

Novel Clawback Proposal to Watch

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While we wait for the SEC to act on the Dodd-Frank mandate on recoupment of executive compensation, Walmart will be facing an unusual shareholder proposal on the topic this coming week.

The proposal asks that the board adopt a policy to disclose annually whether the company in the previous fiscal year recouped compensation from any senior executive or caused a senior executive to forfeit an outstanding award, after determining that the senior executive breached a company policy or engaged in conduct "inimical to the interests of or detrimental to Walmart." Walmart has an existing policy that is fairly broad in covering possibilities of recoupment if employees violate company policies or otherwise engage in actions that are not in Walmart's best interest. As nearly 87% of Fortune 100 companies have reportedly already adopted clawback policies, it is a reflection of the evolution of these policies that the Walmart proposal focuses on disclosure of recoupment actions actually taken.

Even the eight proponents, in several notices of exempt solicitations, acknowledge that Walmart's policy is "relatively strong," but they argue that the disclosure being sought would further reinforce the policy and communicate "concrete consequences for misconduct." The proponents are clearly seeking to discover whether the company's policies have been applied, given recent controversies surrounding Walmart. The company argues that the proposal is unnecessary since it believes that existing SEC rules require disclosure of when compensation has been recouped from NEOs, including the amount, as well as the reasons for the recoupment if material. Both ISS and Glass Lewis are supporting the proposal.

The SEC in April rejected McKesson's attempt to exclude a proposal similar to Walmart's, finding that it is neither vague nor constitutes ordinary business. That proposal also attempts to strengthen the aspect of the company's existing policy which differs from Walmart's, by removing the requirement that a clawback is triggered only by intentional misconduct that causes a restatement or material impact on financial results. Only 25% of the policies of the Fortune 100 companies contain triggers not associated with financial restatements, according to a 2012 Equilar study.

It has been a busy year for activists interested in clawback policies. Earlier this proxy season, a group of six pharmaceutical companies [agreed](#) to adopt a set of recoupment principles after discussions with 13 investors led by UWA Retiree Medical Benefits Trust, the lead proponent of the Walmart proposal. Unlike most policies that are only triggered when there is a financial restatement and seek to recover compensation already paid, these principles give the compensation committee the discretion to recoup compensation that has not been awarded or vested and can also be triggered upon a material violation of company policy related to the sale, manufacture or marketing of health care services that causes significant financial harm. The persons targeted extends beyond the responsible individuals to potentially include supervisors. The principles include public disclosure concerning decisions to recoup compensation, but only in compliance with SEC rules.

As a result of separate discussions, [Capital One](#) agreed with the New York City Comptroller's office to disclose how much it recoups under its clawback policy, provided that the underlying event has already been publicly disclosed. Wells Fargo and Citigroup also committed to consider disclosure of their clawbacks on a case-by-case basis.

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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