

# SEC Offering Reform Proposal (Release 33-11418)

## WRITTEN BY

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## KEY POINTS

- The SEC's proposed amendments to Form S-3 would eliminate the one-year seasoning and \$75 million public float requirements, allowing more issuers to conduct unlimited shelf offerings.
- The proposal would replace the WKSJ category with ELI and SELI, extending enhanced registration and communication benefits to a broader group of exchange-listed Form S-3 issuers.
- By redefining "qualified purchaser" in Rule 146, the SEC would make all Securities Act-registered offerings "covered securities," preempting state blue sky registration and qualification requirements for those offerings.
- The SEC would align Form N-2 affected funds with the modernized Form S-3 framework, allowing ELI and SELI BDCs and closed-end funds broader access to Short Form N-2, automatic shelf registration, and WKSJ-style flexibilities.
- The proposed amendments to Form S-1 would expand both backward and forward incorporation by reference, enabling more domestic operating companies to use Form S-1 in a short-form manner similar to Form S-3.

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On May 18, 2026, the Securities and Exchange Commission (SEC) released [proposed amendments](#) to the public company offering and reporting framework, which, if implemented, would represent the most significant overhaul of the offering and reporting regulations in more than two decades. The SEC's proposals would materially expand the universe of issuers that can take advantage of the most flexible registration and offering tools. The proposed changes include:

- Revising Form S-3 eligibility criteria to allow more public companies to conduct shelf offerings;
- Extending the registration and offering communication benefits afforded to well-known seasoned issuers to a much larger set of issuers;
- Preempting state securities law registration and qualification requirements for all registered offerings, allowing over-the-counter traded companies and non-traded companies, such as non-traded public real estate investment trusts (REITs), much easier access to public capital;
- Taking further actions to maintain parity between certain Form N-2 filers and operating companies across registration, offering, and communication provisions; and
- Modernizing Form S-1 by expanding the ability to incorporate information by reference into that form to most registered issuers.

## THE PROPOSED AMENDMENTS WOULD REVISE FORM S-3 ELIGIBILITY CRITERIA TO ENABLE A GREATER NUMBER OF PUBLIC COMPANIES TO CONDUCT SHELF OFFERINGS.

Under the current regulations, issuers may only use Form S-3 to offer an unlimited amount of securities if they both satisfy the registration requirements of Form S-3 and meet additional transaction-specific requirements based

on public float. First, in order to file a Form S-3, an issuer must have been subject to Exchange Act reporting for at least one year (the one-year seasoning requirement), among other conditions. Additionally, issuers can also only make unlimited primary use of Form S-3 if they have a public float of at least \$75 million (the public float requirement). Companies that do not meet the public float requirement are limited to selling no more than one-third the value of their public float in a 12-month period, which can be very limiting for many small companies.

The SEC's proposals, among other changes, would eliminate the one-year seasoning requirement and the public float requirement, meaning that any issuer which is otherwise eligible to file a Form S-3 can use Form S-3 to make primary and secondary offerings without regard to seasoning or public float. Instead, the principal determinant for Form S-3 eligibility would become whether the issuer is current and timely with the reports it has made.

Additionally, the proposals would soften the consequences of a missed Exchange Act filing, adding a one-time limited seven-day grace period for late filings, instead of having one late filing cause an issuer to lose Form S-3 eligibility for the entire next year. The proposals would also add two new registrant requirements prohibiting a subset of "ineligible issuers" (as defined by Rule 405) and certain other types of issuers from making offerings under Form S-3.

The SEC estimates that implementing these proposals could increase the number of issuers able to register an unlimited amount of securities on Form S-3 by more than 60%, including approximately 1,127 currently ineligible sub-\$75 million non-listed issuers and 1,023 current "baby shelf" issuers that would no longer be subject to one-third-of-float limits, thereby enabling a substantially larger population of public companies to conduct shelf and at-the-market offerings.

**THE PROPOSED AMENDMENTS WOULD EXTEND REGISTRATION AND OFFERING COMMUNICATION FLEXIBILITIES, MANY OF WHICH CURRENTLY ARE RESERVED ONLY FOR WELL-KNOWN SEASONED ISSUERS, TO A BROADER SET OF ISSUERS.**

Currently, issuers designated as a well-known seasoned issuer (WKSI) receive certain benefits that ease the reporting and other regulatory burdens of offering securities to the public (collectively, the enhanced registration and communication benefits). These benefits include the ability to:

- Make certain offers prior to filing a registration statement under Rule 163;
- Rely on the free writing prospectus rules in Rule 164;
- Register additional classes of securities via automatically effective post-effective amendments to automatic shelf registration statements under Rule 413(b);
- Omit information on the type of offering, the kinds of securities offered, or the identification of other matters under Rule 430B;
- Use a free writing prospectus without it being preceded by a Section 10 prospectus under Rule 433;
- Defer payment of the SEC's filing fee on an automatic shelf registration statement under Rules 456(b) and 457(r); and
- Rely on Rule 462 to file a shelf registration statement that is immediately effective upon filing.

An issuer seeking WKSI status must, among other requirements, be eligible to use Form S-3 and must have either (a) at least \$700 million in public float or (b) at least \$1 billion of nonconvertible, nonequity securities issued for cash in registered primary offerings over the past three years.

Under the proposed amendments, issuers who are eligible to use Form S-3 and have at least one class of common equity securities listed on a national securities exchange would qualify for the enhanced registration and communication benefits.

- Specifically, the SEC seeks to replace the current WKSJ designation with two designations: eligible listed issuer (ELI) and seasoned eligible listed issuer (SELI);
- An ELI would be an issuer that meets Form S-3's registration requirements and is exchange-listed;
- A SELI would be defined as an ELI that has been subject to the Exchange Act's reporting requirements for at least 12 calendar months; and
- ELIs would be eligible to rely on Rules 163, 163A, 164, 413, 430B(a), 456(b), and 457(r) regardless of how long they have been subject to Exchange Act reporting requirements.

The SEC estimates that, under this approach, the number of issuers eligible for all enhanced registration and communication benefits through their SELI status would increase by more than 200%, extending many WKSJ-style flexibilities to a far larger set of exchange-listed Form S-3-eligible companies and funds that historically fell below WKSJ size thresholds.

## **PREEMPT STATE SECURITIES LAW REGISTRATION AND QUALIFICATION REQUIREMENTS FOR ALL REGISTERED OFFERINGS.**

At present, §18 of the Securities Act of 1933, as amended (the Securities Act), only preempts certain kinds of state regulation for offerings of "covered securities," which do not include all securities sold in registered offerings. Covered securities currently include securities listed or approved for listing on a national securities exchange, securities of registered investment companies, certain secondary trades of reporting issuers' securities, and securities sold to "qualified purchasers," among others. While many registered offerings already benefit from federal preemption, registered offerings by SEC registrants whose securities are not listed on an exchange, including non-traded REITs and non-traded business development companies (BDCs), must comply with the state securities (blue sky) laws of each state in which they offer and sell securities, significantly adding to the list of regulatory burdens associated with offering these securities, and often making these offerings impractical to undertake.

The SEC's proposal would alter the definition of "qualified purchaser" to include all purchasers in any offering registered under the Securities Act, thereby making all securities offered and sold in such offerings "covered securities" and preempting state registration and qualification requirements for those offerings. Specifically, the SEC would amend Rule 146 to provide that, for §18(b)(3) purposes, a "qualified purchaser" includes any person to whom securities are offered or sold in an offering registered under the Securities Act. This definition would extend covered security status, and thus preemption, to OTC-traded issuers conducting registered offerings and non-traded BDCs and non-traded REITs (See our recent release "[SEC's Registered Offering Reform Proposal: A Potential Game-Changer for Public Non-Traded REITs](#)").

The SEC anticipates that this broad preemption would reduce offering costs and delays for unlisted issuers by eliminating duplicative multistate registration reviews, merit-based conditions, and associated blue sky legal and filing expenses. With respect to public offerings by OTC-traded companies, the preemption may create a new market that does not currently exist in a significant sense, given that compliance with state law is typically a complete bar to registered public offerings by these companies. The SEC believes that robust federal registration,

disclosure, and liability regimes, SEC staff review, and continued state antifraud and notice/fee authority are sufficient to maintain appropriate investor protection under this new regime.

## **MAINTAIN PARITY BETWEEN CERTAIN FORM N-2 FILERS AND OPERATING COMPANIES ACROSS REGISTRATION, OFFERING, AND COMMUNICATION PROVISIONS.**

Currently, exchange-listed BDCs and registered closed-end funds (CEFs) register offerings on Form N-2 in order to use a short-form, shelf-registration-style process. BDCs and CEFs can only use Short-Form N-2 if they meet the registrant and transaction requirements of Form S-3 (such as having timely filed all required reports during the prior 12 months and (for CEFs) at least 12 months of Investment Company Act registration). “Seasoned affected funds” that satisfy these conditions can use Short-Form N-2 similarly to Form S-3 in order to conduct shelf offerings under Rule 415(a)(1)(x) and use Rule 430B to omit certain information from their base prospectus and add it later without filing post-effective amendments. Additionally, affected funds that qualify as WKSIs, generally by meeting Form S-3 registrant criteria and a \$700 million float test, can also use automatic shelf registration, pay-as-you-go filing fees, and broad pre- and post-filing communication flexibilities, mirroring WKSI operating companies. Other unlisted affected funds, including interval funds and tender offer funds cannot become seasoned or WKSIs. Instead, they rely on a separate, fund-specific framework under Rule 415(a)(1)(ix) and (xi) and Rule 486 to achieve a degree of shelf-like, automatic-effectiveness flexibility.

The SEC’s proposal would redesign the current affected fund regime so that BDCs and registered CEFs are treated in parallel with operating companies under the modernized Form S-3 framework when they use Form N-2. First, as with the expanded Form S-3 eligibility, the SEC would extend Short-Form N-2 eligibility from the current Form S-3 Public Float and One-Year Seasoning Requirements to all ELI funds, *i.e.*, exchange-listed BDCs and registered CEFs that satisfy the proposed Form S-3-style registrant requirements (current and timely reporting) and are not “ineligible issuers” under a narrowed, disclosure-focused Rule 405 standard. Second, the proposal would introduce a SELI tier for affected funds, consisting of ELI funds with at least 12 months of Exchange Act/Investment Company Act reporting, who alone would gain access to automatic shelf registration on Short-Form N-2 under Rule 462(e), directly paralleling SELI operating companies. The proposal would further extend the Enhanced Registration and Communication Benefits that are being shifted from WKSIs to ELI/SELI Form S-3 issuers to ELI/SELI affected funds: ELI funds (all exchange-listed affected funds meeting the reporting standard) would gain WKSI-style flexibilities such as use of Rules 163/163A for pre-filing offers, expanded use of Rule 430B to omit information from the base prospectus, the ability to register additional classes or majority-owned subsidiaries under Rule 413, and pay-as-you-go filing fees under Rules 456(b) and 457(r), while SELI funds would also receive automatic shelf treatment under Rule 462(e). At the same time, unlisted affected funds would not be brought into the ELI/SELI Short-Form N-2 structure; instead, they would continue to use the existing Rule 486 automatic-effectiveness framework, which the SEC characterizes as a functionally comparable capital-raising regime tailored to unlisted funds.

By replacing public-float and market-following screens with criteria focused on current/timely reporting and exchange listing, and by opening Short-Form N-2 and WKSI-style enhanced registration and communication benefits to all ELI and SELI affected funds, the SEC expects a substantially larger share of listed BDCs and registered CEFs to be able to register shelf offerings, conduct at-the-market and other takedowns quickly, tailor terms in real time, and rely more heavily on registered (rather than exempt) offerings, with associated reductions in issuance costs and delays. At the same time, unlisted affected funds, particularly non-traded BDCs, would benefit from uniform state-law preemption for registered offerings via the new “qualified purchaser” definition, reducing

duplicative blue sky burdens and further aligning their regulatory environment with that of operating companies.

## **MODERNIZE FORM S-1 BY EXPANDING THE ABILITY TO INCORPORATE INFORMATION BY REFERENCE.**

Currently, the ability to incorporate previously filed reports by reference (backward incorporation) is limited to issuers that have filed an annual report for their most recently completed fiscal year, and the ability to incorporate by reference future Exchange Act filings (forward incorporation) is limited to smaller reporting companies (SRCs). The ability to forward-incorporate information allows issuers to automatically update their registration statements without needing to file a prospectus supplement or amendment. The proposed amendments would allow any issuer to utilize both backward and forward incorporation, regardless of whether it had filed its annual report for the immediately preceding year or its size. The SEC estimates that this could increase the number of issuers eligible to incorporate on Form S-1 by up to 106%.

Form S-1 is the default registration statement for domestic operating companies that do not qualify for another form, and historically has functioned as a “long-form” registration that must include most disclosure directly in the prospectus. While Form S-1 does permit Exchange Act reporting issuers to utilize backward incorporation, issuers who do so must first satisfy the requirements of General Instruction VII, which include: (i) being subject to Exchange Act reporting; (ii) having filed all required reports for the prior 12 months; (iii) having filed an annual report on Form 10-K for the most recently completed fiscal year; (iv) not being, or having been in the last three years, a blank check, shell, or penny stock issuer; and (v) providing website access to incorporated filings. Automatically updating the prospectus with forward incorporation is currently available only to smaller reporting companies (SRCs) that meet General Instruction VII and Item 12(b).

The SEC’s proposed amendments would expand both backward and forward incorporation by reference so that more domestic operating companies can use S-1 in a short-form manner similar to offerings made using Form S-3. First, the SEC would eliminate General Instruction VII.C’s requirement that an issuer must have filed a Form 10-K for its most recently completed fiscal year to incorporate by reference, and make conforming amendments to General Instruction VII.D.1 and Items 11A, 12(a)(1), and 12(a)(2), among other changes. Under the revised Items 11A and 12, an issuer could incorporate by reference its most recent Form 10-K or, if that report has not yet been filed, a Securities Act or Exchange Act filing containing “Form 10 information,” and would backward incorporate Exchange Act reports filed since the fiscal year covered by the audited financial statements included in the S-1. Second, the SEC would amend Item 12(b) so that *any* issuer eligible to backward incorporate under General Instruction VII, not just SRCs, could forward incorporate future Exchange Act reports by reference, with Item 12(b) revised to remove references to sections 13(c) and 14 of the Exchange Act. As a result, for eligible domestic operating companies that elect backward and forward incorporation, Form S-1 would “effectively...serve as a short-form registration statement,” though delayed shelf and ATM offerings would remain limited to Form S-3.

While the SEC acknowledges that heavier use of incorporation by reference may raise search and aggregation costs for some investors who must pull information from multiple filings, it believes these concerns are mitigated by required active hyperlinks to incorporated documents, widespread internet access, and growing use of tools (including AI) that help investors compile and analyze public filings, and therefore, are justified by the cost savings that Form S-1 issuers would experience.

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