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Fenwick Securities Law Update

– May 7, 2026 –

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

- The SEC shortening the minimum offering period for tender offers to 10 business days, approving Nasdaq's 23/5 trading proposal, and submitting a semiannual reporting proposal to the White House
- Washington state banning noncompete agreements
- A Massachusetts federal court granting a shareholder proponent's preliminary injunction requiring a public company to include the proponent's shareholder proposal in the company's proxy statement
- State Street publishing its 2026 global proxy voting and engagement policy

2026 Reporting Season Considerations

- **Risk Factor Updates for Geopolitical Developments:** In light of the ongoing conflict in Iran, companies should revisit their risk factor disclosures to ensure they adequately address potential impacts on their business operations, supply chains, and financial condition. Companies with exposure to the Middle East region, energy markets, defense contracting, or international shipping should pay particular attention to updating their disclosures to reflect current geopolitical risks and any material impacts that have already occurred.

- **Early 2026 Proxy Season Trends:** The 2026 proxy season is taking shape against a backdrop of significant regulatory and market shifts. In late 2025, SEC Chair Paul Atkins questioned the legal foundation of precatory shareholder proposals under Delaware law, and the Division of Corporation Finance announced it would largely cease issuing substantive no-action responses, instead permitting exclusions based on a company's representation of a "reasonable basis" for exclusion. A White House executive order also directed the SEC to scrutinize proxy adviser regulations and shareholder proposal rules.

  These changes have had tangible effects. Overall shareholder proposal submissions are down, with 661 proposals tracked to date and an expected full-season decline of roughly 20%, according to *Proxy Analytics*. Environmental and social (E&S) proposals have seen an especially sharp drop, falling nearly 40% compared to the full-year 2025 average, with average E&S support declining by more than 50% compared to this point last season.

  The revised no-action framework has also prompted a shift toward substantive arguments for exclusion. According to *Proxy Analytics*, more than 75% of reasonable basis exclusions now include at least one substantive ground, with environmental proposals excluded overwhelmingly on substantive bases and political contributions proposals seeing a marked increase in exclusions compared to prior years.

- **Reminder — Inline XBRL Requirements for Proxy Statements:** The following proxy statement disclosures for annual meetings must be tagged in inline XBRL:
  - Pay versus performance (Item 402(v))
  - Action to recover erroneously awarded compensation (if applicable) (Item 402(w))
  - Policies and practices related to the grant of certain equity awards close in time to the release of material non-public information (Item 402(x))
  - Insider trading arrangements and policies (Item 408(b)(1))

Rules and Regulations

- **SEC Shortens Minimum Offering Period for Tender Offers to 10 Business Days:** On April 16, the SEC's Division of Corporation Finance issued an exemptive order that meaningfully shortens the minimum offering period for tender offers by public companies and private companies from 20 business days to 10 business days, provided certain conditions are satisfied. The division cited market inefficiencies, technological advancements that enable faster dissemination of offer materials, and the desire to reduce bidder exposure to market fluctuations as the basis for shortening the minimum period. period.
  - **Public company conditions for relief:** To rely on the exemption, a public company must meet all of the following conditions:
    - **Offers Subject to Regulation 14D or Rule 13e-4:** The tender offer is subject to Regulation 14D or Rule 13e-4 under the Securities Exchange Act of 1934, as amended.
      - If the tender offer is subject to Regulation 14D, (i) the offer is made pursuant to the terms of a negotiated merger agreement or similar business combination agreement between the subject company and the offeror, (ii) the offer is made for all outstanding securities of the subject class, and (iii) a Schedule 14D-9 is filed and disseminated by the subject company no later than 5:30 p.m. ET on the first business day following the date of commencement of the tender offer.
      - If the tender offer is subject to Rule 13e-4, the offer is made for less than all outstanding securities of the subject class.
    - **Cash Consideration:** The consideration consists solely of cash at a fixed price.
    - **No Going Private Transactions:** The tender offer is not made in connection with a going-private transaction (Rule 13e-3).
    - **No Cross-Border Exemptions:** The tender offer is not made in reliance on the cross-border exemptions in Rule 14d-1(d) or Rule 13e-4(i).
    - **Competing Offers:**
      - At the time of public announcement, the securities are not the subject of a previously announced or pending tender offer by another offeror.
      - If a competing tender offer is publicly announced after commencement of the initial offer, the initial offer must be extended so that it remains open for at least 20 business days from the date it commenced.

- Timing of Required Communications:
  - On the commencement date, the tender offer is announced via a press release through a widely disseminated wire service that includes the basic terms (offeror identity, class of security, consideration, expiration date) and an active hyperlink to a website where security holders may access offer materials.
  - Any increase or decrease in the percentage of securities sought (other than acceptance of up to an additional 2% of subject securities) or any change in consideration is communicated by press release no later than 9 a.m. ET on the fifth business day before expiration.
  - Any other material change in the terms of the offer is communicated by press release no later than 9 a.m. ET on the second business day before expiration.

- **Private Company Conditions for Relief:** To rely on the exemption, a private company must meet all of the following conditions:
  - **Securities of an Unregistered Issuer:** The targeted equity securities are issued by an issuer that has no registered securities and that is not required to file reports under § 15(d) of the Securities Exchange Act of 1934, as amended.
  - **No Third-Party Offeror:** The offer is made by the issuer or its wholly owned subsidiary for the issuer's own securities.
  - **Cash Consideration:** The consideration consists solely of cash at a fixed price.
  - **Timing of Required Communications:**
    - Any increase or decrease in the percentage of securities sought (other than acceptance of up to an additional 2% of subject securities) or any change in consideration is communicated by press release no later than 9 a.m. ET on the fifth business day before expiration.
    - Any other material change in the terms of the offer is communicated no later than 9 a.m. ET on the second business day before expiration.

- **SEC Approves Nasdaq's 23/5 Trading Proposal:** The SEC recently approved Nasdaq's application to extend trading to 23 hours per day, five days per week. Trading will commence at 9 p.m. ET Sunday evening and conclude at 8 p.m. ET Friday evening with a one-hour trading pause from 8 p.m. ET to 9 p.m. ET daily to allow for processing and transition to the next trade date. Holiday closures will be effective as of 8 p.m. ET on the day prior to the closure date, and the market will generally reopen at 9 p.m. ET on the closure date. If the closure date falls on a Friday, the market will reopen at 9 p.m. ET on Sunday. The timing of the expanded trading hour launch will depend on overall infrastructure readiness, but Nasdaq expects the expanded trading to begin on Dec. 6, 2026, subject to further regulatory approval.

  In February 2025, the SEC approved NYSE Arca, a subsidiary exchange of the Intercontinental Exchange, known for being a leading exchange for exchange-traded funds, to extend trading to 22 hours per day, five days a week.

  Nasdaq's expanded trading hours will likely have notable implications for Nasdaq-listed companies, including Regulation FD, insider trading policies and procedures, 10b5-1 plans, earnings calls and corporate announcements,

Nasdaq notification requirements, shelf take-down and block trade timing and pricing, M&A, and other corporate actions.

- **SEC Releases Proposed Semiannual Reporting Rule:** On May 5, the SEC released proposed amendments that would allow Exchange Act reporting companies to file semiannual interim reports on a new Form 10-S in lieu of quarterly reports on Form 10-Q. The following is a summary of the key aspects of the proposal.

Overview

- The proposal would give all Exchange Act reporting companies subject to quarterly reporting the option to file one semiannual report and one annual report per fiscal year, rather than three quarterly reports and one annual report.
- A new Form 10-S would be created for semiannual reports. Form 10-S would require the same narrative disclosures and financial information as existing Form 10-Q but would cover a six-month period rather than a fiscal quarter.
- The proposal is intended to reduce compliance costs and regulatory burden, provide flexibility, and encourage more companies to go and remain public.

Election Mechanics

- Companies would elect semiannual reporting by checking a box on the cover page of their annual report on Form 10-K. Leaving the box unchecked would default the company to quarterly reporting.
- The election would be made annually and could not be changed mid-fiscal-year. Companies would be committed to the chosen reporting frequency for the remainder of that fiscal year.
- Companies that have not yet filed Exchange Act reports (e.g., IPO registrants) would make an initial election by checking the box on the cover page of their Securities Act or Exchange Act registration statement (Forms S-1, S-3, S-4, S-11, or Form 10).
- A company that inadvertently marks or fails to mark the checkbox may amend its Form 10-K to correct the error, provided the amendment is filed no later than the due date of the first Form 10-Q for the applicable fiscal year.

Form 10-S Content and Filing Deadlines

- Form 10-S would require the same disclosures as Form 10-Q, including MD&A, market risk disclosures, disclosure controls and procedures, legal proceedings, material changes in risk factors, and officer certifications.
- Financial statements for the semiannual period would be required to be prepared in accordance with U.S. GAAP, reviewed (but not audited) by an independent public accountant, and data tagged in Inline XBRL.

- The filing deadline for Form 10-S would be 40 or 45 days after the end of the first semiannual period, depending on the company's filer status; the same deadlines that currently apply to Form 10-Q.
- The second semiannual period would be subsumed within the annual report on Form 10-K, similar to the current treatment of the fourth fiscal quarter.
- Scaled disclosure would remain available to smaller reporting companies on Form 10-S, as it is on Form 10-Q.

Regulation S-X Amendments and Age of Financial Statements

- The proposal includes proposed amendments to Rule 3-01 and 8-08 of Regulation S-X to facilitate semiannual reporting and to ensure that financial statements in registration statements filed by semiannual filers are not considered "stale" under existing rules built around a quarterly framework.
- The amendments would consolidate and simplify the existing age of financial statement requirements, including by folding Rule 3-12 into Rule 3-01.

Other Key Points

- The proposal is voluntary; companies that do not elect semiannual reporting would continue filing quarterly reports on Form 10-Q under the existing framework.
- Companies electing semiannual reporting may still voluntarily provide earnings announcements or other disclosures during the first or third quarter.

- **Nasdaq Increases Initial Listing Requirements for SPACs:** On April 22, 2026, the SEC published notice of Nasdaq’s proposed rule change to increase the initial listing requirements for special purpose acquisition companies (SPACs). The proposed rule change is immediately effective and will be operative for the listing of SPACs in 30 days; SPACs that list within that 30-day period can continue to qualify based on the prior rules.
    - **Nasdaq Global Market:** Nasdaq proposes to modify Listing Rule 5405(b)(3)(A) to increase the minimum Market Value of Listed Securities that a SPAC must have from $75 million to at least $100 million. This requirement is consistent with the NYSE’s requirements and the existing requirement under Nasdaq’s Alternative Initial Listing Requirements for SPACs pursuant to Listing Rule 5406. SPACs listing under this rule would continue to be required to have 400 shareholders.
    - **Nasdaq Capital Market:** Nasdaq proposes to adopt new Listing Rule 5505(b)(4) setting forth requirements for SPACs listing on the Capital Market. The new rule will require: (1) Market Value of Listed Securities of $75 million; (2) Market Value of Unrestricted Publicly Held Shares of at least $20 million; and (3) at least four registered and active Market Makers. Nasdaq also proposes to require that an acquisition company listing on the Capital Market must have a minimum of 400 public shareholders (an increase from the 300 Round Lot Holders requirement applicable to other companies). These requirements are substantially similar to the current requirements for listing of a SPAC on the Nasdaq Global Market and are consistent with NYSE American requirements.

Other SEC Developments and Announcements

- **Fenwick Comments on SEC Plan to Modernize Regulation S-K Disclosure Requirements.** Fenwick has submitted a comment letter responding to the SEC's request for comments regarding potential amendments to modernize and simplify disclosure requirements of Regulation S-K. The comment letter addresses opportunities to eliminate redundancy, reduce compliance costs, and improve the quality of disclosures for technology and life sciences companies. The letter emphasizes that the SEC should consider amendments to existing related party transaction requirements under Item 404; executive compensation disclosure requirements under Item 402 and Items 5.02 and 5.07 of Form 8-K; and periodic reporting requirements, such as the human capital disclosure under Item 101, summary risk factors under Item 105, market price of and dividends on the registrant's common equity and related stockholder matters under Item 201, and quantitative and qualitative disclosures about market risk under Item 305 among other changes.

Other Matters of Interest

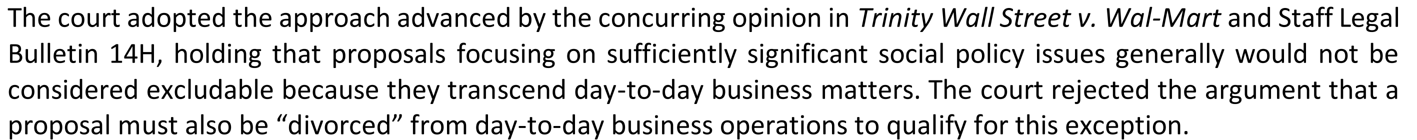
- **Washington State Bans Noncompete Agreements:** On March 23, 2026, Washington Gov. Bob Ferguson signed a bill into law that will ban post-employment/post-service noncompete agreements for employees and independent contractors. Effective June 30, 2027, all current employment-based and independent contractor-based "noncompetition agreements" will be void and unenforceable in Washington State, with limited exceptions. Employers must notify employees, former employees, and independent contractors, in writing, by October 1, 2027, that any applicable noncompete agreements are no longer enforceable. Similar to California law, this law exempts and preserves "sale-of-business" noncompetes, specifically in connection with the purchase or sale of the goodwill of a business or otherwise the acquisition or disposition of an ownership interest, **but** only if the person subject to the noncompete purchases, sells, acquires, or disposes of an ownership interest representing 1% or more of the business.

  Companies with operations or employees in Washington should start preparing for compliance. Such companies may want to start:
  - Identifying which workers must be sent notices (by reviewing all post-employment noncompete agreements currently in place, including those found in employment agreements, offer letters, confidentiality agreements, and equity-related agreements)
  - Drafting the required notices, which may have to be customized based on the specific noncompete provision at issue
  - Preparing a distribution plan

  However, companies should hold off on sending out the notices in case there is a legal challenge to the new law.

  Companies should consider evaluating the advantages and disadvantages of implementing noncompete agreements at this time, given that such agreements will necessarily expire in approximately 15 months. In connection with this evaluation, consider consulting with outside counsel to assess the enforceability and strategic implications of any such agreements.

- **Massachusetts Federal Court Grants Shareholder Proponent's Preliminary Injunction Requiring a Public Company Include Proponent's Shareholder Proposal in Company Proxy Statement.** In early April, the New York's comptroller challenged BJ's Wholesale Club Holdings, Inc.'s exclusion of a deforestation proposal based on the ordinary business exception. The U.S. District Court for the District of Massachusetts has granted the comptroller's request for a preliminary injunction requiring the deforestation proposal to be included in the company's proxy statement.



The court adopted the approach advanced by the concurring opinion in *Trinity Wall Street v. Wal-Mart* and Staff Legal Bulletin 14H, holding that proposals focusing on sufficiently significant social policy issues generally would not be considered excludable because they transcend day-to-day business matters. The court rejected the argument that a proposal must also be "divorced" from day-to-day business operations to qualify for this exception.

The court found that the focus of the proposal was clearly on the deforestation risks arising from BJ's private-label brands (a growing portion of BJ's business that accounts for a quarter of the company's sales)
and the mere fact that the proposal touched on ordinary business matters (i.e., BJ's supply chain) did not change the nature of this focus. The court distinguished this case from the recent decision in *As You Sow v. Chubb*, where the D.C. District Court found that a proposal fell under the ordinary business exclusion because its clear focus was on the company's decisions about whether to subrogate claims; the very core of an insurance company's day-to-day business determinations.

This decision has important implications for the evolving landscape of shareholder proposal exclusions in the absence of traditional SEC no-action relief. Companies considering excluding environmental or social proposals should carefully evaluate whether a proposal focuses on a significant social policy issue transcending ordinary business matters, even if the proposal touches on day-to-day operational considerations. Companies should also note that the court addressed Staff Legal Bulletin 14M's company-specific approach to evaluating significance, finding that the proposal adequately positioned the significant policy concern of deforestation in relation to company-specific issues; namely, the risks associated with the company's private-label brands.

- **Delaware Court of Chancery Upholds Tesla's Texas Forum Bylaw Adopted After Filing of Derivative Suits:** In April 2024, Tesla announced plans to seek stockholder approval to reincorporate from Delaware to Texas. As part of that proposal, Tesla proposed new bylaws designating Texas as the exclusive forum for derivative actions (Texas Forum Bylaw), replacing its existing bylaw designating Delaware as the exclusive forum.

  Between the announcement and the stockholder vote, three groups of Tesla stockholders filed derivative suits in the Court of Chancery alleging insider trading, usurpation of corporate opportunities related to xAI, misappropriation of assets, and oversight failures by the board. On June 13, 2024, the same day the last suit was filed, the reincorporation and Texas Forum Bylaw were approved by Tesla stockholders.

  The court rejected plaintiffs' argument that venue must be assessed solely at the time of filing, finding that the federal transfer statute (28 U.S.C. § 1404(a)) on which they relied was inapplicable in this context. Instead, the court noted that courts may look to later points in time to determine venue. Drawing on settled Delaware law that stockholders consent to be bound by future bylaw amendments and have no vested right to litigate in a particular forum, the court held that the Texas Forum Bylaw could be enforced against the pending suits.

  This decision indicates that companies are not locked into a prior forum selection bylaw simply because a lawsuit was filed before a reincorporation occurs. The enforceability analysis is fact-specific, but the Court of Chancery made clear that there is no inflexible rule tying venue to the date of filing.

  The court did emphasize that the Texas Forum Bylaw was publicly announced before any of the lawsuits were filed and took effect before defendants appeared. Accordingly, companies considering forum selection changes should factor timing and transparency into their planning.

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- **State Street Publishes 2026 Global Proxy Voting and Engagement Policy:** State Street Investment Management has published its 2026 Global Proxy Voting and Engagement Policy. The policy continues to reflect State Street's three core principles (effective board oversight, disclosure, and shareholder protection) and includes several material changes that became effective in April 2026. Key changes include:
  - **U.S. Engagement Guidelines:** State Street has published new guidelines governing its asset stewardship team's engagement with U.S. public companies. The team may discuss State Street's viewpoints on best practices for board oversight of material risks, disclosure, and shareholder protection. However, the team will not discuss how it intends to vote on any ballot item or its rationale for any vote it has made. Significantly, the team will not dictate or pressure companies to adopt particular policies (including policies related to climate, DEI, or sustainability) or capital allocation decisions, and it will not suggest contingent voting or divestment if a company does not adopt State Street's viewpoint on a particular item.
  - **Listen-Only Mode:** The policy specifies that State Street's asset stewardship team will remain in listen-only mode and will not discuss the following topics with U.S. portfolio companies or other investors soliciting votes in connection with contested shareholder meetings, vote-no campaigns, or shareholder proposals: (1) contested director elections; (2) adoption of a climate transition plan; (3) adoption of specific targets for emissions reductions; (4) Scope 3 emissions; and (5) changes to the company's capital allocation.
  - **Diversity Engagement:** State Street does not apply and will not discuss specific targets or thresholds for gender, racial, or ethnic diversity in connection with U.S. portfolio companies.
  - **Financial Performance:** When evaluating board composition, compensation, and board oversight of risks and opportunities, State Street now assesses a company's financial performance relative to its Global Industry Classification Standard (GICS) sector. This change is consistent with similar shifts by Vanguard and BlackRock this year.
  - **Shareholder Proposals:** State Street has streamlined its framework for considering shareholder proposals. The policy now states that State Street does not support shareholder proposals on topics the company has not determined to be material to its business or that appear to impose changes to business strategy or operations. When assessing shareholder proposals, State Street considers whether adoption would promote long-term shareholder value. Notably, the updated policy no longer includes appendices setting forth specific criteria for assessing disclosure effectiveness on common shareholder proposal topics or criteria for supporting certain common shareholder proposal categories.

- **White House Executive Order Imposes New Anti-DEI Clause in Federal Contracting:** President Donald Trump issued the executive order (EO) Addressing DEI Discrimination by Federal Contractors, which requires federal agencies, beginning on or before April 25, 2026, to ensure that all federal contracts incorporate a new clause whereby a contractor commits not to engage in racially discriminatory DEI activities and adheres to new reporting and compliance obligations for itself and its subcontractors and lower tier suppliers. Although prior EOs and policy directives have restricted or discouraged DEI practices in government agencies, this EO differs in requiring inclusion of a contractual clause, including material consequences for breach, in all federal contracts.

  Given the EO's broad definition of DEI activities, including employment, contracting, program participation, and internal resource allocation, contractors should audit HR, mentoring, leadership, and employee resource group activities for compliance. The White House fact sheet on the EO cautions contractors against "concealing" DEI programs, signaling there will be close scrutiny by agencies.

- **DOL Issues Guidance on Proxy Advisory Firms as ERISA Fiduciaries:** The U.S. Department of Labor's (DOL) Employee Benefits Security Administration provided new guidance reminding proxy advisory firms that certain services they provide may cause them to be "fiduciaries" with respect to plans governed by the Employee Retirement Income Security Act of 1974 (ERISA plans), subjecting them to ERISA's fiduciary duties of prudence and loyalty. The guidance specifically identifies two circumstances under which proxy advisory firms may be functional fiduciaries:
  - **Exercise of Authority or Control:** Under ERISA § 3(21)(A)(i), a proxy advisory firm that exercises any authority or control over the exercise of shareholder rights attributable to shares owned by an ERISA-covered plan (including voting proxies or retaining ultimate discretion over voting policies) will be a functional fiduciary.
  - **Providing Investment Advice for a Fee:** Under ERISA § 3(21)(A)(ii), proxy advisory firms may also be fiduciaries if they provide investment advice with respect to plan property for a fee. Proxy advisory services concerning how to exercise shareholder rights based on the particular needs of an ERISA-covered plan on an ongoing basis, if rendered for a fee pursuant to a mutual understanding, will generally cause them to be fiduciaries.

  The DOL cautioned that mere written disclaimers of fiduciary status are not necessarily determinative.

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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.