California Public Employees' Retirement System
Executive Office
400 Q Street, Sacramento, CA 95811 | Phone: (916) 795-3829 | Fax: (916) 795-3410
888 CalPERS (or **888**-225-7377) | TTY: (877) 249-7442 | **www.calpers.ca.gov**

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Via email: *rule-comments@sec.gov*

November 22, 2021

Subject: Reopening of Comment Period for Listing Standards for Recovery of Erroneously Awarded Compensation (File No. S7-12-15)

Dear Ms. Countryman,

On behalf of the California Public Employees' Retirement System (CalPERS), I write to express our support for the Securities and Exchange Commission's (SEC or Commission) proposed rule to implement the provisions of Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank").

Introduction to CalPERS

As the largest public defined benefit pension fund in the United States, CalPERS manages approximately $495 billion in global assets on behalf of more than two million members. We seek long-term sustainable, risk-adjusted returns through efficient capital allocation and stewardship consistent with our fiduciary duty. We are guided by CalPERS' Investment Beliefs[1] which recognize that "Long term value creation requires effective management of three forms of capital: financial, physical and human."[2] Accordingly, our fiduciary duty requires that we proactively assess whether the companies that we hold in our portfolio are effectively managing capital. We view robust governance practices as critical to long-term performance. Therefore, we expect fair, accurate, timely, and assured reporting about how companies

[1] CalPERS' Investment Beliefs, https://www.calpers.ca.gov/page/about/organization/calpers-story/our-mission-vision#investment-beliefs.
[2] Id.

manage their financial, physical, and human capital to generate sustainable returns, as well as how they identify, monitor, and mitigate risks to those three forms of capital.[3]

The Importance of Effective Compensation Programs

Executive compensation structures, practices, and disclosures continue to serve as a bridge for alignment of interests, a vehicle to drive long-term outcomes, and a mechanism for shareowners to hold management accountable for performance. Compensation programs should be structured to incentivize prudent risk-taking by executives and employees, and should be evaluated to ensure alignment with the company's risk tolerances, including discouragement of excessive risk-taking. Clawback policies potentially mitigate excessive risk-taking that certain compensation may incentivize.[4] Therefore, it is in the best interests of companies to have well-structured compensation programs that properly incentivize executives and employees, appropriately align the interests of executives and shareowners, and create long-term shareowner value. For these reasons, we support issuance of a final rule implementing Section 954 of Dodd-Frank.

Since Section 954 of the Dodd-Frank Act was enacted in 2010, markets have continued to evolve. As appropriate incentives can work to enhance shareowner value, there is a growing acceptance of the use of executive compensation programs as mechanisms to motivate, retain, and hold responsible directors and executives for excessive risk-taking. Policies for recovering erroneously awarded incentive-based compensation, also known as clawbacks, are a key feature of robust compensation structures. Clawback provisions demonstrate the importance of risk awareness and serve as powerful tools to encourage effective financial, physical, and human capital risk oversight.

As outlined in our Governance and Sustainability Principles:

> "Companies should develop and disclose policies to recoup compensation made to executives during periods of fraudulent activity, inadequate oversight, misconduct including harassment of any kind such as sexual harassment, or gross negligence, which impacted or is reasonably expected to impact financial results or cause reputational harm."[5]

Accordingly, we believe clawback policies should be thoroughly developed, prominently disclosed, and diligently enforced. In our view, compensation based on results that are later proven false should be returned. There is no reason to allow executive officers to keep compensation that has not been earned due to ineffective oversight of financial, physical, or human capital which led to an accounting restatement[6] that is based on misstated financials. Moreover, we believe that transparency is essential to promoting corporate accountability. So,

[3] CalPERS' Governance and Sustainability Principles (Sept. 2019), https://www.calpers.ca.gov/docs/forms-publications/governance-and-sustainability-principles.pdf.
[4] The Institutional Shareholder Services (ISS) Executive Compensation FAQ, https://www.issgovernance.com/file/policy/active/americas/US-Equity-Compensation-Plans-FAQ.pdf.
[5] CalPERS' Governance and Sustainability Principles (Sept. 2019), https://www.calpers.ca.gov/docs/forms-publications/governance-and-sustainability-principles.pdf.
[6] As defined by U.S. Generally Accepted Accounting Principles (GAAP).

disclosures on recovery policies and any actions under the policy provide a level of transparency that investors need to make investment decisions.

CalPERS Long-standing Support for Effective Compensation Programs

Consistent with our Beliefs and Principles, we continue to advocate and encourage adoption of expanded clawback policies. For instance, we provided detailed public comment[7] to the Commission in 2015, as well as testimony[8] before the House Financial Services Committee in 2016. In both instances, we promoted well-designed executive compensation plans which include a clawback policy, improved disclosures, and enhanced compensation committee accountability. In addition, we have continued to enhance our internal approach[9] to "Say on Pay" shareholder proposals, consistent with our long-standing position on clawbacks, by deepening our quantitative and qualitative analysis of the design, structure, and practice of compensation plans.

Potential Deficiencies in Section 954 to Consider

In working to finalize Section 954, we encourage the Commission to take a deep look into potential deficiencies and unintended consequences with a focus on transparency and financial statement quality. For instance, there are noted concerns regarding Section 954's interpretation and design.[10] There is also a potential risk of non-compliance in that finalizing Section 954 could push executives to attempt to insulate management from accountability by handling serious matters quietly. Similarly, there has been concern[11] that the use of formal restatements relative to revision statements should be carefully monitored. In light of these deficiencies, some companies are going beyond minimum requirements of Section 954 by adopting clawback triggers and forfeiture provisions to address detrimental behavior and violation of restrictive covenants, among other things.[12]

Conclusion

Since executive compensation plays a key role in rewarding and aligning the users of our capital with our objectives to achieve sustainable, long-term investment returns, we fully support expansion of repayment provisions under Section 954. We echo Chairman Gensler's recent

[7] September 14, 2015 Letter to Brent J. Fields, SEC, Listing Standards for Recovery of Erroneously Awarded Compensation, https://www.calpers.ca.gov/docs/2015-09-14-recovery-erroneously-awarded-compensation.pdf.
[8] September 21, 2016 Testimony before the U.S. House of Representatives Committee on Financial Services Subcommittee on Capital Markets and Government Sponsored Enterprises, titled "Corporate Governance: Fostering a System that Promoted Capital Formation and Maximizes Shareholder Value," 09.21.16_cm_simpson_anne_testimony.pdf (house.gov).

[9] CalPERS' Executive Compensation Analysis Framework (April 2021), https://www.calpers.ca.gov/docs/executive-compensation-analysis-framework.pdf.
[10] Joseph Bachelder III, "Clawbacks Under Dodd-Frank and Other Federal Statutes" (June 9, 2011), https://corpgov.law.harvard.edu/2011/06/09/clawbacks-under-dodd-frank-and-other-federal-statutes/.
[11] Francine McKenna, "Part 1: The SEC's Dodd-Frank Clawback Proposal" (Oct. 29, 2021), https://thedig.substack.com/p/part-1-the-secs-dodd-frank-clawback.
[12] Jonathan Ocker, et al., "The State of Play on Clawbacks and Forfeitures Based on Misconduct" (July 7, 2019), https://corpgov.law.harvard.edu/2019/07/07/the-state-of-play-on-clawbacks-and-forfeitures-based-on-misconduct/.

statement[13] regarding clawbacks that this is "an opportunity to strengthen the transparency and quality of corporate financial statements as well as the accountability of corporate executives to their investors." Accordingly, we support the Commission's efforts to finalize the provisions of Section 954 of Dodd-Frank. The proposed rule would address a deficiency in existing practice by providing a mechanism to finally compel executive officers to return unearned compensation.

Thank you for the opportunity to share our comments. If you have any questions or would like to discuss, please do not hesitate to contact Anne Simpson at Anne.Simpson@calpers.ca.gov, or (916) 795-9672.

Sincerely,

Marcie Frost
Chief Executive Officer

13 Gary Gensler, "Statement on Rules Regarding Clawbacks of Erroneously Awarded Compensation" (Oct. 14, 2021), https://www.sec.gov/news/public-statement/gensler-clawbacks-2021-10-14.