

**“The SEC’s Registered Offering Reform Proposal: What You
Need to Know Now”**

Thursday, July 23, 2026

Course Materials

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2 to 3 p.m. Eastern [archive and transcript to follow]

Join us for a timely and practical webcast on the SEC’s sweeping Registered Offering Reform proposal and what it means for public companies, capital markets participants, and deal counsel. Our panel of seasoned practitioners and senior SEC staff will focus on real-world implications, areas of uncertainty, and key issues to watch as the proposal moves toward adoption, offering actionable insights you can use to prepare your company and clients now.

Join our experts:

- **Valian Afshar**, Chief, Office of Rulemaking, SEC’s Division of Corporation Finance
- **Sonia Gupta Barros**, Partner, Sidley Austin LLP
- **Edwin O’Connor**, Partner, Goodwin Procter LLP
- **Ted Yu**, Associate Director (Specialized Policy and Disclosure), SEC’s Division of Corporation Finance
- **Dave Lynn**, Partner, Goodwin Procter LLP, and Senior Editor, TheCorporateCounsel.net

Topics:

1. Key Changes to Form S-3 Eligibility
2. Expanded Communications Flexibility
3. Modernization of Registration Processes and Shelf Offerings
4. Impacts on Capital-Raising Strategy
5. Transition Timing, Open Questions, and Practical Implementation Considerations

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“The SEC’s Registered Offering Reform Proposal: What You Need to Know Now”

Course Outline

1. Overview

- On May 19, 2026, in Release No. 33-11418, “Registered Offering Reform,” the Securities and Exchange Commission proposed a sweeping overhaul of the rules governing registered public offerings of securities.
 - The 511-page proposing release lays out potential rule changes that would ease companies’ ability to access the public markets by, among other things, significantly expanding the availability of Form S-3 for primary offerings, extending the liberal rules regarding registration and communications currently enjoyed by well-known seasoned issuers (“WKSIs”) to a broader set of issuers and expanding the ability of Form S-1 registrants to incorporate information by reference into their registration statements.
 - The comment period for the proposal ends on July 27, 2026.

2. Key Changes to Form S-3 Eligibility

- The Commission proposes expanding Form S-3 eligibility to many more issuers than current rules allow primarily by eliminating two existing limitations on the use of Form S-3:
 - General Instruction I.A.3 of Form S-3’s requirement that, to use the form, a company must have filed all required Exchange Act reports for the 12 calendar months immediately preceding the filing of the registration statement; and
 - General Instruction I.B.1 of Form S-3’s requirement that companies must have an aggregate public float of at least \$75 million to use the form to engage in a primary offering of an unlimited amount of securities.

- The Commission estimates that elimination of these two requirements will expand the number of issuers eligible to offer an unlimited amount of securities on Form S-3 by over 60%.
- Proposed Elimination of the One-Year Seasoning Requirement: The Commission does not believe that an investor’s ability to obtain issuer-specific information in Exchange Act reports depends on the length of an issuer’s reporting history, but on whether the issuer is current and timely with its Exchange Act filings.
- Under the terms of the proposed amendment, an issuer would immediately become Form S-3 eligible once it has registered a class of securities under Section 12(b) or 12(g), or became subject to Section 15(d), of the Exchange Act.
 - The current language of Item 12(a)(1) of Form S-3 requiring an issuer to incorporate by reference its latest annual report on Form 10-K that contains audited financial statements for its latest fiscal year and any subsequent Exchange Act reports would be amended so that an issuer that had not been required to file a Form 10-K since becoming subject to Exchange Act reporting requirements would instead incorporate by reference a Securities Act or Exchange Act filing that contains Form 10 information, including financial statements required by Regulation S-X.
 - Under proposed revisions to Item 11(a) of Form S-3, an issuer also would be required to describe material changes in its affairs which have occurred since the end of the most recent fiscal year covered by the audited financial statements required to be included in the registration statement pursuant to Item 12(a)(1) that have not been described in a filing incorporated by reference into the registration statement.

- The proposing release also reminds issuers that under Securities Act Rule 408, they would be required to provide “such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.”
 - The proposing release argues that although the amendments would allow issuers with shorter reporting histories to use Form S-3 more than is the case under the current rules, they would not pose heightened investor protection risks.
 - The release points to the incentives provided by the liability provisions of the Securities Act to offering participants to ensure the accuracy and completeness of the registration statement, and the fact that the Staff would have had the opportunity to review and comment on the audited financial statements included in an issuer’s initial Form S-1 or Form 10 registration statement.
- Proposed Elimination of All Transaction Requirements: Form S-3 currently limits the ability to register unlimited amounts of securities for issuance in a primary offering to issuers that have a public float of at least \$75 million. However, it permits issuers that do not meet that threshold to use Form S-3 for a limited number of other transactions, including certain rights offerings and “baby shelf” offerings involving less than one-third of the issuer’s public float.
 - The SEC’s proposal would eliminate these transaction requirements.
 - The Commission no longer believes it is necessary to rely on public float as a proxy for investors’ access to an issuer’s Exchange Act information, and that retaining

the current and timely Exchange Act reporting requirement and the proposed prohibition on certain types of issuers using Form S-3 provides sufficient protection against abuses.

- The proposing release addresses concerns raised in the past by the Commission about expanding eligibility to use Form S-3 to smaller public companies. These include:
 - The potential for price manipulation;
 - Financial reporting errors and abuse;
 - The different disclosure requirements;
 - Liability standards (due to the inapplicability of certain provisions of Section 404 of the Sarbanes-Oxley Act) applicable to smaller companies; and
 - The unique risks of shelf offerings involving smaller companies.
- The Commission concluded that these concerns were not sufficient to dissuade it from moving forward with the elimination of Form S-3's transaction requirements.
- Proposed Elimination of Payment Defaults Criteria: The Commission proposes to eliminate the eligibility requirement in General Instruction I.A.4, which currently provides that an issuer is ineligible to use Form S-3 for primary offerings if, since the end of the last fiscal year for which a Form 10-K has been filed, they failed to pay any dividend or sinking fund installment on preferred stock or had any material default in paying any installments on debt or long-term lease obligations.
 - The Commission views this requirement as the type of qualitative measure the Commission previously deemed inappropriate and that Form S-3 eligibility should focus on an

issuer's status as a current and timely Exchange Act reporting company.

- Proposed Elimination of Electronic Filings and iXBRL Data Files Requirements: The Commission proposes to eliminate the electronic filings and Interactive Data File requirements in General Instruction I.A.7(a), which conditions Form S-3 eligibility on an issuer having filed all required electronic filings and interactive data files.
 - The Commission believes these requirements are no longer necessary to induce compliance with XBRL tagging requirements and points to the fact that issuers have long been accustomed to making filings electronically, as well as the fact that paper filings are no longer accepted absent a hardship exemption.
- Retention of Timely and Current Reporting Requirement: The proposing release would retain the current requirement that an issuer must be subject to the Exchange Act's reporting requirements, current in its Exchange Act reporting obligations and have filed all required Exchange Act reports in a timely fashion during the preceding 12 calendar months or such shorter period as it was subject to the Exchange Act's reporting requirements.
- But the proposing release includes a provision that would permit an issuer to avoid being disqualified from using Form S-3 due to a delinquent filing if:
 - The filing was made within seven calendar days of the original due date; and
 - The issuer made only one untimely filing during the relevant lookback period.

- In situations where Rule 12b-25 applies, the seven calendar days would be calculated from the original due date and not from the end of the extended period prescribed under Rule 12b-25.
 - A delinquent filer could not extend the seven-day deadline through the strategic use of a filing under Rule 12b-25, but if an issuer made the required filing within the five- or 15-day period specified in Rule 12b-25, the filing would be regarded as having been made on the date it was due and the issuer would not be considered delinquent.

3. Treatment of Certain Issuers

- Prohibitions: Due to the expansion of issuers eligible to use Form S-3, the Commission proposes adding new General Instruction I.A.2 and I.A.3 to Form S-3 that would prohibit the use of Form S-3 by certain categories of issuers that may present greater potential for abuse:
 - *BSP Issuers*: “BSP issuers,” or issuers that, at any time during the past three years, were “blank check companies” within the meaning of Securities Act Rule 419(a), “shell companies” as defined in Securities Act Rule 405 (but excluding domestic SPACs and business combination shell companies), and “penny stock” issuers as defined in Exchange Act Rule 3a51-1;
 - *“Bad Boys”*: “Bad boys,” or issuers convicted within the last three years of any one of a laundry list of felonies and misdemeanors set forth in paragraphs (i) through (iv) of Section 15(b)(4)(B) of the Exchange Act, or issuers that have been, during that same three-year period, subject to a government order addressing violations of the antifraud provisions of the federal securities laws where the order is based on materially false or misleading statements or omissions in specified securities filings or offering materials.

- *Stop Orders and Cease-and-Desist Proceedings*: Issuers that have had a stop order issued with respect to a registration statement during the past three years or with respect to which a stop order proceeding is pending, and those that are subject to pending administrative cease-and-desist proceedings involving alleged violations of the Securities Act or its rules.
- De-SPAC Issuers: Issuers that go public through a deSPAC transaction would no longer be regarded as ineligible issuers under Rule 405 and would be eligible to use Form S-3 if they met the criteria applicable to other public companies.
- FPIs and Other Prohibited Issuers: The Commission proposes to prohibit foreign governments, foreign private issuers, asset backed issuers, investment companies and BDCs from using Form S-3.
 - FPIs are currently eligible to use Form S-3 if they otherwise meet the eligibility criteria and file their Exchange Act reports on domestic forms, but considering the agency’s ongoing review of the FPI framework, it decided not to propose extending the benefits of the proposed amendments to FPIs at this time.
- Asset-Backed Issuers, Investment Companies and BDCs: The proposing release notes that asset-backed issuers are not currently eligible to use the form, and that investment companies and BDCs have their own specialized registration statement forms.
- Majority-Owned Subsidiaries: The proposal would consolidate and simplify the existing Form S-3 instructions governing majority-owned subsidiaries. Specifically, it would replace General Instructions I.C.3, I.C.4 and I.C.5 with new General Instruction I.B.1. Under the proposed framework, certain majority-owned subsidiaries that are not themselves Exchange Act reporting companies could register guarantee-related offerings on a parent’s Form S-3, provided that the

parent is Form S-3 eligible and both the parent and the subsidiary are named as co-registrants.

- By contrast, Exchange Act reporting subsidiaries that are not current and timely in their reporting, or that fall within specified categories of ineligible issuers would not be permitted to rely on the parent’s eligibility to use Form S-3.
- The Commission says that retaining this framework would benefit investors and promote more efficient capital formation in parent-subsidiary financing structures, in that investors may benefit from guarantees that reduce default risk, as well as from the enhanced disclosure and liability protections available in registered offerings under Sections 11 and 12(a)(2) of the Securities Act, as compared to exempt transactions.
 - The Commission also notes that, once these subsidiaries register the offer and sale of securities under the Securities Act, they become subject to ongoing Exchange Act Section 15(d) reporting obligations, which would increase transparency.
 - The proposal would also eliminate other subsidiary-related Form S-3 instructions that would become unnecessary due to the other proposed amendments.

4. Key Changes to Incorporation by Reference

- Currently, Form S-1 issuers are limited in their ability to incorporate information by reference to their Exchange Act filings. To incorporate by reference from information on file prior to the effective date of the registration statement (“backward” incorporation by reference), the issuer must have filed an annual report for its most recent fiscal year. In addition, the ability to incorporate by reference information contained in filings subsequent to the effective date of the registration

statement (“forward” incorporation by reference) is limited to smaller reporting companies.

- The Commission proposes to amend various line-items of Form S-1 to permit companies to use incorporation by reference prior to filing a Form 10-K for their most recently completed fiscal year. This proposed change also would permit an issuer to use incorporation by reference during its first year as an Exchange Act reporting company prior to the time it files its first Form 10-K. Conforming changes to Item 11A and Item 12(a)(1) and 12(a)(2) would be made to recognize the elimination of the Form 10-K filing condition.
- This change would be accompanied by a prohibition on incorporation by reference by BSPs, and companies would also be required to be current in their Exchange Act reports to be eligible to incorporate by reference.
- The Commission also proposes to amend Item 12(b) of Form S-1 to allow any issuer that is eligible to backward incorporate by reference to also forward incorporate by reference. The Commission believes that this expansion would not diminish investor protection because incorporated materials would remain easily accessible on EDGAR and issuers would continue to assume liability for the incorporated information. The proposal would also eliminate the existing inconsistency that permits smaller reporting companies, but not larger issuers, to use forward incorporation.
 - These benefits would only be available when the subsidiary’s offering is registered on the parent’s registration statement. This requirement is intended to preserve investor protections, since under those circumstances the parent and its senior officers and directors would assume Securities Act liability for the registration statement.

5. Expanded Communications Flexibility and Modernization of Registration Processes and Shelf Offerings

- Expansion of WKSIs Benefits: Under current rules, WKSIs enjoy significant benefits that are not available to other issuers. For example:
 - The ability to use automatic shelf registration statements that become effective immediately upon filing without Commission staff review;
 - The ability to register an unspecified amount of securities rather than a fixed amount;
 - The ability to take advantage of a “pay as you go” system to defer payment of registration fees until the time of a particular takedown;
 - The ability to add classes of securities and eligible majority-owned subsidiaries as registrants to an existing shelf by post-effective amendment;
 - The ability to use free writing prospectuses without many of the restrictions applicable to other issuers;
 - The ability to communicate more freely around offerings without risking gun-jumping;
 - More flexible prospectus delivery mechanisms; and
 - The ability to omit more information from a Form S-3 base prospectus.
- The Commission proposes to expand the issuers eligible to enjoy the registration and communications benefits currently provided to WKSIs by replacing the WKSIs eligibility criteria, including criteria based on public float and amount of registered debt, with new requirements.
 - Under the terms of the proposal, the WKSIs definition would be eliminated as it relates to all issuers other than FPIs, and two

new categories of issuers would be created: an eligible listed issuer (“ELI”) and a seasoned eligible listed issuer (“SELI”), both of which would be defined in Rule 405.

- *ELIs*: An ELI would be defined as an issuer that meets Form S-3’s proposed registrant requirements and has at least one class of common equity securities listed on a national securities exchange.
- *SELIs*: A SELI would be defined as an ELI that has been subject to the Exchange Act’s reporting requirements for a period of at least 12 calendar months and any portion of a month immediately preceding the relevant measurement date.
- As a result of the proposed changes, the three current categories of issuers (“unseasoned,” “seasoned” and “WKSI”) would be replaced by three new categories (Form S-3 eligible issuers, ELIs and SELIs).
 - The determination date for ELI or SELI status would be the same as that currently applies to the determination of WKSI status:
 - The date the issuer files a registration statement on Form S-3;
 - The date of the most recent Section 10(a)(3) update (or the date that such update is required if no such Section 10(a)(3) update has been filed); or
 - If the issuer has not filed or amended a registration statement to comply with Section 10(a)(3) for 16 months, the date of filing its most recent annual report on Form 10-K or Form 20-F (or, if such report has not been filed by its due date, that report’s due date).

- Because eligibility for enhanced registration and communication benefits would be determined only on these dates, an issuer would remain eligible to take advantage of them even if an intervening event would otherwise cause it to lose ELI or SELI status between determination dates.
- Each new category of issuer would be eligible for the following enhanced registration and communication benefits:
 - SELIs would be the only category of issuers entitled to use automatic shelf registration, and as the “top tier” issuer category, they would also be able to enjoy all the benefits provided to ELIs and Form S-3 eligible issuers.
 - ELIs would have many of the communication and offering flexibilities now reserved for WKSIs. ELIs could:
 - Engage in broader pre- and post-filing communications;
 - Update and expand shelf registration statements more freely, including by adding new securities through post-effective amendments;
 - Omit certain offering details from the base prospectus, including whether an offering is primary or secondary;
 - Use pay-as-you-go filing fees at the time of takedowns; and
 - Retain the benefits already available to Form S-3 eligible issuers.

- All Form S-3 eligible issuers, even those that are not exchange listed, would benefit from:
 - Rules allowing broker-dealers involved in an offering to publish issuer-specific research without the report being deemed an “offer”;
 - The ability to omit the names of selling security holders and the amounts they are registering from the base prospectus in secondary offerings; and
 - Greater freedom to use free writing prospectuses without needing to precede or accompany them with a statutory prospectus.
- In 2024, approximately 36% of issuers qualified as WKSIs, but if the amendments are adopted, approximately 74% of Exchange Act reporting companies would qualify as SELIs and be eligible to take advantage of all the benefits currently provided to WKSIs.
- The Commission does not believe the extent of an issuer’s market following should determine which issuers should qualify for these benefits and, to the extent these metrics were intended to protect investors, that function is adequately served by limiting the benefits of SELI and ELI status to exchange-listed companies and by the retention of the current reporting requirements for Form S-3 eligibility and the proposed implementation of a category of ineligible issuers.
- Majority-Owned Subsidiaries: The proposed amendments would also allow majority-owned subsidiaries of SELIs and ELIs to access the enhanced registration and communication benefits available to their parent companies in certain circumstances even if the subsidiaries do not independently qualify. A subsidiary could rely on its parent’s ELI or SELI status if:

- Both are co-registrants on the same Form S-3 registration statement;
- The subsidiary is either conducting a guarantee-related offering or is otherwise Form S-3 eligible and issuing non-convertible, non-equity securities; and
- The subsidiary’s offering is registered on the parent’s registration statement.

6. Impacts on Capital-Raising Strategy

- ATM Offerings: The current version of Securities Act Rule 415(a)(4) prohibits companies that are not eligible to use Form S-3 from engaging in an “at-the-market” offering. The proposed changes to the eligibility criteria for Form S-3 would significantly expand the number of issuers eligible to engage in ATM programs, but, due to investor protection concerns, the Commission is proposing to limit the securities that may be offered in ATM programs to securities that are listed on a national securities exchange or in certain designated trading markets.
 - Rule 415(a)(4) would be amended to specify that the term “trading market” means that the securities are either listed and traded on a national securities exchange or traded in a market designated by the Commission.
 - Initially, and consistent with the Staff’s current practices, offers of securities that qualify for the OTCQX Best Market tier or OTCQB Venture Market tier of the OTC Link ATS would continue to qualify as offerings into an existing “trading market” for purposes of Rule 415(a)(4).
 - The amended rule would also give the Commission the ability to extend trading market status to other markets

or to withdraw that status from existing designated trading markets if their eligibility criteria or operations change.

- The proposing release also discusses the criteria that the Commission would apply in determining whether to recognize an additional platform as a “trading market” for purposes of Rule 415(a)(4).
- Other Proposed Changes: The Commission also ties up a few other regulatory loose ends in the proposing release that will have a positive impact on capital raising activities.
 - *Blue Sky Preemption for All Registered Offerings*: The National Securities Markets Improvement Act (“NSMIA”), which added Section 18(a) to the Securities Act, preempts the application of state “blue sky” registration and qualification requirements to “covered securities,” which are all securities listed on a national securities exchange. Section 18(b)(3) of the Securities Act also permits the Commission to define “qualified purchasers,” and provides that a security is a covered security with respect to the offer or sale of the security to qualified purchasers.
 - The Commission proposes to define “qualified purchaser” to include investors in any registered offering, thereby making those securities “covered securities” and preempting state registration because the Commission believes that nationwide offerings are impractical to regulate on a state-by-state basis and that federal preemption is necessary to enable efficient interstate communications and dissemination of offering materials.
 - *Delaying Amendments*: Section 8(a) of the Securities Act provides that registration statements automatically become

effective 20 days after filing. Issuers typically use delaying amendments under Rule 473 to prevent a registration statement from becoming effective automatically. The Commission is proposing to make delayed effectiveness the default standard by revising Rule 473 to provide that effectiveness of a registration statement filed with the Commission would be deemed to be delayed unless the issuer included on the registration statement's facing page a legend stating that the registration statement is to become effective in accordance with the provisions of Section 8(a) of the Securities Act.

- *Age of Financial Statements*: Rule 3-12 of Regulation S-X allows issuers to omit audited financial statements for the most recent fiscal year during a limited “grace period” after year-end, with the possibility of extended grace periods if certain conditions are met. These extended periods currently depend in part on profitability-based tests, requiring issuers to expect income for the current year and to have reported income in at least one of the prior two years, so loss-generating issuers may be unable to rely on these extensions, forcing them to accelerate preparation of audited financials, delay offerings or proxy solicitations, and incur additional costs compared to more profitable companies.
 - The Commission proposes to eliminate the income-based eligibility conditions for extended grace periods, allowing a broader set of issuers to benefit regardless of profitability.
 - Exchange Act reporting companies that are current in their filings would align the timing of audited financial statement requirements in registration and proxy statements with their

Form 10-K deadlines, while smaller reporting companies and certain non-reporting companies would have up to 90 days after fiscal year-end to provide audited financials.

- The Commission’s rationale is that profitability is not a meaningful proxy for disclosure quality or investor protection, and that removing these conditions would reduce compliance burdens, facilitate capital formation and improve consistency without undermining the reliability or completeness of financial disclosure.

7. Practical Implementation Considerations

- The proposal could make it easier for more public companies to raise capital and use registered offerings more efficiently. Even though the rules are not final, companies can start now to identify where they may gain flexibility and where stronger processes will still be needed.
 - Review Financing Plans and Strategy. Companies should consider how broader Form S-3 access could affect future financings. The ability of ELIs to use a shelf registration statement for primary offerings involving an unlimited amount of securities may open additional financing alternatives, such as medium term note or ATM programs. Companies that would qualify as SELIs would enjoy even greater flexibility through the availability of automatic shelf registration statements.
 - Do a Reality Check. The extent to which the market will be receptive to smaller companies’ ability to access the capital markets through financing arrangements that have traditionally been available only to larger, more seasoned issuers remains to be seen and will likely vary from company to company. However, exploring the viability of these alternatives with the company’s legal and financial advisors is essential to understand the company’s financing options going forward.

- Update Disclosure and Communications Controls. If the rules are adopted, companies may have more freedom in how they communicate around offerings and how they use information already filed with the Commission. Companies should review investor relations practices, disclosure templates and approval procedures so they can use that flexibility without creating legal or disclosure problems.
- Be Ready to Move Quickly. Companies that already have updated forms, clear responsibilities and coordinated internal and outside teams will be better positioned to act if the rules are adopted. Now is a good time to refresh offering documents and make sure your team can move quickly when needed.
- Ensure Your Reporting Remains Timely. Because of the increased flexibility available to timely reporting companies, the proposal would make timely Exchange Act reporting even more important. Companies should review filing calendars, disclosure controls and internal review procedures so they can stay current and avoid late filings.

MAY 21, 2026

SEC Proposes Significant Changes to the Registered Offering Framework

Folake Ayoola, James P.C. Barri, David M. Lynn, Ben Marsh, Edwin M. O'Connor, Bradley C. Weber, Jonathan Burr, Rachel Staats

Highlights

- SEC proposes significant amendments to modernize and streamline the registered offering framework under the Securities Act.
- The proposed amendments would significantly expand access to Form S-3, shelf registration and ATM offerings by eliminating existing public float and “baby shelf” limitations and removing the current requirement that issuers wait 12 months before becoming eligible to use Form S-3.
- The proposed amendments would extend many WKSJ-style communications and offering accommodations to a substantially broader range of domestic public companies through new “ELI” and “SELI” categories.
- The proposed amendments would modernize Form S-1 incorporation-by-reference rules and preempt state blue sky registration and qualification requirements for registered offerings.

On May 19, 2026, the U.S. Securities and Exchange Commission (SEC) proposed amendments to the registration framework under the Securities Act of 1933 (the Securities Act) intended to modernize and streamline the registered offering process (the Proposing Release).¹ The proposal would significantly expand access to Form S-3 and shelf registration by eliminating existing public float, seasoning and “baby shelf” limitations, extend certain benefits currently reserved for well-known seasoned issuers (WKSJs) to a broader range of public companies, modernize incorporation by reference on Form S-1, and preempt state securities law registration and qualification requirements for registered offerings. The proposal also includes a range of related conforming and modernization amendments. Comments are due 60 days following publication in the Federal Register.

Background

The current registered offering framework is tiered based on issuer size, Securities Exchange Act of 1934 (the Exchange Act) reporting history, and market following. Since the adoption of Form S-3 and the integrated disclosure system in the early 1980s, the SEC has conditioned access to short-form and shelf registration on the premise that certain public companies are sufficiently well-followed by the market so that

investors can rely on a company's reports filed pursuant to the Exchange Act, rather than extensive offering-specific disclosure. In the Proposing Release, the SEC explains that these standards historically were intended to ensure that information about eligible companies was broadly disseminated and actively followed by investors, analysts, and other market participants.

Under the current framework, Form S-3 eligibility generally requires at least 12 months of Exchange Act reporting history and, for unlimited primary offerings, a public float of at least \$75 million. Automatic shelf registration, which permits certain registration statements to become effective immediately without prior SEC staff review and allows companies to register unspecified amounts of securities for future offerings, is currently limited to companies that qualify as WKSIs. WKSI status generally requires either a public float of at least \$700 million or at least \$1 billion aggregate principal amount of registered non-convertible securities issued in the prior three years. Companies that do not satisfy those requirements generally must use Form S-1, which does not permit delayed or shelf offerings and requires more extensive updating through post-effective amendments and prospectus supplements.²

In the Proposing Release, the SEC indicated that the proposed amendments represent a recalibration of these longstanding eligibility requirements to reflect modern capital markets and the current availability of public company disclosure through EDGAR and other electronic channels. The SEC noted that many of the existing eligibility requirements for short-form registration and related offering accommodations were developed when SEC filings were available primarily in paper form and the concept of "market following" served as a proxy for the dissemination of company information. According to the Proposing Release, widespread electronic access to Exchange Act reports and other issuer disclosures has substantially changed how investors obtain and evaluate information, reducing the need to condition access to Form S-3 and related offering benefits on public float, seasoning, or other measures of market following.

The Proposed Amendments

Revised Form S-3 Eligibility Requirements

The proposal would substantially revise the eligibility requirements under proposed General Instruction I.A of Form S-3 by eliminating several eligibility conditions, while retaining the requirement for current and timely Exchange Act reporting compliance as the principal eligibility standard.

Elimination of 12-Month Seasoning Period. Most significantly, the proposal would eliminate the current requirement under General Instruction I.A.3(b) that a company must be subject to the Exchange Act reporting requirements for at least 12 calendar months before becoming eligible to use Form S-3. In the Proposing Release, the SEC notes that this seasoning requirement no longer reflects how investors access and evaluate disclosure in modern markets, given the widespread electronic accessibility of Exchange Act reports through EDGAR and other digital channels.

While the proposed amendments would eliminate the 12-month seasoning requirement, companies would continue to be required to satisfy the current and timely reporting requirements under proposed General Instruction I.A.1. Specifically, a company would need to have timely filed all required Exchange Act reports during the preceding 12 calendar months, or such shorter period that the company was required to file such reports, subject to the existing exceptions for certain Form 8-K items. The proposed amendments also would introduce a limited accommodation for certain late filings under proposed General Instruction I.A.1.c. Under

the proposed amendments, a company would remain eligible to use Form S-3 notwithstanding a single untimely filing during the applicable lookback period, provided that the filing was made within seven calendar days of the original due date and was the company's only late filing during the applicable period.

Eliminating Outdated Technical Eligibility Conditions. The proposed amendment would eliminate several existing Form S-3 conditions applicable to companies that the SEC characterizes as outdated or unnecessary. These include the "Certain Failures to Make Payments and Defaults" condition under existing General Instruction I.A.3(c), as well as the conditions tied to electronic filings and Interactive Data Files under existing General Instructions I.A.3(d) and (e). According to the SEC, those provisions no longer serve a meaningful gatekeeping function in light of current EDGAR filing requirements and the widespread use of XBRL reporting.

Expand Categories of Companies Prohibited from Using the Form. In addition, the proposed amendments would expand the categories of companies prohibited from using Form S-3 under proposed General Instruction I.A.2. These proposed restrictions would apply to certain "ineligible issuers," including blank check companies, shell companies (other than certain business combination-related shell companies), penny stock issuers, companies subject to specified SEC stop or refusal orders, and companies subject to certain antifraud-related orders, injunctions, or criminal convictions during the preceding three years. The proposal further would prohibit FPIs, asset-backed issuers, registered investment companies, and business development companies from using Form S-3, directing those registrants to their respective dedicated registration forms.

Revise Incorporation by Reference. The proposed amendment would revise the incorporation-by-reference framework in Form S-3 specified in Item 12 of Form S-3, including through the introduction of a new "Form 10 information" concept that would permit certain Form 10 information³ omitted from the registration statement at effectiveness, to instead be incorporated by reference from subsequently filed Exchange Act reports. In addition, the proposal would eliminate the current successor registrant instruction, such that successor registrants generally would no longer be permitted to rely on predecessor Exchange Act reporting history for purposes of establishing Form S-3 eligibility.

Proposed Elimination of Form S-3 Transaction Requirements, Including the "Baby Shelf" Limitations

The proposed amendments would eliminate the Form S-3 transaction requirements specified in General Instruction I.B in their entirety through amendments as part of a broader effort to simplify and expand Form S-3 eligibility. Under the proposed amendments, any company that satisfies the revised Form S-3 company eligibility requirements described above and is not otherwise ineligible to use Form S-3 would be eligible to use the form without also satisfying any separate transaction-level conditions. The proposed amendments would include eliminating the requirement in General Instruction I.B.1 which specifies that a company must maintain at least \$75 million in public float to conduct unlimited primary offerings for cash using Form S-3. Under the proposed amendments, any eligible company could use Form S-3 for primary or secondary offerings of its securities.

In the Proposing Release, the SEC states that the existing transaction requirements were developed at a time when public float and market following were viewed as important indicators of the availability and

dissemination of information about public companies. According to the SEC, the widespread electronic accessibility of Exchange Act reports through EDGAR has materially changed the information-dissemination landscape such that Form S-3 eligibility should depend principally on the availability and currency of Exchange Act reports rather than on market following as measured by public float. The SEC further states that the existing public float thresholds may unnecessarily restrict access to the registered capital markets for smaller reporting companies and newer public companies, notwithstanding the public availability of their Exchange Act disclosures.

Because General Instructions I.B.2. through I.B.6. principally apply to companies that do not satisfy the existing \$75 million public float threshold and subject to the “baby shelf” limitations, the proposal would eliminate those provisions in their entirety, including the one-third public float limitation under General Instruction I.B.6. As a result, if the proposed amendments were adopted, companies that currently rely on the “baby shelf” framework specified in Form S-3 would no longer be subject to the one-third public float cap for primary offerings conducted on Form S-3 during any 12-calendar-month period.

Expanded Registration and Communications Accommodations — A New ELI and SELI Framework

The proposed amendments would replace the existing domestic WKSJ framework with two new categories of eligible issuers under proposed Rule 405: Eligible Listed Issuers (ELIs) and Seasoned Eligible Listed Issuers (SELIs). Under the proposed framework, WKSJ status would be retained only for FPIs, while domestic issuers would instead qualify for specified registration and communications accommodations based principally on Form S-3 eligibility and exchange listing status. Under the proposed amendments, FPIs would continue to access the shelf registration framework through Form F-3 and would remain eligible to qualify as WKSJs under Rule 405. The SEC is not proposing to extend the new ELI and SELI framework to FPIs. In the Proposing Release, the SEC states that the proposed framework is intended to more closely align access to offering-related benefits with current market structure and the availability of disclosure, rather than with public float thresholds and other existing WKSJ eligibility criteria.

ELIs. Under proposed amendments to Rule 405, an ELI would be defined as a company that is eligible to use Form S-3 and has at least one class of common equity securities listed and registered on a national securities exchange. ELIs would become eligible for a number of communications and offering-related accommodations currently available only to WKSJs. These accommodations would include:

- the ability to engage in unrestricted pre-filing communications under Rules 163 and 163A;
- expanded flexibility with respect to post-filing communications and the use of free writing prospectuses under Rules 164 and 433;
- the ability to register additional securities or classes of securities, including securities of majority-owned subsidiaries, through post-effective amendments under Rule 413;
- the ability under Rule 430B(a) to omit specified information from the base prospectus, including information regarding the plan of distribution, whether the offering is a primary or secondary offering, certain descriptions of the securities being registered and the identification of other issuers; and
- the ability to pay registration statement filing fees on a “pay-as-you-go” basis under Rules 456(b) and

457(r).

In addition, the proposed amendments would extend certain communications and registration flexibilities currently available only to WKSIs and certain non-WKSIs to all Form S-3 eligible issuers, regardless of exchange-listing status. Those accommodations would include:

- the ability under Rule 139 for participating broker-dealers to publish issuer-specific research reports without those reports being deemed offers;
- the ability under Rule 430B(b) to omit the identities of selling securityholders and the amounts of securities registered on their behalf in certain resale registration statements; and
- the ability under Rule 433 to use a free writing prospectus without it being accompanied or preceded by a statutory prospectus.

SELIs. Under proposed amendments to Rule 405, a SELI would be an ELI that also has been subject to the Exchange Act reporting requirements for at least 12 calendar months. SELIs would become eligible to utilize automatic shelf registration under proposed amendments to Rule 462, a benefit currently limited to WKSIs. The SEC states that the proposed 12-month reporting requirement for SELIs is intended to preserve a seasoning component for automatic shelf registration eligibility, while also substantially broadening access to the automatic shelf framework. According to the SEC, approximately 74% of Exchange Act reporting issuers would qualify as SELIs under the proposed framework, compared to approximately 36% of issuers that currently qualify as WKSIs.

Proposed Expansion of At-the-Market Offering (ATM) Eligibility and New Trading Market Requirements

ATMs are continuous or delayed equity offerings in which a company sells shares directly into the existing trading market for its securities, typically through a broker-dealer acting as sales agent, at prevailing market prices rather than at a fixed offering price. ATM programs have become one of the most widely used capital-raising tools for public companies, because they permit companies to raise capital opportunistically, incrementally, and with substantially greater flexibility than traditional marketed offerings.

Under Rule 415(a)(4), a company may conduct a primary ATM offering only if it is eligible to register a primary offering on Form S-3, Form F-3, or Form N-2. As a result, ATM eligibility is currently constrained by the Form S-3 transaction eligibility framework, including the \$75 million public float requirement under General Instruction I.B.1 and the one-third-of-float limitation applicable to companies relying on the “baby shelf” framework under General Instruction I.B.6.

Because the proposed amendments discussed above would eliminate the Form S-3 transaction requirements in their entirety if adopted, the proposed amendments would substantially expand the population of companies eligible to conduct ATM offerings.

Companies currently subject to the “baby shelf” framework would no longer be subject to the one-third public float limitation, potentially permitting smaller reporting companies and newer public companies to access ATM programs on an uncapped basis. In the Proposing Release, the SEC states that expanded ATM eligibility could provide companies with greater flexibility to raise capital opportunistically over time and in

amounts calibrated to market conditions and company liquidity needs.

To address potential investor protection concerns arising from expanded ATM eligibility, the proposed amendments would revise Rule 415(a)(4) to define the term “trading market” and limit ATM offerings to securities that are either (i) listed on a national securities exchange or (ii) traded on a market designated by the SEC as a qualifying trading market.

In the Proposing Release, the SEC notes that ATM offerings historically have been permitted primarily for exchange-listed securities and securities traded on higher-tier OTC markets, including OTCQX and OTCQB, based largely on SEC staff interpretive positions rather than as codified by SEC rules. The proposed amendments would formalize that framework by establishing rule-based standards governing which non-exchange markets qualify as permissible trading markets for ATM offerings.

Under the proposed amendments, the SEC would designate qualifying trading markets based on a non-exclusive set of factors relating to information availability, market quality, and trading liquidity. Those factors would include reporting standards, bid-price requirements, public float, trading volume, and market-maker participation. The Proposing Release indicates that OTCQX and OTCQB likely would qualify as permissible trading markets under the proposed framework.

Form S-1 Modernization — Expanded Incorporation by Reference

Incorporation by reference permits a company to satisfy disclosure obligations in a registration statement by referencing previously filed Exchange Act reports rather than reproducing those disclosures in full. Currently, however, Form S-1 imposes significant limitations on both backward and forward incorporation by reference as compared to Form S-3. In particular, companies generally may not incorporate by reference into Form S-1 unless they previously have filed a Form 10-K for their most recently completed fiscal year, and forward incorporation by reference currently is available only to smaller reporting companies. In the Proposing Release, the SEC states that these limitations create operational burdens for newly public companies and other companies that regularly access the capital markets but are not yet eligible to use Form S-3.

The proposed amendments would modernize Form S-1 by expanding both backward and forward incorporation by reference. With respect to backward incorporation by reference, the proposal would eliminate the existing requirement that a company previously have filed a Form 10-K for its most recently completed fiscal year. Instead, a company would be permitted to incorporate by reference a filing containing “Form 10 information,” thereby permitting recently public companies that have not yet completed a Form 10-K filing cycle to make broader use of Form S-1.

The proposed amendments would expand forward incorporation by reference to all companies permitted to incorporate by reference into Form S-1 rather than limiting that accommodation to smaller reporting companies. As a practical matter, the proposal would permit eligible companies to update Form S-1 registration statements automatically through subsequently filed Exchange Act reports without the need for repeated post-effective amendments. In the Proposing Release, the SEC notes that the proposed amendments would more than double the number of registrants eligible to use forward incorporation by reference on Form S.

Regulation S-X — Expanded Availability of Financial Statement Grace Periods

Rules 3-01 and 8-08 of Regulation S-X establish “age of financial statements” requirements governing how current financial statements must be at the time a registration statement is filed or declared effective. Under the existing framework, certain companies may rely on extended grace periods permitting the use of older financial statements, thereby avoiding the need to prepare additional interim financial statements on an accelerated basis.

Currently, eligibility for those extended grace periods depends in part on income-based conditions tied to a company’s income or loss from continuing operations. Companies that do not satisfy those income thresholds therefore may be required to update their financial statements more frequently in connection with registered offerings, including by preparing additional interim financial statements that otherwise would not yet be required under the Exchange Act reporting framework. In practice, those requirements can increase transaction costs, compress offering timelines, and delay access to the capital markets, particularly for issuers with volatile or negative earnings profiles.

The proposal would eliminate those income-based conditions entirely, thereby expanding the population of registrants eligible to rely on the extended grace periods under Rules 3-01 and 8-08 of Regulation S-X. As a practical matter, the proposal would permit a broader range of companies to rely on older financial statements for longer periods in connection with registered offerings without being required to prepare incremental interim financial statements solely to satisfy Securities Act staleness requirements.

In the Proposing Release, the SEC states that the existing income tests no longer serve as an effective proxy for the availability or reliability of disclosure and may impose unnecessary compliance costs and operational burdens on registrants accessing the registered capital markets. According to the SEC, the proposed amendments are intended to better align the financial statement staleness framework with the broader objective of reducing unnecessary friction in the registered offering process while preserving investor access to current Exchange Act reporting.

State Blue Sky Preemption for Registered Offerings

Section 18 of the Securities Act currently preempts state securities law registration and qualification requirements for certain “covered securities,” including securities listed on a national securities exchange and securities issued by registered investment companies. Registered offerings involving securities that do not qualify as covered securities, however, remain subject to state “blue sky” registration and qualification requirements. As a practical matter, companies conducting registered offerings of unlisted securities may be required to comply with separate registration and qualification regimes in multiple states, including, as applicable, state merit review standards, separate filing requirements, and coordination with multiple state securities regulators.

Proposed amendments to Rule 146 under Section 18(b)(3) of the Securities Act would define any person to whom securities are offered or sold pursuant to a Securities Act registration statement as a “qualified purchaser” for purposes of Section 18(b)(3). As a result, securities sold in any registered offering would constitute “covered securities,” regardless of whether the securities are listed on a national securities exchange.

In the Proposing Release, the SEC states that the proposed amendments are intended to further the objectives underlying the National Securities Markets Improvement Act of 1996 by reducing duplicative state and federal regulation of registered offerings. According to the SEC, modern electronic disclosure practices and the widespread accessibility of Exchange Act reports and registration statements through EDGAR have reduced the practical utility of separate state registration and qualification review for registered offerings.

As a practical matter, the proposal could materially reduce the role of state blue sky review in registered offerings and simplify the offering process for registrants conducting registered offerings of unlisted securities, including non-traded business development companies and similar investment products. The SEC nevertheless states that the proposal would remain consistent with investor protection because registered offerings would continue to be subject to comprehensive federal disclosure requirements, SEC review authority, periodic reporting obligations, and federal securities law liability provisions.

Importantly, the proposed amendments would not eliminate state antifraud authority. States would continue to retain authority to investigate and bring enforcement actions involving fraud, deceit, and unlawful broker-dealer conduct, as well as authority to require notice filings and filing fees.

Rule 473 — Delaying Amendments as the Default

Under Section 8(a) of the Securities Act, a non-automatic registration statement becomes effective automatically 20 days after filing unless the registrant includes a delaying amendment. In practice, companies almost universally include delaying amendments in order to prevent automatic effectiveness before the SEC staff's review is complete and the company is prepared to proceed with the offering.

Proposed amendments to Rule 473 would make delayed effectiveness the default for all non-automatic registration statements. Rather than requiring companies to affirmatively include a delaying amendment, all non-automatic registration statements would be deemed automatically to include one unless the registrant affirmatively elects immediate effectiveness under Section 8(a).

In the Proposing Release, the SEC states that the proposed amendment is intended principally to codify existing market practice, eliminate the risk of inadvertent omission, and reduce unnecessary procedural formalities in the registration process.

Conclusion

The SEC's proposed amendments, if adopted, would expand access to Form S-3, automatic shelf registration, ATM programs, and other Securities Act offering accommodations for a substantially broader population of public companies. The Proposing Release reflects the SEC's view that access to registered offering flexibility should depend principally on current and timely Exchange Act reporting and the widespread electronic accessibility of issuer disclosure rather than on public float, seasoning, or other traditional measures of market following. Although the proposed amendments could significantly reduce transactional friction and expand access to the registered capital markets, the Proposing Release highlights a range of investor protection, market structure, and operational considerations that may affect whether, and to what extent, the proposed framework ultimately is adopted. Public companies, underwriters, and other market participants should evaluate the proposal in light of their specific circumstances and monitor further

developments as the SEC considers comments and potential final rules.

[1] Release No. 33-11418, *Registered Offering Reform* (May 19, 2026) (the Proposing Release).

[2] Foreign Private Issuers (FPIs) generally access the current shelf registration framework through Form F-3 rather than Form S-3. Form F-3 contains substantially similar registrant and transaction eligibility requirements to Form S-3, and FPIs may qualify as WKSIs based on substantially similar public float and registered debt issuance thresholds applicable to domestic issuers. Notably, the SEC is not proposing comparable revisions to the Form F-3 eligibility framework for FPIs, which would continue to operate under the existing Form F-3 and WSKI framework.

[3] “Form 10 information” would be defined as information that is required by Form 10 to register under the Exchange Act each class of securities being registered under the form.

This informational piece, which may be considered advertising under the ethical rules of certain jurisdictions, is provided on the understanding that it does not constitute the rendering of legal advice or other professional advice by Goodwin or its lawyers. Prior results do not guarantee similar outcomes.

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SEC Proposes Sweeping “Registered Offering Reform” Rules to Expand Access to Public Capital Markets

May 26, 2026

On May 19, 2026, the SEC [proposed](#) a broad package of amendments to the Securities Act of 1933 (Securities Act) registration framework intended to modernize and expand access to the public capital markets. If adopted substantially as proposed, the amendments would represent the SEC’s most significant registered offering reform initiative in two decades and would materially affect a broad range of issuers. The proposed amendments substantially expand the availability of shelf registration and short-form registration by broadening issuer eligibility for Form S-3 or short-form shelf registration on Form N-2 (Short-Form N-2), extend automatic shelf registration and other enhanced registration and communication benefits to additional issuers, expand incorporation-by-reference accommodations on Form S-1, partially preempt state registration requirements for registered offerings, simplify various procedural requirements applicable to public offerings and create a new advertising framework for registered nonvariable annuity products, among other changes. The SEC also proposed significant amendments to the Securities Exchange Act of 1934 (Exchange Act) and related securities regulations on the same date (discussed in the [Sidley Update “SEC Proposes to Overhaul Filer Status Framework and Extend Scaled Disclosure to Most Public Companies”](#)) that are designed to modernize the public company reporting framework.

Comment Period

Comments on the proposal are due on July 27, 2026.

What to Do Now?

Companies should review the proposal and reach out to counsel to discuss how the proposed changes, if adopted, would affect the company and whether and how the company could share its views with the SEC on the proposed amendments.

Key Proposed Changes

I. Expanded Form S-3 Eligibility

The proposal would significantly expand access to Form S-3 by making significant changes to several longstanding eligibility requirements:

- *Elimination of the One-Year Seasoning Requirement* — The requirement that an issuer has been subject to the Exchange Act reporting for at least 12 months (One-Year Seasoning Requirement) would be eliminated. An issuer would still need to be timely and current in its Exchange Act reporting but with the ability to have one untimely filing no more than seven calendar days late.
- *Elimination of All Transaction Requirements* — All of the current transaction requirements, most notably the \$75 million public float requirement for unlimited primary offerings on Form S-3, would be removed. This includes eliminating the “baby shelf” provision (General Instruction I.B.6), which currently caps primary offerings by issuers with less than \$75 million in public float at one-third of their public float over any rolling 12-month period. Under the proposal, any Form S-3 eligible issuer could register an unlimited primary offering regardless of float size.

- *Elimination of the Requirement for Certain Failures to Make Payments and Defaults* — The requirement that an issuer must have not (a) failed to pay any dividend or sinking fund installment on preferred stock or (b) defaulted (i) on any installment or installments on indebtedness for borrowed money or (ii) on any rental on one or more long-term leases would be removed.
- *Elimination of the Requirement for Electronic Filings and XBRL Compliance*
- *Restriction of Certain “Ineligible Issuers”* — The proposed amendments would prohibit the use of Form S-3 by certain “ineligible issuers,” including “BSP issuers” and certain “bad actors,” which currently applies to “well-known seasoned issuer” (WKSI) status but not to Form S-3 eligibility. “BSP issuers” would include (i) a blank check company, (ii) a shell company, or (iii) a penny stock issuer. However, former special purpose acquisition companies (SPACs) that have successfully completed a “de-SPAC” transaction by combining with a target would not be within scope of the “ineligible issuer” definition. For “bad actors” subject to governmental decrees or orders relating to violations of the antifraud provisions of the federal securities laws, an issuer would be an “ineligible issuer” only if the order or decree is based on an untrue, false or misleading statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

Under the proposal, any issuer (that is not otherwise an “ineligible issuer”) could become an Exchange Act reporting company — for example, by registering a class of equity securities on Form 10 under Section 12(g) of the Exchange Act — and then immediately conduct its first registered offering on Form S-3, regardless of market capitalization. The ability to have a shelf registration statement effective and ready for future use shortly after entering the reporting system would be a significant development for newly public issuers.

The proposed amendments do not extend to foreign private issuers (FPIs), which would be prohibited from using Form S-3 (and must use Form F-3, which retains its existing 12-month seasoning and \$75 million public float requirements). The SEC has deferred FPI-related changes pending its separate review of the FPI definition through the June 2025 Concept Release (Release No. 33-11376), discussed in our prior [Sidley Update](#).

The SEC estimates that these amendments could increase by more than 60% the number of issuers eligible to conduct unlimited registered offerings on Form S-3.

II. Enhanced Registration and Communication Benefits

The proposal also would substantially expand the availability of automatic shelf registration and other benefits currently reserved for WKSI by replacing the current WKSI framework for domestic issuers with new issuer categories and revised eligibility criteria. Under the proposed amendments, issuers would *not* be required to have a public float of \$700 million or more or have issued at least \$1 billion aggregate principal amount of nonconvertible securities in primary offerings for cash registered under the Securities Act in the last three years. Instead, the SEC would eliminate the WKSI category as applied to domestic issuers and establish two new categories of issuer:

- *Eligible Listed Issuers (ELIs)* — issuers that meet the proposed Form S-3 registrant requirements and have at least one class of common equity securities listed on a national securities exchange.
- *Seasoned Eligible Listed Issuers (SELIs)* — ELIs that have been subject to the Exchange Act’s reporting requirements for a period of at least 12 calendar months and any portion of a month immediately preceding the relevant measurement date.

Under the proposal, the benefits would be redistributed across three tiers of domestic issuers as follows:

- All Form S-3 eligible issuers (regardless of exchange listing) would gain access to Rule 139 (broker-dealer research reports), Rule 430B(b) (omission of selling security holders and amounts in resale registration statements), and Rule 433 (use of free writing prospectuses without an accompanying or preceding statutory prospectus).
- ELIs would additionally gain access to many current WKSI communication and offering flexibilities, including:

- broader pre-filing and post-filing communication flexibility;
 - pay-as-you-go filing fees;
 - expanded prospectus omission accommodations, including the ability to omit the plan of distribution, whether the offering is primary, secondary, or a combination thereof, the description of the securities (other than name or class), and the identification of other issuers; and
 - the ability to register additional securities or classes of securities, including securities of majority-owned subsidiaries, by filing a post-effective amendment to a non-automatic shelf registration statement.
- SELIs would additionally become eligible to file automatic shelf registration statements.

Issuers that presently qualify as WKSIs solely on the basis of having issued \$1 billion or more of nonconvertible securities in registered offerings, but that do not have exchange-listed common equity, would not qualify as ELIs or SELIs under the proposed framework. Such issuers would therefore lose their current WKSI benefits upon adoption of the proposed rules and, absent exchange-listing of common equity, would revert to being treated as ordinary Form S-3 filers without any enhanced registration or communication benefits.

The SEC estimates that these changes could increase by more than 200% the number of issuers eligible for the full suite of Enhanced Registration and Communication Benefits currently reserved for WKSIs.

The direction of the proposal is broadly consistent with recommendations submitted earlier this year by the American Bar Association Federal Regulation of Securities Committee and the New York City Bar Association, each of which urged the Commission to scale eligibility for Form S-3 and shelf benefits to disclosure compliance rather than size. The proposed rule, however, goes further by eliminating the WKSI concept for domestic issuers entirely. The proposing release expressly frames the SELI 12-month seasoning requirement for automatic shelf access as an incremental approach and invites comment on whether all Form S-3 eligible issuers should ultimately receive the full slate of benefits.

For newly public and pre-initial public offering (IPO) issuers, the proposed framework would meaningfully accelerate the timeline on which a recently public issuer can move from Form S-1 to Form S-3 and ultimately to automatic shelf registration. A newly reporting issuer would become Form S-3 eligible upon becoming subject to Exchange Act reporting (subject to being current and timely and not otherwise ineligible), would qualify as an ELI as soon as a class of its common equity is listed on a national securities exchange, and would reach SELI status, and thus automatic shelf eligibility, on the first anniversary of becoming an Exchange Act reporter. Former SPAC issuers warrant particular attention — although such issuers would be permitted to use Form S-3 once they cease to be shell companies (notwithstanding the three-year shell company lookback), the proposal would not permit a successor issuer to credit a SPAC predecessor's Exchange Act reporting history toward the 12-calendar-month SELI seasoning requirement. Notably, a company filing Form S-3 immediately after its IPO would not need to prepare a full stand-alone prospectus — the proposed amendments would permit the Form S-3 to incorporate "Form 10 information" by reference directly from the issuer's Form S-1 registration statement (proposed Item 12(a)(1) of Form S-3), so the IPO disclosure document would carry over directly into the shelf registration statement.

III. Form S-1 Modernization

The proposed amendments include major changes to Form S-1 designed to modernize the registration process for public offerings and reduce duplicative disclosure requirements for reporting companies. The proposal would significantly expand companies' ability to incorporate Exchange Act filings by reference into Form S-1 registration statements. Specifically, the proposal would:

- eliminate the requirement that an issuer have filed an annual report for its most recently completed fiscal year before being eligible to incorporate information by reference; and
- permit all issuers eligible to incorporate by reference on Form S-1 to forward incorporate future Exchange Act filings rather than limiting forward incorporation to smaller reporting companies (SRCs).

Currently, a company generally cannot incorporate Exchange Act reports by reference into Form S-1 unless it has already filed an annual report for its most recently completed fiscal year. The SEC proposes eliminating that requirement. If adopted, companies that have recently become public — including companies that have not yet filed their first Form 10-K — could still use incorporation by reference on Form S-1 by incorporating a prior Securities Act or Exchange Act filing containing “Form 10 information.”

The proposal would also allow all eligible issuers — not just SRCs — to automatically update Form S-1 registration statements through future Exchange Act filings. Under the current rules, only SRCs may forward incorporate future filings into Form S-1; larger reporting companies generally must update registration statements through post-effective amendments or prospectus supplements.

The proposal would continue to restrict incorporation-by-reference accommodations for BSP issuers, which definition is noted above and would also carve out former SPACs that have successfully completed a de-SPAC transaction by combining with a target.

The SEC also proposes amendments that would prohibit FPIs, investment companies, and business development companies from using Form S-1 because those issuers generally have access to other specialized registration forms.

Form S-3 Advantages Remain

The proposal would significantly reduce the historical differences between Form S-1 and Form S-3 by broadly expanding the availability of incorporation by reference on Form S-1, but despite these changes, the SEC emphasized that Form S-3 would continue to provide the principal advantages associated with shelf registration. In particular, only Form S-3 would continue to permit:

- delayed and continuous shelf offerings under Rule 415(a)(1)(x);
- at-the-market (ATM) offerings;
- rapid shelf takedowns in response to market conditions; and
- for eligible issuers, automatic shelf registration and pay-as-you-go filing fees.

Accordingly, while the proposed amendments would materially streamline the use of Form S-1 for many reporting companies, Form S-3 would remain the key registration form for issuers seeking flexible, ongoing access to the public capital markets.

IV. Changes Affecting Closed-End Funds and Business Development Companies

For business development companies (BDCs) and registered closed-end funds (collectively, affected funds), the proposal would extend many of the operating-company registration, offering, and communication reforms to Form N-2 filers while preserving certain fund-specific distinctions. These proposed changes build on the SEC’s 2020 closed-end fund offering rule amendments, which were intended to align the affected-fund offering framework more closely with the framework available to non-investment company issuers. Currently, affected funds register offerings on Form N-2, but their ability to use Short-Form N-2 and conduct delayed shelf offerings under Rule 415(a)(1)(x) generally is tied to Form S-3–style eligibility criteria, including the One-Year Seasoning Requirement and, for primary offerings, the \$75 million public-float test. The proposal would expand Short-Form N-2 and shelf access for exchange-listed affected funds that satisfy the proposed ELI criteria while reserving automatic shelf registration for SELI affected funds.

An ELI affected fund generally would be an exchange-listed affected fund that meets the proposed Form S-3 registrant requirements, including timely Exchange Act and Investment Company Act of 1940 (1940 Act) reporting for the period it has been subject to those requirements; it would not need to satisfy the current \$75 million public float test. ELI affected funds would be eligible to use Short-Form N-2 and would receive certain WKSI-type registration and communication benefits, including pre-filing communication flexibility, certain Rule 430B(a) prospectus omissions, Rule 413 flexibility, and pay-as-you-go filing fees under Rules 456(b) and 457(r) under the Securities Act. Automatic shelf registration, however, would be available only to SELI affected funds.

In contrast, unlisted affected funds would remain on their existing path. The proposal would not extend Short-Form N-2 eligibility to unlisted affected funds, such as interval funds, tender offer funds, and unlisted BDCs. These funds generally would continue to rely on the Rule 486 framework, which permits certain registration statements and post-effective amendments to become effective either immediately upon filing or automatically after 60 days, depending on the filing. The proposal also would remove Rule 139b's minimum public-float condition, making the covered investment fund research-report safe harbor available to all covered investment funds, including unlisted affected funds and affected funds with shorter reporting histories.

V. Registered Non-Variable Annuity Advertising

To align the annuity advertising framework more closely across product types, the proposal would permit registered non-variable annuity issuers and intermediaries to use Rule 482 under the Securities Act for broad-based advertising rather than relying primarily on Rule 433's free writing prospectus framework. Currently, registered index-linked annuities (RILAs) and registered market value adjustment annuities (registered MVA annuities and, together with RILAs, registered non-variable annuities) are registered on Form N-4, like most variable annuities, but Rule 482 does not currently apply to registered non-variable annuity advertisements. Instead, Rule 433 permits such advertisements without prospectus delivery only for issuers that would otherwise be Form S-3 eligible. This distinction can be significant for issuers of securities subject to insurance company regulation, such as registered non-variable annuities, eligible to rely on Rule 12h-7 because they may need to choose between relying on that reporting exemption and filing Exchange Act reports solely to satisfy Form S-3 eligibility for more flexible Rule 433 advertising. The proposal would eliminate that Form S-3-based distinction, subject to certain Rule 482 conditions, and would rescind the related Rule 433 exception.

The proposed Rule 482 framework would include product-specific conditions as well. For example, an RILA advertisement could not include RILA performance information, although historical index performance could be used if presented consistently with Form N-4 requirements. Advertisements that include fee or expense figures would also be required to include specified disclosures. Registered, non-variable annuity advertisements would be required to be filed with the SEC or the Financial Industry Regulatory Authority and would remain subject to Rule 482's general conditions.

VI. Partial Preemption of State Securities (Blue Sky) Laws for Registered Offerings

Pursuant to Section 18(b)(3) of the Securities Act, a security is a "covered security," thus not subject to registration and certain other requirements imposed under states' so-called "Blue Sky" or securities laws, if the security is offered or sold to "qualified purchasers" as defined by the SEC by rule. Section 18(b)(3) states that the SEC may define the term "qualified purchaser" "differently with respect to different categories of securities, consistent with the public interests and the protection of investors." The proposal would define "qualified purchaser" in Rule 146 under the Securities Act (for the purposes of Section 18(b)(3) thereof) to include any person to whom securities are offered or sold pursuant to an offering registered under the Securities Act, notwithstanding any particular sophistication, suitability, or experience of the investor.ⁱ As a result, all securities sold in registered offerings would become "covered securities," thereby preempting state securities law registration and qualification requirements for those offerings. However, the proposal would not completely preempt state securities regulation. As set forth in Section 18(c) of the Securities Act, states would continue to have authority, as they do today, to require notice filings and filing fees, which states may not require for securities listed on a national securities exchange (or securities of the same issuer that are senior to or *pari passu* with such listed securities, such as debt). States would also retain authority to investigate and enforce state antifraud provisions — in particular with respect to "fraud or deceit" (including broker-dealer customer suitability requirements). As a result, issuers conducting registered offerings to "qualified purchasers" would remain subject to certain state-level compliance obligations before offers and sales may be made in a particular state, including applicable notice filing and fee requirements, even though substantive state registration and qualification requirements (e.g., disclosure and merit review) would be preempted.

The proposal is intended to reduce regulatory fragmentation and lower execution costs for issuers by expanding federal preemption in offerings that already are subject to significant federal disclosure and oversight requirements. The SEC noted that state-by-state review can increase transaction costs, create timing uncertainty due to the need to obtain registration from multiple regulators, and discourage smaller companies from accessing the public markets. The proposal could be significant for non-listed real estate investment trusts (REITs) and non-listed BDCs Securities Act registered offerings of their securities, which currently must comply with registration and review requirements in multiple states. Under the proposal, these issuers would be treated more similarly to

registered investment companies, such as interval and tender offer funds, which already benefit from broader federal preemption. If adopted, the proposal would preempt state registration and qualification requirements for non-traded BDCs and non-traded REITs that issue securities publicly in Securities Act registered offerings while preserving antifraud and notice filing (and fee) authority at the state level.

VII. Other Rule Amendments

Other proposed amendments include the elimination of the so-called “delaying amendments” under Rule 473 and the elimination of certain income-related conditions included in age-of-financial-statement requirements under Regulation S-X.

As proposed, Rule 473 would be amended to reverse the existing delaying amendment framework so that Securities Act registration statements would *automatically* be deemed delayed *unless* an issuer *affirmatively* elects automatic effectiveness under Section 8(a) of the Securities Act.ⁱⁱ

In addition, certain income-related conditions would be eliminated from age-of-financial-statement requirements under Regulation S-X. Currently, issuers are provided extended grace periods (beyond an initial 45-day grace period) before updated audited annual financial statements from the most recently completed fiscal year must be included in registration statements and proxy materials. The availability of these extended grace periods, however, is conditioned on the issuer meeting certain income-related conditions. As proposed, the income-related conditions in Rules 3-01(c)(2) and (3) and 8-08(b)(2) and (3) of Regulation S-X would be eliminated. As a result, under the proposed amendments:

- An SRC that is either
 - an Exchange Act reporting company that has filed all reports due or
 - a non-reporting companywould have 90 days after its fiscal year-end to provide audited annual financial statements for its most recently completed fiscal year.
- A non-SRC Exchange Act reporting company that has filed all required reports would have until its Form 10-K due date (which varies based on its filer status) to provide annual audited financial statements for its most recently completed fiscal year.

In practice, these changes mean that companies will no longer need to accelerate their year-end audits solely to satisfy registration statement requirements, which would benefit issuers planning capital markets transactions in the weeks following fiscal year-end.

The proposal also includes a wide range of conforming and technical amendments designed to align existing rules and forms with the broader proposed amendments. These conforming and technical amendments generally are not intended to have a substantive effect.

SEC Rationale for the Proposal

The proposing release emphasizes that the SEC’s historical reliance on public float, market following, and Exchange Act seasoning requirements was grounded in a pre-EDGAR environment in which investor access to issuer information was significantly more limited.

The SEC now takes the position that investors can readily obtain issuer disclosures electronically and that Form S-3 eligibility therefore should depend primarily on whether issuers are current and timely in their reporting obligations rather than on market capitalization or analyst following.

At the same time, the SEC proposes retaining various investor protection safeguards, including:

- continued current and timely reporting requirements;

- limitations on certain “ineligible issuers,” including certain shell companies, blank check companies, penny stock issuers, and certain issuers subject to antifraud-related orders or proceedings; and
- exchange-listing requirements for the expanded automatic shelf registration framework.

Potential Implications

If adopted substantially as proposed, the amendments would represent a significant modernization of the registered offering framework since the SEC’s 2005 Securities Offering Reform initiative.

The proposal could meaningfully expand access to:

- shelf registration;
- ATM offerings;
- automatic shelf registration;
- incorporation-by-reference accommodations;
- faster offering execution; and
- streamlined capital raising processes.

The amendments may be particularly relevant for SRCs, recently public issuers, exchange-listed issuers with public floats below current thresholds, exchange-listed BDCs and registered closed-end funds, registered non-variable annuity issuers, and other issuers that historically have not been eligible for the most flexible offering accommodations.

At the same time, the proposal raises important questions regarding:

- the continued role of SEC staff review;
- the scope of federal preemption of state securities laws;
- potential effects on due diligence practices;
- treatment of issuers with limited reporting histories; and
- the balance between offering flexibility and investor protection.

The SEC’s release contains extensive requests for comment on these and numerous related issues.

Sidley will continue to monitor developments relating to the proposal and provide updates as the rulemaking process progresses. The proposing release also poses various questions to the public as part of a request for comment. Please contact our team if you would like assistance in submitting a comment letter in response to the proposing release.

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ⁱ This proposal would not affect the definition of “qualified purchaser” under the 1940 Act.

ⁱⁱ Rule 406 also would be amended to provide that for issuers that affirmatively elect automatic effectiveness under Section 8(a), requests for confidential treatment must be made *prior to filing the registration statement*.