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Fenwick Securities Law Update

– January 21, 2026 –

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

- Directors and officers of foreign private issuers becoming subject to § 16(a) reporting
- The SEC soliciting comments on amending Regulation S-K
- The SEC soliciting comments on a proposal to provide Nasdaq with limited discretion to deny initial listings even when a company meets the stated listing requirements
- A new bill proposing to create an SEC Public Company Advisory Committee
- The Delaware Supreme Court reinstating Elon Musk's 2018 pay package, reversing the rescission ordered by the Delaware Court of Chancery
- President Donald Trump signing the BIOSECURE Act into law
- JPMorgan Chase announcing that it will be using a new in-house artificial intelligence tool called "Proxy IQ" to help make its voting decisions instead of external proxy advisory firms

2026 Reporting Season Considerations

- **2026 Reporting Season – Upcoming Disclosure Considerations for Your Form 10-K and Proxy Statement:** Please see our December 2025 Securities Law Update for a high-level overview of disclosure topics and other considerations for upcoming Forms 10-K and proxy statements.

Rules and Regulations

- **Directors and officers of foreign private issuers (FPIs) will become subject to Section 16(a) reporting no later than March 18, 2026.** Trump signed the Holding Foreign Insiders Accountable Act into law, subjecting the directors and officers of FPIs to § 16(a) reporting requirements. The SEC must issue final rules to make this change no later than March 18, 2026. The SEC may grant exemptive relief for FPIs that are listed in a foreign jurisdiction that imposes "substantially similar requirements" to § 16(a).

  FPIs should start implementing a § 16 compliance program, including designating § 16 officers, educating directors and officers about § 16 reporting, enrolling directors and officers in EDGAR, and preparing Forms 3.

- **On December 19, 2026, the SEC published a notice to solicit comments on a Nasdaq proposal to provide the Exchange with limited discretion to deny initial listings even when applicants meet all stated listing requirements.** The notice provides the following non-exhaustive list of risk factors that Nasdaq will consider:
    - Where the company is located
    - Whether a person or entity exercises substantial influence over the company and, if so, where that person or entity is located
    - Whether the expected public float and share distribution, based on the service providers' prior deals, raises concerns about adequate liquidity and potential concentration
    - Whether there are concerns about the company's advisors (including auditors, underwriters, legal counsel, brokers, or other professional service providers)
    - Whether any of the company's advisors were involved in prior transactions where the securities became subject to a pattern of concerning or volatile trading
    - Whether the company's management and board have experience with U.S. public company requirements
    - Whether there are any FINRA, SEC, or other regulatory referrals concerning the company or its advisors
    - Whether the company has or had a going concern audit opinion and the company's plan to remediate such concern
    - Whether there are other factors that raise concerns about the integrity of the company's board, management, significant shareholders, or advisors

Other SEC Developments and Announcements

- **The SEC is soliciting public comments on amending Regulation S-K, with the goal of revising the requirements to focus on eliciting disclosure of material information and avoid compelling the disclosure of immaterial information.** The SEC has requested that public comments be submitted as soon as possible and no later than April 13, 2026.

- **House lawmakers introduced a bill to create a new Public Company Advisory Committee within the SEC.** The bill would amend the Securities Exchange Act of 1934 by establishing a Public Company Advisory Committee within the SEC to address emerging regulatory priorities as well as issues relating to public reporting and trading.

- **SEC Division of Investment Management Director Brian Daly urged investment advisers to reassess their proxy voting policies and processes in his prepared remarks at the New York City Bar Association.** In his remarks, he addressed two questions about proxy voting by investment advisers:
    - **Must investment advisers vote client proxies?** Daly believes that investment advisers do not have a fiduciary duty to vote every proxy. While voting on fundamental corporate matters is important, he stated that there may be times when refraining from voting a proxy is in the client's best interest. For example, he noted that many investment advisers say that "voting on board members, management policies, or on precatory social and political matters is irrelevant to their strategy and imposes costs without conferring any measurable benefit to investors," but they "continue to vote proxies (often using a proxy advisor's default settings) because it is perceived as being 'safer' than not voting."
    - **How must investment advisers vote?** Daly stated that "[a]n adviser is a fiduciary and should cast ballots in the client's best interests, on an informed basis." While Daly believes there is nothing inherently wrong

with proxy advisers, he questioned whether voting based on a proxy adviser's standard voting policies and positions was really in the best interests of the client.

Daly asked investment advisers to consider whether proxy voting is required by their investment program. If proxy voting is required, he stated that advisers should utilize their best judgment and whatever resources they deem appropriate under the circumstances when making that vote. In particular, he advocated for the use of AI in proxy voting with proper oversight. Daly's remarks are consistent with recent White House and SEC efforts targeting proxy advisers' influence.

- **Commissioner Caroline Crenshaw's extended term expired on January 2, 2026.** Until a successor is appointed, there are three remaining SEC Commissioners: Chair Paul Atkins, Hester Peirce, and Mark Uyeda.

Other Matters of Interest

- **On December 19, the Delaware Supreme Court reinstated Elon Musk's 2018 pay package**, reversing the rescission ordered by the Delaware Court of Chancery (Chancery Court). The Delaware Supreme Court reversed the decision solely on remedy grounds, declining to address the underlying governance issues and holding that equitable rescission was improper because the parties could not be restored to the *status quo ante* (Musk had already worked for six years and achieved the targets) and the trial court misallocated the burden of proposing alternative remedies to full rescission. The court instead awarded the plaintiff $1 plus $54 million of attorneys' fees based on the methodology proposed by Tesla.

  Historically, the Delaware courts have been highly deferential to board decisions about executive compensation, so the Chancery Court's reversal of the Musk pay package sparked a debate over high levels of executive compensation and the related process. After the Chancery Court's decision, Tesla reincorporated in Texas, and other companies also began to consider reincorporation due to related corporate governance concerns.

  Since the Delaware Supreme Court declined to address the corporate governance issues raised by this case ("controlling stockholder" status, director independence, approval process, stockholder ratification, proxy statement disclosures, and other matters), its decision leaves many of these issues unresolved and may not settle ongoing concerns about Delaware as a state of incorporation.

- **On December 18, Trump signed the BIOSECURE Act into law as part of the National Defense Authorization Act for Fiscal Year 2026.** The BIOSECURE Act places restrictions on dealings with certain "biotechnology companies of concern" (BCOCs) by federal agencies and recipients of federal contracts, grants, and loans. The new law could curtail transactions with biotechnology companies in China, including the sourcing of equipment from such Chinese companies.

  Companies with relationships to Chinese biotechnology companies should start to consider the potential impacts of the new restrictions on collaboration and other agreements with the Chinese biotechnology sector. Companies should monitor the BCOC designations and Federal Acquisition Regulation (FAR) implementation as well as review their supply chains for potential impacts and mitigation opportunities. Affected companies should also consider discussing any material impacts in their upcoming periodic reports and earnings materials.

- **The Trump administration is considering new rules targeting proxy advisor influence and shareholder proposals.** In December, the White House issued an executive order directing the SEC, the FTC, and the Department of Labor to

take and consider actions to regulate and dismantle the influence of proxy advisory firms, such as Institutional Shareholder Services (ISS) and Glass Lewis, in corporate governance, particularly DEI and ESG matters.

The executive order specifically directs the SEC to consider revising or rescinding any shareholder proposal rules, regulations, or guidance inconsistent with these objectives, including potentially requiring proxy voting advisory firms to register as investment advisers and treating investors who rely on such firms' recommendations as a "group," as well as examining Investment Advisers for breaches of fiduciary duties by considering non-pecuniary factors (e.g., ESG/DEI) in voting advice and voting.

If adopted, these changes would generally favor corporate management and boards by reducing external scrutiny and influence from proxy advisors and activist investors on a range of issues. They would also likely result in corporate boards and management gaining greater control over key decisions, including executive pay, director elections, and overall corporate governance practices. A common criticism is that these changes could lead to less transparency for shareholders who do not have the resources to conduct their own in-depth analysis on voting matters.

- **On January 7, 2026, JPMorgan Chase (JPM) announced that it will be using a new in-house AI tool called "Proxy IQ" to help make its voting decisions instead of external proxy advisory firms, such as ISS and Glass Lewis.** According to JPM's client memo, it is "the first major investment firm to fully eliminate any reliance on external proxy advisors for [its] U.S. voting process." JPM plans to complete its transition to Proxy IQ during the first quarter of this year and will start using the tool for upcoming 2026 annual meetings.

  The SEC appears to be supportive of asset managers and investors using AI for voting recommendations. Recently, the director of the SEC's Division of Investment Management stated that AI could be a "valuable tool" in proxy voting that "enhances—not replaces—human judgment, and that helps advisers better serve their clients." However, he noted that asset managers and investors should keep in mind "principles of transparency, auditability, and consistency with fiduciary duties" when using such tools.

  This shift and the heightened regulatory and political scrutiny around proxy advisors could also push asset managers to have more customized voting recommendations. As asset managers and investors move away from standardized voting recommendations from proxy advisory firms, issuers should expect more bespoke voting rationales (based on each firm's differentiated data, risk models, and policy priorities) and greater variance in voting outcomes across their top holders. These changes will also necessitate changes to how issuers approach investor engagement, which will also need to become more individualized.

- **The Trump administration issued an executive order targeting state AI regulation.** In December, the White House issued an executive order targeting state AI regulation. The executive order directs:
  - The Commerce Department to identify problematic state AI laws
  - The secretary of commerce to issue a notice specifying the conditions under which states may be eligible for funding under a federal broadband program, implying that states with onerous AI laws may not be eligible
  - The Federal Communications Commission to withhold grants for non-compliant states
  - The Justice Department to create an AI litigation task force to challenge state AI regulations
  - The special advisor for AI and crypto, along with the assistant to the president for science and technology, to jointly recommend a uniform federal policy framework for regulating AI

This executive order introduces new uncertainty with respect to AI regulation. Per the executive order, the federal government will likely start challenging state AI laws in court. Companies should monitor federal efforts but continue to comply with state AI laws unless they have been stayed by a court or revoked by the state.

- **BlackRock released its 2026 proxy voting guidelines**. The guidelines include notable updates regarding:
  - **Board Composition:** BlackRock removed references to "diversity" in the board composition section and throughout the policy. However, in footnote 8, BlackRock states that "[a]spects of a director's background that may, depending on the company, contribute to the experiences, perspectives, and skillsets that inform effective board oversight include professional background, as well as demographic background, including gender, race/ethnicity, disability, U.S. veteran status, LGBTQ+ identity, and national, Indigenous, religious, or cultural identity."
  - **Executive Compensation:** BlackRock added new language about executive perquisites. BlackRock states that it "looks to understand the rationale for certain executive perquisites, such as security, and whether the appropriateness of any such executive perquisites is regularly evaluated by the compensation committee."
  - **Human Capital Management:** BlackRock removed its request for companies to disclose their approach to DEI and their workforce demographics in their human capital management disclosures. Instead, BlackRock states that it is helpful for companies to disclose their "workforce size, composition, compensation, engagement, turnover, training and development, working conditions and health, safety and wellbeing, among other possible topics."
  - **Shareholder Proposals:** BlackRock reiterated that it "takes a case-by-case approach to voting on shareholder proposals," focusing on "the proposal's implications for long-term financial value creation for shareholders." It also added new language that it "take[s] into consideration the legal effect of the proposal, as shareholder proposals may be advisory or legally binding depending on the jurisdiction."
- **AI-related securities litigation is expected to continue increasing in 2026.** AI-related securities litigation has significantly increased over the past three years. In 2023, there were seven AI-related federal securities filings, followed by 15 such filings in 2024, and 12 filings in the first half of 2025 alone, according to Cornerstone Research figures from July. This trend is expected to continue through 2026. Indeed, an AI-related securities lawsuit was already filed against AI energy support company Fermi earlier this month. See Worried About A Possible AI Bubble Burst? (*The D&O Diary*, January 2026), Event-Driven, AI Cases Dominate 2026 Securities Litigation Field (*Bloomberg Law*, January 2026), and 2025's Defining AI Securities Litigation (*Law360*, January 2026).

  The SEC also continues to focus on AI disclosure. The SEC's Division of Examinations recently announced that it will "focus on recent advancements in AI" and a review of "representations regarding ... AI capabilities or AI" as part of its Fiscal Year 2026 Examination Priorities.

  As companies prepare to file their Forms 10-K, they should have adequate disclosure controls and procedures for AI. In particular, disclosure committee members should consider the following questions:
  - Is the term "artificial intelligence" clearly defined?
  - Does the disclosure explain how the company is using AI (externally and internally)?
  - Does the disclosure explain how the company is managing AI risks? Should the company disclose how the board oversees AI and related risks?

- Does the company have backup for any quantifiable AI statements? Does the company have a reasonable basis for claims about AI prospects?
- Is AI disclosure consistent throughout the Management Discussion & Analysis, Description of Business, Cybersecurity, Risk Factors, Forward-looking Statements, Financial Statements, and any earnings materials?

Ensuring that disclosures are consistent and adequately supported will continue to be important in preventing AI-related securities litigation.

- **The Department of Justice (DOJ) is reportedly using social media to find anti-DEI targets.** Harmeet Dhillon, assistant attorney general for the Civil Rights Division, has stated that the DOJ does "open up investigations based on internet leads" and considers social media a "very valuable tool." In light of the DOJ's recent focus on social media, companies may want to review their social media policies and ensure that they have adequate social media training for employees covering what types of speech are permitted and prohibited by employees, whether such speech is made on behalf of the company or in their personal capacity.

- **The Ninth Circuit hears oral arguments on California's climate disclosure laws.** The U.S. Court of Appeals for the Ninth Circuit heard oral arguments on the District Court's denial of plaintiffs' motion for a preliminary injunction pending judgment on the merits. The central question being debated is whether California's climate laws (SB 253 and SB 261) amount to unconstitutional compelled speech or fall within the bounds of permissible commercial regulation. The appellant, the U.S. Chamber of Commerce, argued that California is requiring companies to make comprehensive, costly disclosures that are untethered to any specific product or transaction, while the State of California argued that the relevant commercial activity is the investment decisions being made by investors and that standardized climate and emissions disclosures seek to correct the current problem of fragmented, non-uniform climate disclosures. The court appeared somewhat skeptical of the scope of SB 261 and possibly the Scope 3 emissions reporting requirements of SB 253, by forcing companies to assume responsibility for emissions data attributable to other entities with whom they do business.

  The court did not indicate when it would issue a decision in the matter. Until it does, enforcement of SB 261 will remain stayed. SB 253 remains in effect, with Scope 1 and 2 reporting obligations currently scheduled to begin in August 2026.

- **Corporate Census calls into question "DExit" hype.** The latest Corporate Census (with data through October 2025) finds that Delaware experienced a sharp increase in corporate incorporations in 2025, both absolutely and relative to other states. The Corporate Census is a draft paper and accompanying data set that tracks entity formation (including corporations, LLCs, and other business forms) in the United States dating back to the nation's founding.

- **EU approves Omnibus I, significantly reducing the number of companies subject to CSRD and CSDDD.** In December, the EU Council and the European Parliament formally approved the "Omnibus I" package, which, among other things, significantly reduced the scope of both the Corporate Sustainability Reporting Directive (CSRD) and the Corporate Sustainability Due Diligence Directive (CSDDD), as follows:

  - CSRD will only apply to EU companies with more than 1,000 employees on average and a worldwide annual net turnover of more than €450 million and to non-EU companies with an EU annual net turnover of more than €450 million for each of the last two consecutive financial years that have an EU subsidiary or branch that generated more than €200 million in net annual turnover.

- CSDDD will only apply to EU companies with more than 5,000 employees and a worldwide annual net turnover of more than €1.5 billion and to non-EU companies with more than €1.5 billion in EU annual net turnover (with no employee threshold). The compliance deadline for CSDDD has been postponed for another year, to July 26, 2028, with companies required to comply starting July 2029.

Notable Resources

- 2025 Proxy Season Results in Silicon Valley and Large Companies Nationwide
- 2025 Corporate Governance Practices and Trends in Silicon Valley and at Large Companies Nationwide
- Regulatory Considerations in Connection with Clinical Data Release
- Preparing for Clinical Data Release
- From Breakthroughs to Backing – What Life Sciences Investors Want
- Where the Life Sciences Market is Headed in 2026

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.