

[Securities Regulation Daily Wrap Up, TOP STORY—Comment period on clawbacks reopened for consideration of DERA data, \(Jun. 9, 2022\)](#)

Securities Regulation Daily Wrap Up

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Is the third time the charm? Comments on the clawback proposal are re-re-opened to allow commenters to review staff memo with additional data and analysis.

The SEC has again reopened the comment period for a proposal to implement the clawback provisions of Dodd-Frank Act Section 954. The initial comment period ended in September 2015, and the comment period was reopened for a month in October 2021 in light of developments since the original proposal. The comment period has again been reopened to allow the opportunity to analyze and comment upon the proposed rules in light of additional analysis and data on compensation recovery policies and accounting restatements contained in a staff memorandum added to the public comment file on June 8, 2022 (*Reopening of Comment Period for Listing Standards for Recovery of Erroneously Awarded Compensation*, [Release No. 33-11071](#), June 8, 2022).

Proposed Rule 10D-1. In July 2015, the Commission [issued](#) a rule [proposal](#) to implement the clawback provisions of Section 954 of the Dodd-Frank Act. Proposed new rule 10D-1 directs the national securities exchanges and associations to establish listing standards requiring issuers to adopt clawback policies for executive officers who received incentive-based compensation during the three fiscal years preceding an accounting restatement to correct a material error.

The Commission received numerous [comments](#) on the proposal, many of which [outlined](#) areas of [concern](#) with various aspects of the proposed rules. No further action was taken, however, until [October 2021](#), when the comment period was [reopened](#) until November 22, 2021. The [reopening](#) of the comment period was intended to allow opportunity to comment on the proposal in light of developments since 2015, the Commission said. At the time, the Commission [noted](#) that since 2015, increased numbers of issuers have implemented clawback policies to recoup performance-based awards in the event of fraud or restatements. The re-opening release also contained several new questions for comment.

DERA memo. The Commission has [reopened](#) the comment period for a second time to all commenters to review a [staff memo](#) containing additional analyses and data. The memo, issued by the Division of Economic and Risk Analysis on June 8, 2022, discusses:

- **Increasing voluntary adoption of compensation recovery policies.** DERA found that while many filers have adopted compensation recovery policies, the circumstances under which they are triggered are more limited than would be the case under the proposed rules. DERA expects that the increased voluntary adoption of recovery provisions may reduce the anticipated benefits and mitigate the anticipated costs of the proposed rules.
- **Frequency of "little r" restatements.** At issue here is whether clawbacks should be triggered only by restatements correcting errors that resulted in a material misstatement in previously issued financial statements ("Big R" restatements) or whether "little r" restatements—restatements correcting errors that were not material to previously issued financial statements, but would result in a material misstatement if the errors were left uncorrected or the if error correction was recognized in the current period—should be included as well. DERA estimates that there were roughly three times as many "little r" restatements in 2021 as "Big R" restatements. The potential inclusion of "little r" restatements may increase both the benefits and the costs associated with the proposed rules due to the increase in the number of restatements that would be included and compared, the memo says.

The public comment period will remain open for 30 days after publication in the Federal Register.

The release is [No. 33-11071](#).

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