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Fenwick Securities Law Update

– June 12, 2025 –

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

- Form 10-Q disclosures
- Stock exchange rule changes and SEC interpretive guidance
- Other SEC announcements
- Increased FINRA fee caps
- State corporate law developments
- Certain other matters of interest

Important Reminders

- Risk Factor and MD&A Considerations for Upcoming Form 10-Q
  - **Trade Issues and Tariffs:** Trade tensions between United States and other countries declined modestly in May, but much uncertainty remains as trade talks continue. The U.S. and the United Kingdom reached accord on a number of trade topics and agreed to continue negotiations on several other trade matters. The 10% reciprocal tariff on U.K. goods imported to the U.S. remains in place. On May 12, the Trump administration reduced the previously announced 145% tariffs on Chinese imports to 30% for a 90-day period as trade talks continue. The administration agreed to delay commencing 50% tariffs on imports from the European Union until July 9. Learn more about the potential impacts of increased tariffs and trade uncertainty.
  - **U.S. Budget and Tax Policy:** Last month, the U.S. House of Representatives approved a budget and tax bill largely aligned with the Trump administration's goals. This legislation has been delivered to the U.S. Senate for approval or proposed amendment. The House bill maintains the 21% corporate tax rate established in the major tax overhaul in 2017 and also contains research-and-development–related tax changes relevant to tech and life sciences companies.
  - **Foreign Currency Exchange Risk:** As of May 27, 2025, the U.S. dollar was down ~8.5% in 2025. In light of this significant decrease, companies should review their disclosures about foreign currency exchange risk. For example, some companies include a statement that a hypothetical 10% increase

or decrease in the relative value of the U.S. dollar to other currencies would not have a material effect on their operating results. With the value of the U.S. dollar decreasing by almost 10%, companies should evaluate the continued accuracy of this statement.

Rules and Regulations

- NYSE Listed Company Manual: The New York Stock Exchange (NYSE) adopted two amendments to the NYSE Listed Company Manual—one to reduce fees for the initial period of a company's listing on the exchange and another to formally expand the universe of holders that will be considered in evaluating the listing application of a company located outside of Canada, the US and Mexico.
    - Relaxation of Additional Listing Fees for Newly Listed Issuers: Amended Rule 902.03 of the Manual provides that effective April 1, 2025, an issuer that lists a primary class of equity securities on the NYSE on or after April 1, 2025, will, for the first five years that the issuer has been listed on the Exchange, be charged only the initial listing fee and the annual listing fee for such class of securities. Rule 902.03 refers to the five-year period as the "Limited Fee Exemption Period." For the avoidance of doubt, Rule 902.03 specifies that during the Limited Fee Exemption Period, the issuer will not be charged any other listing fees associated with:
        - The listing of additional shares of the primary class of equity securities (including with respect to shares issued in connection with a stock split or stock dividend)
        - The listing of an additional class of common stock, preferred stock, warrants, or rights
        - The listing of securities convertible into, exchangeable, or exercisable for additional securities of the issuer's primary class of equity securities
        - Applications in connection with a Technical Original Listing or reverse stock split
        - Applications for changes that involve modification to NYSE records or in relation to a poison pill
    - An issuer that listed a primary class of equity securities on the NYSE before April 1, 2025, but on or after April 1, 2021, will be entitled to the remaining balance of the Limited Fee Exemption Period running from April 1, 2025, until the five-year anniversary of the date on which such company listed its primary class of equity securities on the exchange.
- Stockholder Distribution Requirements: On May 2, 2025, the SEC approved an amendment to Rule 102.01B of the Manual. Rule 102.01A contains listing standards for companies seeking to list on NYSE, and these standards include specified minimum numbers of stockholders (referred to as stockholder distribution requirements). Amended Rule 102.B now provides that when evaluating an issuer located outside of North America that is applying to list equity securities in connection with its initial public offering, and that is not listed on any other regulated stock exchange, NYSE will include all stockholders on a global basis for the purpose of applying the stockholder distribution requirements. Prior to this amendment, NYSE had discretion to include stockholders located outside of North America. In seeking to make this amendment,

the exchange noted that the rules of the Nasdaq Stock Market LLC do not contain any geographic limitation on its total stockholder initial listing criteria.

- **The SEC's Division of Corporation Finance Statement Regarding Protocol Staking Activities:** The SEC's Division of Corporation Finance issued a statement on Certain Protocol Staking Activities, essentially articulating the Division's view that "Protocol Staking Activities," which are defined in the statement and which Commissioner Caroline Crenshaw described as "locking up crypto tokens in a blockchain protocol to earn awards," do not involve the offer and sale of securities within the meaning of the Securities Act of 1933 and or the Securities Exchange Act of 1934, and accordingly no registration is required for persons involved in this activity.

Other SEC Developments and Announcements

- **Petition for Rulemaking with Respect to Cybersecurity Incident Disclosure:** A group of financial services industry trade associations submitted a joint petition for rulemaking requesting that the SEC amend the Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure rule adopted in 2023. The petition explains that, while the group continues "to have significant concerns regarding the rule as a whole—including the requirements of Regulation S-K Item 106 relating to cybersecurity risk management, strategy, and governance disclosures—we believe the most urgent and problematic aspects are the cybersecurity incident disclosure mandates under Form 8-K Item 1.05 for domestic issuers and under Form 6-K for foreign private issuers, both of which require rapid—often premature—disclosure of material cybersecurity incidents." The petition requests that the SEC rescind Form 8-K Item 1.05 because:

    - Publicly disclosing cybersecurity incidents directly conflicts with confidential reporting requirements intended to protect critical infrastructure and warn potential victims, thereby compromising coordinated regulatory efforts to enhance national cybersecurity
    - The complex and narrow disclosure delay mechanism interferes with incident response and law enforcement investigations
    - It has created market confusion and uncertainty as companies struggle to distinguish between mandatory and voluntary disclosures
    - The incident disclosure requirement has been weaponized as an extortion method by ransomware criminals to further malicious objectives and may subject disclosing companies to additional cybersecurity threats
    - Insurance and liability implications of premature disclosures can exacerbate financial and operational harm to registrants
    - The public disclosure requirement risks chilling candid internal communications and routine information sharing

- **SEC Publishes Data on Regulation A and Crowdfunding Offerings:** The SEC's Division of Economic and Risk Analysis published reports Analysis of the Regulation A Market: A Decade of Regulation A; and Analysis of Crowdfunding Under the JOBS Act that provide information on capital formation. The two papers analyze how capital is being raised in the U.S., particularly by smaller issuers. During the periods reviewed (2015–2024 for Regulation A and 2016–2024 for Regulation Crowdfunding) more than $10 billion was raised.

- **SEC Considers Nasdaq Proposed Rule Change to Allow Trading Bitcoin Options:** Nasdaq filed an amendment to a previously proposed rule to allow bitcoin options to be traded on the exchange. Nasdaq proposes to amend its rules to provide for the listing and trading of cash-settled, European-style options on the Nasdaq Bitcoin Index, which reflects the price of spot bitcoin. A basis for the exchange to be able to trade these options is they be regarded as foreign currency options, which the exchange does trade. The exchange asserts that this should be the case since bitcoin is legal currency in El Salvador. The SEC is currently seeking comments (Release No. 34-103118) to help it determine whether it agrees with this characterization or whether the proposed index options should instead be treated as commodity options and not securities. It notes that the Commodity Futures Trading Commission has exclusive jurisdiction with respect to certain derivatives, such as commodity options, traded or executed on certain markets, boards of trade, or exchanges.

- **SEC Seeks Input on Foreign Private Issuer Definition:** The SEC issued a Concept Release seeking commentary on the definition of "foreign private issuer." The release notes that many filing requirements for foreign private issuers (FPIs) are less stringent than those for domestic issuers. This is due in part to the conditions prevailing at the time that the current regulatory framework was adopted. At that time, the SEC sought to recognize that FPIs were subject to meaningful regulation in their home countries and that, accordingly, less-stringent SEC reporting was appropriate. In recent years, an increasing number of FPIs are headquartered in China and incorporated in the Cayman Islands and the British Virgin Islands, whereas 20 years ago most were incorporated and located in Canada and the U.K. The release further notes that the reporting regimes of the countries in which FPIs are increasingly domiciled are less stringent than had been the case for most FPIs when the current rules were adopted. The SEC is seeking comment as to whether revising the definition of "foreign private issuer" is appropriate given the reporting advantages accorded to such issuers and the likelihood that investors have access to less information about such issuers given the lack of meaningful reporting requirements in their home jurisdictions.

- **SEC Provides Tips for Transitioning to EDGARNext:** The SEC issued a brief statement referring to advice it has prepared to assist filers with their passphrases and CIK confirmation code (CCC).

- **SEC Roundtables:** The SEC announced roundtables on a variety of topics:

    - On June 5, the SEC's Investment Advisory Committee held a public meeting focusing on non-GAAP financial disclosures and pass-through voting.

    - On June 9, the SEC's Crypto Task Force hosted a roundtable, "DeFi and the American Spirit."

    - On June 26, the SEC will host a roundtable on executive compensation disclosure requirements.

Increase in FINRA Fee Caps

Section 7 of Schedule A to the FINRA By-Laws sets forth the fees associated with filing documents pursuant to the Corporate Financing Rule. It currently provides for a flat fee of $500 plus .015% of the proposed maximum aggregate offering price or other applicable value of all securities registered on an SEC registration statement or included on any other type of offering document (where not filed with the SEC), with a cap of $225,500; or a fee of $225,500 for an offering of securities filed with the SEC and offered pursuant to Securities Act Rule 415 by a Well-Known Seasoned Issuer (WKSI). Effective July 1, 2025, the cap for non-WKSIs will increase from $225,000 to $1,125,000. The fee cap for WKSI filings will increase gradually from the current cap of $225,000 to $560,000 in 2029. In addition, FINRA is instituting a review fee for certain filings made in connection with a private placement transaction. Filings made for a private placement offering exceeding $25 million will incur a fee of $300 plus .0008% of the maximum offering proceeds, with a cap of $40,300. FINRA advises that reimbursement of these fees will not be considered underwriting compensation.

State Law Developments

- **Texas Developments:** On May 14, 2025, Texas adopted significant amendments to its corporate statutes—the Texas Business Organizations Code (TBOC)—which among other things:
    - Codify the business judgment rule for directors and officers (gross negligence not enough, must be knowledge of guilt, similar to Nevada corporate law)
    - Allow corporations to impose beneficial ownership requirements for shareholders bringing derivative suits (as specified in charter or bylaws, up to 3%)
    - Allow corporations to designate Texas as the exclusive forum and venue for internal disputes
    - Provide for the ability to waive jury trials in the certificate of formation or bylaws
    - Impose limitations on books and records demands (to exclude emails, texts, other electronic communications, and social media accounts)
    - Allow corporations to petition court for independence/disinterestedness director determination
    - Eliminate attorneys' fees in "disclosure-only settlements," which solely provide additional disclosures to shareholders, in derivative suits

  Additional amendments will become effective (or are expected to become effective pending the governor's signature) on September 1, 2025, including:

    - **SB 1057 (signed May 19, 2025):** Any "nationally listed corporation" that either (1) has its principal office in Texas or (2) is admitted to listing on a stock exchange that has its principal office in Texas and has received the necessary approval by the securities commissioner, may incorporate a provision in its governing documents that would impose stock ownership requirements on shareholders seeking to submit proposals to the corporation. Specifically, in order to submit a proposal to the corporation (other than director nominations and procedural resolutions ancillary to the conduct of the meeting, which are not subject to this provision), a shareholder or group of shareholders must:

    - Hold an amount of voting shares of the corporation, determined as of the date of submission of the proposal, equal to at least (A) $1 million in market value or (B) 3% of the corporation’s voting shares

    - Hold the requisite shares: (A) for a continuous period of at least six months before the date of the meeting and (B) throughout the entire duration of the meeting

    - Solicit the holders of shares representing at least 67% of the voting power of shares entitled to vote on the proposal

  - **SB 2337 (awaiting governor’s signature):** Provides for the right to seek injunctive relief against proxy advisors that provide voting recommendations, including director no votes, that take into account ESG guidelines, DEI, or any interest other than shareholder financial interest

  - **SB 2411 (signed May 27, 2025):**

    - Permits officers to be exculpated for the duty of care

    - Increases the ability for boards to effect stock splits without shareholder vote

    - Expands business court jurisdiction

- **Nevada Developments:** On May 30, 2025, Nevada adopted significant amendments to its corporate statutes—the Nevada Revised Statutes (NRS)—which among other things:

  - Clarify that stockholders do not owe fiduciary duties to the corporation or other stockholders, except that “controlling stockholders” (defined stockholders that have the voting power, by way of stock ownership or other rights under the articles of incorporation, to elect a majority of the corporation’s directors) have a fiduciary duty to refrain from exerting undue influence over a director or officer with the purpose and proximate effect of inducing a breach of fiduciary duty by said director or officer that (1) results in liability to the director/officer under the NRS and (2) involves a contract/transaction where the controlling stockholder (or any of its affiliates or associates) is a party or has a material and nonspeculative financial interest and the contract/transaction results in a material, nonspeculative, and non-ratable financial benefit to the controlling stockholder that results in a material and nonspeculative detriment to the other stockholders generally

  - Provide a safe harbor for transactions/acts involving controlling stockholders where the transaction/act is authorized or approved by committee of disinterested directors (or recommended to board for approval)

  - Provide for the ability to waive jury trials in the articles of incorporation

  - Permit publicly traded corporations (but not privately held corporations) to amend their articles of incorporation to increase or decrease the number of authorized shares of capital stock with stockholder approval under the voting standard (established either by the NRS or set forth in the

corporation's governing documents) for "routine" matters instead of a "majority of the outstanding voting power" standard

- Confirms that materials provided with a notice or communication are deemed to be part of the notice
- Allow boards to adopt agreements, instruments, or other documents in final form or such preliminary form as directors deem appropriate in their business judgment
- Permit the reference to external facts or events in voting agreements
- Provide for holding company reorganizations without stockholder approval

The amendments became effective upon Gov. Joe Lombardo's signature on May 30, 2025, but have yet to be codified.

- The Nevada Assembly also approved Assembly Joint Resolution 8 (ARJ8), which proposes an amendment to the Nevada Constitution to authorize the legislature, to the extent money is available, to provide by law for the establishment of a business court that would have exclusive original jurisdiction to hear disputes involving shareholder rights, mergers and acquisitions, fiduciary duties, receiverships involving business entities, other commercial or contractual disputes between business entities, and any other business disputes of a similar nature in which equitable or declaratory relief is sought. To become effective, AJR 8 will need to pass both houses of the Nevada Legislature during its 2027 session and be approved by way of a citizen referendum.

- **Delaware Developments:** On June 6, 2025, Vice Chancellor Lori Will of the Delaware Court of Chancery granted a motion to certify to the Delaware Supreme Court constitutionality questions about recently enacted Senate Bill 21. The court agreed on June 11, 2025, to accept the matters for consideration and will consider two questions:
  - Does § 1 of the bill, codified at 8 Del. C. § 144—eliminating the Court of Chancery's ability to award "equitable relief" or "damages" where the Safe Harbor Provisions are satisfied—violate the Delaware Constitution of 1897 by purporting to divest the Court of Chancery of its equitable jurisdiction?
  - Does § 3—applying the Safe Harbor Provisions to plenary breach of fiduciary claims arising from acts or transactions that occurred before the date that Senate Bill 21 was enacted—violate the Delaware Constitution of 1897 by purporting to eliminate causes of action that had already accrued or vested?

Other Matters of Interest

- **Department of Commerce Required Report Regarding Foreign Affiliates:** Every five years the U.S. Department of Commerce's Bureau of Economic Analysis (BEA) administers a survey to collect information from U.S. persons that hold, directly or indirectly, at least 10% of the voting interest in a foreign affiliate. The

survey collects financial and operating data on the U.S. parent and information on its foreign affiliates. The BE-10 responses were due by May 30, 2025—or will be due by June 30, 2025, for filers with 50 or more foreign affiliates. The BE-10 survey gathers information on each of the U.S. person's foreign affiliate's ownership, industry classification, total sales, employment figures, exports, imports, and certain financial information. The reporting period for the BE-10 is the company's 2024 fiscal year. The required BE-10 response includes one BE-10A regarding the U.S. company, plus one form BE-10B, BE-10C, or BE-10D for each foreign affiliate (based on the total assets, sale and net income of the affiliate). Additional information, including links to the BE-10 forms, are available on the BEA website.

- Preliminary Report on Proxy Season Trends: Proxy Analytics LLC issued a report on key trends in proposal submissions, voting outcomes, notable resolutions, director elections, and say-on-pay results through May 15, 2025.

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.