

JUMP START ON DISCLOSURE CHANGES AND UPDATES FOR Q2 2023 SEC FILINGS

Jun 15, 2023

As we near June 30, 2023, companies are advised to get a jump start on disclosure changes and possible updates to upcoming Form 10-Qs (or Form 10-Ks in the case of non-calendar year companies). The SEC recently updated the Form 10-Q to include a new Part II, Item 5(c) disclosure requirement for director and officer trading plans, as described below.

UPDATES TO RISK FACTORS

Consider whether any material updates to risk factors are appropriate, such as:

- *Effect of the Ukraine war*, including any direct or indirect effects on a company's business, including the possible areas of disclosure covered in SEC guidance and the sample comment letter (see our [May 20, 2022](#) post).
- *Developments in China*, including its economic slowdown, pandemic challenges and U.S. relations, including supply chain implications.
- *Effect of U.S. political developments on stock market and U.S. economy*, including potential implications of possible future U.S. government budget disagreements, criminal indictments, political elections, etc.
- *COVID-19*, including possible deletion of references or revisions since the public health emergency was declared finished in May 2023, as well as remote-hybrid work issues and continued supply chain pressures.
- *Volatile market conditions*, including banking failures, potential recessionary pressures, inflation, interest rate changes, and their impact on customers and capital markets.
- *Artificial intelligence*, as discussed in our [May 24, 2023](#) post.

PREPARE FOR NEW DISCLOSURE RULES REGARDING DIRECTOR AND OFFICER TRADING PLANS

For most U.S. companies (other than smaller reporting companies), the Form 10-Q for the quarter ended June 30, 2023, must include quarterly disclosure about Rule 10b5-1 trading plans that were adopted, modified or terminated on or after April 1, 2023, by the company's officers or directors and the material terms of such plan, other than price, as discussed in our [December 15, 2022](#) post. The SEC stated that the new disclosure requirements are intended to better allow investors, the SEC and other market participants to observe how companies use Rule 10b5-1 plans.

The SEC staff recently detailed the specific compliance dates for calendar year and June 30 companies (other than smaller reporting companies), with respect to quarterly and annual filings in [CDI 120.26](#), stating that the following compliance dates apply:

- December 31 fiscal year-end company – Quarterly disclosures must first be provided in the Form 10-Q for the period ended June 30, 2023, and should continue to be provided in the Form 10-Q for the period ended September 30, 2023 and the Form 10-K for the fiscal year ended December 31, 2023.
- June 30 fiscal year-end company – Quarterly disclosures must first be provided in the Form 10-K for the fiscal year ended June 30, 2023.
- December 31 fiscal year-end company – Annual disclosures must first be provided in the Form 10-K or 20-F for the fiscal year ended December 31, 2024.
- June 30 fiscal year-end company – Annual disclosures must first be provided in the Form 10-K or 20-F for the fiscal year ended June 30, 2024.

CDI 120.26 also sets forth the delayed schedule for smaller reporting companies, requiring disclosure of plan adoptions, modifications or terminations that occur on or after October 1, 2023 and provide disclosure beginning with the quarter ending December 31, 2023.

[CDI 120.27](#) provides guidance on disclosures for annual meeting proxy statements.

HELP DIRECTORS AND OFFICERS WITH STOCK GIFTS UNDER SEC SECTION 16 GUIDANCE

As discussed under "[Faster reporting of gifts](#)" in our December 15, 2022 post, the SEC believes that "a gift followed closely by a sale, under conditions where the value at the time of donation and sale affects the tax or other benefits obtained by the donor, may raise the same policy concerns as more common forms of insider trading." Since most charities have policies to sell stock immediately upon receipt, and approximately [31% of annual giving comes in December](#), insiders planning to make stock gifts may wish to plan ahead and make gifts during open windows or consider including gifting in their 10b5-1 plans, recognizing that the SEC has not addressed the application of the prohibition on multiple overlapping plans to this situation.

EFFECTIVE DATE OF CLAWBACK RULES SET FOR OCTOBER 2, 2023

The SEC has approved the extension of the effective dates for NYSE and [Nasdaq](#) clawback rules to October 2, 2023. This means the deadline for companies to adopt clawback policies is December 1, 2023. Those policies will cover incentive-based compensation received by executive officers beginning October 2, 2023. Additionally, companies must provide the required disclosures in SEC filings required on or after October 2, 2023. We described the rules in our [February 27, 2023](#) and [May 3, 2023](#) posts.

REPORTING DECISION ON SAY-WHEN-ON-PAY

Many companies held the say-when-on-pay vote this year. Item 5.07(d) of Form 8-K requires disclosure of the decision on how frequently the say-on-pay vote will take place. The disclosure is required no later than 150 days after the shareholder meeting, but in no event later than 60 days before the deadline for 14a-8 proposals. This means the disclosure could be included in an amended 5.07 8-K (if not included in the original 8-K with voting results) or in a subsequent 10-Q or 10-K filed before the deadline.

NEW SHARE REPURCHASE DISCLOSURE RULES

As discussed in our [May 4, 2023](#) post, most companies will need to comply with the new share repurchase disclosure rules in Forms 10-Q and 10-K beginning with the first filing that covers the first full fiscal quarter that begins on or after October 1, 2023. Companies should evaluate their existing share repurchase plans, and related policies and procedures, as spelled out under ["Takeaways"](#) in that post.

OPPORTUNITY TO REVIEW ISS E&S DATA DURING VERIFICATION PERIOD

ISS [announced](#) updates to its E&S Disclosure QualityScore methodology. Companies are permitted – from July 10 to July 21 – to review and submit changes to their data, before scores are calculated and made available under the updated methodology. Access to the data verification portal is provided free-of-charge and available year-round.

FILING STATUS AND PUBLIC FLOAT DAY

Companies with a calendar year end should prepare to conduct their public float calculation as of June 30, 2023, to determine their filing status for next year.

MEET THE TEAM



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