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Fenwick Securities Law Update

– February 7, 2025 –

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

- Form 10-K and proxy statement disclosures and upcoming compliance deadlines
- Vanguard releasing its 2025 proxy voting policy, including updated sections on board composition and environmental/social proposals
- New and updated compliance and disclosure interpretations from the SEC regarding notices of exempt solicitations
- SEC leadership transition updates and potential upcoming changes
- The SEC's complaint against Elon Musk in federal court for delayed disclosure of his ownership interest in Twitter
- The SEC's filing of charges against a restaurant-technology company for AI-washing

Important Reminders

- 2025 Reporting Season — Upcoming Disclosure Requirements for Your Form 10-K and Proxy Statement: Please see our client alert for a high-level overview of the new disclosure requirements required in companies' upcoming Forms 10-K and/or proxy statements.
- Part III of Form 10-K — Incorporating by Reference: As a reminder, Rule 12b-23(e) requires companies to "include an express statement clearly describing the specific location of the information you are incorporating by reference." Accordingly, when companies are forward-incorporating information from the proxy statement into the Form 10-K, companies must disclose the specific location of the information within the proxy statement under Rule 12b-23(e). It is insufficient to broadly reference the proxy statement. Instead, Part III of Form 10-K should list the specific sections of the proxy statement where the specific information being incorporated can be found. See Part III of Form 10-K: Incorporating by Reference (*theCorporateCounsel.net*, January 2025).
- Early Trends — Item 402(x)(1): Companies will now be required to provide both narrative and tabular disclosures in their Forms 10-K and proxy statements regarding the timing of awards of stock options, stock appreciation rights, and similar option-like instruments issued in proximity to disclosures of material non-

public information (MNPI). This information can be forward-incorporated into the Form 10-K from the proxy statement. Based on a review of early filers, here are the key takeaways:

- General discussion of option grant policy. As a reminder, Item 402(x)(1) is not limited to named executive officers (NEOs). Consistent with this, many companies are discussing their option grant policy for employees generally.
- Item 402(x)(1) has no time limit. Over the past few years, many companies have stopped granting options, but they may still have options outstanding. Item 402(x)(1) does not specify whether these companies need to address their previous policies and procedures for option grants.
- Some companies that don't grant options are still discussing their equity grant policies and practices. Some companies, including those that don't grant options at all, discuss their policies and practices related to the timing of equity grants generally (i.e., restricted stock units, restricted stock, and performance stock units). While this information is not required, it can provide helpful information for proxy advisors and investors.
- SEC review is expected to take a similar approach to PVP. Similar to the SEC's review of the initial Pay versus Performance (PVP) disclosures, the SEC is expected to focus on materially deficient disclosures this year. After its initial review, the SEC may issue new Compliance and Disclosure Interpretations (CDIs) or other guidance to help guide companies next year.

See Item 402(x)(1): What if You Don't Grant Options or SARs? (*CompensationStandards.com*, January 2025).

- XBRL: Remember that filings without all required XBRL tags can result in not being "current" for purposes of Form S-3, Form S-8, and other forms and Rule 144.
- Director Skills Matrix: If a company includes a director skills matrix in its proxy statement, remember to review each director's skills against those disclosed for any other public company board on which that director serves. Any inconsistencies should be discussed before including the information in the proxy statement. Companies may want to also consider disclosing how a director acquired a skill. For more information, please see Professional Directors: Compare Skills in Other Proxies (*theCorporateCounsel.net*, December 2024).
- Upcoming Deadlines:
  - Form 10-K for 12/31 large accelerated filers: Monday, March 3
  - Quarterly Schedule 13G amendments: Friday, February 14
  - Forms 5 for 12/31 companies: Friday, February 14
  - Delaware annual report and franchise taxes: Saturday, March 1
  - Form 10-K for 12/31 accelerated filers: Monday, March 17
  - Form 10-K for 12/31 non-accelerated filers: Monday, March 31

Rules and Regulations

- Vanguard released its 2025 proxy voting policy. The updated proxy voting policy for U.S. portfolio companies includes the following notable changes:

    - Board composition: Vanguard streamlined its board composition policy, tempering its prior diversity guidelines. In particular, the updated policy removes the factor that stated boards should "at a minimum, represent diversity of personal characteristics, inclusive of at least diversity in gender, race and ethnicity." These changes are part of a broader shift away from diversity, equity, and inclusion initiatives under the current administration. For more information, see Vanguard Softens Language on Diversity for U.S. Proxy Voting Policy (*ESGtoday*, February 2025).

    - Environmental and social (E&S) shareholder proposals: Vanguard removed the list of E&S shareholder proposals that the fund would likely support from its environmental/social proposal section. Instead, Vanguard advised that the funds are more likely to support proposals seeking disclosure of material risks and/or the company's policy and practices to manage such risks, but states that "shareholders typically do not have sufficient information about specific business strategies to propose specific targets or environmental or social policies for a company."

- The SEC issued new and updated CDIs regarding Notices of Exempt Solicitations. On January 27, the SEC issued the following three new CDIs:

    Question 126.08 — EDGAR cannot be used as a means of solicitation:
    Question: Can a person submit written soliciting material under the cover of a Notice of Exempt Solicitation on EDGAR if the written soliciting material has not been sent or given to security holders?

    Answer: No. The submission of a Notice of Exempt Solicitation on EDGAR is not intended to be the means through which a person disseminates written soliciting material to security holders. Rather, its purpose is to notify the public of the written soliciting material that the person has sent or given to security holders through other means. See Release No. 34-30849 (June 23, 1992) (proposing the notice requirement so there would be public notice of extensive soliciting activity made in reliance on the Rule 14a-2(b)(1) exemption); Release No. 34-31326 (Oct. 16, 1992) (adopting the notice requirement in response to commenters' concerns that, absent such a requirement, the Rule 14a-2(b)(1) exemption would permit large shareholders to conduct "secret" solicitation campaigns).

    Question 126.09 — Only for written communications that constitute a solicitation:
    Question: Can a person submit a Notice of Exempt Solicitation on EDGAR for a written communication that does not constitute a "solicitation" under Rule 14a-1(l)?

    Answer: No. Because Rule 14a-6(g) only applies to solicitations made pursuant to the Rule 14a-2(b)(1) exemption, only written communications that constitute a "solicitation" should be submitted under the cover of a Notice of Exempt Solicitation. For example, a written communication solely about matters that are not the subject of a solicitation by the registrant or a third party for an

upcoming shareholder meeting generally would not be viewed as a solicitation and, therefore, should not be submitted under the cover of a Notice of Exempt Solicitation.

Question 126.10 — Written soliciting materials subject to anti-fraud rule:
Question: Does Rule 14a-9, which prohibits materially false or misleading statements, apply to written soliciting materials sent or given to security holders in reliance on the Rule 14a-2(b)(1) exemption and filed under the cover of a Notice of Exempt Solicitation?

Answer: Yes. Rule 14a-2(b) does not provide an exemption from Rule 14a-9. As a result, written soliciting material attached to a Notice of Exempt Solicitation is subject to liability under Rule 14a-9. See also Release No. 34-31326 (Oct. 16, 1992) ("Pursuant to the [Rule 14a-2(b)(1)] exemption, solicitations by or on behalf of eligible persons would be exempt from all of the proxy statement filing, delivery and information requirements imposed by the proxy rules but remain subject to Rule 14a-9, which prohibits false or misleading statements in connection with written or oral solicitations.").

In addition, the SEC updated two existing CDIs on this topic. Please find below links to marked versions of the CDIs and a brief summary of the changes:

Question 126.06 — Voluntary filings:
The updated CDI discusses the circumstances under which the SEC staff will permit soliciting persons owning less than $5 million of the subject class of securities to voluntarily submit a Notice of Exempt Solicitation.

Question 126.07 — Required 14a-103 cover page:
The updated CDI reiterates that the information required by Rule 14a-103 must be presented in the submission before any written soliciting materials (including any logo or other graphics used by the soliciting person) are presented.

- **The SEC approved Nasdaq's proposal to formally remove its board diversity listing standards following Fifth Circuit's decision overturning the rules.** In August 2021, the SEC approved an amendment to NASDAQ's listing standards to require certain disclosures regarding board diversity. After the Fifth Circuit overturned these standards in December 2024, NASDAQ proposed to formally remove these standards. The SEC agreed to allow the proposed rule change to become effective on February 4. While this disclosure will no longer be required, Fenwick is tracking whether Nasdaq-listed companies continue to include this disclosure in their proxy statements.

- **The SEC approved Nasdaq's proposal to suspend companies from trading on Nasdaq if the company has been non-compliant with the $1.00 bid price requirement for more than 360 days.** Further, any company that has effected a reverse stock split within the last 12 months but again becomes non-compliant with the bid price requirement will be immediately sent a Delisting Determination without any compliance period.

- **The SEC approved NYSE's proposal to limit the use of reverse stock splits to regain compliance with the exchange's minimum price criteria of $1.00.**

- **The Corporate Transparency Act (CTA) remains paused amid recent court developments.** On January 23, the United States Supreme Court stayed a preliminary injunction that had paused enforcement of the CTA nationwide—but reporting obligations under the CTA remain on hold nonetheless, due to a separate preliminary injunction in a different lawsuit. FinCEN confirmed that reporting companies are not required to submit beneficial ownership information and will not face liability for failing to do so while the other preliminary injunction remains in force.

SEC Public Commentary and Guidance

- **SEC Commissioner Mark T. Uyeda is named acting chair of the agency.** President Trump designated Uyeda as acting Chair of the SEC while awaiting the Senate confirmation of former SEC Commissioner Paul Atkins. Uyeda worked for Atkins at the SEC from 2002 to 2008.

- **Commissioner Hester Peirce provides insight into potential upcoming SEC changes at the Northwestern Securities Regulation Institute (SRI).** Atkins is expected to be confirmed as the new SEC chair in March. Peirce, who previously served as counsel to Atkins, provided insights into the following potential changes at the SEC during her remarks at SRI:

    - SEC Disclosure Regime: In her remarks at SRI, Peirce emphasized a return to focusing on information material to investors rather than special interests, criticizing climate and human capital disclosures. We may see more comments on the MD&A section of periodic reports.

    - Shareholder Proposals: Peirce argued the SEC should help protect companies from burdensome shareholder proposals not aimed at maximizing corporate value. She suggested re-examining the ownership thresholds in Rule 14a-8 and the bases for exclusion. We may see revised guidance on shareholder proposals after this proxy season.

    - SEC Enforcement: Peirce stated that the SEC should refrain from using enforcement actions to override managerial decision-making, calling out recent internal control and disclosure control enforcement actions. She thinks the SEC needs to reconsider when it is appropriate to use enforcement tools versus other tools, such as guidance. Former SEC enforcement officers and others predict that under the new presidential administration, the SEC will likely focus on traditional cases, such as fraud, over more novel cases, while still addressing artificial intelligence and cybersecurity. See SEC Expected to Focus on Fraud Enforcement Fundamentals in 2025 (*Bloomberg Law*, January 2025).

    - SEC Guidance: Peirce advocated for the SEC staff to provide more formal guidance on disclosure issues and to proactively engage with companies on difficult questions.

- **Uyeda announced the formation of a new crypto task force to be led by Peirce.** According to the SEC's announcement, the task force will "help the Commission draw clear regulatory lines, provide realistic paths to registration, craft sensible disclosure frameworks, and deploy enforcement resources judiciously."

Delaware Developments

- **DropBox is planning to reincorporate outside of Delaware and Meta exploring reincorporation.** On January 31, DropBox announced that its shareholders had approved reincorporating from Delaware to Nevada. According to its PRE 14C, DropBox's board of directors considered, among other reasons, "the increasingly litigious environment in Delaware, which has engendered less meritorious and costly litigation and has the potential to cause unnecessary distraction to the Company's directors and management team and potential delay in the Company's response to the evolving business environment." Last November, the Trade Desk's shareholders also approved an incorporation from Delaware to Nevada. See Facebook Parent Meta in Talks to Reincorporate Outside Delaware (*the Financial Times*, January 2025).

  Separately, Meta is reportedly also considering reincorporating from Delaware to either Nevada or Texas. See Meta Said to Explore Incorporating in a Different State (*The New York Times*, January 2025).

Relevant Litigation and Enforcement Actions

- **On January 14, the SEC filed a complaint against Elon Musk in federal court for delayed disclosure of his ownership interest in Twitter.** According to the SEC complaint, Musk reported his ownership stake in Twitter on a Schedule 13G on April 4, 2022, more than 20 days after exceeding the 5% threshold. When he did file the 13G, Musk already owned 9% of the company's outstanding common stock and was discussing possibly joining Twitter's board of directors. The SEC alleges that Musk delayed disclosure of his ownership interest because he understood that Twitter's stock price might substantially increase once he disclosed his ownership, making it more costly to acquire control.

  The SEC is seeking an injunction against further violations of Section 13(d) and Rule 13d-1, disgorgement plus interest, and a civil penalty.

- **The SEC charged a restaurant-technology company for AI-washing.** According to the SEC's order, Presto Automation, Inc. made false and misleading claims about critical aspects of its artificial intelligence product, Presto Voice, in SEC filings and public statements from November 2021 through May 2023. The SEC alleges:

  - Presto's statements regarding the technology were misleading, because it failed to disclose that, for a period of time, the AI speech-recognition technology was owned and operated by a third party.

  - When Presto did deploy Presto Voice units powered by its own technology, it falsely claimed that its own AI product eliminated the need for human order-taking. In reality, most drive-thru orders placed through these units required human intervention.

  - Presto misleadingly disclosed its reported rate of orders completed without human intervention using this technology.

  The SEC did not impose a civil penalty based on Presto's cooperation during the staff's investigation and remedial efforts.

- **The Former CEO of World Wrestling Entertainment Inc. (WWE) was charged for failure to disclose to WWE two settlement agreements he executed on behalf of the company.** The SEC settled charges against the former Executive Chairman and CEO of WWE for signing two settlement agreements on behalf of himself

and WWE without disclosing the agreements to the company's board of directors, legal department, accountants, financial reporting personnel, or auditor. The SEC alleged that in doing so, he circumvented the company's internal accounting controls and caused material misstatements in the company's 2018 and 2021 financial statements. The former CEO agreed to pay a civil penalty and to reimburse WWE $1,330,915.90 pursuant to Section 304(a) of the Sarbanes-Oxley Act.

Stockholder Activism

- **Beacon Roofing Supply Inc. adopted a poison pill defense to defend against a hostile takeover attempt from QXO Inc.** For more information, see Beacon Adopts Poison Pill to Defend Against Hostile QXO Bid (*Bloomberg Law*, January 2025).

Disclosure Trends

- **Director Time Commitment Policies:** In recent years, proxy advisory firms and investors have increasingly focused on companies' director time commitment policies. Director time commitment policies typically consist of (i) a description of the annual review process undertaken by the nominating committee to evaluate director time commitments, and (ii) numerical limit(s) on public company board seat(s) that directors can serve on. These policies can be helpful in prompting a thoughtful discussion between the nominating committee and board members regarding time commitments and encourage board refreshment. Accordingly, both Glass Lewis and State Street now consider these policies when evaluating companies and overcommitted directors. For more information, please see Director Commitments Policies, Overboarding, and Board Refreshment (Glass Lewis, March 2024) and Global Proxy Voting and Engagement Policy (State Street Global Advisors, March 2024).

  Companies may want to consider including disclosure about their nominating committees' annual review process to evaluate director time commitments, including any numerical limit(s). For examples of such disclosure, please see the following: Apple (pg. 20), Dell (pg. 16), Bank of America (pg. 9), and Prudential (pg. 15). For more information, see Director Time Commitments: Sample Disclosures (*theCorporateCounsel.net*, January 2025) and Disclosure About Director Time Commitments (*Real Transparent Disclosure*, December 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.