

# Public Company Planning: 2023 Executive Compensation To-Do List

December 16, 2022

In a flurry of activity, the Securities and Exchange Commission (the “SEC”) has issued several final regulations impacting executive compensation over the last few months, most recently on December 14th. Compensation planning for 2023 is well underway, so don’t let these compliance items get lost in the holiday shuffle!

- **Begin to review policies and procedures regarding timing of option grants to avoid future unanticipated disclosures under new final regulations.** On December 14, 2023, the SEC adopted [final amendments](#) to Rule 10b5-1 plans and related disclosures. In addition to the material changes on the Rule 10b5-1 front, there are new disclosure requirements for option and SAR awards under new Item 402(x) that create the inference that the issuer’s practices in granting such awards are deserving of special scrutiny. While this disclosure is first required for calendar year-end companies in the Form 10-K and proxy statement to be filed in early 2025 with respect to option grants made in 2024, issuers will want to begin considering changes to option grant policies and procedures during 2023 in anticipation of these new disclosure requirements.

The new rule says that, if, during the last completed fiscal year, any stock options, SARs or similar option-like awards are granted to a named executive officer (“NEO”) within a period starting four business days before and ending one business day after the filing of a Form 10-Q, 10-K or 8-K that discloses material nonpublic information (including earnings information, but excluding a Form 8-K that discloses only a material new option award grant), the issuer must provide the following information concerning each award for the NEO: (1) grant date of the award; (2) number of the securities underlying the award; (3) per-share exercise price; (4) grant date fair value of each award; and (5) the percentage change in the market price of the underlying securities between the closing market price of the security one trading day prior to and one trading day following the disclosure of material nonpublic information. Unless there is a material increase in the stock price following the disclosure of the material nonpublic information, nothing in the tabular disclosure itself will be particularly problematic, but it will add particular focus to the grant to the NEO.

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To avoid prescheduled annual or quarterly grants being disclosed in the new table, issuers may wish to consider revising policies and procedures for the granting of equity-based awards such that option grants to executive officers are made in an open trading window that is more than four business days before, or more than one business day after, the issuer's release of earnings for the most completed fiscal year or filing of its annual report on Form 10-K or quarterly report on Form 10-Q. Issuers will want to keep this timing in mind when setting their 2024 board and committee meeting calendars. Option and SAR grants can also be approved at a meeting with a later grant date outside the time period covered by the new table. (If the grant date is different than the approval date, note that there will be an extra column in the "Grants of Plan-Based Awards Table" for the fiscal year.)

There may still be compelling business reason to grant non-routine, off-cycle options and SARs that may ultimately be disclosed in the new table, for example in connection with new hires. If non-routine, off-cycle equity awards are entered into in contemplation of or shortly before the planned release of material nonpublic information, keep in mind that the principles outlined in [Staff Accounting Bulletin No. 120](#) may require additional analysis and disclosure as part of an issuer's preparation and filing of financial statements.

New Item 402(x) will also require an issuer to provide narrative disclosure in its 10-K and proxy or information statement regarding its policies and practices on the timing of option grants in relation to the release of material, nonpublic information, including (a) how the board determines when to grant such awards, (b) whether the board takes material, nonpublic information into account when determining the timing and terms of an award and (c) whether the registrant has timed the disclosure of material, nonpublic information for the purpose of affecting the value of executive compensation.

- **Prepare for pay-versus-performance disclosures—don't wait!** The first disclosures under the [final pay-versus-performance rule](#) for calendar year-end companies will be made beginning in the 2023 proxy season. Preparing the disclosures requires the input and coordination among internal departments including legal, finance and HR, and outside advisors including accounting and valuation firms, legal counsel and compensation consultants. The calculation of "compensation actually paid" can require numerous valuations of outstanding awards held by the named executive officers—many of these valuations are not already done for financial statement purposes. We expect compensation committees will want to review mock-ups of the pay-versus-performance disclosure well in advance of the filing of the proxy, so the internal workstream to prepare this disclosure should already be well underway. More detail regarding the final rule and how to prepare is available in our [client alert](#) and recent [virtual roundtable](#).

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- **Don't forget say-on-frequency vote.** Under Rule 14a-21(b), no less than once every six years, companies are required to provide shareholders with an advisory vote on how often to hold the say-on-pay vote (every year, every second year or every third year). 2023 is the twelfth year of say-on-pay, so most public companies (other than smaller reporting companies) will be including say-on-frequency votes on the ballot this 2023 proxy season.
  - **Get ready for clawback policy changes.** The final clawback rules were published in the Federal Register on November 28, 2022, which started the 90-day clock for the national securities exchanges to propose listing standards. The exchanges' listing standards must be effective no later than November 28, 2023. Companies will have 60 days following the listing standard effective date to adopt a compliant clawback policy. There are actions that issuers can begin taking now, including educating boards and compensation committees about the final rules, reviewing existing clawback policies to identify areas of potential change (including an evaluation of whether to retain more stringent clawback policy elements than what the final rules require—*e.g.*, longer look-back periods, additional compensation subject to recovery, or covering more employees in the organization), and adding references to clawback obligations in executive officer employment and separation agreements and equity and bonus programs. More details are available in our recent [client alert](#).
  - **Remind executive officers and directors of Section 16 filing obligations—starting on April 1, 2023, bona fide gifts of securities will be reported on Form 4 within two business days.** Gifts of issuer securities were previously permitted to be reported on a deferred basis on a year-end Form 5. Public companies should inform executive officers and directors of this change and remind them to notify in-house counsel promptly (and ideally in advance) of these transactions.

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Please do not hesitate to contact us with any questions.



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