rules).

The rules require issuers to file their clawback policies as an exhibit to their annual reports and make several disclosures in annual reports and proxy and information statements.

CLAWBACK ANALYSIS

Upon preparing a financial statement restatement, an issuer must recover incentive-based compensation awarded to any current or former executive officers during the three years preceding the date of the restatement. A clawback analysis is triggered by an accounting restatement that corrects an error that:

- ▶ Is material to the previously issued financial statements (a "Big R" restatement)
- ▶ Would result in a material misstatement if the error was corrected or remained uncorrected in the current period (a "little r" restatement)

BDO INSIGHT: ASSESSING THE MATERIALITY OF AN ERROR

In making the materiality determination, an issuer must consider the quantitative and qualitative effect of the error from the perspective of a reasonable investor based on the totality of information that an issuer discloses. See our publication, [Accounting Changes and Error Corrections](#), for more guidance.

Once an issuer has determined an accounting restatement is necessary, the issuer must evaluate whether incentive-based compensation awarded to any current or former executive officers during the three years preceding "the date the issuer is required to prepare the restatement" must be recovered.

- ▶ The amount to be recovered is the difference between the amount of incentive-based compensation "received" by the executive and the amount that the executive should have received based on the restated financial reporting measure(s). Under the transition period, the clawback policy only applies to incentive-based compensation received on or after October 2, 2023, the effective date of the rule (even if the incentive compensation was granted before that date).
- ▶ Such recovery does not require misconduct by an executive or consideration of whether the executive had responsibility for the erroneous financial statements.

The following table describes some key terms in the rule:

TERM	DESCRIPTION
Executives ¹	<p>► Includes anyone who performs policy-making functions for the issuer.</p> <ul style="list-style-type: none"> • For example, the issuer’s president, principal financial officer, and vice president in charge of a business unit, division, or function.
Incentive-based compensation	<p>► Applies broadly² to an issuer’s incentive-based compensation and includes bonuses, raises, and other equity or cash awards earned based on the achievement of a financial reporting measure.³ Bonuses, raises, and other equity awards that are not tied to a financial reporting measure are excluded.</p> <ul style="list-style-type: none"> • Incentive-based compensation is received in the fiscal year in which the award is attained, regardless of when payment occurred, and is computed on a pre-tax basis.
Date the issuer is required to prepare the restatement	<p>► Occurs on the earlier of:</p> <ul style="list-style-type: none"> • The date the issuer’s board (or committee thereof) or officer(s) concludes, or reasonably should have concluded, that the issuer is required to prepare an accounting restatement. • The date a court, regulator, or other legally authorized body directs the issuer to prepare an accounting restatement.

There are limited exceptions whereby issuers are not required to collect erroneously awarded compensation, including:

- When expenses paid for collection would exceed the amount of the recovery and the issuer has made a reasonable attempt to recover.
- Recovery would violate home country law.
- Recovery would cause a tax-qualified retirement plan to fail to meet the requirements of the Internal Revenue Code.

DISCLOSURES

Checkboxes

The clawback checkboxes appear on the cover page of annual reports on Forms 10-K, 20-F, and 40-F and require issuers to indicate whether:

- 1) The financial statements included in the filing reflect the correction of an error to previously issued financial statements (the “first checkbox”).
- 2) Any of the error corrections identified in 1) required an analysis for the recovery of incentive-based compensation from its executive officers (the “second checkbox”).

¹ Compliance and Disclosure Interpretations (C&DIs) 121H.02 and 121H.03 provide guidance on which persons are considered named executive officers and require individualized disclosure pursuant to Item 6.F of Form 20-F and Item B.(19) of Form 40-F.

² Also refer to C&DI 121H.04.

³ Financial reporting measures are “measures that are determined and presented in accordance with the accounting principles used in preparing the issuer’s financial statements, and any measures derived wholly or in part from such measures.” This includes GAAP and non-GAAP measures or metrics, as well as stock price and total shareholder return (TSR).

Disclosure Requirements



SEC REFERENCE

S-K Item 402(w)

Issuers must disclose:

- ▶ The date the accounting restatement was required to be prepared
- ▶ The total erroneously awarded compensation, including how the amount was calculated (or an explanation about why the amount has not been determined)
- ▶ The total erroneously awarded compensation outstanding at the end of the most recently completed fiscal year (including the name of the executive officer and the amounts that have been outstanding for 180 days or more since the determination of such amounts)
- ▶ Any estimates used in determining the amount to be recovered for incentive-based compensation tied to stock price or total shareholder return
- ▶ An explanation of any clawback analyses that did not result in the recovery of erroneously awarded compensation
- ▶ Recovered amounts that were deducted from the executive's compensation that is presented in the Summary Compensation Table pursuant to S-K Item 402(c)

SEC STAFF GUIDANCE



SEC REFERENCE

[Exchange Act Forms Compliance and Disclosure Interpretations](#) (C&DIs)

C&DIs 104.20 through 104.25

The first checkbox applies when the financial statements included in the filing reflect the correction of an error to previously issued financial statements. The determination of whether a change to the previously issued financial statements reflects the correction of an error should be made in accordance with U.S. GAAP (or IFRS). As such, the first checkbox applies to “Big R,” “little r,” and voluntary restatements.⁴ Out-of-period adjustments are recorded in the current period financial statements rather than the previously issued financial statements. Accordingly, the first checkbox does not apply to out-of-period adjustments.

⁴ At the 2023 AIPCA & CIMA Conference on Current SEC and PCAOB Developments, the SEC staff indicated that voluntary restatements include corrections of immaterial errors in the financial statement footnotes.

The following table summarizes the types of error corrections and the applicability of the first checkbox based on SEC staff guidance:

TYPE OF ERROR CORRECTION	SUMMARY	DOES CHECKBOX 1) APPLY?
Big R	An error is corrected through a Big R restatement when the error is material to the previously issued financial statements. A Big R restatement requires the entity to restate and reissue its previously issued financial statements.	Yes
little r	An error is corrected through a little r restatement when the error is immaterial to the previously issued financial statements, but correcting the error in the current period would materially misstate the current period financial statements. For example, an immaterial error that has been uncorrected for multiple periods and has aggregated to a material number in the current period may be corrected through a little r restatement.	Yes
Voluntary restatement	An error is corrected through a voluntary restatement if previously issued financial statements are corrected for errors that are not considered Big R or little r restatements. Examples of voluntary restatements include immaterial classification errors in the balance sheet and statement of cash flows, and corrections of immaterial errors in the financial statement footnotes.	Yes
Out-of-period adjustment	An error is corrected within the current period as an out-of-period adjustment when it is considered immaterial to both the current and prior period(s). The error correction is reflected in the current period, not the previously issued financial statements.	No

The second checkbox applies to Big R and little r restatements (it does not apply to voluntary restatements). When the first checkbox is checked due to a Big R or little r restatement, the second checkbox applies. This is true even if the executive officers did not receive incentive compensation during the relevant periods of the recovery analysis, and when the restatement has no impact on incentive compensation received, as an analysis for the recovery is required. Similarly, issuers must comply with the S-K Item 402(w) disclosure requirements when a restatement requires a clawback analysis, even when recovery is not required. When a recovery analysis is required but results in no recovery, issuers should explain why.

The clawback checkboxes apply to error corrections reflected in annual reports, not quarterly reports (such as Form 10-Q). In contrast, the S-K Item 402(w) disclosures apply to restatements during or after the last completed fiscal year that require the recovery of erroneously awarded compensation. In other words, the application of the S-K Item 402(w) disclosures is not limited to restatements reflected in annual reports. As such, the S-K Item 402(w) disclosures may apply even when the clawback checkboxes do not.

EXAMPLE 1: RESTATED INTERIM PERIODS**FACTS**

Before filing its 20X4 Form 10-K, an issuer restates its first, second, and third quarter 20X4 Form 10-Qs to correct an error. After filing the amended Form 10-Qs, the issuer files its 20X4 Form 10-K and presents restated 20X4 interim financial information in an unaudited footnote to comply with S-K Item 302. When filing its 20X4 Form 10-K, should the issuer check either of the clawback checkboxes?

CONCLUSION

The issuer does not check the first checkbox (and therefore does not check the second checkbox) on the cover page of its 20X4 Form 10-K because the previously issued financial statements included in the annual report do not reflect the correction of an error. However, the issuer's 20X4 Form 10-K must include, or incorporate by reference from its definitive proxy statement, the S-K Item 402(w) disclosures because the restatement occurred during or after its last completed fiscal year.

When an annual report includes financial statements that were previously restated, the application of the checkboxes will depend on whether those financial statements were restated in an annual report. If an issuer restates its previously issued financial statements in a filing other than an annual report (such as a registration statement or Form 8-K), the issuer must check the first checkbox (and for Big R and little r restatements, the second checkbox) in its annual report that reflects the correction of the error to the previously issued financial statements.

EXAMPLE 2: PREVIOUSLY RESTATED ANNUAL PERIODS IN FILING OTHER THAN AN ANNUAL REPORT**FACTS**

An issuer identifies an immaterial error in the financial statements included in its 20X3 Form 10-K. Correcting the error in the 20X4 would materially misstate the 20X4 financial statements (a little r restatement). Prior to filing its 20X4 Form 10-K, the issuer corrects the error in its financial statements by filing them in Item 8.01 of Form 8-K. When filing its 20X4 Form 10-K, which includes the previously restated 20X3 financial statements, should the issuer check the clawback checkboxes?

CONCLUSION

The issuer should check the clawback checkboxes when it files its 20X4 Form 10-K as the issuer has not previously checked the first checkbox to inform investors of the error (and the second checkbox must be checked because the error correction was a little r restatement).

EXAMPLE 3: PREVIOUSLY RESTATED ANNUAL PERIODS - CHECKBOXES**FACTS**

An issuer identifies a material error in the financial statements included in its 20X3 Form 10-K. The issuer amends its 20X3 Form 10-K to correct the error (a Big R restatement) and checks the clawback checkboxes. When filing its 20X4 Form 10-K, which includes the previously restated 20X3 financial statements, should the issuer check the clawback checkboxes?

CONCLUSION

If there are no additional restatements, the SEC staff will not object if the issuer does not check the clawback checkboxes on its 20X4 Form 10-K. The issuer is not required to check the first checkbox in its 20X4 Form 10-K for the same restatement because investors were made aware of the error when the issuer checked the clawback checkbox in its amended 20X3 Form 10-K.

EXAMPLE 4: PREVIOUSLY RESTATED ANNUAL PERIODS - PROXY OR INFORMATION STATEMENT**FACTS**

Assume the same facts as Example 3 above. In 20X5, the issuer files its proxy or information statement that includes the executive compensation disclosures required by S-K Item 402. Is the issuer required to include S-K Item 402(w)(2) disclosures?

CONCLUSION

Yes. The S-K Item 402(w)(2) disclosures apply because the restatement occurred during or after the issuer's last completed fiscal year. This is true even if the issuer disclosed why the recovery analysis resulted in no recovery in the amended 20X3 Form 10-K. This is also true if the disclosure is in the annual report and not incorporated by reference from a proxy or information statement, or made according to the requirements of Form 20-F or Form 40-F.

EXAMPLE 5: PREVIOUSLY RESTATED ANNUAL PERIODS - DISCLOSURES**FACTS**

An issuer identifies an immaterial error in the financial statements included in its 20X3 Form 10-K. Correcting the error in the 20X4 would materially misstate the 20X4 financial statements (a little r restatement). The issuer identified the error in 20X5, prior to filing its 20X4 Form 10-K. The 20X4 Form 10-K reflects the correction of the error and the issuer checks both clawback checkboxes. The issuer determines no recovery is required and discloses the information required by S-K Item 402(w)(2) in its proxy or information filed in 20X5 and incorporated by reference in its 20X4 Form 10-K. Is the issuer required to include S-K Item 402(w)(2) disclosures in its 20X5 Form 10-K because the restatement occurred during its last completed fiscal year?

CONCLUSION

If no additional facts arise that affect the previous conclusion that no recovery is required, the SEC staff will not object if the issuer does not include, or incorporate by reference, the S-K Item 402(w)(2) disclosures in its 20X5 Form 10-K. Similarly, the SEC staff will not object if a foreign private issuer omits the disclosure in its subsequent annual report if it previously provided the disclosure pursuant to Item 6.F(2) of Form 20-F or Instruction (B)(19)(c) to Form 40-F.

The clawback disclosures must be tagged using Inline XBRL.

BDO INSIGHT: CHECKBOXES

We encourage issuers to work closely with legal counsel regarding the applicability of the checkboxes to their particular facts and circumstances.

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