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2024 PROXY SEASON UPDATES

In this article, the authors provide a high-level overview of certain updates for the 2024 proxy season ranging from the SEC's new clawback and insider trading rules to cybersecurity disclosure requirements.

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On December 12, 2023, we hosted Katten's annual proxy season program and, along with representatives of Ernst & Young LLP and Meridian Compensation Partners, shared updates for the 2024 proxy season. During the presentation, we provided an overview of various matters for registrants to consider during the 2024 proxy season, a number of which are briefly discussed below.

SEC CLAWBACK RULE

On October 26, 2022, the SEC adopted rules requiring national securities exchanges to adopt listing standards for companies listed on such exchanges to adopt and maintain mandatory "clawback" policies for incentive compensation when the related financial statements to which the incentive payments are tied are later required to be restated. In 2023, the New York Stock Exchange ("NYSE") and Nasdaq adopted listing standards that became effective on October 2, 2023, and required listed companies to adopt an SEC-compliant clawback policy by or before December 1, 2023. Under the rules, exchange-listed companies must enact and enforce clawback policies to seek to recover incentive-based compensation paid to a current or former executive officer during the three fiscal years preceding a required accounting restatement when *both*: (1) the incentive compensation at issue was paid or issued based on a misstated financial reporting measure that was subsequently restated and (2) non-compliance resulted in the officer being erroneously overpaid. The new SEC clawback rule applies to all public companies listed on a U.S. stock exchange as well as issuers of listed debt or other non-equity securities that are traded on an exchange. Each issuer that is subject to the new clawback rule will be required to file its clawback policy as an exhibit to its annual report, and, if an event occurs that triggers a clawback under the policy, it will be required to provide detailed disclosure regarding the event, the amounts erroneously awarded, and any amounts it subsequently recovers.

Failure to adopt or enforce a clawback policy or failure to make required clawback disclosures may result in an issuer being delisted. The recovery of compensation must be made without regard to whether any misconduct occurred or an executive officer's responsibility for the misstated financial statements, and issuers are not permitted to indemnify officers in respect of any such erroneously awarded incentive-based compensation that is subject to the clawback policy. Issuers will have limited discretion to not pursue recovery of overpayments in covered circumstances where (1) the cost to recover the overpayment would exceed the amount to be recovered, (2) recovery would violate the law of the issuer's home country, or (3) recovery would likely cause an otherwise tax-qualified plan (e.g., a 401(k) plan) to fail to meet the requirements of the Internal Revenue Code.

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