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Fenwick Securities Law Update

– December 11, 2025 –

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

- Reporting season considerations for upcoming Form 10-K and Form S-8 filings
- The SEC Division of Corporation Finance announcing streamlined Rule 14a-8 process for 2025–2026 proxy season
- The SEC voluntarily dismissing its lawsuit against SolarWinds Corporation and the company's chief information security officer over allegations that they misled investors about cybersecurity vulnerabilities leading up to the 2020 "Sunburst" breach
- SEC Chair Paul Atkins discussing his regulatory priorities, including disclosure reform, de-politicizing annual meetings, securities litigation reform, and Project Crypto
- The United States of Court of Appeals for the Ninth Circuit issuing an order temporarily staying part of California's climate risk disclosure law
- Institutional Shareholder Services publishing its 2026 Benchmark Policy Updates and Glass Lewis publishing its 2026 Benchmark Policy Guidelines

2026 Reporting Season Considerations

While there have not been any SEC rule changes governing 10-K and proxy disclosures since last year, companies need to carefully consider how to draft their disclosures in response to the rapidly evolving political and regulatory climate. In particular, companies may want to consider the following topics, keeping materiality, specificity, and consistency in mind:

- AWS and Cloudflare Outages: Amazon Web Services (AWS) and Cloudflare recently experienced widespread outages impacting the wider internet and mobile applications. These outages serve as a reminder of companies' reliance on third-party infrastructure providers, such as AWS, Google Cloud Platform, Microsoft Azure, Cloudflare, and CrowdStrike.

  Affected companies should consider updating their risk factors about system downtime and/or reliance on third parties to operate critical business systems. Companies should remember to update relevant hypothetical and forward-looking language about outages or system downtime to indicate that such risks have already occurred. For example, language that system outages "may" occur when the company has already experienced outages and downtime should be updated to reflect that outages "have occurred" and "could again" occur. In addition, software and technology companies that similarly update systems,

including automated updates, should ensure that their risk factors cover risks associated with errant updates, and that their boards have oversight visibility on how those risks are mitigated where it may be deemed mission critical to such companies.

Impacted companies should also consider discussing material impacts (if any) in the management's discussion and analysis section.

- Market Volatility and Economic Slowdown: In light of ongoing market volatility and a potential economic slowdown spurred by an ongoing shift in global trade policy and other 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.

- Drug Pricing and Manufacturing: The Trump administration has issued executive orders that address the pricing of pharmaceuticals in the United States and proposed a so-called "most favored nation" pricing policy, which would tie the price of drugs in the U.S. to the lowest price in a group of other countries. With the Trump administration's continued focus on drug pricing and lowering healthcare costs, life science companies may want to consider the material impact of recent political and social pressure to reduce costs. For example, such efforts could adversely affect a company's ability to generate revenue, its ability to achieve or maintain profitability, its ability to set prices, or the demand for its products.

  In addition to drug pricing, the Trump administration has issued executive orders on reshoring pharmaceutical manufacturing, including key ingredients and materials necessary to manufacture prescription drugs. In response, a number of companies have committed to investing in U.S.-based manufacturing. Life sciences companies may want to consider disclosing the challenges and risks related to reshoring manufacturing, such as regulatory compliance (e.g., current Good Manufacturing Practices or cGMP).

- Climate: Despite a U.S. federal shift away from climate regulation, companies are still required under existing securities laws to evaluate and disclose in their SEC reports material impacts from climate-related matters. Companies should consider whether they need to update any climate disclosures in the risk factors, business, MD&A, or financial statements sections of their upcoming Forms 10-K. While reviewing disclosures, companies may want to evaluate the direct and indirect impacts of (i) transition risks, such as regulatory shifts, carbon pricing, and investor/customer expectations and (ii) physical risks, including extreme weather, water scarcity and resource depletion. Companies should also update disclosures to reflect any applicable regulatory changes, such as part of California's climate risk disclosure law being temporarily stayed.

- Diversity/DEI: In response to increasing political and regulatory scrutiny, many companies are scaling back or reframing disclosures around diversity and related initiatives. According to a study by The Conference Board, in 2025, the use of the "DEI" acronym by S&P 500 companies declined by 68% compared to 2024 filings. Additionally, 21% of such companies reduced or removed DEI-related metrics and targets. While reviewing their Form 10-Ks, 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 and other stakeholder perceptions and demands.

- **Immigration:** Companies should consider whether recent changes in U.S. immigration laws and work authorization laws and regulations may impact their workforce, such as negatively affecting efforts to attract and hire new personnel or retain existing personnel.

- **Government Agency Layoffs and Related Delays:** With the Trump administration's continued 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 sciences companies, should consider such FDA and other regulatory risks carefully and discuss whether new risk factor disclosure is appropriate.

- **Delisting:** Earlier this year, Nasdaq amended its rules to accelerate delisting for companies that fail to meet minimum bid price requirements and proposed additional amendments to accelerate delisting for companies with a low public float or stocks trading at low prices. Smaller companies should consider updating their risk factor disclosures to reflect the heightened risk of delisting as a result of Nasdaq's rule changes.

Additional Form 10-K reminders:

- **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. The following items must be tagged in Inline XBRL in the Form 10-K:
    - Cover page information, including registrant name, form type, filer size, public float (see a recent SEC reminder), and ticker symbol
    - Financial statements
    - Auditor information (e.g., any auditor providing an opinion, its location, and its PCAOB ID number)
    - Item 106 (cybersecurity)
    - Item 402(w) (clawbacks)
    - Item 402(x) (grant of certain equity awards close in time to the release of material non-public information)
    - Item 408(a) and (b)(1) (insider trading arrangements and policies)
- **Incorporating by Reference:** Rule 12b-23(e) requires companies to include an express statement clearly describing the specific location of the information they are incorporating by reference. Accordingly, when companies are forward-incorporating information from the proxy statement into the Form 10-K, they 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.

Upcoming Form S-8 Considerations

- **Fee Rate:** Effective October 1, the SEC decreased its registration fee rate to $138.10 per million dollars. Remember to use the new rate when calculating filing fees for Form S-8.

- **Fee Data in XBRL:** Effective July 31, all filers are now required to submit filing fee data in inline XBRL format.

- **Fee Table Compliance:** In recent years, filers could construct fee tables without strictly adhering to the Filing Fee Disclosure and Payment Methods Modernization rule and form instructions. However, all filers are now required to follow the prescribed fee table layout in order for the filing to be accepted by EDGAR. We recommend closely reviewing the Filing Fee Disclosure and Payment Methods Modernization rule and form instructions.

- **NYSE Supplemental Listing Application:** NYSE-listed companies should remember to submit their supplemental listing applications via Listing Manager to report any annual evergreen increases to their equity plans.

Rules and Regulations

- **The SEC's Division of Corporation Finance (Corp Fin) has announced a streamlined Rule 14a-8 process for the 2025–2026 proxy season**. According to the SEC's statement, Corp Fin will not respond to or express views on companies' intended reliance on any basis for exclusion of shareholder proposals under Rule 14a-8, other than Rule 14a-8(i)(1) (i.e., proposals not a proper subject for action by shareholders under state law), for the current proxy season (October 1, 2025–September 30, 2026) and for no-action requests received before October 1, 2025, to which it has not responded.

  This modified approach effectively shifts more responsibility to issuers to assess and document a reasonable basis for exclusion of shareholder proposals, while limiting staff engagement to Rule 14a-8(i)(1) requests. Issuers should recalibrate proxy season workflows to account for limited staff engagement and reinforce internal governance and documentation protocols to support shareholder proposal exclusion decisions under other bases. If such processes require a submission to the SEC prior to exclusion of a proposal, the SEC has indicated that it will respond to submissions that state that there is a reasonable basis for exclusion with a "no objection" letter.

  The University of Delaware Weinberg Center for Corporate Governance is conducting a large-scale survey to collect feedback on the shareholder proposal process from companies, investors and related professionals. You can participate by completing its survey. The survey is expected to influence potential legislative responses to Atkins' suggestion that precatory proposals are not necessarily required to be entertained by Delaware corporations, irrespective of the existence of Rule 14a-8.

Other SEC Developments and Announcements

- **On November 13, the SEC issued guidance regarding the more than 900 registration statements filed during the government shutdown.** The Division of Corporate Finance is reviewing filings on a first-come, first-served basis, but it has provided a set of Questions and Answers addressing issues with pending filings in the meantime.

- **On November 20, the SEC voluntarily dismissed its lawsuit against SolarWinds Corporation and the company's chief information security officer (CISO) over allegations that they misled investors about cybersecurity vulnerabilities leading up to the 2020 "Sunburst" breach.** The suit, filed under the Gensler administration, was notable for targeting a CISO personally and for the SEC's theory that cybersecurity deficiencies amounted to internal accounting controls failures. A U.S. district judge dismissed most of the SEC's case last year, reasoning that the company's post-breach statements were not deceptive because SolarWinds did not know at the time it disclosed the attack that the incident may have been linked to two

earlier incidents. However, the SEC was allowed to move forward with a claim that a security statement posted on SolarWinds' website was fraudulent because it misled the public about the company's security practices. Although the parties had reported a tentative settlement earlier this year on the remaining claim, the SEC's joint stipulation dismissed the case with prejudice. SolarWinds and Brown have agreed not to pursue attorney fees from the SEC.

- On December 2, Atkins outlined the following three pillars of his plan to "make IPOs great again" in his prepared remarks at the New York Stock Exchange:

    - Disclosure Reform: Atkins plans to prioritize disclosure reform, focusing on rooting disclosure requirements in materiality and scaling such requirements with a company's size and maturity. Among other proposed changes, he discussed allowing newly public companies to remain on the "IPO on-ramp" established in the JOBS Act for a set number of years rather than forcing them off as soon as their first year after the IPO. His remarks provide insight into the potential actions that the SEC is considering as part of its "rationalizing disclosure practices" in the 2025 Spring Agenda.

    - De-Politicizing Annual Meetings: Atkins is also prioritizing "de-politicizing shareholder meetings and returning their focus to voting on director elections and significant corporate matters." To this end, the SEC under his administration has already been making changes to the shareholder proposal process, including issuing updated guidance on excluding shareholder proposals and streamlining the overall process. We expect to see more changes in this area over the next year.

    - Securities Litigation Reform: Finally, he wants to "reform the litigation landscape for securities lawsuits to eliminate frivolous complaints."

- Atkins plans to address large institutional asset managers' influence on management decisions. In a media interview, Atkins stated that "Where [BlackRock, Vanguard, and State Street] get out of line, I think, is where they act to try to influence management and that's just not their role. And so, we'll be looking at this entire area and come out with proposals and clarifications and that sort of thing."

  While Atkins did not provide any further details about potential proposals or guidance, previous discussions at the SEC Investor Advisory Committee suggest that the SEC could be considering pass-through voting in combination with asset managers' influence on management decisions. At the June 5 meeting, the committee discussed "trends in pass-through voting, potential impacts of pass-through voting, and the challenges and opportunities in more directly engaging beneficial owners in decisions about how asset managers vote proxies." Pass-through voting would allow fund investors to indirectly vote on proposals and effectively shift voting power away from asset manager stewardship teams.

- SEC enforcement activity against public companies and subsidiaries dropped by 30% in fiscal year 2025. In FY 2025, the SEC initiated 56 enforcement actions against public companies and subsidiaries, resulting in 24 fewer actions compared to FY 2024, according to a report by Cornerstone Research and the NYU Pollack Center for Law and Business. Of those, 52 actions were initiated prior to then-Chair Gary Gesler stepping down, and four actions were initiated under then-acting Chair Mark Uyeda and Atkins, representing the lowest number of actions initiated by a new administration during its first fiscal year since at least FY 2013. Three out of the four actions initiated after Gensler's departure had issuer reporting and disclosure allegations.

- On December 4, the SEC Investor Advisory Committee recommended that the SEC issue AI-related disclosure guidance based on materiality. In particular, the committee recommended that the SEC require companies:
    - Define "artificial intelligence"
    - Disclose board oversight mechanisms, if any, for overseeing the deployment of AI
    - To the extent material, report separately on how the company is deploying AI and the effects of AI deployment on internal business operations and consumer facing matters

  The committee did not recommend adopting any new rules, but instead, recommended integrating AI disclosure guidance into existing disclosure items, such as Regulation S-K items 101, 103, 106, and 303. Based on this recommendation, the SEC may decide to issue a sample comment letter on AI or similar guidance next year.

- On November 12, Atkins outlined the SEC's proposed approach to digital assets in his prepared remarks at the Federal Reserve Bank of Philadelphia. Atkins organized his remarks around the following topics:
    - Token Taxonomy: Atkins described his current thinking on the various categories of crypto assets. He states that "digital commodities," "digital collectibles," and "digital tools" are not securities in his opinion, because purchasers are not expecting profits from the managerial efforts of others. However, he concluded that "tokenized securities" are indeed securities because these "crypto assets represent the ownership of a financial instrument enumerated in the definition of 'security' that is maintained on a crypto network."
    - Application of the Howey Test: Atkins went on to clarify that even though most "crypto assets are not themselves securities, crypto assets can be part of or subject to an investment contract." A token launch might involve an investment contract, but once the investment contract runs its course or expires, "the token may continue to trade, but those trades are no longer 'securities transactions' simply by virtue of the token's origin story."
    - Regulation of Crypto: Finally, Atkins announced that he hopes that the SEC will "consider a package of exemptions to create a tailored offering regime for crypto assets that are part of or subject to an investment contract" and asked the SEC staff to make recommendations.

  Atkins' remarks provide valuable insight into the SEC's Project Crypto and potential upcoming rule changes next year. This new framework could provide the clear rules and guidance that cryptocurrency companies need to effectively navigate the regulatory environment.

Other Matters of Interest

- On November 18, the United States of Court of Appeals for the Ninth Circuit issued an order temporarily staying part of California's climate risk disclosure law. The Ninth Circuit granted a motion for injunction pending appeal that temporarily pauses enforcement of California Senate Bill 261 (SB 261) requiring biennial climate risk reporting by certain companies "doing business" in California while the court considers a legal

challenge to SB 261 and Senate Bill 253 (SB 253). Notably, the court denied appellants' request for a similar injunction pausing enforcement of SB 253.

Notwithstanding this injunction, companies within the scope of SB 261 should continue to prepare for reporting in the event that the legality of SB 261 is ultimately upheld, while continuing to monitor developments in this case. For now, however, companies can take comfort in the fact that the looming January 1, 2026, deadline for SB 261 reporting has been delayed.

- **Institutional Shareholder Services (ISS) published its 2026 Benchmark Policy Updates, effective for meetings on or after February 1, 2026.** The updates include notable shifts in board accountability for capital structures and responsiveness, executive compensation assessments, evaluation of equity plans, and ISS's approach to key environmental and social shareholder proposal topics.

- **Glass Lewis published its 2026 Benchmark Policy Guidelines.** The updates include notable shifts in Glass Lewis' evaluation of mandatory arbitration provisions, pay-for-performance (including a new scorecard-based approach), shareholder rights, amendments to governance documents, supermajority vote requirements, and shareholder proposals.

- **ISS and Glass Lewis face government scrutiny, including an antitrust investigation, potential executive order, and state lawsuit.** The Federal Trade Commission is investigating whether ISS and Glass Lewis have violated antitrust laws by engaging in unfair methods of competition, according to *The Wall Street Journal*. President Donald Trump is also reportedly considering an executive order that would generally ban voting recommendations or block such recommendations for companies that previously engaged the firms for consulting.

  In addition, Florida's attorney general recently filed a new lawsuit against ISS and Glass Lewis arguing that the proxy advisory firms allegedly violated consumer protection and antitrust laws by pushing an "ESG Agenda." Likewise, the attorney general of Texas is investigating ISS' and Glass Lewis' voting recommendation practices.

- **Nasdaq announced plans to launch a Texas-based stock exchange in 2026, pending regulatory approval.** Meanwhile, TXSE Group has already received permission from the SEC to launch its Texas Stock Exchange early next year.

Notable Resources

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.