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Fenwick Securities Law Update

– April 30, 2025 –

Welcome to the latest edition of Fenwick's Securities Law Update. This issue contains updates and important reminders on:

- Form 10-Q and proxy statement disclosures
- The SEC's updated Compliance and Disclosure Interpretations (CDIs) on Rule 10b5-1 plans, clawbacks, and de-SPAC transactions
- The SEC's approval of Nasdaq's proposed changes to the initial listing requirements related to liquidity
- The SEC's updated guidance on cryptocurrencies
- Delaware's adoption of significant amendments to the Delaware General Corporation Law (DGCL)

Important Reminders

- Risk Factor Considerations for Upcoming Form 10-Q:
    - Trade Issues and Tariffs: On April 2, the Trump administration announced a 10% tariff on all countries and an individualized reciprocal higher tariff on certain countries with large trade deficits. On April 9, the Trump administration paused the individualized reciprocal tariffs on all countries except China for 90 days, but it kept the 10% base tariff in place. With respect to China, the Trump administration has implemented a total tariff of 145% on Chinese imports, and China has raised its tariff on U.S. imports to 125% in response. The Trump administration has also suggested tariffs on pharmaceutical products may be coming.

      Trade issues and tariffs can have a direct impact on a company based on its industry and the extent of its international operations and supply chain, while these trade issues and tariffs may indirectly affect other companies through the downstream impacts of upstream tariffs and the impact of trade tensions on the economy, such as increasing uncertainty and volatility (which can reduce underlying customer demand), inflation or the unavailability of certain components. While reviewing their Form 10-Qs, companies should consider how their specific businesses may be impacted by trade tensions and tariffs on any components from, or their business with, these countries or secondary effects domestically and internationally.

In addition, companies should consider whether any of their supply chain disclosure should be updated to reflect new risks, such as increasing prices, reduced availability, new disruptions, the risk of holding excess inventory, or any other developments.

- Market Volatility and Economic Slowdown: In light of ongoing market volatility and a potential economic slowdown spurred by the recent shift in global trade policy and other recent or rapid policy shifts, companies should consider how their specific businesses may be impacted by a decrease in their stock prices, significant changes in the valuation of the U.S. dollar and other currencies, a significant decline in consumer and investor confidence, decreased demand, higher interest rates or reduced access to credit, and reduced access to capital through equity and debt offerings, among other things.

- Uncertainty Regarding Regulatory Environment: Earlier this year, President Trump issued an executive order requiring that "whenever an agency promulgates a new rule, regulation, or guidance, it must identify at least 10 existing rules, regulations, or guidance documents to be repealed." In addition, the executive order requires that "the total incremental cost of all new regulations, including repealed regulations, be significantly less than zero" for fiscal year 2025. This executive order and recent Supreme Court decisions have introduced significant uncertainty into the regulatory environment, which may create risks for highly regulated companies. Further, with the Trump administration's focus on reducing costs and personnel within agencies, companies may want to also consider referencing longer review periods for any applicable regulatory approvals or delays in responsiveness. Companies in highly regulated industries, particularly life science companies, should consider such FDA and other regulatory risks carefully and discuss whether new risk factor disclosure is appropriate.

- ESG, Including Diversity Programs: The Trump administration's executive order calling for potential federal investigations into corporate diversity practices has resulted in some companies adding new risk factor disclosure that their environmental, social, and governance (ESG) programs, particularly any diversity, equity, and inclusion (DEI) initiatives, could pose business risks. However, other companies are scaling back their ESG risk factor in response to the EU Corporate Sustainability Reporting Directive (CSRD) compliance deadlines being delayed and the SEC's climate disclosure rules likely being repealed. While reviewing their Form 10-Qs, companies should consider how their specific businesses may be impacted by uncertainty regarding ESG and DEI; the current federal and state legal, regulatory, and political environments; and recent changes in market perceptions and demands. For example, please see JPMorgan (pg. 34), Advanced Micro Devices (pg. 33), Eli Lilly (pg. 36), Pinterest (pg. 26), and Snowflake (pg. 44).

- EU AI Act: *Bloomberg Law* previously reported that at least 70 other public companies have disclosed risks related to the EU AI Act in their 10-K filings, including potential financial penalties, increased compliance costs, inconsistencies among AI regulations, potential increases in civil claims, adverse impact on business, and impact on AI commercialization.

- Executive/Office Safety: A few S&P 500 companies have added disclosure about the potential risk of a physical attack on their senior leadership or offices in the general risk factor section of their Form 10-K. For example, see Nasdaq (pg. 30) and Halozyme Therapeutics (pg. 41).

- Hypothetical Risks: Companies should carefully review any hypothetical risks described in their risk factors and update the disclosure if the risk has actually occurred.

- Quantitative and Qualitative Disclosures About Market Risk

  - Foreign Currency Exchange Risk: As of April 21, the U.S. dollar is down ~9% this year. In light of this significant decrease, companies should review their disclosures about foreign currency exchange risk. For example, some companies include a statement that a hypothetical 10% increase or decrease in the relative value of the U.S. dollar to other currencies would not have a material effect on their operating results. With the value of the U.S. dollar decreasing by almost 10%, companies should evaluate the continued accuracy of this statement.

- Management Discussion & Analysis (MD&A) Considerations for Upcoming Forms 10-Q:

  - Trade Issues and Tariffs: Under Item 303(b), companies must disclose any known trends or uncertainties that have had or that are reasonably likely to have a material impact on net sales, revenues, income from continuing operations, or liquidity. Even though the latest round of tariffs was announced after the fiscal quarter end, companies still need to address any material impacts from the latest tariffs in their MD&A.

    As a reminder, the SEC will often review a company's Form 10-Q against its earnings calls and related materials. Companies should ensure that their Form 10-Q disclosure aligns with their earnings materials. If a company is discussing tariffs and trade issues on their earnings call, it should likely be addressed in their MD&A as well.

- Last-Minute Proxy Statement Reminders

  - Mandatory Electronic Submission of Glossy Annual Reports: Submit glossy annual reports (typically, a 10-K wrap) electronically as a Form ARS on EDGAR in a PDF format no later than the date on which the report is first sent to shareholders. Note that the PDF cannot be reformatted or otherwise redesigned from the original format.

  - Voting Standards: Ensure that the proxy statement describes the correct voting standards, including the treatment of abstentions and broker non-votes, for each proposal under the company's bylaws and applicable state law.

  - Non-GAAP: Ensure compliance with Regulation G and Item 10(e) of Regulation S-K for any non-GAAP metrics used in the proxy statement other than those used as target levels or in the Pay versus Performance table. Instruction 5 to Item 402(b) provides that "[d]isclosure of target levels that are non-GAAP financial measures will not be subject to Regulation G and Item 10(e)."

    However, "[i]f non-GAAP financial measures are presented in CD&A or in other parts of the proxy statement for any other purpose, such as to explain how pay is structured or implemented to reflect the registrant's or a named executive officer's performance or to justify certain levels or amounts of pay, [those measures] are subject to the requirements of Regulation G and Item 10(e) of Regulation S-K (except with regards to the Company-Selected Measure or additional

financial performance measures disclosed [in the Pay Versus Performance table]).” See CDI 118.08 and 118.09.

- **XBRL Tagging:** Ensure that the following disclosures are XBRL-tagged:
  - **Pay Versus Performance:** Disclosure required by Item 402(v) of Regulation S-K must be tagged in Inline XBRL.
  - **Clawback:** Disclosure required by Item 402(w) of Regulation S-K (i.e., required disclosure in connection with an accounting restatement) must be tagged in Inline XBRL. Note: this requirement does not include the voluntary description of the clawback policy generally.
  - **Equity Awards Close in Time to material nonpublic information (MNPI):** Disclosure required by Item 402(x) of Regulation S-K must be tagged in Inline XBRL. Insider Trading Arrangements and Policies: Disclosure required by Item 408(b)(1) of Regulation S-K must be tagged in Inline XBRL.
  - **Exhibit Links:** Ensure that all exhibit links are correct and functional prior to filing.

Rules and Regulations

- **The SEC published updated CDIs on 10b5-1 plans.** On April 25, the SEC Staff added two new CDIs, revised 20 CDIs and withdrew three CDIs related to 10b5-1 plans. The SEC Staff largely revised the CDIs to conform to the 2022 Rule 10b5-1 amendments, including updated rule references and adding the new compliance requirements. However, it did make substantive changes to CDIs 120.12, 120.15, and 120.16 regarding limit orders; CDI 120.18 regarding 10b5-1 plan terminations; and CDIs 120.21, 120.22, and 120.23 regarding certain 401(k) transactions.
  - Exchange Act Rules – Rule 10b5-1
    - New Question 120.32 – A company sponsors a 401(k) plan that permits both employer and employee contributions to be invested through a self-directed “brokerage window.” Because the counterparty to the self-directed “brokerage window” transaction will be an open market participant, the instruction for any self-directed “brokerage window” transaction will need to satisfy all conditions of Rule 10b5-1(c)(1), including those applicable to purchases and sales of the issuer’s securities on the open market.
    - New Question 120.33 – Rule 10b5-1(c)(1)(ii)(D) provides that an individual claiming the Rule 10b5-1(c) affirmative defense may not have multiple Rule 10b5-1 plans. Rule 10b5-1(c)(1)(ii)(D)(3) provides an exception for an eligible sell-to-cover transaction. An eligible sell-to-cover transaction is a contract, instruction, or plan that authorizes an agent to sell only such securities as are “necessary to satisfy tax withholding obligations” arising exclusively from the vesting of a compensatory award where the insider does not otherwise exercise control over the timing of such sales. In this context, “necessary to satisfy tax withholding obligations” refers to tax withholding payments that are calculated in good faith to satisfy the employee or director’s expected effective tax obligation solely with respect to the vesting transaction, consistent with applicable tax law and accounting rules.

- Withdrawn Question 120.02 – A person who has adopted a written trading plan or given trading instructions to satisfy Rule 10b5-1(c) plans to sell the securities in reliance on Rule 144. It is unnecessary to modify the Form 144 representation regarding the seller's knowledge of MNPI to be as of the date of the Rule 10b5-1 plan rather than the Form 144 signature date since the form already includes the representation.

- Withdrawn Question 120.19 – The cancellation of one or more plan transactions would be a modification of an alteration or deviation from the plan, which would terminate that plan. The Rule 10b5-1(c) defense would be available for transactions following the alteration such termination only if the transactions were pursuant to a new contract, instruction or plan that satisfies the requirements of Rule 10b5-1(c).

  The 2022 amendments added a new section to Rule 10b5-1 clarifying when a modification to a plan would be deemed a termination and adoption of a new plan.

- Withdrawn Question 220.01 – After the written trading plan described in Q&A 120.11 has been in effect for several months, the broker that has been executing plan sales goes out of business at a time when the person is aware of MNPI. The person wishes to continue sales under the plan pursuant to its original terms. The person may transfer plan transactions to a different broker without being deemed to have cancelled the original plan and adopted a new plan if the transfer to the new broker is timed so that there is no cancellation of any transaction scheduled in the original plan, and the new broker effects sales in accordance with the original plan's terms.

- The SEC published updated CDIs on clawbacks and de-SPAC transactions.

  - Exchange Act Forms – Section 104. Form 10-K

    - New Question 104.20 – When a company reports a change to its previously issued financial statements in an annual report, it should determine whether "the financial statements of the registrant included in the filing reflect the correction of an error to previously issued financial statements" for purposes of the Form 10-K check box by looking to applicable GAAP guidance on whether the change represents the correction of an error. The CDI clarifies that "Big R" restatements and "little r" restatements constitute a correction, but "out-of-period adjustments" are not a correction since the previously issued financial statements are not revised.

    - New Question 104.21 – Companies must mark the check box on the cover of an amended annual report to indicate that the restatement "required a recovery analysis of incentive-based compensation received by any of the registrant's executive officers during the relevant recovery period" pursuant to Exchange Act Rule 10D-1(b) even when (1) no incentive-based compensation was received by any executive officers at all during the relevant time frame or (2) incentive-based compensation was received but that incentive-based compensation was not based on a financial reporting measure impacted by the restatement (and explain).

- New Question 104.22 – After filing an amended 20X3 10-K, a company includes the same restated financial statements in its subsequent 20X4 annual report. Assuming there are no additional restatements, SEC staff will not object to the check boxes remaining unmarked on the cover page of the 20X4 annual report.

  However, any proxy or information statement filed during 20X5 that includes 20X4 executive compensation information pursuant to Item 402 must also include the disclosure of Item 402(w)(2) of Regulation S-K (even if the company previously explained why there was no recovery).

- New Question 104.23 – If a company discovers an error in its previously issued 20X3 financial statements in 20X5 (prior to filing the 20X4 annual report), applies its recovery policy, determines that no recovery is required, checks both boxes on its 20X4 annual report, and provides Item 402(w)(2) disclosure in its proxy or information statement incorporated by reference, the staff will not object if the 20X5 annual report does not include or incorporate by reference Item 402(w)(2) disclosure, notwithstanding that the restatement occurred "during…the [company's] last completed fiscal year" as long as there are no additional facts that would affect the conclusion of the prior recovery analysis that no recovery is required.

- New Question 104.24 – A company initially reports a restatement of an annual period in a form that does not include a cover page check box requirement, such as a Form 8-K or a registration statement. If that annual period is presented in the issuer's financial statements in its next annual report, the company must mark that check box on the cover page.

- New Question 104.25 – If a company determines in the fourth quarter that it is required to prepare restatements of its first, second, and third quarterly periods of that year, it is not required to mark any of the check boxes on the cover page of its annual report because the restatements do not impact the annual periods in the issuer's financial statements.

  However, it must provide disclosure pursuant to Item 402(w) of Regulation S-K in its 10-K or proxy or information statement since, for purposes of that disclosure, an accounting restatement includes interim periods and is not limited to one that impacts annual periods.

- Exchange Act Rules. Section 253. Rule 12h-3

  - New Question 253.03 – A SPAC completed a de-SPAC transaction wherein the target company or companies were included as co-registrants on the effective Securities Act registration statement for the de-SPAC transaction. As a result, these co-registrants incurred an obligation to file reports under Section 15(d) of the Exchange Act upon effectiveness of the de-SPAC registration statement. Notwithstanding that a class of securities offered and sold using such registration statement remains outstanding, once the de-SPAC transaction has closed, the Staff will not object if each target company files

a Form 15 to suspend its 15(d) reporting obligations in reliance on Rule 12h-3 as long as the target company is wholly owned by the combined company and the target company remained current in its 15(d) reporting obligations through the date of filing.

- **The SEC recently approved Nasdaq's proposed changes to the initial listing requirements related to liquidity.** Nasdaq proposed to change Listing Rules 5405 and 5505 to:

    1. Require that a company listing on the Nasdaq Global Market or Nasdaq Capital Market in connection with an initial public offering (IPO) satisfy the applicable minimum Market Value of Unrestricted Publicly Held Shares (MVUPHS) requirements solely from the proceeds of the offering

    2. Make similar changes affecting companies that uplist to Nasdaq Global Market or Nasdaq Capital Market from the U.S. over-the-counter market in conjunction with a public offering

  According to Nasdaq, it has observed that the companies that meet the applicable MVUPHS requirement through an IPO by including previously issued shares registered for resale and not held by affiliates (Resale Shares) have experienced higher volatility on the date of listing than those of similarly situated companies that meet the requirement with only the proceeds from the offering. As a result, Nasdaq believes it is appropriate to modify the rules to exclude the Resale Shares because these shares may not contribute to liquidity to the same degree as the shares sold in the IPO.

- **The Council of Institutional Investors (CII) updated its Policies on Corporate Governance** to reflect the following changes:

    - **Reincorporation:** CII amended Section 1.8 to address companies reincorporating outside of Delaware. The new policy states that companies should not make changes to governing documents in connection with reincorporation that diminish shareholder rights and protections.

    - **"Stealth" dual-class structures:** CII added Section 2.6c and amended Section 3.3 to address the use of arrangements by companies that mimic the effects of dual-class share structures without formally implementing a dual-class share structure with unequal voting rights (e.g., identity-based voting, golden shares, and vote caps). The amendments discourage companies from adopting other alternative structures or mechanisms that similarly misalign voting rights and economic ownership.

- **Goldman Sachs updated its 2025 global proxy voting policy, procedures and guidelines.** Consistent with other asset managers, Goldman Sachs updated its guidelines to be less specific about its expectations and to permit the stewardship team to exercise more discretion in voting. For example, Goldman Sachs softened its voting policy on diversity by replacing its board diversity targets with a case-by-case approach to voting decisions on members of the nominating committee.

- **The Second Circuit of the U.S. Court of Appeals suggests that Rule 16b-3 exempts a director's board-approved purchase even if the director resigns before closing**. See Rule 16b-3 Exempts Director's Board-Approved Purchase Even If Director Resigns Before Closing (Section16.net, March 2025).

- **Nasdaq has begun engaging with regulators, market participants, and other key stakeholders to enable 24-hour trading, five days a week on the Nasdaq Stock Market by the second half of 2026.** Some stakeholders argue that this potential change will make it more difficult for companies to control when investors receive material information, such as earnings results, which could increase trading volatility. See What 24-Hour Trading Could Mean for Investor Relations – and How to Prepare (Mark Hayes, LinkedIn Newsletter, February 2025).

  Last year, the SEC approved the "24X exchange," which currently allows trading 23 hours a day, five days a week.

SEC Public Commentary and Guidance

- **On April 21, Paul Atkins was sworn in as the new SEC chair.**

- **Commissioner Mark Uyeda called for reevaluating the roles of federal securities laws and state laws in regulating registration or qualification of securities transactions at the Annual Conference on Federal and State Securities Cooperation.** In his remarks at the conference, Uyeda stated that "the interplay between federal and state securities laws with respect to the registration or qualification of securities transactions should be reconsidered," particularly which securities transactions should receive federal preemption and the degree of preemption. For example, he questioned why a company is subject to state registration requirements when the company files a Form S-1 to register the offering under the Securities Act but does not list the securities on a national securities exchange, especially since the Form S-1 is already subject to SEC review.

  He invited input on this topic from the public and state regulators.

- **The SEC staff issued a statement articulating how existing disclosure requirements under the federal securities laws apply to offerings and registrations involving crypto assets.** The statement specifically addresses obligations under federal securities laws for offerings and registrations of (1) debt or equity securities of issues whose operations relate to crypto networks, applications, or assets; and (2) crypto assets offered as part of or subject to an investment contract security.

  In addition, the statement provides guidance for issuers on key disclosure areas, including descriptions of business, risk factors, description of securities, supply, governance, financial statements, and exhibits. In the statement, the SEC staff emphasize that disclosures under Regulation S-K and applicable SEC forms (including Forms S-1, 10, 20-F, and 1-A) must be clear, concise, and tailored specifically to each issuer's particular business context. Public companies involved in crypto assets should carefully review this guidance in advance of filing their next Form 10-Q.

- **The SEC staff issued a statement that, in its view, transactions in "covered stablecoins" do not involve the offer and sale of securities under the federal securities laws and do not need to be registered.** Covered stablecoins can be redeemed for U.S. Dollars (USD) on a one-for-one basis and are backed by assets held in a reserve that are considered low risk and readily liquid with a USD value that meets or exceeds the redemption value of the stablecoins in circulation.

- A presidential memorandum directs federal agencies to reassess and immediately repeal regulations inconsistent with recent Supreme Court decisions, such as *Loper Bright Enterprises v. Raimondo* and *SEC v. Jarkesy*, without public notice and comment. We expect to see a number of SEC rules quickly repealed in the coming months.

- On April 23, the Business Roundtable urged the SEC to prohibit shareholder proposals related to ESG issues, arguing that such proposals have become tools to advance political agendas. In a white paper published by the group, it advocated for (1) amending Rule 14a-8 to prevent activist investors from hijacking the process and (2) greater oversight of proxy advisory firms to ensure that proxy advisory firms operate with transparency and accountability.

Delaware Developments

- On March 25, Delaware adopted significant amendments to Sections 144 and 220 of the DGCL, which aim to provide greater clarity and predictability to corporate fiduciaries in light of certain recent controversial decisions from the Delaware Court of Chancery.

    - The amendments to Section 144 of the DGCL

        - Provide safe harbor protections for interested transactions with directors, officers, controlling stockholders, and members of a control group, including providing specific processes for approval of such transactions and a path for ratification by stockholders after the fact in some circumstances

        - Lower the requirements for approval of acts and transactions with interested directors, officers, and controlling stockholders

    - The amendments to Section 220 of the DGCL

        - Provide more clarity with respect to the scope and requirements for a stockholder inspection of books and records, including an exclusive list of items that may be requested

        - Raise the procedural requirements for such demands

        - Allow corporations to impose confidentiality restrictions consistent with current case law

    The amendments are immediately effective and apply to all prior and future acts and transactions, but they do not apply to court proceedings that were pending or completed on or before February 17, 2025, or to stockholder demands to inspect books and records made on or prior to that date.

Disclosure Trends

- Board Diversity Disclosure in Proxy Statements: Based on its review of the more than 900 Russell 3000 proxy statements filed as of April 1, DiversIQ reported the following notable board diversity disclosure trends:

- Disclosure of at least one quantitative measure of board diversity has declined ~20% season-over-season across all companies.
- In response to the elimination of the Nasdaq board diversity rules, disclosure among Nasdaq companies declined ~35% season-over-season, compared to a decline of ~15% for NYSE companies.
- Disclosure by Nasdaq companies of the standard board diversity matrix has dropped from 87% in the last proxy season to 38% this year.

DiversIQ also observed that some companies are removing diversity terminology, such as gender, race/ethnicity, nationality, and veteran status. See DEI Rollbacks in Full Effect this Proxy Season (DiversIQ, April 2025), reported in the Society Alert – April 9, 2025 (Society of Corporate Governance, April 2025).

	2025	2024
Gender: Aggregate	76.9%	99.6%
Gender: Individual	37.7%	53.9%
Race/Ethnicity: Aggregate	72.9%	98.4%
Race/Ethnicity: Individual	36.0%	53.9%
LGBTQ+: Aggregate	10.1%	29.4%
LGBTQ+: Individual	5.7%	11.0%

Proxy Season Update

- Shareholder Proposals: As of April 15, Proxy Analytics has recorded 809 shareholder proposals, representing about a 13% decline from the same time last year and a 19% drop from the final 2024 total. Based on current trends, proxy season is expected to close with approximately 850 proposals, down about 15% year-over-year and in line with levels seen around the 2022 proxy season.
  - According to Proxy Analytics, conservative-leaning proposals are on track to represent a larger share of shareholder proposals, making up 14% of all submissions right now.
- No-Action Letters: Proxy Analytics reports that companies have submitted a record-breaking 372 no-action letter requests, meaning that more than 44% of stockholder proposals have been challenged. The SEC's overall grant rate is currently 68.4%, which is the highest since the 2021 proxy season. Of these grants, 53% were excluded under the micromanagement prong of Rule14a8(i)(7), likely driven by the SEC's updated guidance.
- Director Elections: Average support for uncontested director nominees continues to trend higher, rising from 94% among Russell 3,000 companies last year to 95% this season. Support for S&P 500 directors is 96%.

- **Say-on-Pay:** Average support for "Say-on-Pay" proposals among Russell 3000 companies is 92%, up from 91% at the same time last year. Average support among S&P 500 companies is currently 90%, up slightly from 89%.

See Proxy Season Reporting Trends Through April 15, 2025 (Proxy Analytics, April 2025).

Notable Resources

- Sample Letter to Companies Regarding Securities Offerings During Times of Extreme Price Volatility (SEC, June 2024)

This update was created by Fenwick's corporate governance and capital markets practices.

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As a leading technology and life sciences law firm, Fenwick advises companies on the full suite of corporate governance matters. We partner with our clients to anticipate and navigate issues arising in an evolving corporate governance landscape, including SEC reporting and governance requirements of relevant securities exchanges, board and committee structure, corporate purpose and sustainability, shareholder engagement, and executive compensation.