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# Fenwick Securities Law Update

– March 18, 2025 –

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

- The SEC's expansion of confidential filing options, including for follow-on offerings
- The SEC's issuance of updated guidance on the exclusion of shareholder proposals under Rule 14a-8
- The SEC's publishing of updated Compliance and Disclosure Interpretations (CDI) on Schedules 13D and 13G eligibility in connection with shareholder engagement, Form S-4 and lock-up agreements, and tender offers
- Changes by certain proxy advisors, institutional investors, and banks to their diversity policies and mandates
- Delaware's proposal of significant amendments to the Delaware General Corporation Law

## 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 10K and proxy statement disclosure requirements.
- **The new filing fee Fedwire payment format became effective on March 10.** The Fedwire payment instructions will be updated with the implementation of the new format.

## Rules and Regulations

- **The SEC has expanded the confidential filing options, including:**
    - All Securities Act registration statements for follow-on offerings may be submitted confidentially, regardless of how much time has passed since a company's IPO.
        - A confidential submission for a follow-on offering must be made publicly available on EDGAR **at least two business days** prior to effectiveness.
    - The names of underwriters may be omitted from initial submissions, when such information is otherwise required by Items 501 and 508 of Regulation S-K, provided that the company includes the name of the underwriter(s) in subsequent submissions and public filings.
    - Any financial information that will not be required at the time of the public flip may be omitted from draft registration statements.
    - Registration statements for de-SPAC transactions will be treated as initial registration statements and may be submitted confidentially where the co-registrant target is a private company.

- Initial Section 12(g) registration statements and subsequent Section 12(b) and 12(g) registration statements may now be submitted confidentially.
    - A confidential submission for an Exchange Act filing (e.g., Forms 10, 20-F or 40-F) must be made publicly available on EDGAR 30 or 60 days, as applicable, prior to effectiveness.

You may submit questions about a company's eligibility to use the expanded confidential filing process to CFDraftPolicy@sec.gov.

- **The SEC issued updated guidance on the exclusion of shareholder proposals under Rule 14a-8.** The SEC rescinded Staff Legal Bulletin No. 14L and issued updated guidance on the exclusion of shareholder proposals under Rule 14a-8 and on certain other aspects of Rule 14a-8.
    - **Economic Relevance Exclusion:** The SEC Staff will now focus on a proposal's significance to a company's specific business when it relates to operations accounting for less than 5% of total assets, net earnings, and gross sales, rather than the abstract social or ethical significance of an issue. Where significance is not apparent on its face, the proponent has the burden of demonstrating the proposal's significance to the company's business.
        - The Staff states that substantive governance matters are generally significant to "almost all companies."
        - **Key Takeaway:** This change will help companies exclude environmental and social proposals, but not governance proposals.
    - **Ordinary Business Exclusion:** Previously, proposals related to ordinary business matters but focusing on a significant policy issue were generally not excludable. The Staff will now take a company-specific approach in evaluating significance rather than focusing solely on whether a proposal raises a policy with broad societal impact.
        - The Staff also reinstated the following guidance regarding micromanagement: Staff Legal Bulletin No. 14J Section C.2. Micromanagement; Staff Legal Bulletin No. 14J Section C.3. The Division's application of Rule 14a-8(i)(7) to proposals that address senior executive and/or director compensation; and Staff Legal Bulletin No. 14K Section B.4. Micromanagement.
        - **Key Takeaway:** The staff's new approach will likely make it easier to exclude proposals raising broad social or environmental issues.
    - **Timing/Effectiveness of Updated Guidance:** The staff will consider the guidance in place at the time it issues a response.
        - Previously submitted requests do not need to be resubmitted unless the company wishes to raise new arguments considering the updated guidance.
        - In light of the new bulletin, the SEC will accept a no-action request this proxy season even if the prescribed deadline has already passed.
    - **Other Notable Updates:**
        - **Use of Email/Proof of Delivery:** When using email to submit proposals and make other communications, proponents and companies should request a reply email confirming receipt of

the email. Screenshots or photos of emails are not sufficient proof of delivery. Generally, the burden to prove timely delivery is on the sender of the email.

- Proponents risk exclusion of their proposals if they do not receive a confirmation of receipt from the company.
- Proponents may start using standard mail, which provides proof of delivery, rather than email to submit proposals. Companies should make sure that a current physical address is listed for these submissions and regularly check their mail.

- **Use of Graphics in Proposals:** Shareholders may use graphics in their proposals, but any words in the graphics will count towards the 500-word limit. Graphics are subject to Rule 14a-8(i)(3).
- **Board Analysis:** The Staff will no longer expect a no-action request to include a board analysis of the policy issue.
- **Proposed Amendments to Rule 14a-8:** The staff will not take into account the proposed amendments to Rule 14a-8 under the prior administration unless and until these amendments are formally adopted.

- **The SEC published updated CDIs on the filing of Schedules 13D and 13G/Shareholder Engagement.**
  - Revised Question 103.11 – This CDI was revised to state that a shareholder's ability to file on Schedule 13G in lieu of the Schedule 13D otherwise required will be informed by the meaning of "control" as defined in Exchange Act Rule 12b-2.
  - New Question 103.12 – This new CDI outlines the circumstances under which a shareholder's engagement with management would cause the shareholder to lose its eligibility to report on Schedule 13G. In particular, Schedule 13G may be unavailable to a shareholder who goes beyond discussion and exerts pressure to implement certain measures, such as a shareholder who either:
    - Urges a company to remove its staggered board, switch to a majority voting standard in uncontested director elections, eliminate its poison pill plan, change its executive compensation practices, or undertake specific actions on a social, environmental, or political policy and, as a means of pressuring the company to adopt the recommendation, explicitly or implicitly conditions the shareholder's support of one or more of the company's director nominees on the company's adoption of the shareholder's recommendation
    - Discusses with management its voting policy on a particular topic and how the company fails to meet the shareholder's expectations on such topic, and, to apply pressure on management, states or implies during any such discussions that the shareholder will not support one or more of the company's director nominees at the next election unless management makes changes to align with its expectations

The new CDI 103.12 may force institutional investors and asset managers to choose between engaging on voting policy topics and consequences versus maintaining 13G eligibility. This will make significant stockholders more circumspect in their engagement discussions with companies. For example, in February, BlackRock and Vanguard temporarily paused engagement with companies to evaluate the impact of CDI 103.12. Both BlackRock and Vanguard have now resumed engagements. Likewise, in response to this new guidance, State Street added the following preface to its 2025 Global Proxy Voting and Engagement Policy:

> "When engaging with and voting proxies with respect to the portfolio companies in which we invest our clients' assets, we do so on behalf of and in the best interests of the client accounts we manage and do not seek to change or influence control of any such portfolio companies…State Street Global Advisors will not apply any policies contained herein in any jurisdictions where State Street Global Advisors believes that implementing or following such policies would be deemed to constitute seeking to change or influence control of a portfolio company."

Going forward, companies will need to be carefully attuned to what such investors may be saying or signaling in their engagement discussions.

- **Changes in Diversity Policies and Mandates:**
  - ISS will no longer consider gender, racial, or ethnic diversity for director election recommendations for reports published on or after February 25.
  - Glass Lewis will continue to apply its existing policies for the 2025 proxy season but announced that it will now flag information that could support an alternative vote by the client for any proxy report with a negative diversity-related director recommendation.
  - State Street removed its board diversity targets from its 2025 Global Proxy Voting and Engagement Policy. Instead, State Street says that "nominating committees are best placed to determine the most effective board composition" and "encourage[s] companies to ensure that there are sufficient levels of diverse experiences and perspectives represented in the boardroom."
  - BlackRock and Vanguard also recently softened their voting policies on diversity.
- **The European Commission adopted an omnibus package aimed at simplifying various sustainability regulations, including the EU's Corporate Sustainability Reporting Directive (CSRD)**. If adopted by the European Parliament, the omnibus package will significantly reduce the number of companies in scope of the CSRD by an estimated 80%. As proposed, non-EU parent companies will only be in scope if they generated EU-derived turnover of €450 million (for two consecutive financial years), rather than €150 million, with either an EU large undertaking meeting the revised thresholds or an EU branch with €50 million in turnover, rather than €40 million.

  For companies that do not fall in scope of the CSRD, the commission will adopt a voluntary reporting standard, which will act as a shield, by limiting the information that companies or banks falling in scope of the CSRD may request from out-of-scope companies
- **On March 6, the SEC published updated CDIs on M&A transactions, particularly on Form S-4 and lock-up agreements, and new CDIs on tender offers.**
  - Securities Act – Section 5 CDIs
    - Revised Question 239.13
  - Securities Act – Form S-4 CDIs
    - Revised Question 225.10
  - Tender Offer Rules and Schedules CDIs

- New Question 101.17
- New Question 101.18
- New Question 101.19
- New Question 101.20
- New Question 101.21

- **On March 2, the Treasury Department announced it would suspend enforcement of the Corporate Transparency Act** and indicated that the only future enforcement will pertain to foreign reporting companies.
- **The SEC provided an exemption to reporting personally identifiable information to the Consolidated Audit Trail (CAT) for natural persons trading in the stock market.** The CAT is a market surveillance tool designed to give the SEC a live window across markets in near real time, with an eye toward detecting unusual activity and misconduct.

## SEC Public Commentary and Guidance

- **Acting SEC Chair Mark T. Uyeda outlined potential regulatory changes to make IPOs more attractive and to scale public company disclosures at the Florida Bar's 41st Annual Federal Securities Institute and M&A Conference.** At the conference, Uyeda provided insights into the following potential regulatory changes at the SEC:

    - **EGC Definition:** In his remarks, Uyeda stated he has asked the SEC Staff to review the definition of "emerging growth company" and recommend potential changes, including how a company qualifies and the duration for which it retains the status. Uyeda believes that appropriately tailoring disclosure requirements for newly public companies may incentivize more companies to go public and in turn provide attractive exit opportunities for venture funds.

    - **Filer Categories:** Uyeda stated that the SEC should consider:

        - **Updating Financial Thresholds to Qualify as a Large Accelerated Filer (LAF) or Accelerated Filer (AF):** He noted that the SEC has not updated these thresholds since 2005, resulting in the number of LAFs doubling from 18% to 36% today.

        - **Scaling Disclosure Requirements for Filer Categories:** He pointed out that only one requirement differentiates LAFs and AFs—the deadline for filing a Form 10-K.

        - **Aligning the Definition of Smaller Reporting Companies and AFs:** Uyeda noted that a smaller reporting company could be either an AF or a non-AF. According to Uyeda, these overlapping definitions increase complexity and compliance costs. For example, smaller reporting companies that qualify as an AF must provide costly auditor attestation of the company's evaluation of internal controls.

    Overall, Uyeda suggests that the SEC's filer categories should be updated to reflect "the size and make-up of public companies today."

- **The SEC Crypto Task Force will host a series of roundtables to discuss key areas of interest in crypto asset regulation**, beginning with an inaugural roundtable on defining security status on March 21. The initial session will be open to the public and live streamed on SEC.gov.

- **The SEC will host a roundtable on artificial intelligence on March 27** discussing the risks, benefits, and governance of AI in the financial industry.

- **On February 20, the SEC announced a new Cyber and Emerging Technologies Unit** to combat cyber-related misconduct and to protect retail investors from bad actors in the emerging technologies space. The unit will focus on the following areas:

    - Fraud committed using emerging technologies, such as artificial intelligence and machine learning
    - Use of social media, the dark web, or false websites to perpetrate fraud
    - Hacking to obtain material nonpublic information
    - Takeovers of retail brokerage accounts
    - Fraud involving blockchain technology and crypto assets
    - Regulated entities' compliance with cybersecurity rules and regulations
    - Fraudulent disclosure relating to cybersecurity
    - The SEC Staff issued a statement that transactions involving meme coin sales may not be securities transactions because the token purchases often do not satisfy all elements of an "investment contract" under the federal securities law.

## Delaware Developments

- Delaware proposed significant amendments to §§ 144 and 220 of the Delaware General Corporation Law addressing some of the issues that have prompted companies to consider incorporating or reincorporating in other states. Notable changes include:

- The proposed amendments to § 144, if adopted, will 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. They also lower the requirements for approving acts and transactions with interested directors, officers, and controlling stockholders.

- The proposed amendments also provide clearer guidance on who will qualify as a "controlling stockholder," what constitutes a "material interest" and a "material relationship," and who qualifies as a "disinterested" stockholder or director (in the latter case, generally deferring to the board's determination).

- The proposed amendments to § 220, if adopted, will provide more clarity with respect to the scope and requirements for a stockholder inspection of books and records, providing an exclusive list of items that may be requested (narrowing the universe awarded in some § 220 cases), raising the procedural requirements for such demands, and allowing corporations to impose confidentiality restrictions.

  There is some speculation that the proposed amendments could be approved sometime this spring, not in the usual August timeframe. Companies considering reincorporation may wish to consider the potential benefits of the proposed amendments to the DGCL and their progress toward adoption, as well as other pending developments, including the appeal of *Tornetta v. Musk* that is currently before the Delaware Supreme Court, which collectively may materially alter the balance of considerations involved.

## Relevant Litigation and Enforcement Actions

- **The SEC has requested a delay in climate disclosure litigation to reconsider the rules.** In light of the recent change in the composition of the SEC and a recent presidential memorandum imposing a regulatory freeze, acting Chair Uyeda directed the SEC staff to request that the Eighth Circuit Court of Appeals not schedule the case for argument to provide time for the SEC to deliberate and determine the appropriate next steps.

- **The SEC dropped or paused at least 10 cases against crypto companies**, including dismissing its civil enforcement action against Coinbase. In the agency's announcement of the Coinbase dismissal, Uyeda stated, "For the last several years, the Commission's views on crypto have been largely expressed through enforcement actions without engaging the general public. It's time for the Commission to rectify its approach and develop crypto policy in a more transparent manner. The Crypto Task Force is designed to do just that."

## Disclosure Trends

- **Notable 10-K Risk Factor Trends:**

  - **Uncertainty Regarding Healthcare Regulatory Environment:** In January, President Donald 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 in the regulatory environment, which may create risks for highly regulated companies, such as life science companies. Further, with the Trump Administration's focus on cutting costs and staff within agencies, companies may want to also consider referencing longer review periods for any applicable regulatory approvals or delays in responsiveness. For example, some life science companies are adding the following new risk factor:

    > *"Disruptions at the FDA may slow the time necessary for new products to be reviewed and/or approved, which would adversely affect our business. In addition, there is substantial uncertainty regarding new initiatives and how these might impact the FDA, its implementation of laws, regulations, policies and guidance and its personnel. Similar initiatives may also be directed toward other government agencies. These initiatives could prevent, limit or delay development and regulatory approval of our product candidates, which would adversely affect our business.*

> Similar consequences would also result in the event of another significant shutdown of the federal government. For example, in 2024, the U.S. government was on the verge of a shutdown and has previously shut down several times, and certain regulatory agencies, such as the FDA, had to furlough critical employees and stop critical activities. If a prolonged government shutdown occurs, or if geopolitical or global health concerns prevent the FDA from conducting their regular inspections, reviews, or other regulatory activities, it could significantly impact the ability of the FDA to timely review and process our regulatory submissions, which could have a material adverse effect on our business. Further, future government shutdowns or delays could impact our ability to access the public markets and obtain necessary capital in order to properly capitalize and continue our operations.
>
> FDA-regulated industries, such as ours, face uncertainty with regard to the regulatory environment we will face as we proceed with research, development and commercialization. Some of these efforts have manifested to date in the form of personnel measures that could impact the FDA's ability to hire and retain key personnel, which could result in delays or limitations on our ability to obtain guidance from the FDA on our product candidates in development and obtain the requisite regulatory approvals in the future. There remains general uncertainty regarding future activities. New executive orders, regulations, policies or guidance could be issued or promulgated that adversely affects us or creates a more challenging or costly environment to pursue the development of new therapeutic products. Alternatively, state governments may attempt to address or react to changes at the federal level with changes to their own regulatory frameworks in a manner that is adverse to our operations. If we become negatively impacted by future governmental orders, regulations, policies or guidance, there could be a material adverse effect on us and our business." Achieve Life Sciences, Inc., Form 10-K (FY 2024).

While some companies may prefer to avoid addressing potential political topics, highly regulated companies, particularly life science companies, should consider such regulatory risks carefully and discuss whether new risk factor disclosure is necessary.

- **EU AI Act:** *Bloomberg Law* reports that Mastercard, Reddit, and 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. For example:

  > "[T]he EU AI Act came into effect in August 2024 and applies to companies that develop, use, and/or provide AI in the EU and includes requirements around transparency, conformity assessments and monitoring, risk assessments, human oversight, security, and accuracy, and includes substantial penalties for non-compliance. This regulatory framework is expected to have a material impact on the way AI is regulated in the EU, and together with developing guidance and decisions in this area, may affect our use of AI and our ability to provide and to improve our services, require additional compliance measures and changes to our operations and processes, result in increased compliance costs and potential increases in civil claims against us, and could

adversely affect our business, results of operations, financial condition, and prospects." Reddit, Inc., Form 10-K (FY 2024).

- **Security Concerns:** 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:

  - "Given our position in the global capital markets and our brand, we may be more likely than other companies to be a target for malicious disruption activities or physical attacks on our senior leadership team and/or our office locations." Nasdaq, Inc., Form 10-K (FY 2024)

  - "Violence, physical attacks or threats of violence directed toward company facilities or key company personnel may disrupt company operations and undermine investor confidence. Our office and manufacturing facilities face the risk of physical attacks, both threatened and actual, which could negatively impact our ability to conduct day-to-day operations. Despite the implementation of security measures designed to prevent such physical attacks, our facilities are potentially vulnerable to the failure of such security measures due to various causes such as human error or technological failure. If, despite implementation of our security measures, a significant physical attack occurred, our operations could be disrupted for an extended period of time, and we could experience costly property damage, loss of revenues, and other financial loss which could have an adverse impact on our results of operations. Further, if any of our key company personnel were harmed as a result of a physical attack on our facilities or other act of violence, such attack could disrupt our ability to operate our business and undermine investor confidence." Halozyme Therapeutics, Inc., Form 10-K (FY 2024).

## Notable Resources

- Clinical Data FAQs: How to Prepare for Disclosure (Fenwick, December 2024)
- Clinical Data FAQs: How to Approach Fundraising and Investor Relations (Fenwick, December 2024)
- 2025 Proxy Season Reporting Trends Through March 8, 2025 (Proxy Analytics, March 2025).
- Lightning Round: Ten Proxy Disclosures That Have Evolved in Recent Years (Labrador, January 2025).
- The Art of Telling a Director's Story (RealTransparentDisclosure.com, January 2025).

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.