Did The SEC Misapprehend The Meaning of “Will”?  

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Today is the close of the comment period on the Securities and Exchange Commission’s proposed rules under Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which added Section 10D to the Securities Exchange Act of 1934. Briefly, the proposed rules would “direct the national securities exchanges and national securities associations to establish listing standards that would require each issuer to develop and implement a policy providing for the recovery, under certain circumstances, of incentive-based compensation based on financial information required to be reported under the securities laws that is received by current or former executive officers, and require the disclosure of the policy”.

To date, very few comment letters have been received by the Commission. However, I suspect many commenters have simply used the full comment period to draft their comments. I plan to submit a lengthy comment letter today and will provide a link to it in a subsequent post.

The proposed rules take a hard line against issuers indemnifying executive:

We believe that indemnification arrangements may not be used to avoid or nullify the recovery required by Section 10(D) [Section 954]. Section 10D’s listing standard requirement that “the issuer will recover” is inconsistent with indemnification because a listed issuer does not effectively “recover” the excess compensation from the executive officer if it has an agreement, arrangement or understanding that it will mitigate some or all of the consequences of the recovery. (footnote omitted)

The Commission has misinterpreted the meaning of “will” in Section 954. Subsection (a) provides that the “Commission shall” and subsection (b) provides that the rules of the Commission under subsection (a) “shall require each issuer”. In contrast, the statute provides only that the “issuer will recover”. It is unlikely that Congress chose different words out of a desire simply to achieve an elegance of variation. A more reasonable interpretation is that Congress intended these words to have different meanings with “shall” expressing an obligation and “will” expressing a simple futurity.

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