FENWICK

Fenwick Securities Law Update

– October 7, 2025 –

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

- Risk Factor and Management's Discussion and Analysis considerations for upcoming Form 10-Q filings
- Filer status transition for Smaller Reporting Companies and the transition to EDGAR Next
- Mandatory arbitration provisions
- Retail voting programs

Risk Factor and MD&A Considerations for Upcoming Form 10-Q

- United States Federal Government Shutdown: The U.S. federal government has been shut down since October 1, 2025, after lawmakers were unable to resolve a spending impasse by the September 30, 2025, deadline. The last such shutdown began in December 2018 and continued for 35 days. Hundreds of thousands of federal workers are expected to be furloughed until lawmakers can agree upon a plan to fund the government. Companies whose operating results or financial condition are materially affected by the ability to interact with federal government agencies should consider appropriate disclosures if the shutdown remains in place at the time of their next periodic report. Companies that expect to provide the investment community with information about the effects of the shutdown should consider the desirability or necessity of filing an Item 7.01 Form 8-K to disclose any material information that is so disseminated, and companies might otherwise consider the desirability of filing an Item 8.01 Form 8-K to voluntarily report material effects of the shutdown on their operations or financial condition.

- Trade Issues and Tariffs: On September 25, 2025, President Donald Trump announced his intent to impose a 100% tariff on any branded or patented pharmaceutical product unless the company is building their pharmaceutical plant in the United States. He also announced tariffs on large trucks and household goods. On September 29, 2025, he announced an intent to impose a 100% tariff on films made outside the United States. The newly announced tariffs are to take effect on October 1, 2025, although implementation details were not announced. These actions come while the Trump administration awaits Supreme Court review of a Circuit Court of Appeals decision that the tariffs exceeded presidential authority. The potential impacts of increased tariffs and trade uncertainty are discussed in our April 30, 2025, and June 12, 2025, Securities Law Updates and recent material developments in this regard were also discussed in our September 5, 2025, edition.

- **Interest Rates:** The Federal Reserve cut the federal funds rate by a quarter percentage point on September 17, 2025 (the first reduction this year). The decision came in response to concerns over the U.S. labor market and inflation. One or more additional reductions in the key rate are expected before the end of 2025.

- **Foreign Currency Exchange Risk:** As of September 30, the U.S. dollar index was down ~10% this year. Learn more about foreign currency exchange risk in our July 7, 2025, Update.

- **FDA Regulatory Risk:** The United States Food and Drug Administration (FDA) released 89 previously issued complete response letters (CRLs) on September 4, 2025, as part of its new policy to release CRLs in "real time." For later stage biotech companies, the FDA's shift to real time disclosure raises implications across disclosure obligations, litigation exposure and strategic communications.

Rules and Regulations

- **SEC Reverses Position on Mandatory Arbitration Clauses:** For decades the SEC has maintained a policy position by which it would refuse to declare a registration statement effective under the Securities Act of 1933 if the issuer's charter documents contained a mandatory arbitration provision for claims under the federal securities laws. This posture was based on the SEC's perspective that such provisions were inconsistent with the "anti-waiver" provisions of the federal securities statutes. On September 18, 2025, the SEC issued a policy statement clarifying that the inclusion of mandatory issuer-investor arbitration provisions will not impact the SEC's decision to declare a registration statement effective going forward. Instead, the SEC will focus on "the adequacy of the registration statement's disclosures, including disclosure regarding the arbitration provision." In adopting the policy statement, the SEC noted that it was not expressing a view on the advisability or enforceability of mandatory arbitration provisions included in an issuer's charter or bylaws, which may not be enforceable under certain state laws, including Delaware. The SEC also adopted a technical amendment to Rule 431 of its Rules of Practice to provide that the staff's declaration of effectiveness of a registration statement will not automatically be stayed if a commissioner or aggrieved party asks the SEC to review the decision to accelerate.

- **Transition to EDGAR Next:** The deadline to transition to EDGAR Next was September 15, 2025. Filers not enrolled in EDGAR Next as of that date will not be able to make SEC filings until they enroll. Legacy EDGAR codes may now only be used for enrollment. Beginning December 22, 2025, legacy codes may no longer be used to enroll in EDGAR Next, and all filers, including existing filers who have not enrolled in EDGAR Next by December 22, will need to submit a new Form ID to apply for EDGAR access. The SEC is encouraging Form ID applicants to apply for EDGAR Next access well in advance of any anticipated filing, as it is currently taking the SEC Staff an average of at least six business days to complete their Form ID reviews.

- **Filing Fee Reduction:** As we announced in our September 5, 2025, Update, the SEC reduced fees for the registration of securities under the Securities Act of 1933, and certain other fees. This reduction became effective on October 1, 2025.

Other SEC Developments and Announcements

- **SEC Guidance on Filer Status Transition for Smaller Reporting Companies:** The SEC added new Compliance and Disclosure Interpretation (CDI) 130.05 related to filer status transition for smaller reporting

companies (SRCs) on August 27, 2025. The CDI clarifies that an issuer that previously qualified as a SRC under the revenue test but no longer qualifies as of the assessment date (the last business day of the issuer's second fiscal quarter) may continue reporting as an SRC through the remainder of the fiscal year (including relying on all SRC-based reporting accommodations) until the issuer's first quarterly report in the next fiscal year (Q1 Report). Although such issuer will lose its ability to rely on the SRC reporting accommodations as of the next fiscal year's Q1 Report, it will qualify as a "non-accelerated filer" for filings due during the next fiscal year with respect to the timeframes for filing annual and quarterly reports accorded to non-accelerated filers.

- SEC Allows "Set and Forget" Proxy Instructions for Retail Investors: The Division of Corporation Finance issued a no action letter to ExxonMobil on September 15, 2025, indicating that it would not recommend enforcement action under Exchange Act Rules 14a-4(d)(2) and (d)(3) if ExxonMobil implemented the Retail Voting Program delineated in its request letter. Under that program, participating retail shareholders could elect to have their shares voted in accordance with recommendations of the Board of Directors on either (1) all matters; or (2) all matters except contested director elections or any acquisition, merger or divestiture transaction that, under applicable state law or stock exchange rules, requires shareholder approval. Instructions so given under the program remain effective for future meetings until such time as the shareholder revokes the instructions. Among other protective provisions, the shareholder would still receive voting materials for subsequent meetings and would also be able to vote (without formal revocation) and override any such instructions. Rules 14a-4(d)(2) and (d)(3) effectively prohibit the granting of proxies that do not expire at the next upcoming shareholder meeting. The Division of Corporate Finance explained that it did not regard the program as being in violation of those rules because participating shareholders could change their election at any time and would receive regular notices regarding their participation in the program, the election they have made and the ability to opt out.

- Challenge to "Accredited Investor" Definition: A healthcare executive and a public benefit corporation that operates a venture capital fund have filed suit in Federal District Court in Texas challenging Regulation D's definition of "accredited investor." The suit alleges that the definition is "arbitrary and capricious" because it uses wealth as a proxy for sophistication without justification and that wealth does not correlate with investment acumen. It further alleges that many non-wealthy individuals, like the individual plaintiff, possess the knowledge and experience to evaluate private investments but are excluded by Reg D's arbitrary standards.

- SEC Considers Shift to Semiannual Reporting: SEC Chair Paul Atkins indicated that he expects that the SEC will propose a rule change allowing companies to move from the current quarterly Form 10-Q regime to a semiannual reporting schedule. The announcement follows Trump's call to do away with quarterly financial reporting in favor of semiannual disclosures. In his first term of office, Trump asked the commission to consider eliminating the requirement for quarterly reporting, but no action was taken on that proposal

- Court of Appeals Denies SEC Request to Rule on Climate Disclosure Rules: On September 16, 2025, the Eighth Circuit Court of Appeals paused challenges to climate disclosure rules adopted by the SEC in 2024 and refused the SEC's request to proceed with the litigation and issue a ruling. The court stated that the rules have been paused, and that it is "the agency's responsibility to determine" whether the rules "will be rescinded, repealed, modified, withdrawn, or defended" in court. The court further noted that the pause will be lifted only if the agency formally reconsiders the rules or elects to defend the rules in the future. Formal reconsideration of the rules would involve a substantial administrative process.

- **Government Shutdown:** In light of the federal government shutdown, the staff of the SEC's Division of Corporation Finance issued this announcement:

> "Starting October 1, 2025, a limited number of staff members in the Division of Corporation Finance and Division of Investment Management will be available to answer questions relating to fee calculations and emergency filing relief. If you require assistance in these matters, submit your request and contact information to CFEmergency@sec.gov or IMEmergency@sec.gov, as appropriate. Staff in the Division of Corporation Finance and Division of Investment Management will not be available to respond to other questions. In all situations, responsibility for complete and accurate disclosure remains with the company and others involved in the preparation of a company's filings."

Staff issued additional details on its limited scope of activities during the shutdown, and observations for filers who might otherwise be interacting with the staff. This announcement primarily relates to offerings for which registration is required under the Securities Act of 1933.

- **SEC Releases Spring 2025 Regulatory Agenda:** On September 4, 2025, the SEC released its Spring 2025 Regulatory Agenda, which includes the following topics, among others:
  - Increasing instances in which Rule 144 safe harbor would be available
  - Expanding emerging growth company accommodations, simplifying the categorization of filer status, and reducing compliance burdens
  - Modernizing shelf registration process to reduce compliance burdens and facilitate capital formation
  - Facilitating and simplifying the pathways for raising capital for (and investor access to) private businesses
  - Rationalizing disclosure practices to facilitate material disclosures by companies (the SEC has indicated on multiple occasions that it will focus on executive compensation disclosures, including pay for performance and CEO pay ratio, and it recently mentioned risk factor disclosure as another area of focus)
  - Modernizing the requirements of Exchange Act Rule 14a-8 to reduce compliance burdens for companies
  - Exploring rules relating to the offer and sale of crypto assets, potentially to include certain exemptions and safe harbors, to help clarify the regulatory framework for crypto assets and provide greater certainty to the market

In a statement, Atkins said the agenda items represent the SEC's "renewed focus on supporting innovation, capital formation, market efficiency, and investor protection."

Stock Exchange Rules and Proposals

- **Nasdaq Proposes to Enable Trading of Tokenized Securities:** Nasdaq submitted a rulemaking proposal to the SEC that seeks to integrate digital assets into the exchange's current infrastructure and systems and, to that end, proposes to amend Nasdaq rules to allow member firms and investors to tokenize equity securities and exchange-traded products they trade on Nasdaq.

Other Matters of Interest

- **House Holds Hearing on Proxy Power and Proposal Abuse:** The House Committee on Financial Services held a meeting on September 10, 2025, focused on proxy power and proposal abuse. The hearing examined Rule 14a-8 and whether the shareholder proposal process "has been co-opted by activist investors who prioritize narrow policy goals over maximizing shareholder value." The committee also discussed the influence of proxy advisory firms and institutional investment manager practices.

- **CARB Holds Second Annual Workshop on California Climate Disclosure Rules and Releases Preliminary List of Entities that May Be in Scope:** On August 21, 2025, the California Air Resources Board (CARB) held its second virtual workshop to support the development of the California climate disclosure rules. Key takeaways from the workshop include:

    - CARB has since provided a preliminary list of entities expected to be in scope of the laws, based on its analysis of the California Secretary of State's website and Dunn & Bradstreet data.

    - CARB is proposing a June 30, 2026, implementation deadline for reporting under SB 253.

    - CARB indicated that it would post a draft reporting template for Scopes 1 and 2 reporting by the end of September 2025 for public feedback. However, as of the date of this update, the template has not been posted.

    - Scopes 1 and 2 emissions data and scenario analysis will not be required for the first SB 261 report.

    - Proposed rulemaking is expected to be released October 14, 2025.

Notable Resources

This update was created by Fenwick's corporate governance and capital markets practices.

Key practice contacts: David Bell, Ran Ben-Tzur, Amanda Rose, and Wendy Grasso

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.