SOCIETY
for Corporate Governance

April 3, 2023

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Submitted electronically via rule-comments@sec.gov

Re: Notice of Filing of Proposed Rule Change to Adopt New Section 303A.14 of the NYSE Listed Company Manual to Establish Listing Standards Related to Recovery of Erroneously Awarded Incentive-Based Executive Compensation (SR-NYSE-2023-12)

Notice of Filing of Proposed Rule Change to Establish Listing Standards Related to Recovery of Erroneously Awarded Executive Compensation (SR-NASDAQ-2023-005)

Dear Ms. Countryman:

The Society for Corporate Governance ("the Society") submits this letter to express our views about the effective date for the executive compensation "clawback" policy listing standards that Nasdaq and NYSE are required to adopt pursuant to Section 954 of the Dodd-Frank Act.

Founded in 1946, the Society is a professional membership association of more than 3,600 corporate and assistant secretaries, in-house counsel, outside counsel, and other governance professionals who serve approximately 1,600 entities, including 1,000 public companies of almost every size and industry.

We are concerned that public companies may be required to comply with the Section 954 listing standards sooner than the anticipated effective date of November 28, 2023, which would pose an unexpected compliance burden on issuers that are already dedicating significant resources to implementing new rules relating to "pay versus performance" disclosure and 10b5-1 plans.

On October 26, 2022, the SEC approved final rules to implement Section 954, which directed the national exchanges to file their proposed listing standards with the SEC within 90 days.[1] As

[1] Listing Standards for Recovery of Erroneously Awarded Compensation, File No. S7-12-15 (October 26, 2022); 87 Fed. Reg. 73076, 73111 (November 28, 2022).

provided by the rules, the new listing standards must take effect no later than one year following the publication of the final rules in the Federal Register (i.e., November 28, 2023). Companies must then adopt compliant clawback policies within 60 days after the effective date.

Contrary to issuers' expectations based on the SEC's October 2022 rulemaking release, we understand that the Commission may act soon to approve these listing standards and may establish an earlier effective date (such as 30 or 60 days after final approval) instead of on/about November 28, 2023.

As the Society noted in previous correspondence[2] on the clawback rulemaking, public companies will face considerable costs in complying with these new listing standards, which will mandate clawback policies that will be much broader in scope and more complex than the existing policies that many companies have adopted. For instance, the definition of restatements in the new listing standards will include "little r" restatements, which were not part of the SEC's 2015 proposing release, and thus will likely result in a significant increase in clawback recovery actions.[3] To prepare for these new listing standards, many issuers will need to retain compensation consultants to provide benchmarking data and obtain legal advice to determine what aspects of their executive compensation programs may be subject to clawbacks.[4] In addition, many companies will need to obtain board approval for these expanded policies.

In other recent Dodd-Frank rulemaking, the Commission provided more than a year for market participants to prepare for compliance. For instance, under the new Form N-PX proxy vote disclosure rules that were finalized in November 2022, investment managers will not have to submit their first disclosures under this rule until August 31, 2024.[5] The Commission should provide similar consideration for public companies so they can adequately prepare for the new clawback listing standards.

As noted above, many issuers reasonably expected that the SEC would follow the timeframe outlined in the October 2022 adopting release and not impose an effective date prior to November 28, 2023. Accordingly, we urge the SEC to provide issuers at least one year for issuers to fully analyze the final listing standards, assess the impact on and potentially modify their compensation programs, and update their policies to reflect the new listing standards.

We appreciate the Commission's consideration of our views.

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[2] *See* Society Comment Letter on File No. S7-12-15, Reopening of Comment Period for Listing Standards for Recovery of Erroneously Awarded Compensation (November 29, 2021).
[3] *See, e.g.,* WTW, "SEC's final clawback rules: What to know," (March 20, 2023), https://www.wtwco.com/en-US/insights/2023/03/secs-final-clawback-rules-what-to-know
[4] See, e.g., WTW's three-part implementation series: "A game plan for harmonizing your holdback and clawback policies; Conduct a detailed inventory of each element of officer pay; Exploring the source of funds for exercising a clawback," (March 2023), https://www.wtwco.com/en-US/insights/2023/03/dodd-frank-clawbacks-game-plan
[5] Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers, File No. S7-11-21, (November 2, 2022), 87 Fed. Reg 78770 (December 22, 2022).

Respectfully submitted,

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Christina Maguire
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cc: Chair Gary Gensler
Commissioner Hester Peirce
Commissioner Caroline Crenshaw
Commissioner Mark Uyeda
Commissioner Jaime Lizárraga