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IMPLEMENTING AND ENFORCING DODD-FRANK CLAWBACK RULES FOR GLOBAL EXECUTIVES

This article examines the U.S. Securities and Exchange Commission's clawback rules adopted in October 2022, which require listed companies to recover erroneously awarded incentive-based compensation from both current and former executive officers following a financial restatement — regardless of fault or misconduct — and to meet related disclosure obligations. It analyzes the compliance challenges faced by non-U.S.-listed companies and U.S.-listed companies with global executives, especially where the clawback rules may conflict with home country laws. The article reviews the available exceptions to the clawback requirements and surveys the enforceability and limitations of these rules across multiple non-U.S. jurisdictions. It concludes by outlining practical strategies to enhance the enforceability of clawback policies for global executives within the complex, multijurisdictional landscape of executive compensation governance.

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I. INTRODUCTION

On October 26, 2022, the U.S. Securities and Exchange Commission adopted final rules implementing the incentive-based compensation recovery provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Clawback Rules").[1] The Clawback Rules directed the stock exchanges (the New York Stock Exchange and Nasdaq Stock Exchange) to establish listing standards requiring listed companies to develop and implement a policy providing for the recovery of erroneously awarded incentive-based compensation received by current or former executive officers in connection with a financial restatement, regardless of an executive officer's fault or misconduct, and to satisfy related disclosure obligations. On October 2, 2023, the NYSE and Nasdaq listing standards implementing the Clawback Rules became effective.[2]

Under the Clawback Rules and the listing standards, listed companies, including foreign private issuers ("FPIs"), are required to adopt a clawback policy

[1] Rel. Nos. 33-11126; 34-96159 (2022).

[2] N.Y. Stock Exch., Listed Company Manual § 303A.14 (2023), https://nyse.wolterskluwer.cloud/listed-company-manual; Nasdaq, Inc., Listing Rule 5608 (2023), https://listingcenter.nasdaq.com/rulebook/nasdaq/rules; Rel. Nos. 33-11126; 34-96159 (2022), https://www.sec.gov/files/rules/final/2022/33-11126.pdf.

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