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Coming Soon? A Finalized Clawback Rule from the SEC

After a false start last Wednesday, when the SEC [cancelled](#) an open Commission meeting to re-open the comment period on its 2015 clawback rule proposal, the SEC's Commissioners unanimously approved re-opening the proposal the following day. Here's the [new release providing a 30-day comment period](#) – and here's a [statement](#) from SEC Chair Gary Gensler about it. As stated in this [related fact sheet](#), the SEC may interpret the Dodd-Frank provision mandating this rulemaking more broadly this time around. Here's an excerpt from the fact sheet driving this point home: These requests for comment include, among other things, whether "an accounting restatement due to the material noncompliance of the issuer with any financial reporting requirement under the securities laws" as used in the Dodd-Frank Act should be read more broadly than initially proposed and whether the proposed "reasonably should have concluded" standard for triggering a lookback should be revised. While there are several new requests for comment outlined in this re-opening release (and the public is free to comment on all aspects of the 2015 proposal as well), the one that is of greatest interest to many is the question of whether certain restatements that are often called "little r" or "revision" restatements should trigger clawbacks. The proposal notes that there are concerns that "issuers may not be making appropriate materiality determinations for errors identified." The implication is that management might push for a "revision" restatement rather than a material restatement to avoid compensation recovery under clawback policies. On the other hand, there's also a concern that making this change could create an undue burden on companies to analyze the potential for clawbacks when the restatement involved would result in insignificant or no actual difference in executive compensation.

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