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Fenwick Securities Law Update

– July 27, 2026 –

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

- SEC releases its Spring 2026 Reg Flex Agenda; its proposed Regulation E-delivery; new corporation finance interpretations on beneficial ownership reporting, proxy solicitations and tender offers; and a new exemptive order expanding the availability of five-business-day tender and exchange offers for non-convertible debt securities.

- SEC Chair Paul Atkins previews a possible "materiality overlay" for Regulation S-K and reflects on the shareholder proposal process.

- Key 2026 proxy season trends regarding reincorporation / "DExit," no-action letters, shareholder proposals, and more.

Rules and Regulations

- **SEC Releases Spring 2026 Reg Flex Agenda:** Please see a high-level summary of relevant proposed rules below:

Rule Topic	**Description**	**Anticipated Timing**
Rationalization of Disclosure Practices	Proposed amendments to rationalize disclosure practices to facilitate material disclosure by companies and shareholders' access to that information.	October 2026
Shareholder Proposal Modernization	Proposed amendments to modernize the requirements of Exchange Act Rule 14a-8 to reduce compliance burdens for registrants and account for developments since the rule was last amended.	October 2026
Executive Compensation Disclosure Reform	Proposed amendments to Item 402 of Regulation S-K to rationalize executive compensation disclosure requirements.	October 2026
Amendments to Certain Proxy Rules	Proposed amendments to modernize certain rules regarding the proxy solicitation process, including certain filing and procedural requirements relating to proxy solicitations and shareholder meetings, to reduce costs and compliance burdens.	October 2026

Enhancement of Emerging Growth Company (EGC) Accommodations and Simplification of Filer Status	Proposed amendments to expand accommodations that are available for EGCs and to rationalize filer statuses to simplify the categorization of registrants and reduce their compliance burdens.	Additional dates not specified
Registered Offerings Reform	Proposed amendments to modernize the shelf registration process to reduce compliance burdens and further facilitate capital formation.	Additional dates not specified
Semiannual Reporting	Proposed amendments to allow Exchange Act reporting companies to report on a semiannual basis.	Additional dates not specified
Foreign Private Issuer Eligibility Enhancements	Proposal to enhance the regulatory framework governing foreign private issuers.	October 2026
Rule 144 Safe Harbor	Proposed amendments to Rule 144 to increase instances in which the safe harbor would be available.	October 2026
Crypto Assets	Proposed 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.	July 2026
Electronic Delivery of Information Under the Federal Securities Laws	Proposed rules that would address the use of electronic delivery for information required to be delivered under the Federal securities laws and rules thereunder, in order to modernize the Commission's approach to the use of electronic media and reduce costs associated with paper delivery.	October 2026
Updating the Exempt Offering Pathways	Proposed amendments to facilitate capital formation and simplify the pathways for raising capital for, and investor access to, private businesses, including potential amendments to the definition of accredited investor.	October 2026

Keep in mind that these dates are aspirational and reflect general timeframes rather than firm deadlines. While the SEC's agenda provides helpful insight into the agency's rulemaking priorities, the agenda is ambitious and includes 36 proposed rules overall so there may be delays.

- **SEC Proposes New Regulation E-Delivery:** On July 16, the SEC proposed Regulation E-Delivery, a new rule that would allow issuers, broker-dealers, investment advisers, and other market intermediaries to use electronic delivery as the default delivery method to satisfy information delivery requirements under the federal securities laws, provided that certain conditions are met. These entities would not be required to obtain affirmative consent from investors and

other recipients, but investors still would be able to opt out of default e-delivery and receive paper copies of information upon request.

For issuers, the practical significance is the change in default: paper delivery would become opt-in rather than the default standard, which could meaningfully reduce the printing and mailing burden tied to the delivery of prospectuses, shareholder reports, and proxy materials.

- **SEC Releases New CFIs on Beneficial Ownership Reporting, Proxy Solicitations, and Tender Offers:** The SEC released a new set of Corporation Finance Interpretations (CFIs) addressing beneficial ownership reporting under § 13(d) and 13(g) of the Securities Exchange Act of 1934, as amended, proxy solicitations, and tender offers. Notably, the new CFIs confirm that entering into a standard cash-settled total return equity swap (TRS) does not, by itself, result in beneficial ownership of the reference securities or evidence a plan or scheme to evade § 13(d)/13(g) reporting. Please see a concise summary of the updates below:

Exchange Act § 13(d) and 13(g) and Regulation 13D-G – Beneficial Ownership Reporting

Section 105. Rule 13d-3 – Determination of Beneficial Ownership

- **New Question 105.08** – A person who simply enters into a standard cash-settled TRS that only references a class of equity securities, and that confers no voting or investment power or right to acquire the reference securities, does not acquire beneficial ownership of those securities (including any securities the counterparty holds to hedge its risk). Entry into such a TRS, absent an arrangement conferring such power or rights outside the terms of the TRS, is not by itself evidence of a plan or scheme to evade reporting under Rule 13d-3(b).
- **New Question 105.09** – A TRS purchaser may be "deemed" a beneficial owner under Rule 13d-3(b) only where the TRS is used in connection with an arrangement having the purpose or effect of preventing the vesting of beneficial ownership as part of a plan or scheme to evade reporting; for example, using the TRS to direct how the counterparty votes its hedge shares or to pre-arrange the purchaser's acquisition of those shares.
- **New Question 105.10** – The mental state contemplated by "plan or scheme to evade" is generally the intent to enter into an arrangement that creates a false appearance or illusion contrary to the actual state of affairs. For a TRS, the inquiry focuses on whether the person knew or was reckless in not knowing that use of the TRS would create a false appearance that its interest is economic alone.

Section 110. Schedule 13D

- **New Question 110.09** – Where an entity (e.g., a limited partnership) is formed to raise funds to acquire a specific issuer's securities and engage in an activism campaign, and investors are informed in advance of the specific purpose and the targeted issuer, the identities of the entity's investors must be disclosed in the Schedule 13D under Item 3.
- **New Question 110.10** – Instruction C to Schedule 13D does not limit the Items 2–6 information required as to the reporting person itself. It identifies the persons and entities (e.g., general partners and controlling persons) – in addition to the reporting person; for whom Items 2–6 information must also be provided when the reporting person is not a natural person.

Proxy Rules and Schedules 14A/14C

Section 155. Schedule 14A

- New Question 155.02 – Where an entity (e.g., a limited partnership) is formed to raise funds to acquire a registrant's securities and engage in a proxy solicitation to change the board's composition, and investors are informed in advance of the purpose and the targeted registrant, each investor that invested more than $500 falls within the definition of "participant" under Instruction 3(a)(iv) to Item 4 of Schedule 14A.

Tender Offer Rules and Schedules

Section 104. Rule 13e-4

- **New Question 104.03** – Although Rule 13e-4(e)(1) has no express "other methods" provision like the Instruction to Rule 14d-4(a), the staff will not object if an issuer disseminates a cash and/or exempt-securities tender offer by a widely disseminated press release (issued as soon as practicable on the commencement date, containing the Rule 13e-4(d)(3) information and an active hyperlink to the offer materials) provided the offer is not subject to Rule 13e-3 and the issuer promptly furnishes materials to any security holder who requests them.

Section 131. Regulation 14D

- **New Question 131.04** – The three dissemination methods in Rule 14d-4(a) are not exclusive. A bidder may satisfy Rule 14d-6 for a cash and/or exempt-securities tender offer by issuing a widely disseminated press release (as soon as practicable on the commencement date, containing the Rule 14d-6(d)(2) information and an active hyperlink to the offer materials) provided the offer is not subject to Rule 13e-3 and the bidder mails or otherwise furnishes materials with reasonable promptness to any security holder who requests them.

- **SEC Expands Availability of 5-Business-Day Tender/Exchange Offers for Non-Convertible Debt:** On June 30, the SEC's Division of Corporation Finance issued an exemptive order that expands the availability of five-business-day tender and exchange offers for non-convertible debt securities, subject to certain conditions. The division stated that the order is intended to address market inefficiencies, better reflect technological advancements, reduce exposure to market and interest-rate fluctuations, and facilitate the availability of tender offers as debt management transactions.

- **SEC Seeks Public Comment on Novel ETFs:** On June 30, the SEC issued a request for public comment on Exchange Traded Funds (ETFs) seeking to invest in innovative asset classes or engage in novel investment strategies.

Other SEC Developments and Announcements

- **Atkins Previews Possible "Materiality Overlay" for Regulation S-K and Suggests SEC Will Continue Rule 14a-8 No-Action Pause in Upcoming Proxy Season:** During his remarks at the 2026 Society for Corporate Governance Conference, Chair Atkins suggested that the SEC is considering an overarching "materiality overlay" applicable throughout Regulation S-K that would permit a company to omit information called for by a line item where that information is not material, with perhaps some exceptions such as executive compensation. He cautioned, however, that this approach only works if companies actually exercise the discretion afforded to them and remove immaterial disclosures.

  Atkins also reported few disruptions from the Rule 14a-8 no-action letter pause and signaled a broader reassessment of the rule. In November 2025, the Division of Corporation Finance announced that it would stop responding to no-action requests under Rule 14a-8 (other than requests under Rule 14a-8(i)(1)) for the 2025-2026 proxy season. Atkins noted that the predicted disruptions (wholesale exclusion of proposals on the one hand, or over-inclusion driven by litigation and proxy-advisor risk on the other) did not materialize, with year-over-year trends and omission rates largely consistent with the prior season. He noted that only six exclusion-related lawsuits were filed (less than 4% of exclusions, with one resolved in the company's favor and three settled), that adverse proxy-advisor recommendations were rare, and that direct company-shareholder engagement increased. Likening the change to "removing the training wheels from the shareholder proposal bicycle," Atkins indicated the staff's role as intermediary is unnecessary and signaled that the SEC is holistically re-evaluating Rule 14a-8 itself (including the rule's relationship to state corporate law and the limits of the SEC's authority) while cautioning that the proposal process should not be "weaponized" by those representing fringe interests. Based on his comments, the SEC is expected to continue its Rule 14a-8 no-action pause in the upcoming proxy season.

- **SEC Forms New Retail Fraud Working Group:** The SEC recently announced the creation of a new Retail Fraud Working Group designed to strengthen the Division of Enforcement's efforts to identify and combat fraud targeting everyday investors.

Other Matters of Interest

- ***Ayers v. Foley*: First Decision Interpreting New DGCL § 144 Independence/Disinterestedness Presumption:** In June 2026, the Delaware Court of Chancery issued the first decision interpreting the new DGCL § 144 director independence/disinterestedness presumption, which was enacted in 2025 via Delaware Senate Bill 21.

  The case involved two challenged compensation decisions: a one-time equity grant to the company's founder and non-executive chairman (Foley), and annual non-employee director compensation. The plaintiff alleged breach of fiduciary duty and unjust enrichment. Although the plaintiff sought to aggregate the two transactions, the court elected to treat the two transactions independently for both demand futility and DGCL § 144 purposes given their distinct processes, committees, timing, and motivations.

  The court held that the heightened presumption of director independence and disinterestedness under § 144(d)(2) applies broadly, including to the demand-futility analysis under Delaware Court of Chancery Rule 23.1.

  To overcome the heightened presumption, a plaintiff must plead "substantial and particularized facts"; specific, non-conclusory facts of sufficient qualitative (not quantitative) significance to support a reasonable inference of a material interest or relationship that would impair the director's objective judgment. The facts must be significant enough to evidence a disabling conflict.

  In the underlying case, allegations focusing on a decade of board fees from chairman-affiliated entities, overlapping board service on Foley-affiliated companies, board fees whose materiality to each director was never pleaded, minority or non-voting co-investments in sports franchises, and other generalized business ties (all lacking allegations of personal materiality, control, or dependence) were held insufficient to rebut the heightened presumption of disinterestedness and independence from the founder/chair.

  The founder/chair equity grant claims were dismissed for failure to plead demand futility: at least a majority of the directors were independent under the new § 144(d)(2) standard, the § 144(a)(1) safe harbor applied (good-faith, informed approval by a disinterested committee), and no bad faith was pled to overcome the charter's § 102(b)(7) exculpation. However, the claims relating to the non-employee director compensation survived, with the court noting that because self-compensating directors are inherently self-interested, entire-fairness review applies to such claims.

The decision in *Ayers v. Foley* rewards well-documented, disinterested approval processes. Companies should ensure that conflicted transactions are supported by robust procedural protections, though self-dealing arrangements (such as director self-compensation) will continue to face heightened scrutiny.

- ***Masimo Corp. v. Kiani*: Significant Decision Interpreting New DGCL § 122(18):** In April 2026, the Delaware Court of Chancery issued a significant decision interpreting the new DGCL § 122(18), which governs stockholder agreements.

  In the underlying case, founder and former CEO/chair Kiani sued Masimo in California for severance and a "Special Payment" under the terms of his employment agreement after resigning from the company for "Good Reason" following his removal from the board. The Special Payment (2.7 million RSUs (approximately 5% of Masimo's outstanding shares) plus $35 million) was triggered by Kiani losing his chair title or a board "Change in Control," and removing him for cause required a 75% supermajority board vote.
  Masimo countersued in Delaware to invalidate the employment agreement as a product of breaches of fiduciary duty (relying on a Delaware forum clause in its bylaws). Despite the "employment agreement" label, the court found the agreement's substance (governing board composition and allocating control rights long-term) made it a § 122(18) governance/stockholder agreement, citing Masimo's own "poison pill" characterization of the arrangement.

  The court held that § 122(18) abrogates the "Independent-Source Principle" for qualifying stockholder agreements and eliminates the requirement of explicit language to route fiduciary claims away from Delaware. The broad "arising out of or relating to" forum language included in the agreement was held to capture Masimo's fiduciary duty and waste claims; the case was dismissed in Delaware and sent to California.

  This decision indicates that § 122(18) will be construed broadly; substance over label controls, and a company's own characterizations can later be used against it. Companies should carefully consider how they describe agreements that touch on governance or control rights, as those characterizations may affect future litigation.

- **Reincorporation / "DExit" Trends:** Reincorporation is now a recurring, closely watched management vote since Tesla's 2024 move to Texas. According to our internal tracking, from July 1, 2025, to July 1, 2026, 38 Delaware companies have proposed reincorporating to either Nevada (22 companies) or Texas (16 companies) compared to 26 Delaware companies in the same period last year (23 companies to Nevada and three companies to Texas (with one proposal subsequently withdrawn)).[1] Notably, the earlier filings in fall 2025 leaned more heavily toward Nevada, while the later filings in spring/summer 2026 include a growing share of Texas proposals. Texas-bound companies tend to be larger, more established enterprises with substantial revenues and employee bases (e.g., Tesla, Exxon, Coinbase, Dell) while many, but not all (e.g., Datadog, Samsara, Liberty Media) of the Nevada-bound companies are smaller or micro-cap companies. The presence of a controlling stockholder does not appear to dictate a clear preference for one state over the other.

- **Key Trends from the 2026 Proxy Season:** Surface-level stability masks a substantially reshaped proposal universe: Overall support is flat year-over-year, but the underlying mix has changed, according to a *Proxy Analytics* analysis.

  - **Smaller, More Governance-Weighted Slate:** Total shareholder proposals fell approximately 16% from 865 in 2025 to 723 (and approximately 27% from 2024). The environmental and social (E&S) submissions have decreased 33% from last year, while governance proposals rose approximately 24%, from 277 last year to 343 this year; now the largest category of shareholder proposals for the first time since at least the 2021 proxy season.

[1] These numbers exclude reincorporations effected in connection with M&A transactions and SPACs.

- E&S Support Compressing: Support for environmental and social proposals slipped from 12.7% in 2025 to 10.4% in 2026, and no E&S proposal has reached majority support this year, versus five at this point last year. Governance proposals now drive most favorable outcomes.

- **Routine Votes Remain Stable:** Average director support (95.5%) and say-on-pay support (92.0%) in the Russell 3000 edged higher with fewer failures as large investors step back from E&S- and diversity-related voting triggers.

- **Key Trends from the 2026 No-Action Season:** With the Division of Corporation Finance declining to respond to Rule 14a-8 no-action requests for the 2025-2026 proxy season, a recent review of the season's data by Proxy Analytics shows that companies navigated exclusions largely on their own, and generally without the disruptions many had feared:

    - **Activity Declined:** Russell 3000 companies submitted 216 no-action letters, down roughly 37% from the prior season and the lightest volume since 2023.

    - **Fewer Challenges, but a Higher Exclusion Rate:** Companies challenged 30% of submitted shareholder proposals down from 39% the prior year. However, the exclusion rate rose modestly from 22% the prior year to roughly 24% this year, with 174 proposals excluded: 154 on a reasonable-basis "no-objection" rationale and 20 under staff grants issued before the November 2025 policy change.

    - **Substantive Grounds Predominated:** Approximately 73% of reasonable-basis exclusions relied on substantive rather than procedural grounds. The "ordinary business" exclusion (Rule 14a-8(i)(7)) remained the most-cited basis, though its share fell to about 32% from 51%, while "substantial implementation" (Rule 14a-8(i)(10)) roughly doubled to about 23% from 12% last year.

    - **Companies Tested Broader Theories:** Nearly three in 10 exclusions relied on grounds the staff had rarely or never granted the prior season (most notably false or misleading statements (Rule 14a-8(i)(3)) and violation of law (Rule 14a-8(i)(2))) while no company invoked the improper-under-state-law exclusion (Rule 14a-8(i)(1)). Independent-chair proposals drew the most exclusions.
    - **Litigation Was Limited and Mixed:** Six proponents sued over exclusions, all challenging "ordinary business" determinations; three settled (with companies including the AT&T and PepsiCo proposals and Axon committing to added disclosure), and courts split on the remainder; permitting exclusion in the Chubb and UnitedHealth matters but ordering inclusion in the BJ's Wholesale matter.

    - **The Takeaway:** The season proceeded more smoothly than many anticipated, but the framework remains unsettled: Atkins has signaled further change, and "Shareholder Proposal Modernization" appears on the SEC's Spring 2026 Reg Flex Agenda.

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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.