



# Fenwick Securities Law Update

– March 25, 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 releasing a series of Corporation Finance Interpretations (formerly known as Compliance and Disclosure Interpretations)
- The SEC implementing § 16(a) reporting for directors and officers of foreign private issuers
- The SEC being sued over its new “no-objections” policy
- The Delaware Supreme Court upholding the constitutionality of Senate Bill 21
- Five companies being sued over excluding a shareholder proposal from their 2026 proxy materials, with three subsequently agreeing to settle (including one that agreed to adopt the shareholder proposal)
- Recent trends regarding board AI oversight disclosure, shareholder proposals, and director overboarding

## 2026 Reporting Season Considerations

- **Risk Factor Disclaimer:** Recently, companies have been adding a disclaimer to the introduction of their risk factors in response to securities lawsuits increasingly claiming that risk factors are misleading when they describe potential risks as hypothetical when such risks have already occurred. The disclaimer is intended to warn investors that risk factors are inherently speculative and exclusively forward-looking. While it remains important to keep risk factors updated, companies may want to consider including the following disclaimer:

“These disclosures reflect the Company’s beliefs and opinions as to factors that could materially and adversely affect the Company and its securities in the future. References to past events are provided by way of example only and are not intended to be a complete listing of such events or a representation as to whether or not such factors or similar events have occurred in the past or their likelihood of occurring in the future.”

- **Investor Expectations on Board Oversight of AI:** Glass Lewis raised several questions relating to board oversight of AI and related considerations in its 2024 and 2025 policy surveys. According to the [results from its policy surveys](#):
  - 67% of U.S. investors evaluate AI issues on a case-by-case basis, while just 29% of U.S. investors do not have any benchmarks or related voting policies for AI issues.
  - 65% of U.S. investors believe all companies should provide clear disclosure of the board’s oversight of AI governance issues and AI ethics.



- 46% of U.S. investors responded that the entire board, one of the board’s committees, or a standalone committee should be tasked with AI oversight.
- 49% of U.S. investors stated that board oversight of AI governance should be codified in a committee charter or relevant governing documents.

Given AI’s significance and capital-intensive nature, as well as the risks it entails, investors want to understand how boards are overseeing its implementation. Accordingly, companies may want to consider including disclosure about board oversight of AI in their proxy statements this year. This disclosure could cover a range of topics, including how responsibility for overseeing AI is delegated among the board and its committees, whether AI oversight is codified in any governance documents, frequency of board updates on AI, and [details about director education on AI](#).

- **Insider Trading Policies and Prediction Markets:** Companies should consider updating their insider trading policies and codes of conduct to explicitly prohibit trading on the basis of material nonpublic company information in prediction markets. As prediction markets have grown in popularity, regulators and enforcement authorities are increasingly focused on potential insider trading violations on these platforms. Proactively addressing this emerging risk in corporate policies can help mitigate compliance exposure and reinforce expectations for employees, directors, and officers.
- **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.

## Rules and Regulations

- **SEC Updates Corporation Finance Interpretations ([formerly known](#) as Compliance and Disclosure Interpretations) related to Form S-3, Rule 701, Rule 405, CIK codes, and smaller reporting company (SRC) Status:** The updated interpretations replaced outdated references to \$5 million with \$10 million in Revised Questions [271.10](#), [271.12](#), [271.14](#), [271.16](#), [271.23](#) and [271.24](#). In addition, the SEC added the following new Corporation Finance Interpretations (CFIs):
  - **[New Question 116.26 \(Form S-3 ATM\)](#):** This interpretation provides helpful guidance for companies with existing ATM programs that lose full Form S-3 eligibility. If a company that filed an ATM prospectus supplement subsequently falls below the \$75 million public float threshold and becomes subject to baby shelf limitations, the SEC staff will not object to the company continuing to sell the full amount under its existing prospectus supplement even if that amount exceeds the baby shelf cap of one-third of the company’s public float under General Instruction I.B.6. This is likely welcome news for life science companies with shifting market caps, as it provides certainty that an ATM program established during a period of eligibility can continue uninterrupted following a § 10(a)(3) update.
  - **[New Question 271.26 \(Identifying Which Investors Must Receive Rule 701\(e\) Disclosure for Options\)](#):** The obligation to deliver Rule 701(e) disclosure is triggered when the value of options granted (based on their exercise price) during a consecutive 12-month period, plus the aggregate sales price of additional securities sold in reliance on Rule 701 during the same period, exceeds \$10 million. The trigger is based on grant-date values, not vesting or exercise amounts. The timing of the disclosure is based on the date of exercise.

- [New Question 271.27 \(Consequences of Failure to Deliver Timely 701 Disclosure\)](#): If an issuer fails to deliver the Rule 701(e) disclosure a reasonable period of time before the date of sale, the Rule 701 exemption is lost for the entire offering that took place during the 12-month period in which the \$10 million threshold was exceeded. The exemption is not lost, however, for offerings that took place during other 12-month periods in which the threshold was not exceeded.
- [New Question 101.06 \(CIK for a Reorganized Company\)](#): A company that has reorganized from an LLC to a C corporation may retain the same CIK but should update its information in EDGAR.
- [New Question 102.06 \(Failure to Check SRC Status Box\)](#): Failure to check the SRC status box does not result in loss of SRC status or the ability to use SRC accommodations, provided the issuer otherwise qualifies as an SRC.

Please see a [full summary of the recent CFI Updates here](#).

- **SEC Implements § 16(a) Reporting for Foreign Private Issuers (FPIs)**: The SEC [adopted amendments to its rules and forms](#) to conform them to the Holding Foreign Insiders Accountable Act (HFIAA), which requires the directors and officers of FPIs with a class of securities registered under § 12 of the Exchange Act to comply with § 16(a) reporting requirements, effective March 18, 2026. Directors and officers of FPIs are not subject to § 16(b) and 16(c).

On March 5, the SEC issued an [exemptive order](#) exempting directors and officers of certain FPIs from § 16(a) reporting requirements if the FPI is organized under the laws of a “qualifying jurisdiction,” and the insider is subject to reporting under a “qualifying regulation.” Currently, “qualifying jurisdictions” include Canada, Chile, the European Economic Area, Korea, Switzerland, and the United Kingdom.

The SEC's [HFIAA Frequently Asked Questions](#) address various transition issues for foreign insiders, including the following:

- **Question 6**: The SEC will not recommend enforcement action for a late report as long as the insider (i) submitted a completed Form ID and the related required documents before March 18, 2026, (ii) did not receive EDGAR access codes by March 18, 2026, and (iii) files the required report as soon as possible after receiving EDGAR access codes (and no later than April 1, 2026).
- **Question 7**: Recognizing the impact of the HFIAA on the overall processing time for Form ID applications, the SEC will not recommend enforcement action for a late report filed by insiders of domestic issuers as long as the insider (i) submitted a completed Form ID before the filing deadline for the Section 16 report and the deadline for filing the report was between December 18, 2025, and March 18, 2026, (ii) did not receive EDGAR access codes by the filing deadline, and (iii) files the required report as soon as possible after receiving EDGAR access codes (and no later than April 1, 2026).
  - While domestic issuers must still disclose their insiders’ reporting delinquencies under Item 405 of Regulation S-K, the issuer can explain that the insider relied on the staff’s no-action position.

## Other SEC Developments and Announcements

- **SEC Sued over New No-Objection Policy**: The Interfaith Center on Corporate Responsibility (ICCR) and As You Sow, represented by Democracy Forward, have [filed a complaint against the SEC](#) in the U.S. District Court of the District of Columbia over the SEC’s new No-Objection Policy adopted for the 2025-2026 proxy season. The complaint asserts three counts under the Administrative Procedure Act, and requests that the court declare the no-objections policy contrary to law, arbitrary and capricious, and procedurally defective, set aside, vacate and/or permanently enjoin the policy, and award costs and reasonable attorneys’ fees.



- **SEC Small Business Forum:** On March 9, the SEC held its annual Small Business Forum, where participants discussed ways to improve the capital-raising process from startups to smaller public companies and their investors and to encourage more companies to go public. Key themes included streamlining reporting requirements and expanding access to Form S-3 registration for smaller reporting companies, as well as policy recommendations covering Regulation A reforms, proxy advisory oversight, OTC market transparency, and market structure improvements for smaller issuers.
- **SEC Director of Enforcement Margaret Ryan Resigns:** The [agency announced last week](#) that she left after seven months in the role.
- **EDGAR Reminder:** Beginning March 16, 2026, EDGAR generally will suspend filings rather than issue warnings for incorrect or incomplete structured filing fee-related information for all filers. Please consult the following for guidance:
  - [Filing Fee Disclosure and Payment Methods Modernization Release \(33-10997 \(Oct. 13, 2021\)\)](#)
  - [EDGAR Filer Manual](#)
  - [EDGAR XBRL Guide](#)
  - [EDGAR Filing Fee Interface Courtesy Guide](#)
  - [How Do I Guide: Prepare an Inline XBRL Filing Fee Exhibit](#)
  - [SEC Modernizes Filing Fee Rules](#)

## Other Matters of Interest

- **Delaware Supreme Court Upholds Constitutionality of Senate Bill (SB) 21:** Delaware enacted SB 21 in March 2025 to, among other things, amend § 144 of the DGCL and create new “safe harbor” approval procedures for contracts and transactions between corporations and their controlling stockholders, interested directors, and/or interested officers. Critically, § 3 of SB 21 provides for retroactive application of the amended statute to “all acts and transactions, whether occurring before, on, or after the enactment” of the law, except for court proceedings pending on or before February 17, 2025.

In [Rutledge v. Clearway Energy Group LLC](#), plaintiffs alleged that SB 21 violated the Delaware Constitution. The Court of Chancery certified two questions to the Delaware Supreme Court related to the constitutionality of SB 21:

1. Whether § 1 of SB 21 eliminating the Court of Chancery’s ability to award “equitable relief” or “damages” where the safe harbor provisions are satisfied violates the Delaware Constitution by purporting to divest the Court of Chancery of its equitable jurisdiction
2. Whether § 3 of SB 21, applying the safe harbor provisions to plenary breach of fiduciary claims arising from acts or transactions that occurred before the date that SB 21 was enacted, violates the Delaware Constitution by purporting to eliminate causes of action that had already accrued or vested

The Delaware Supreme Court has [upheld both SB 21’s safe harbor and retroactivity provisions](#), rejecting constitutional challenges on both grounds and preserving protections for directors, officers, and controlling

stockholders. This decision, alongside the Delaware Supreme Court’s recent rulings in *In re Tesla* and *Moelis*, reinforces that Delaware’s courts are validating steps taken by the Delaware legislature to protect the state’s pro-business reputation amid “DExit” concerns.

- **Five companies Sued over Excluding Shareholder Proposal from 2026 Proxy Materials:** So far, five lawsuits have been filed by shareholder proponents challenging company decisions to exclude shareholder proposals from their 2026 proxy materials based on the ordinary business exception:
  - **AT&T:** A group of New York City pension funds challenged the company’s exclusion of an EEO-1 workforce diversity disclosure proposal based on the ordinary business exception. The case has been settled, with AT&T agreeing to include the proposal in its proxy statement.
  - **Axon Enterprise:** Nathan Cummings Foundation challenged the company’s exclusion of a political spending disclosure proposal based on the ordinary business exception. The case has been settled, with Axon Enterprise agreeing to disclose its policies and governance framework for political contributions and electoral spending made with corporate funds or assets, amounts, and recipients (essentially implemented the underlying proposal).
  - **PepsiCo:** PETA challenged the company’s exclusion of a proposal seeking a report on the treatment of animals in the company’s supply chains based on procedural deficiencies. Case has been settled, with PepsiCo agreeing to include the proposal in its proxy statement.
  - **BJ’s Wholesale Club Holdings:** New York’s comptroller challenged the company’s exclusion of a deforestation proposal based on the ordinary business exception.
  - **Chubb Limited:** As You Sow challenged the company’s exclusion of a climate-related proposal based on the ordinary business and micromanagement exceptions.

Each of these companies filed exclusion notices with the SEC and included an unqualified representation that they had a reasonable basis for exclusion.

In the absence of substantive SEC responses this year, more proponents may start turning to the court system to force companies to include their proposals. To minimize this risk, companies should consult no-action precedents and clearly explain their basis for excluding a shareholder proposal in their 14a-8(j) notice. Companies may also want to consider the full spectrum of risks and engaging with proponents before excluding a shareholder proposal.

- **Companies Include More Shareholder Proposals and Reportedly Engage More with Shareholder Proponents:** [According to ISS-Corporate](#), companies are putting more than 71% of shareholder proposals submitted to a vote at annual meetings this year (excluding proposals where the proxy statement has not been filed yet), up from 59% for the 2025 proxy season overall. Further, [Bloomberg Law reports](#) that several investor groups say they have reached more agreements with companies on policy initiatives. For example, “[s]hareholder proponent James McRitchie said he has withdrawn roughly half of his proposals so far after reaching agreements with companies. ... He withdrew about 40% last year and about 20% in previous years.”
- **Director Commitment Trends:** Glass Lewis recently published a report providing an [overview of board trends based on the 2025 proxy season](#) and its 2025 policy survey. According to Glass Lewis, “the number of directors serving on

three or four boards continues to decline, while the number of directors serving on only one or two boards generally remains consistent.” This trend aligns with continued shareholder concern regarding the notable increase and scope of directors’ responsibilities and oversight in recent years.

- **California Air Resources Board (CARB) Approves Initial Climate Disclosure Regulations:** On February 26, 2026, CARB voted to approve the adoption of initial regulations implementing SB 253 and SB 261, substantially as proposed in December 2025. In particular, the regulations provide for a first-year reporting deadline for SB 253 of **August 10, 2026**. CARB shared its latest thinking on the implementation of SB 253, California’s corporate greenhouse gas reporting law, during a public workshop on March 23, 2026. With the first-year Scope 1 and 2 reporting deadline now officially set for August 10, 2026, and Scope 3 obligations beginning in 2027, the workshop offered companies [the most detailed look yet at what CARB is proposing](#) for the next phase of SB 253 rulemaking.

The California climate laws remain subject to ongoing litigation. SB 261 (climate-related financial risk disclosure) specifically has been enjoined by the Ninth Circuit Court of Appeals, but the injunction does not extend to SB 253 (GHG emission Scopes 1, 2, and 3 disclosure).

## Notable Resources

- [Capital Markets 2025 Year in Review and Insights for 2026](#)
- [Open for Business: Delaware Supreme Court Upholds Constitutionality of SB 21](#)
- [Partner Noah Solowiejczyk Discusses Insider Trading in Prediction Markets with American Banker](#)
- [Lessons for Medical Technology Companies After Cyber Incident at Medical Device Manufacturer](#)

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.