**As filed with the Securities and Exchange Commission on June 23, 2023**

**Registration No. 333-**

**UNITED STATES**
**SECURITIES AND EXCHANGE COMMISSION**
**Washington, D.C. 20549**

**FORM S-8**
**REGISTRATION STATEMENT**
***UNDER***
***THE SECURITIES ACT OF 1933***

**FOXO Technologies Inc.**
**(Exact name of registrant as specified in its charter)**

| Delaware | 85-1050265 |
| --- | --- |
| (State or other jurisdiction of incorporation or organization) | (I.R.S. Employer Identification No.) |

**729 N. Washington Ave., Suite 600**
**Minneapolis, MN 55401**
**(Address of Principal Executive Offices)**

**FOXO TECHNOLOGIES INC. 2022 EQUITY INCENTIVE PLAN, AS AMENDED**
**(Full title of the plan)**

**Tyler Danielson**
**Interim Chief Executive Officer**
**729 N. Washington Ave., Suite 600**
**Minneapolis, MN 55401**
**(Name and address of agent for service)**

**(612) 562-9447**
**(Telephone number, including area code, of agent for service)**

***Copies to:***

| | |
| --- | --- |
| **Tyler Danielson**<br>**Interim Chief Executive Officer**<br>**729 N. Washington Ave., Suite 600**<br>**Minneapolis, MN 55401**<br>**Telephone: (612) 562-9447** | **Nimish Patel, Esq.**<br>**Blake Baron, Esq.**<br>**Mitchell Silberberg & Knupp LLP**<br>**437 Madison Ave., 25th Floor**<br>**New York, New York 10022**<br>**Telephone: (917) 546-7709** |

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, a smaller reporting company or an emerging growth company. See the definitions of “large accelerated filer”, “accelerated filer,” “smaller reporting company” and “emerging growth company” in Rule 12b-2 of the Exchange Act.

| | | | |
| --- | --- | --- | --- |
| Large accelerated filer | ☐ | Accelerated filer | ☐ |
| Non-accelerated filer | ☒ | Smaller reporting company | ☒ |
| | | Emerging growth company | ☒ |

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 7(a)(2)(B) of the Securities Act. ☐

## EXPLANATORY NOTE

This Registration Statement on Form S-8 (this "**Registration Statement**") is being filed, pursuant to General Instruction E of Form S-8, by FOXO Technologies Inc. (the "**Registrant**") to register an additional 3,232,385 shares of the Registrant's Class A common stock, par value $0.0001 per share (the "**Class A Common Stock**"), for issuance with respect to equity awards made under the FOXO Technologies Inc. 2022 Equity Incentive Plan, as amended (the "**2022 Plan**"). These additional 3,232,385 shares of Class A Common Stock have been reserved for issuance under the 2022 Plan pursuant to the amendment to the 2022 Plan, as approved by the Registrant's stockholders at the 2023 annual meeting of stockholders on May 26, 2023.

The Registrant filed a Registration Statement on Form S-8 (File No. 333-268981) with the Securities and Exchange Commission (the "**Commission**") on December 23, 2022 (the "**Prior Form S-8**") to register an aggregate of 6,251,735 shares of Class A Common Stock reserved for issuance with respect to equity awards made under the 2022 Plan and the FOXO Technologies Inc. 2020 Equity Incentive Plan (the "**2020 Plan**"), consisting of 3,286,235 shares of Class A Common Stock reserved for issuance pursuant to the 2022 Plan and 2,965,500 shares of Class A Common Stock that may be issued pursuant to the exercise of outstanding stock options under the 2020 Plan. The Prior Form S-8 is currently effective.

These additional 3,232,385 shares of Class A Common Stock are securities of the same class as other securities for which the Prior Form S-8 relating to the same benefit plan was filed with the Commission. Pursuant to General Instruction E of Form S-8, the contents of the Prior Form S-8 are incorporated by reference herein. In accordance with the instructional note to Part I of Form S-8 as promulgated by the Commission, the information specified by Part I of the Form S-8 has been omitted from this Registration Statement.

## PART II

## INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

**Item 3. Incorporation of Documents by Reference.**

The following documents previously filed by FOXO Technologies Inc. (the "**Registrant**") with the Commission are incorporated by reference into this Registration Statement:

(1) The Registrant's Annual Report on Form 10-K for the fiscal year ended December 31, 2022, as filed with the Commission on March 31, 2023;

(2) The Registrant's Quarterly Report on Form 10-Q for the fiscal quarter ended March 31, 2023, filed with the Commission on May 11, 2023;

(3) The Registrant's Current Reports on Form 8-K, filed with the Commission on January 12, 2023, February 2, 2023, February 3, 2023, February 6, 2023, February 8, 2023, March 10, 2023, March 20, 2023, March 31, 2023, April 18, 2023, May 11, 2023, May 17, 2023, May 30, 2023, June 15, 2023, and June 16, 2023, respectively; and

(4) The description of the Registrant's Class A Common Stock set forth in Exhibit 4.4 of the Registrant's Annual Report on Form 10-K for the fiscal year ended December 31, 2022, as filed with the Commission on March 31, 2023, together with any amendments or reports filed for the purpose of updating such description.

All documents subsequently filed by the Registrant with the Commission pursuant to Sections 13(a), 13(c), 14, or 15(d) of the Exchange Act, prior to the filing of a post-effective amendment to the Registration Statement which indicates that all securities offered have been sold or which deregisters all securities then remaining unsold, shall be deemed incorporated by reference into this Registration Statement and to be a part hereof from the date of the filing of such documents, except that information furnished to the Commission under Item 2.02 or Item 7.01 in Current Reports on Form 8-K and any exhibit relating to such information, shall not be deemed to be incorporated by reference in this Registration Statement.

Any statement contained herein or in a document incorporated or deemed to be incorporated by reference in this Registration Statement shall be deemed to be modified or superseded for purposes of this Registration Statement to the extent that a statement contained in this Registration Statement, or in any other subsequently filed document which also is or is deemed to be incorporated by reference in this Registration Statement, modifies or supersedes such earlier statement. Any statement so modified or superseded shall not be deemed, except as so modified or superseded, to constitute a part of this Registration Statement.

**Item 4. Description of Securities.**

Not applicable.

**Item 5. Interests of Named Experts and Counsel.**

Not applicable.

**Item 6. Indemnification of Directors and Officers.**

Section 145 of the Delaware General Corporation Law authorizes a court to award, or a corporation's board of directors to grant, indemnity to directors and officers under certain circumstances and subject to certain limitations. The terms of Section 145 of the Delaware General Corporation Law are sufficiently broad to permit indemnification under certain circumstances for liabilities, including reimbursement of expenses incurred, arising under the Securities Act of 1933, as amended, or Securities Act.

Our Certificate of Incorporation contains provisions limiting the liability of directors, and our Bylaws provide that we will indemnify each of our directors to the fullest extent permitted under Delaware law. The Certificate of Incorporation and Bylaws also provide us with discretion to indemnify officers and employees when determined appropriate by the Board of Directors.

We entered into indemnification agreements with each of our directors and executive officers. The indemnification agreements provide that we indemnify each of our directors, executive officers and such other key employees against any and all expenses incurred by that director, executive officer or other key employee because of his or her status as one of our directors, executive officers or other key employees, to the fullest extent permitted by Delaware law, our Certificate of Incorporation and our Bylaws. In addition, the indemnification agreements provide that, to the fullest extent permitted by Delaware law, we will advance all expenses incurred by our directors, executive officers, and other key employees in connection with a legal proceeding involving his or her status as a director, executive officer or key employee.

**Item 7. Exemption from Registration Claimed.**

Not applicable.

**Item 8. Exhibits.**

| Exhibit No. | Description |
|---|---|
| 3.1 | Certificate of Incorporation of FOXO Technologies Inc. (incorporated by reference to Exhibit 3.1 to FOXO Technologies Inc.'s Current Report on Form 8-K (File No. 001-39783), filed with the SEC on September 21, 2022). |
| 3.2 | Bylaws of FOXO Technologies Inc. (incorporated by reference to Exhibit 3.2 to FOXO Technologies Inc.'s Current Report on Form 8-K (File No. 001-39783), filed with the SEC on September 21, 2022). |
| 5.1* | Opinion of Mitchell Silberberg & Knupp LLP. |
| 23.1* | Consent of Mitchell Silberberg & Knupp LLP (included as part of Exhibit 5.1 hereto). |
| 23.2* | Consent of KPMG LLP. |
| 99.1 | FOXO Technologies Inc. 2022 Equity Incentive Plan, as amended (incorporated by reference to Exhibit 10.5 to FOXO Technologies Inc.'s Current Report on Form 8-K (File No. 001-39783), filed with the SEC on May 30, 2023). |
| 107* | Calculation of Registration Fee |

* Filed herewith.

**Item 9. Undertakings.**

(a) The undersigned Registrant hereby undertakes:

(1) To file, during any period in which offers or sales are being made, a post-effective amendment to this Registration Statement:

(i) To include any prospectus required by Section 10(a)(3) of the Securities Act;

(ii) To reflect in the prospectus any facts or events arising after the effective date of the Registration Statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the Registration Statement; and

(iii) To include any material information with respect to the plan of distribution not previously disclosed in the Registration Statement or any material change to such information in the Registration Statement; *provided, however*, that paragraphs (a)(1)(i) and (a)(1)(ii) do not apply if the information required to be included in a post-effective amendment by those paragraphs is contained in reports filed with or furnished to the Commission by the Registrant pursuant to Section 13 or Section 15(d) of the Exchange Act that are incorporated by reference in the Registration Statement.

(2) That, for the purpose of determining any liability under the Securities Act, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof.

(3) To remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the offering.

(b) The undersigned Registrant hereby undertakes that, for purposes of determining any liability under the Securities Act, each filing of the Registrant's annual report pursuant to Section 13(a) or Section 15(d) of the Exchange Act (and, where applicable, each filing of an employee benefit plan's annual report pursuant to Section 15(d) of the Exchange Act) that is incorporated by reference in the Registration Statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof.

(c) Insofar as indemnification for liabilities arising under the Securities Act may be permitted to directors, officers and controlling persons of the Registrant pursuant to the foregoing provisions, or otherwise, the Registrant has been advised that in the opinion of the Commission such indemnification is against public policy as expressed in the Securities Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the Registrant of expenses incurred or paid by a director, officer or controlling person of the Registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the Registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Securities Act and will be governed by the final adjudication of such issue.

## SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, the Registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-8 and has duly caused this Registration Statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of Minneapolis, State of Minnesota, on June 23, 2023.

**FOXO TECHNOLOGIES INC.**

By /s/ Tyler Danielson
Name: Tyler Danielson
Title: Interim Chief Executive Officer

## POWER OF ATTORNEY

Each person whose signature appears below constitutes and appoints Tyler Danielson and Robby Potashnick as his or her true and lawful attorney-in-fact and agent, with full power of substitution and resubstitution, for such person and in his or her name, place and stead, in any and all capacities, to sign any or all further amendments (including post-effective amendments) to this registration statement (and any additional registration statement related hereto permitted by Rule 462(b) promulgated under the Securities Act (and all further amendments, including post-effective amendments, thereto)), and to file the same, with all exhibits thereto, and other documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorneys-in-fact and agents, and each of them, full power and authority to do and perform each and every act and thing requisite and necessary to be done in and about the premises, as fully to all intents and purposes as he might or could do in person, hereby ratifying and confirming all that said attorney-in-fact and agent, or his or her substitute or substitutes, may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, this Registration Statement has been signed by the following persons in the capacities and on the dates indicated.

| Signature | Title | Date |
|---|---|---|
| /s/ Tyler Danielson<br>Tyler Danielson | Interim Chief Executive Officer and Director<br>(Principal Executive Officer) | June 23, 2023 |
| /s/ Robby Potashnick<br>Robby Potashnick | Chief Financial Officer<br>(Principal Accounting Officer) | June 23, 2023 |
| /s/ Andrew J. Poole<br>Andrew J. Poole | Director | June 23, 2023 |
| /s/ Bret Barnes<br>Bret Barnes | Director | June 23, 2023 |
| /s/ Murdoc Khaleghi<br>Murdoc Khaleghi | Director | June 23, 2023 |

MITCHELL SILBERBERG & KNUPP LLP
A LAW PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

June 23, 2023
FOXO Technologies Inc.
729 N. Washington Ave.
Suite 600
Minneapolis, MN 55401

**Re: Registration Statement on Form S-8**

Ladies and Gentlemen:

We have acted as counsel to FOXO Technologies Inc., a Delaware corporation (the "**Company**"), in connection with the filing of the Company's registration statement on Form S-8 (the "**Registration Statement**") with the U.S. Securities and Exchange Commission (the "**Commission**") for the purpose of registering under the Securities Act of 1933, as amended (the "**Securities Act**"), up to 3,232,385 shares of the Company's Class A common stock, par value $0.0001 per share (the "**Shares**"), that are subject to issuance by the Company upon the exercise or settlement of awards granted or to be granted under the FOXO Technologies Inc. 2022 Equity Incentive Plan, as amended (the "**2022 Plan**").

For purposes of rendering this opinion, we have examined the 2022 Plan, the Registration Statement, the Certificate of Incorporation and the Bylaws of the Company, as amended or restated, the proceedings and other actions of the Company that provide for the issuance of the Shares, and such other documents and matters as we have deemed necessary for purposes of rendering this opinion. We have assumed the authenticity of all documents submitted to us as originals, the conformity to originals of all documents submitted to us as certified or photostatic copies and the authenticity of the originals of all documents submitted to us as copies. We have also assumed the legal capacity of all natural persons who have executed documents examined by us, the genuineness of all signatures on all documents examined by us, the authority of such persons signing on behalf of the parties thereto other than the Company and the due authorization, execution and delivery of all documents by the parties thereto other than the Company. In rendering the opinion set forth below, we have assumed that certificates evidencing the will be signed by the authorized officers of the Company and registered by the transfer agent and registrar and will conform to the specimen certificate for the shares of the Company. In addition, we have assumed that the resolutions of the Company's Board of Directors or its applicable committee authorizing the Company to issue and deliver the Shares will be in full force and effect at all times at which such Shares are issued and delivered by the Company, and that the Company will take no action inconsistent with such resolutions.

Based upon and subject to the foregoing, it is our opinion that the Shares, when issued, delivered and paid for in accordance with the 2022 Plan and in the manner described in the Registration Statement and the related prospectus, will be validly issued, fully paid and nonassessable.

This opinion is being furnished in connection with the requirements of Item 601(b)(5) of Regulation S-K under the Securities Act, and no opinion is expressed herein as to any matter pertaining to the contents of the Registration Statement or related prospectus, other than as expressly stated herein with respect to the issuance of the Shares. This opinion is opining upon and is limited to the current federal laws of the United States and the General Corporation Law of the State of Delaware. We express no opinion with respect to the effect or applicability of the laws of any other jurisdiction. We assume no obligation to revise or supplement this opinion letter should the laws of such jurisdiction be changed after the date hereof by legislative action, judicial decision, or otherwise.

We hereby consent to the filing of this opinion as an exhibit to the Registration Statement. In giving our consent, we do not hereby admit that we are in the category of persons whose consent is required under Section 7 of the Securities Act or the rules and regulations promulgated by the Commission thereunder.

Sincerely,

/s/ Mitchell Silberberg & Knupp LLP
MITCHELL SILBERBERG & KNUPP LLP

2049 Century Park East, 18th Floor, Los Angeles, California 90067-3120
Phone: (310) 312-2000 Fax: (310) 312-3100 Website: WWW.MSK.COM

**Exhibit 23.2**

KPMG LLP
4200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402

**Consent of Independent Registered Public Accounting Firm**

We consent to the use of our report dated March 30, 2023, with respect to the consolidated financial statements of FOXO Technologies Inc., incorporated herein by reference.

/s/ KPMG LLP
Minneapolis, Minnesota
June 23, 2023

**Exhibit 107**

**Calculation of Filing Fee Tables**

Form S-8
(Form Type)

**FOXO Technologies Inc.**

Table 1: Newly Registered Securities

| | Security Type | Security Class Title | Fee Calculation or Carry Forward Rule | Amount Registered (1) | Proposed Maximum Offering Price Per Unit | Maximum Aggregate Offering Price | Fee Rate | Amount of Registration Fee |
|---|---|---|---|---|---|---|---|---|
| | | | | **Newly Registered Securities** | | | | |
| Fees to be Paid | Equity | Class A common stock, par value $0.0001 per share | 457(c) and (h) | 3,232,385(2) | $ 0.3097(3) | $ 1,001,069.63 | $ 0.00011020 | $ 110.32(3) |
| | | **Total Offering Amounts** | | | | $ 1,001,069.63 | | |
| | | **Net Fee Due** | | | | | | $ 110.32 |

(1) Pursuant to Rule 416 under the Securities Act of 1933, as amended (the "**Securities Act**"), this Registration Statement shall also cover an indeterminate number of additional shares of the Registrant's Class A common stock, par value $0.0001 per share (the "**Class A Common Stock**"), that become issuable in respect of the securities identified in the above table by reason of any stock dividend, stock split, recapitalization or other similar transaction effected without the Registrant's receipt of consideration that results in an increase in the number of the outstanding shares of the Registrant's Class A Common Stock.

(2) Represents additional shares of the Registrant's Class A Common Stock reserved for issuance under the Registrant's 2022 Equity Incentive Plan (the "**2022 Plan**") pursuant to an amendment to the 2022 Plan increasing the number of shares reserved for issuance thereunder, effective as of May 26, 2023.

(3) Estimated pursuant to Rule 457(h) under the Securities Act solely for the purpose of calculating the registration fee. The price of $0.3097 per share represents the average high and low sales prices of the Class A Common Stock as quoted on the NYSE American on June 20, 2023.