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LEVELING THE SHELF: THE SEC'S PROPOSAL ON REGISTERED OFFERING REFORM

On May 19, 2026, the U.S. Securities and Exchange Commission (the "SEC" or the "Commission") proposed extensive amendments to the registered offering framework under the Securities Act of 1933, as amended (the "Securities Act").[1] The SEC's rulemaking proposal on Registered Offering Reform (the "Proposal") has the potential to be the most significant offering reform in over 20 years.[2] Most important, the Proposal would broaden eligibility to register securities offerings on Form S-3 and provide enhanced registration and communication benefits to a broad universe of issuers, changes that may dramatically increase the ability of such issuers to raise capital quickly in the public markets.

In a statement, SEC Chair Paul Atkins remarked that the Proposal "would address impediments, which result from outdated SEC rules, to public companies' ability to conduct registered offerings quickly." He noted that the Proposal, along with the second rulemaking proposal aimed at enhancing filer status, "are among the first important steps toward transforming the SEC's regulatory framework for public companies."

We discuss the most significant proposed changes in this Legal Update.

FORM S-3 ELIGIBILITY AMENDMENTS

Form S-3 is the SEC's short-form registration statement that permits eligible issuers to register offerings for future issuance (a "shelf") using streamlined disclosures that rely largely on incorporating by reference from the issuer's filings under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). Form S-3 eligibility allows an issuer to register its securities in advance and offer them on a delayed basis, taking advantage of favorable market conditions, as well as to undertake continuous offerings, such as at-the-market ("ATM") offerings. As noted above, Form S-3s are updated automatically by forward incorporation of the issuer's subsequent Exchange Act filings, including Forms 10-K and 10-Q, and certain current reports on Form 8-K.

The Proposal suggests significant changes to Form S-3 eligibility requirements, which we summarize in the chart below:

CURRENT REQUIREMENT	PROPOSED NEW REQUIREMENT
• One year "seasoning" requirement before becoming Form S-3 eligible	• Issuers would be Form S-3 eligible immediately following initial SEC registration (including through Form 10)
• Must be current in Exchange Act reporting for at least 12 calendar months immediately preceding filing of shelf registration statement	• Same requirement, although for issuers that have not been subject to Exchange Act reporting requirements for 12 calendar months, must be current in reporting during the time the issuer has been required to file such reports
• Must be timely in Exchange Act reporting for at least 12 calendar months and any portion of a month immediately preceding the filing of the shelf registration statement	• Same requirement, although for issuers that have not been subject to Exchange Act reporting for at least 12 calendar months, must have timely filed all reports during the time the issuer has been required to file. • A new instruction proposes that an issuer that files an Exchange Act report late would remain Form S-3 eligible so long as: (a) the filing was made within seven calendar days of the original due date and (b) the issuer made only one untimely filing during the 12-month lookback period[3]
• Issuers must meet $75 million public float requirement or will be limited to certain types of transactions (current General Instructions I.B.1 through I.B.6) referred to as the "S-3 Transaction Requirements"	• None—the Proposal would eliminate all S-3 Transaction Requirements; any issuer that meets the registration requirements would be eligible to use Form S-3 for any primary or secondary securities offering • This eliminates the concept of a "baby shelf" registration, such that all issuers eligible to file a shelf registration statement are not limited in the amount of securities eligible to be offered off the shelf
• No ineligible issuers, assuming registrants otherwise meet Form S-3 requirements[4]	• New category of "ineligible issuers," defined in Securities Act Rule 405, including: o Blank check companies, shell companies, and penny stock issuers (collectively, "BSP Issuers"), or those that were BSP issuers in the previous three years o "Bad actor" issuers or subsidiaries subject to certain enforcement actions or certain judicial actions for federal securities fraud, among other things o Foreign private issuers ("FPIs"), even those filing on domestic forms o Issuers that were previously special purpose acquisition companies ("SPAC") but ceased to be shell companies during the prior three years would be permitted to use Form S-3

The SEC estimates that these amendments would expand Form S-3 eligibility to approximately 1,127 issuers not currently eligible to use Form S-3. The annual per-filing benefit for issuers migrating from Form S-1 to Form S-3 is estimated at $388,106, reflecting reduced filing preparation costs and benefits from faster market access associated with shelf registration.

The SEC's rationale for overhauling Form S-3 eligibility criteria rests heavily on the generational shift in the ways investors access information. When a version of short-form registration was introduced in 1967, SEC filings existed only in paper copy, and obtaining them required visiting the SEC's public reference rooms or ordering copies at significant expense. The SEC, therefore, relied on the public float and seasoning requirements as proxies for whether information about an issuer had been sufficiently disseminated into the market, and to ensure analyst coverage of these larger companies. Today, however, all filings are made electronically through EDGAR and are immediately available without charge. In the proposing release, the SEC notes that 96% of U.S. adults use the internet (up from 71% in 2007), and approximately 91% of Americans own a smartphone (up from 35% in 2011). The SEC posits that an investor's ability to obtain issuer-specific information no longer depends on the length of an issuer's reporting history or its public float.

While this rationale is persuasive, it seems likely that there will be significant debate in the comment file on the Proposal as to whether ready access to information is the right question, or the only question, to consider with regard to shelf eligibility. The one-year seasoning period after an issuer becomes public could still be helpful because issuers that are new public companies are still becoming accustomed to quarterly SEC reporting and adjusting their disclosures. New public companies generally develop more well-ordered internal financial and SEC-reporting processes over time, such that a pause between initial public offering ("IPO") and shelf eligibility may still serve to protect investors. In theory, under the proposed rules, an issuer might file a shelf shortly after the completion of its over-allotment option for its IPO; a very large issuer might conduct ATM offerings almost immediately.

Still, the SEC suggests certain guardrails, notably the BSP Issuer prohibition and restrictions on certain other types of issuers, including "bad actors." However, as mentioned above, former SPACs would benefit from a carve-out from the BSP Issuer prohibition. The SEC seeks to align the regulatory treatment of de-SPAC transactions with traditional IPOs by ensuring new public companies emerging from de-SPAC transactions are not excluded from the efficiencies of shelf registration; we expect that commenters on the Proposal are likely to raise the question of whether there is more risk to investors associated with former SPACs than companies that conducted traditional IPOs. Former SPACs are often less well-established and have shorter operating histories than companies that go public through traditional IPOs, such that there may be value in separate standards for these issuers.

These concerns aside, the linchpin of this framework is the SEC's decision to retain the "Current in Exchange Act Reporting" and "Timely in Exchange Act Reporting" requirements as the cornerstone conditions for eligibility. The proposing release includes compelling arguments that these requirements ensure issuers provide investors with the information necessary to make an informed investment decision and help mitigate information asymmetry, working with other existing protections (*i.e.*, Securities Act liability

provisions, underwriter due diligence obligations and SEC staff review) that operate as additional safeguards.

At this time, given its ongoing evaluation of FPIs, the SEC is not extending the benefits of the proposed amendments to FPIs. As noted above, FPIs will be prohibited from using Form S-3, but can continue to use Form F-3, which provides substantially similar benefits.

ATM OFFERINGS

The Proposal would expressly codify that ATM offerings may be conducted on either a primary or resale basis, resolving longstanding ambiguity. Codification of ATM offering mechanics is expected to provide greater certainty to issuers, underwriters, and market participants regarding the permissible scope and structure of continuous offering programs. The proposed amendments would also allow a greater number of issuers to offer securities through ATM offerings without relying on the traditional underwriting process.

CURRENT REQUIREMENT	PROPOSED NEW REQUIREMENT
• ATM offerings permitted if issuer's securities are listed on a national securities exchange, OTCQX Best Market tier or OTCQB Venture Market tier but not, for example, on a tier of OTC market with reduced eligibility criteria, like OTCID Basic Market or Pink Limited Market	• ATMs would be limited to offerings involving securities listed and traded on a national securities exchange or traded in a market designated by the Commission ("Designated Markets"), currently likely to include the OTCQX Best Market tier or OTCQB Venture Market tier of OTC Link ATS.

The SEC would identify Designated Markets based on a non-exclusive list of nine attributes: (1) information reporting requirements, including whether annual financial statements are required to be audited by a PCAOB-registered auditor; (2) minimum bid price requirements; (3) minimum shareholder requirements; (4) minimum public float requirements; (5) number of securities quoted; (6) dollar volume; (7) share volume; (8) trading volume per quoted security; and (9) number of market makers.

REVISED ISSUER HIERARCHY

The Proposal suggests replacing the existing three-tiered hierarchy of issuers, including "unseasoned issuers," "seasoned issuers," and "well-known seasoned issuers," or "WKSIs," with a new framework essentially establishing two new issuer categories:

ISSUER CATEGORY	CRITERIA	ADDITIONAL BENEFITS
Form S-3 eligible issuers	• Meet eligibility requirements for Form S-3	N/A
Eligible Listed Issuers ("ELIs")	• Meet eligibility requirements for Form S-3 and have at least one class of common equity	• Eligible for most, but not all, Enhanced Registration and Communication Benefits

	securities listed on a national securities exchange	
Seasoned Eligible Listed Issuers ("SELIs")	• Subset of ELIs subject to Exchange Act reporting requirements for at least 12 calendar months	• Eligible for automatically effective shelf registration statements and all Enhanced Registration and Communication Benefits

Based on the SEC's analysis of Form 10-K filers, approximately 4,203 issuers would qualify as ELIs and approximately 4,114 issuers would qualify as SELIs. ELI and SELI status would be assessed on the same approximately annual basis used under existing rules to determine WKSI status.[5] Majority-owned subsidiaries of ELIs and SELIs would be permitted to rely on their parent's status as co-registrants on the same registration statement. For offerings of non-convertible securities (other than common equity), a subsidiary must independently meet Form S-3 eligibility; for Guarantee-Related Offerings, as defined in the Proposal, the subsidiary need only satisfy proposed General Instructions I.A.2 and I.A.3 of Form S-3.

The Proposal discusses and requests comments on alternative approaches to WKSI status, including whether the benefits should be broader than proposed or available to all issuers conducting registered offerings, whether to expand issuers' access to other communications rules beyond what is included in the Proposal. The Proposal also asks whether to keep the WKSI definition for domestic issuers while reducing the public float and registered debt-based threshold to expand WKSI eligibility.[6]

ENHANCED REGISTRATION AND COMMUNICATION BENEFITS

The Proposal would reorganize the allocation of Securities Act registration and communication benefits into a tiered structure correlating with the new issuer categories. The SEC uses the term "Enhanced Registration and Communication Benefits" to refer to the benefits described below, and estimates that this restructuring would result in a more than 200% increase in the number of issuers eligible for all such Benefits.

The proposed amendments would make many benefits that are now available only to WKSIs available to SELIs and ELIs, including greater flexibility relating to offering communications; the ability to register additional securities by post-effective amendment; omission of certain information in the base prospectus; and pay-as-you-go filing fees. SELIs would be permitted to file automatically effective shelf registration statements. Certain benefits available now to both WKSIs and non-WKSIs would be made available under the proposed rule to all Form S-3 eligible issuers. See our "**Summary of Enhanced Registration and Communication Benefits under the Securities Act**" table.

The SEC has not revisited the thresholds for communications benefits since they were first adopted, over 20 years ago, even as the rationale underpinning these has evolved, given the technological changes discussed above. The SEC now believes the most appropriate consideration is whether investors can readily obtain issuer-specific information through Exchange Act reports, and that replacing public float and registered debt thresholds with an exchange-listing requirement (for most benefits) and a one-year seasoning requirement (for automatic shelf registration) would allow more issuers to access the public markets quickly

and efficiently, while still protecting investors. Specifically, the SEC would prioritize investor protections by requiring compliance with the "Current and Timely" Exchange Act Reporting requirements and by prohibiting BSP Issuers from qualifying for any of these Enhanced Benefits, thereby limiting access to issuers that "pose the greatest risk of abuse."

The discussion in the Proposal of offering related communications safe harbors does not address social media, which remains an area ripe for SEC comment and modernization.

FORM S-1 MODERNIZATION

The Proposal would change the rules regarding incorporation by reference on Form S-1, which is the "default" Securities Act registration statement for issuers not eligible to rely on Form S-3. Generally, issuers may incorporate Exchange Act filings by reference into Form S-1 only if they have filed a Form 10-K for their most recently completed fiscal year and are current in their Exchange Act reports, among other things, and only smaller reporting companies ("SRCs") current in their Exchange Act reporting can forward incorporate subsequent Exchange Act filings by reference into a Form S-1 registration statement.

The Proposal would:

- eliminate the requirement that the issuer must have filed an annual report for its most recently completed fiscal year, and
- extend the ability to forward and backward incorporate by reference to all domestic issuers that are current Exchange Act filers and are not BSP Issuers, permitting automatic updating of the registration statement through subsequent Exchange Act filings.

Under the Proposal, FPIs, investment companies, and business development companies ("BDCs") would be newly prohibited from using Form S-1, given that there are other forms available to these issuers, such as Form F-1 or N-2, as appropriate. BSP Issuers would be permitted to use Form S-1 but would be ineligible for incorporation by reference.

The proposed amendments to Form S-1 are designed to reduce the burden of registration statement preparation and ongoing maintenance for issuers that do not qualify for Form S-3, while preserving the form's existing disclosure standards.

The SEC estimates that these changes would result in up to a 106% increase in the number of issuers eligible to forward incorporate on Form S-1, with affected issuers realizing significant cost and time savings per filing. Further, more issuers would be able to avoid the costs of the post-effective amendments and prospectus supplement updates that are otherwise required to keep registration statements current, while investors would retain access to the same information through EDGAR.

SUMMARY OF ENHANCED REGISTRATION AND COMMUNICATION BENEFITS UNDER THE SECURITIES ACT

		UNDER THE CURRENT RULES, BENEFIT IS		UNDER PROPOSED RULES, THE BENEFIT IS	
RULE	**DESCRIPTION OF COMMUNICATION EXEMPTION OR REGISTRATION BENEFIT**	**AVAILABLE TO:**	**NOT AVAILABLE TO:**	**AVAILABLE TO:**	**NOT AVAILABLE TO:**
139	Rule 139b provides a safe harbor for broker-dealers that participate or may participate in a registered offering of the securities of a covered investment fund ("CIF"), as defined by Rule 139b, to publish research reports on covered investment funds, including affected funds, without such reports being deemed impermissible offers under the Securities Act.	✓ Non-WKSIs ✓ WKSIs ✓ CIFs ✓ WKSI Affected Funds	✗ Seasoned Affected Funds	✓ S-3 Eligible Issuers ✓ ELIs ✓ SELIs ✓ CIFs ✓ ELI Affected Funds ✓ SELI Affected Funds	
163	Rule 163 allows eligible issuers to make certain offers prior to filing a registration statement without violating Section 5(c) of the Securities Act.	✓ WKSIs ✓ WKSI Affected Funds	✗ Non-WKSIs ✗ Seasoned Affected Funds ✗ CIFs	✓ ELIs ✓ SELIs ✓ ELI Affected Funds ✓ SELI Affected Funds	✗ S-3 Eligible Issuers ✗ CIFs
163A	Rule 163A allows eligible issuers to make certain pre-filing communications more than 30 days before a registration statement is filed.	✓ WKSIs ✓ WKSI Affected Funds	✗ Non-WKSIs ✗ Seasoned Affected Funds ✗ CIFs	✓ ELIs ✓ SELIs ✓ ELI Affected Funds ✓ SELI Affected Funds	✗ S-3 Eligible Issuers ✗ CIFs
164	Rule 164 allows eligible issuers to rely on the free writing prospectus rules.	✓ WKSIs ✓ WKSI Affected Funds	✗ Non-WKSIs ✗ Seasoned Affected Funds ✗ CIFs	✓ ELIs ✓ SELIs	✗ S-3 Eligible Issuers ✗ CIFs ✗ ELI Affected Funds ✗ SELI Affected Funds
413(b)	Rule 413(b) allows eligible issuers to register an additional class of securities or securities of certain majority-owned subsidiaries via automatically effective post-effective amendments to automatic shelf registration statements.	✓ WKSIs ✓ WKSI Affected Funds	✗ Non-WKSIs ✗ Seasoned Affected Funds ✗ CIFs	✓ ELIs ✓ SELIs ✓ ELI Affected Funds ✓ SELI Affected Funds	✗ S-3 Eligible Issuers ✗ CIFs

RULE	DESCRIPTION OF COMMUNICATION EXEMPTION OR REGISTRATION BENEFIT	AVAILABLE TO:	NOT AVAILABLE TO:	AVAILABLE TO:	NOT AVAILABLE TO:
430B(a)	Rule 430B(a) allows eligible issuers to omit from a base prospectus of an automatic shelf registration statement the following: (1) whether the offering is a primary or secondary offering or a combination; (2) the plan of distribution; (3) a description of securities registered (excluding name or class of securities); and (4) the identity of other issuers.	✓ WKSIs ✓ WKSI Affected Funds	✗ Non-WKSIs ✗ Seasoned Affected Funds ✗ CIFs	✓ ELIs ✓ SELIs ✓ ELI Affected Funds ✓ SELI Affected Funds	✗ S-3 Eligible Issuers ✗ CIFs
430B(b)	Rule 430B(b) allows eligible issuers to omit from a form of resale prospectus the identity of selling security holders and the amounts of securities registered on their behalf.	✓ Non-WKSIs ✓ WKSIs ✓ Seasoned Affected Funds ✓ WKSI Affected Funds	✗ CIFs	✓ S-3 Eligible Issuers ✓ ELIs ✓ SELIs ✓ ELI Affected Funds ✓ SELI Affected Funds	✗ CIFs
433	Rule 433 allows eligible issuers to use free writing prospectuses without the free writing prospectus being accompanied or preceded by a Section 10 prospectus.	✓ Non-WKSIs ✓ WKSIs	✗ Seasoned Affected Funds ✗ WKSI Affected Funds ✗ CIFs	✓ S-3 Eligible Issuers ✓ ELIs ✓ SELIs	✗ CIFs ✗ ELI Affected Funds ✗ SELI Affected Funds
456(b) / 457(r)	Rule 456(b) and 457(r) allow eligible issuers to defer payment of registration filing fees and pay on a "pay-as-you-go" basis.	✓ WKSIs ✓ WKSI Affected Funds	✗ Non-WKSIs ✗ Seasoned Affected Funds ✗ CIFs	✓ ELIs ✓ SELIs ✓ ELI Affected Funds ✓ SELI Affected Funds	✗ S-3 Eligible Issuers ✗ CIFs
462	Rule 462 allows eligible issuers to file an automatic shelf registration statement or any post-effective amendment that is immediately effective upon filing.	✓ WKSIs ✓ WKSI Affected Funds	✗ Non-WKSIs ✗ Seasoned Affected Funds ✗ CIFs	✓ SELIs ✓ SELI Affected Funds	✗ S-3 Eligible Issuers ✗ ELIs ✗ CIFs ✗ ELI Affected Funds

EXPANDED OFFERING FLEXIBILITY FOR LISTED BDCs AND CLOSED-END FUND PROVISIONS

The Proposal would significantly revise the registration, communication and offering framework applicable to BDCs and registered closed-end investment companies conducting registered offerings (collectively, "affected funds"). In particular, access to short-form shelf registration on Form N-2 ("Short-Form N-2") would be made available to listed affected funds without a seasoning or public float requirement.

The Proposal would also eliminate the WKSI construct as applied to affected funds and instead establish two new issuer categories under Rule 405 of the Securities Act: exchange-listed affected funds ("ELI Affected Funds") and seasoned exchange-listed affected funds ("SELI Affected Funds").

Under the Proposal, ELI Affected Funds would become eligible to use Short-Form N-2 without satisfying a minimum public float threshold or one-year reporting seasoning requirement. ELI Affected Funds would also be permitted to forward incorporate Exchange Act reports by reference and conduct shelf takedowns through prospectus supplements rather than post-effective amendments. However, the Proposal would continue to exclude certain "ineligible issuers," as defined in Rule 405, from eligibility to use Short-Form N-2. The Proposal would also expand the availability to ELI Affected Funds of the Securities Act communication rules and offerings, as described in our Summary table on the previous page.

Separately, the Proposal would amend Rule 139b to expand the research report safe harbor to all covered investment funds, including unlisted affected funds, by eliminating the current minimum public float requirement. The Proposal would also remove references to affected funds from Rules 164 and 433 and instead direct affected funds to rely on the Rule 482 advertising framework for communications otherwise subject to those rules.

SELI Affected Funds would constitute a subset of ELI Affected Funds subject to Exchange Act and Investment Company Act reporting requirements for at least 12 calendar months. Unlike ELI Affected Funds, SELI Affected Funds would be permitted to use automatically effective shelf registration statements on Form N-2.

If adopted, the expanded availability of Short-Form N-2 and the reduced reliance on post-effective amendments would likely accelerate the use of ATM programs and opportunistic shelf takedowns by listed BDCs and registered closed-end funds, enabling issuers to access the capital markets more efficiently in response to favorable market conditions. The amendments would also reduce transaction execution risk and administrative burdens associated with maintaining effective shelf registration statements by permitting greater reliance on incorporation by reference and prospectus supplements in lieu of post-effective amendments and related SEC review processes.

REGISTERED NON-VARIABLE ANNUITY ADVERTISING

The Proposal would amend Rule 482 under the Securities Act to extend the rule's advertising framework to registered non-variable annuities, including registered index-linked annuities ("RILAs") and registered

market value adjustment annuities ("registered MVA annuities"), thereby permitting insurance companies and intermediaries to engage in broad-based advertising (*e.g.*, print, television, and internet advertisements) for these products without needing to satisfy prospectus delivery requirements, creating a consistent advertising framework for all registered annuity products. The registration framework for RILAs was amended relatively recently, and these changes would complement those.

Key features of the proposed amendments to Rule 482 include:

- **RILA Performance Data Restriction.** Rule 482 would not be available for any RILA advertisement that includes performance data of the annuity itself (*i.e.*, historic or hypothetical performance of the RILA or any element of the RILA). However, historical performance data of the underlying index may be included if presented in a manner consistent with the RILA prospectus disclosure requirements (*i.e.*, a 10-year bar chart with hypothetical 5% cap and -10% buffer applied).
- **Fee and Expense Disclosure.** Advertisements that include fee or expense figures (or state that there are no fees or expenses) must disclose the maximum amount of any sales load, non-recurring fees, potential loss from a contract adjustment, and annual contract expenses. For RILAs, the advertisement must also include a statement that the insurance company limits the amount an investor can earn and that the investor's returns may be lower than the index's returns, and that in return for accepting this limit, the investor receives some protection from index losses.
- **Filing Requirement.** Registered non-variable annuity advertisements would be required to be filed with the SEC or FINRA, consistent with the filing requirements for variable annuity advertisements.

PREEMPTION OF STATE SECURITIES LAW

The SEC has also proposed to preempt state securities law registration and qualification requirements for all securities sold in all offerings registered under the Securities Act. State securities laws are preempted if they are "covered securities" under the National Securities Markets Improvement Act of 1996 ("NSMIA"); currently securities offered and sold in a registered offering that are listed on a national securities exchange are "covered securities" but other securities sold in registered offerings are not. If adopted, the Proposal could result in a significant expansion of the securities that are exempt from state law registration and qualification. States would retain anti-fraud enforcement jurisdiction under Section 18(c) of the Securities Act.

The SEC explained that the changes are expected to result in significant cost savings for issuers of unlisted securities, which currently must comply with a patchwork of state-level registration and qualification requirements in each jurisdiction in which securities are offered or sold. The changes would "promote capital formation by reducing redundant regulatory oversight, thereby simplifying the process for conducting registered offerings of unlisted securities." Specifically, the SEC expects the proposed amendments would improve fundraising efficiency by reducing state registration burdens, shortening offering timelines and facilitating more continuous access to capital markets. Similarly, increased reliance on Exchange Act reporting and incorporation by reference could also reduce legal, accounting and

administrative costs while enhancing a non-traded issuer's ability to respond more efficiently to changing market conditions. More generally, and as reflected throughout the Proposal, the changes reflect a broader regulatory shift away from transaction-specific review and toward increased reliance on ongoing Exchange Act reporting as the principal investor protection framework.

Notwithstanding the benefits of expanded preemption, the Proposal is likely to generate significant opposition from state securities regulators and investor protection advocates who historically have resisted expansions of federal preemption that limit state review authority. The SEC has previously acknowledged the longstanding tension between facilitating capital formation and preserving the states' traditional role in securities regulation and the comment process is likely to reflect these competing considerations from various market participants with differing perspectives and priorities.

NON-TRADED BDCs AND NON-TRADED REITs

In light of this proposed extension of preemption, the Proposal has important implications for non-traded vehicles, including non-traded BDCs and non-traded REITs. In recent years, a growing number of non-traded REITs and non-traded BDCs have elected to become reporting companies through Form 10 registration statements, which automatically go effective 60 days after the initial filing date. These entities use this process to establish Exchange Act reporting status, build a reporting history and position themselves for eventual access to the public capital markets. In addition, because non-traded REITs and BDCs are typically sold in private placements with limited secondary trading, investors face constrained exit opportunities, and Exchange Act reporting provides ongoing information to investors and can help support more active secondary resale markets.

However, securities offered by these non-traded vehicles currently remain subject to extensive state blue sky registration and review requirements because they do not qualify as "covered securities" under NSMIA. As a consequence, these issuers frequently must comply with coordinated state review programs and substantive North American Securities Administrators Association guidelines governing offering terms, underwriting compensation, leverage limitations, suitability standards and disclosure practices. Many of these substantive state law restrictions could become significantly less relevant if federal preemption is expanded as proposed.

Because the proposed amendments would significantly expand federal preemption, securities sold by non-traded REITs and non-traded BDCs in offerings would no longer be subject to substantive blue sky review in individual states, even though the issuer is not listed on a national securities exchange. Preemption would materially reduce the time, cost and complexity associated with multi-state offering compliance for non-listed BDCs and non-listed REITs that historically have faced an extensive 50-state review and approval process and incurred substantial legal, filing and administrative burdens. The impact could be particularly meaningful for continuously offered programs that currently must navigate coordinated state review and renewal processes in connection with ongoing capital raising activities. However, and on balance with regard to investor protection, timely periodic reporting and disclosure controls could become increasingly important for non-listed BDCs and non-listed REITs seeking long-term capital markets flexibility by using continuous offering programs.

DELAYING AMENDMENTS

The Proposal would reverse the current default under Rule 473 of the Securities Act regarding the effectiveness of registration statements. Under existing rules, a registration statement becomes effective 20 days after filing under Section 8(a) of the Securities Act unless the issuer includes a "delaying amendment" deferring effectiveness. The Proposal would instead deem effectiveness to be delayed by default, aligning with market practice. An issuer wishing to trigger the 20-day Section 8(a) effectiveness period would be required to include an affirmative legend opting into automatic effectiveness.

This amendment addresses the risk of inadvertent omission of a delaying amendment, which has been a recurring compliance concern. In some cases where a delaying amendment has been inadvertently omitted, the registration statement has become effective before the omission was discovered. The proposed reversal of the default position would eliminate these risks and the administrative burdens associated with them for both issuers and SEC Staff.

AGE OF FINANCIAL STATEMENT REQUIREMENTS

Currently, registrants are not required to provide, in a registration statement or proxy statement, audited financial statements for the most recently completed fiscal year when the date of effectiveness of such registration statement or mailing date of such proxy statement falls within the first 45 days after such fiscal year end; this grace period can be extended where a registrant meets certain conditions, including an income requirement. The Proposal would amend Regulation S-X to eliminate the income-related conditions that must be met to extend such grace periods. Instead, an SRC that is current in its Exchange Act reporting would have up to 90 days after its fiscal year end before it must include audited annual financial statements in a new registration statement or proxy statement; a non-SRC would have until no later than its Form 10-K due date.

The elimination of income-related conditions is intended to simplify the analysis and provide greater certainty regarding the timing of financial statement updates. These amendments would benefit issuers that do not currently meet the income-related conditions and may need to raise capital, but are ineligible for the extended grace periods.

COMMENTS

The Proposal contains more than 130 requests for comment spanning all aspects of the proposed amendments. Comments are due 60 days after publication of the Proposing Release in the Federal Register and can be submitted (i) through the comment form on the SEC's website, (ii) by e-mail to rule-comments@sec.gov, including File Number S7-2026-17 in the subject line, or (iii) by paper to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. Access the SEC's press release, fact sheet and proposing release through the links.

We will share additional client communications on specific aspects of the proposals and their impacts on capital-raising transactions in the coming days, given that some of these measures have the potential to change radically how companies approach their funding alternatives.

The Free Writings & Perspectives, or FW&Ps, blog provides news and views on securities regulation and capital formation. The blog provides up-to-the-minute information regarding securities law developments, particularly those related to capital formation. FW&Ps also offers commentary regarding developments affecting private placements, mezzanine or "late stage" private placements, PIPE transactions, IPOs and the IPO market, new financial products and any other securities-related topics that pique our and our readers' interest. Our blog is available at: www.freewritings.law.

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ENDNOTES

[1] Registered Offering Reform, Securities Act Release No. 11418 (May 19, 2026), https://www.sec.gov/files/rules/proposed/2026/33-11418.pdf.

[2] *See* Securities Offering Reform, Securities Act Release No. 8591 (Jul. 19, 2005), https://www.sec.gov/files/rules/final/33-8591.pdf.

[3] Where Rule 12b-25 applies, the seven calendar days would be calculated from the filing's original due date and not from the end of the time period prescribed under Rule 12b-25.

[4] Although not applicable to Form S-3 eligibility generally, WKSI status is currently conditioned on the issuer not being an "ineligible issuer" as defined in Rule 405 under the Securities Act.

[5] As is the case with WKSIs today, because eligibility would be determined only on these dates, an issuer would remain eligible to use the Enhanced Registration and Communication Benefits even if an intervening event would otherwise cause it to lose ELI or SELI status between determination dates.

[6] For example, lawmakers have previously proposed legislation on capital formation that would have taken a more modest or limited approach. The INVEST Act, which was passed in the House of Representatives at the end of 2025, would lower the public-float requirement for WKSI status to $400 million from $700 million, while keeping in place current eligibility requirements.