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Shelf Help: SEC Proposes Broad Registered Offering Reform to Facilitate Capital Formation in the Public Markets

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On May 19, 2026, the Securities and Exchange Commission (the "SEC") proposed sweeping amendments to the registered offering framework under the Securities Act of 1933, as amended (the "Securities Act"), aimed at modernizing and streamlining the process for public securities offerings in the United States. The proposal—the most significant rethinking of the short-form and shelf registration system since the 2005 Securities Offering Reform—is the centerpiece of Chairman Atkins's stated agenda to encourage companies to go, and stay, public. In broad strokes, the proposal would let far more companies use Form S-3, extend offering and communication advantages now reserved for the largest issuers to most listed companies, and remove a series of timing and cost frictions that have made registered offerings slow or impractical for smaller and newly public companies.

At a Glance

- **Expanded access to Form S-3.** The 12-month seasoning and $75 million public float requirements for Form S-3 would be eliminated. A company would be eligible to file an unlimited primary shelf immediately after its IPO, with no "baby shelf" cap.
- **WKSI-style benefits for most listed companies.** Two new categories—Eligible Listed Issuers ("ELIs") and Seasoned Eligible Listed Issuers ("SELIs")—would replace Well-Known Seasoned Issuer ("WKSI") status for domestic issuers and extend pay-as-you-go fees, communication flexibility, and (for SELIs) automatic shelf registration to any S-3 eligible listed company.
- **Form S-1 incorporation by reference expanded.** All issuers that meet incorporation by reference conditions (other than BSP issuers, defined below, and foreign private issuers) could backward incorporate even if they have not yet filed a Form 10-K for the most recently completed fiscal year, incorporate by reference during their first year as a reporting company, before any Form 10-K is due, and forward incorporate subsequently filed Securities Exchange Act of 1934, as amended ("Exchange Act"), reports.
- **Preemption of state "blue sky" laws** for all registered offerings, including unlisted securities such as those issued by non-traded real estate investment trusts ("REITs") and business development companies ("BDCs").
- **Comment period.** Comments are due July 27, 2026. Final rules could be adopted later this year.

Under the current framework, an issuer wishing to use a short-form registration statement must satisfy both "registrant" requirements and "transaction" requirements. The proposed amendments would expand the availability of short-form registration to a much broader group of issuers, give issuers more flexibility over the timing and structure of registered offerings, and reduce offering costs. The key elements are described below.

Key Features of the Proposal

1. Expanded Access to Form S-3

Form S-3 serves as a streamlined registration option under the Securities Act for qualifying issuers. Compared to Form S-1, this short-form registration statement provides key procedural efficiencies. Importantly, it allows for automatic prospectus updates through forward incorporation by reference, meaning that periodic reports (such as Forms 10-K and 10-Q) and Current Reports on Form 8-K subsequently filed under the Exchange Act are automatically incorporated. Additionally, Form S-3 supports shelf registration, enabling issuers and selling securityholders to preregister securities offerings and then access the market when conditions are favorable. Form S-3 also accommodates continuous offering structures, including medium-term note programs and at-the-market offerings, which facilitate ongoing securities sales.

Elimination of Certain Registrant Requirements. Today, an issuer must have, among other things, filed reports under the Exchange Act for at least 12 calendar months (the "One-Year Seasoning Requirement") immediately before the Form S-3 filing and be current and timely in those Exchange Act filings. The proposal would eliminate the One-Year Seasoning Requirement. Instead, an issuer would become eligible to use Form S-3 immediately upon registering a class of securities under Section 12(b) or 12(g), or becoming subject to Section 15(d), of the Exchange Act—provided that it is current and timely in its Exchange Act reporting requirements during the 12 calendar months and any portion of a month immediately preceding the Form S-3 filing or for so long as the issuer has been required to file such reports, if less than 12 calendar months (the "Lookback Period"). Except as described below, an issuer that misses a required filing would still be ineligible under the retained current and timely test, however, the current and timely filing requirement continues to exempt certain filings on Form 8-K**.**

The proposal would also drop three other registrant conditions—the requirements that (i) the issuer (along with its subsidiaries) has not missed certain dividend, debt or lease payments since its last audited fiscal year, which defaults are material to the consolidated company, (ii) the issuer has made all required electronic filings with the SEC, and (iii) the issuer has submitted all required XBRL interactive data files.

- **One late filing will not eliminate Form S-3 eligibility.** The proposal hardwires the SEC staff's current practice regarding waivers for Form S-3 eligibility: A single late filing during the Lookback Period would not eliminate Form S-3 eligibility, so long as the filing was made within seven days of the *original* due date (not counting extensions under Rule 12b-25) and it was the issuer's only late filing in the Lookback Period.

- **Who is carved out.** Form S-3 would remain unavailable to certain "ineligible issuers" under Rule 405 that the SEC views as higher risk, including a new "BSP issuer" category (**b**lank check, **s**hell, and **p**enny-stock

issuers—currently or within the past three years), certain bad actors, asset-backed issuers, investment companies, and BDCs.

- **Former SPACs get a clean break.** Critically, the BSP "shell company" prong would **exclude** a company (other than a foreign private issuer) whose shell status only arose from having been a SPAC in the past three years. A company that completed a de-SPAC transaction would therefore be eligible to use Form S-3—and to qualify as an ELI or SELI—on the same footing as a company that completed a traditional IPO, a marked improvement over the current regime in which WKSI status is unavailable for roughly three years after a de-SPAC transaction. (The proposal does not amend Rule 145 or the rolling current public information condition in Rule 144(i), so de-SPACed companies would continue to be treated differently in those respects.)

Elimination of Transaction Requirements – goodbye to the $75 million float test and the "baby shelf." Historically, the SEC used a $75 million public float as a proxy for whether an issuer was widely followed and its information well disseminated. The proposal would eliminate the public float requirement and all other transaction requirements, based on the SEC's view that Form S-3 eligibility should turn on whether current, issuer-specific information is available (i.e., current and timely reporting), not on market following. As a result, any issuer meeting the registrant requirements could offer an unlimited amount of securities on Form S-3. Companies below $75 million in public float would no longer be confined to the "baby shelf" offering limit of one-third of public float per rolling 12 months—the SEC estimates that roughly 1,000 issuers would be freed from that cap, with over 1,100 more becoming S-3 eligible for the first time.

- **ATM guardrail.** Because broader Form S-3 access also expands access to at-the-market ("ATM") offerings, which the SEC views as raising investor protection concerns, the proposal would limit ATM offerings to securities listed on a national securities exchange or traded on a market that the SEC designates based on specified criteria.

Day-one playbook. Taken together, a company could be S-3 eligible immediately after its IPO and incorporate the required disclosure by reference from its Form S-1 (or Form 10)—a meaningful change from today, where Form S-3 is generally unavailable for at least a year. The SEC projects an increase of more than 60% in issuers eligible to offer an unlimited amount of securities on Form S-3.

2. ELIs and SELIs Replace WKSI Status for Domestic Issuers

The proposal would extend the registration and communication advantages adopted as part of the 2005 Securities Offering Reform—today largely reserved for WKSIs (generally, issuers with $700 million in public float or $1 billion of registered debt)—to a much wider group. The WKSI definition would be eliminated for all domestic issuers (and retained only for foreign private issuers) and replaced by three new categories:

- **S-3 Eligible Issuers** – any issuer that meets the proposed Form S-3 registrant requirements.
- **Eligible Listed Issuers ("ELIs")** – any issuer that meets the proposed Form S-3 registrant requirements and has at least one class of common equity listed on a national securities exchange, regardless of how long it has been subject to Exchange Act reporting.
- **Seasoned Eligible Listed Issuers ("SELIs")** – an ELI that has been subject to Exchange Act reporting for at least 12 calendar months and any portion of a month immediately preceding the applicable determination date. Only SELIs would be able to file automatically effective shelf registration statements (Form S-3ASR).

The amendments would also eliminate the non-reporting issuer, unseasoned issuer, and seasoned issuer categories. ELI / SELI status would be determined annually, consistent with the current WKSI framework. The table below shows how the principal benefits would be allocated under the proposal.

Allocation of enhanced registration & communication benefits (proposed)

Rule	Benefit	All S-3 eligible	ELI	SELI
139	Broker-dealer research reports not deemed an "offer"	✓	✓	✓
430B(b)	Omit selling securityholder identities / amounts from resale prospectus	✓	✓	✓
433	Use a free writing prospectus not preceded / accompanied by a prospectus	✓	✓	✓
163 / 163A	Prefiling offers and communications flexibility	–	✓	✓
164	Free writing prospectus for Form S-8 offerings	–	✓	✓
413(b)	Add securities / classes by post-effective amendment	–	✓	✓
430B(a)	Omit certain information from the base prospectus	–	✓	✓
456(b) / 457(r)	"Pay-as-you-go" registration fees (pay at takedown)	–	✓	✓
462	Automatically effective shelf registration (S-3ASR)	–	–	✓

All of these benefits are currently reserved for WKSIs (and, in a few cases, certain other Form S-3 eligible issuers). The SEC estimates that the population eligible for these benefits would rise from roughly 36% of reporting issuers (today's WKSIs) to about 74% of reporting issuers (SELIs).

Watch item – debt-only WKSIs. Because ELI / SELI status requires listed common equity, an issuer that qualifies as a WKSI today solely on the basis of registered debt and has no listed common equity would not become an ELI or a SELI and could lose its current WKSI benefits. The SEC has asked for comment on a transition period for these issuers.

3. A More Useful Form S-1 – Expanded Incorporation by Reference

The proposal would significantly expand incorporation by reference on Form S-1. Today, backward incorporation generally requires that the issuer have filed an annual report for its most recently completed fiscal year, and forward incorporation is available only to smaller reporting companies ("SRCs"). Under the proposal, all issuers that meet the incorporation by reference conditions (other than BSP issuers and foreign private issuers) could:

- backward incorporate even if they have not yet filed a Form 10-K for the most recently completed fiscal year;
- incorporate by reference during their first year as a reporting company, before any Form 10-K is due; and
- forward incorporate subsequently filed Exchange Act reports—a benefit no longer limited to SRCs.

These amendments would narrow the gap between Form S-1 and Form S-3 and reduce the need for prospectus supplements and post-effective amendments, though delayed shelf and ATM offerings would still require S-3 eligibility. The SEC estimates up to a 106% increase in issuers able to forward incorporate on Form S-1.

4. Preemption of State "Blue Sky" Registration and Qualification

Today, federal preemption of state registration and qualification requirements under Section 18(b)(1) of the Securities Act generally covers only securities listed (or approved for listing) on a national securities exchange. The proposal would define "qualified purchaser" under Section 18(b)(3) to include any person to whom securities are offered or sold in a registered offering—thereby preempting state registration and qualification requirements for all registered offerings, including offerings of unlisted securities. State antifraud authority would remain. This is a meaningful cost and time-saver for issuers of unlisted registered securities such as non-traded REITs and certain BDCs. State regulators are likely to be among the most vocal commenters.

5. Other Notable Changes

- **Goodbye to the delaying amendment.** Rule 473 would be revised so that effectiveness is deemed delayed by default (other than for automatic shelf registration statements) unless the issuer affirmatively opts into Section 8(a) effectiveness. This would eliminate the foot-fault risk that an inadvertently omitted legend triggers premature effectiveness.

- **Relaxed staleness / grace periods.** Regulation S-X Rules 3-01(c) and 8-08(b) would be amended to remove the profitability conditions that currently deny loss-making issuers the extended grace period, aligning the deadline to include audited financial statements with the issuer's Form 10-K due date rather than a mid-February cutoff.

- **BDCs and closed-end funds.** Parallel amendments would extend short-form shelf registration on Form N-2 and certain enhanced registration and communication benefits to a broader group of BDCs and registered closed-end funds. For more details, see Willkie Client Alert: "SEC Proposes Allowing RILAs and MVA Annuities to Advertise Using Rule 482."

- **Insurance product advertising.** Rule 482 would be expanded to permit broad-based advertising of registered index-linked and market value adjustment annuities, providing a consistent advertising framework for these products.

Who Benefits Most

The practical impact varies sharply by issuer profile. The table below summarizes how the proposal would change the playing field for the issuers most affected.

Issuer profile	Today	Under the proposal
Newly public company (< 12 months reporting)	No Form S-3; must use Form S-1 and register takedowns by post-effective amendment	Form S-3 eligible and an ELI on day one (subject to the customary 180-day IPO lock-up); a SELI with automatic shelf benefits after 12 months
Company with < $75M public float	"Baby shelf"—primary sales capped at one-third of float per rolling 12 months	Unlimited primary shelf; freed from the one-third cap (~1,000 issuers)
Former SPAC / de-SPAC company	Treated as a shell company; effectively blocked from Form S-3 and WKSI benefits for ~3 years	Treated like a traditional IPO company; Form S-3-, ELI- and SELI-eligible
Listed non-WKSI (≥ 12 months reporting)	S-3 eligible but no WKSI benefits	SELI—automatic shelf, pay-as-you-go fees and full communication flexibility
Non-traded REIT / BDC / unlisted offering	State "blue sky" registration and qualification	State registration and qualification preempted for all registered offerings
Debt-only WKSI (no listed equity)	Full WKSI benefits	Would not qualify as ELI / SELI—monitor for possible loss of benefits; comment opportunity

What This Means for You – Practical Steps to Consider Now

Although the proposal may change through the comment process, companies that would benefit should begin planning now. We suggest the following:

- **Revisit your shelf and offering pipeline.** If you cannot use Form S-3 today—or are limited to a baby-shelf takedown—model how immediate, uncapped shelf access (including pay-as-you-go fees) would change your near-term financing strategy and whether an existing Form S-1 shelf should be migrated. Newly public companies should evaluate filing (or confidentially submitting) a Form S-3 shortly after the IPO so that an effective shelf is ready when a market window opens.

- **Update board authorizations and ATM governance.** Companies that would gain shelf or first-time ATM capacity should confirm that financing authorizations, disclosure controls, blackout policies, and ATM governance (e.g., size limits, pricing discretion, notice procedures, use of proceeds) are in place to act quickly.

- **Refresh communications and FWP practices.** Issuers that would newly qualify for WKSI-style communication benefits should review prefiling communication, free writing prospectus, and Rule 163 / 163A practices with counsel and underwriters before relying on the benefits.

- **Plan for robust diligence on compressed timelines.** Faster offerings with fewer SEC reviews do not reduce Securities Act liability. Expect underwriters and auditors to maintain—and for smaller, less-seasoned issuers, likely heighten—due diligence, comfort letter, and negative assurance expectations. Issuers expecting frequent takedowns should consider a continuous diligence program.

- **Unlisted-securities issuers: watch preemption timing.** Non-traded REIT, BDC, and other unlisted offering sponsors with deals in the pipeline should weigh whether to time transactions in anticipation of full Section 18 preemption and remap “blue sky” checklists accordingly.

- **De-SPAC and former SPAC issuers: reassess access.** Companies that went public via a de-SPAC transaction should confirm whether the proposal would remove the shell company barrier to Form S-3 and ELI / SELI status—and remember that the Rule 144(i) and Rule 145 limitations would remain.

- **Consider commenting.** Companies with strong views—particularly debt-only WKSIs, financial institutions concerned about the ineligible issuer carveouts, and unlisted securities sponsors—should consider submitting comments before the deadline.

Rationale and Policy Considerations

The proposal reflects the SEC’s effort to advance capital formation while preserving investor protection and fair, orderly, and efficient markets. Its central premise is a shift away from seasoning and public float—historically used as proxies for how widely an issuer is followed—toward whether investors can readily obtain current, issuer-specific information through timely Exchange Act reporting. Relying on EDGAR and modern electronic dissemination, the SEC reasons that the availability of information, not market following, should determine short-form eligibility. The release frames the changes as lowering the cost and friction of accessing the public markets while keeping the disclosure-based investor protections of the registered offering process intact.

Implications for Companies Accessing the Capital Markets

If adopted, these changes would meaningfully recalibrate the cost-benefit analysis of being a public company, especially for newly public issuers and companies with a public float below $75 million. By making public market financing faster, cheaper, and more flexible, the proposal could reduce reliance on PIPEs, structured convertibles, and other private financing alternatives that often carry pricing discounts or dilution. Read together with the SEC’s

concurrent proposals to simplify the filer status framework (see Willkie Capital Letters, "Fewer Categories, Fewer Headaches: The SEC's Proposal to Simplify Filer Status and Streamline the Reporting Framework for Public Companies") and permit semiannual reporting (see Willkie Capital Letters, "Half-Time Reports: The SEC's Proposed Play to Allow Semiannual Reporting for Public Companies"), the proposal should prompt private companies weighing private versus public financing—and public companies reassessing their capital raising playbook—to take a fresh look at the public markets.

Looking Ahead

The SEC's proposed overhaul represents a fundamental shift in how quickly companies can access the public markets, with the potential to significantly reduce the time and cost of an offering. Companies considering accessing the public markets should review the proposed changes carefully and assess their impact on capital raising plans.

The SEC is soliciting comment on all aspects of the proposal. The comment period will remain open until July 27, 2026. Companies with strong views should consider submitting comments.

If you have any questions regarding this client alert, please contact the Willkie attorney with whom you regularly work.

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