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May 29, 2026

LEGAL UPDATE

SEC Proposes New Rule to Revise Form S-3 Eligibility Criteria

On May 19, 2026, the Securities and Exchange Commission (the "SEC" or "Commission") proposed a new rule and form amendments aimed at enhancing public companies' ability to conduct registered offerings. The proposed amendments would enable more public companies to conduct shelf offerings through a Registration Statement on Form S-3 ("Form S-3"), extend well-known seasoned issuer ("WKSI") benefits to a broader set of issuers, preempt state "blue sky" securities laws for registered offerings, and modernize the Registration Statement on Form S-1 ("Form S-1") by expanding the ability to incorporate information by reference into the Form.

The comment period for this proposed rule is open until sixty days after its publication in the Federal Register.

Form S-3 Eligibility

The proposed amendments would expand Form S-3 eligibility criteria by no longer requiring issuers to be a reporting company under the Securities Exchange Act of 1934 (the "Exchange Act") for at least twelve months. An issuer would be eligible to use Form S-3 immediately after becoming a reporting company, as long as they are current and timely with their filing requirements under the Exchange Act. The proposal would also eliminate all existing transaction requirements for Form S-3 eligibility, including the requirement for a $75 million public float threshold to register an unlimited amount of securities on Form S-3. This proposed amendment would allow for primary and secondary shelf offerings of an unlimited amount using Form S-3, regardless of the public float if the issuer is timely and current with their filings under the Exchange Act. However, the proposed amendments would prohibit certain "ineligible issuers," as defined in Rule 405 of the Securities Act of 1933 (the "Securities Act"), from using Form S-3.

WKSI Enhanced Registration and Communication Benefits

In order for a company to qualify as a WKSI, an issuer must have at least $700 million in public float or have issued at least $1 billion of debt securities through registered offerings. WKSI issuers are entitled to file automatic Form S-3s which are effective immediately upon filing, paying registration fees on a "pay-as-you-go" basis at the time of each offering, engage in pre-filing and post-filing communication flexibility not available to other issuers, and to add securities or classes to an effective Form S-3 by post-effective amendment.

Under the proposal, the SEC would expand access to these benefits that are currently reserved for WKSIs by replacing the WKSI definition with two new categories of issuers:

- "Eligible Listed Issuer" ("ELI"): an issuer that meets the proposed Form S-3 registration requirements of current and timely compliance with the Exchange Act reporting requirements and has at least one class of common equity securities listed on a national securities exchange; and
- "Seasoned Eligible Listed Issuer" ("SELI"): an ELI that has been subject to Exchange Act reporting requirements for at least twelve calendar months.

The determination date for whether an issuer qualifies as an ELI or SELI would be the latest of: (1) the date the issuer files a Form S-3; (2) the date of the most recent amendment to a Form S-3 to comply with Section 10(a)(3) of the Securities Act; or (3) if the issuer has not filed or amended a registration statement to comply with Section 10(a)(3) of the Securities Act for 16 months, the filing date of its most recent Annual Report on Form 10-K.

Under the proposed amendment, SELIs would be the only type of issuer eligible for automatic shelf registration, but both SELIs and ELIs will gain access to all registration and communication benefits currently reserved for WKSIs.

Preemption of State "Blue Sky" Securities Laws

The Commission is proposing to preempt state "blue sky" laws with respect to all registered offerings in an effort to eliminate the cost associated with complying with numerous states' registration and qualification requirements. The proposed reforms would define "qualified purchaser" under Section 18(b)(3) of the Securities Act to encompass securities issued in all offerings issued under the Securities Act, including companies with securities traded only on OTC Markets.

Incorporation by Reference on Form S-1

Currently, only issuers who have filed their Annual Report on Form 10-K for the most recent fiscal year are permitted to incorporate by reference information into a Form S-1 filed before the effective date of the registration statement ("backward incorporate") and the ability to incorporate by reference certain information filed after the effective date of a Form

S-1 is limited to smaller reporting companies ("forward incorporate"). Under the proposal, domestic issuers would be allowed to backward incorporate information by reference regardless of whether they filed an annual report for their most recently completed fiscal year and forward incorporate regardless of whether they are a smaller reporting company.

Takeaways

If the proposal is implemented in final form, it would have broad and significant implications for U.S. capital markets and periodic reporting compliance. The proposed amendments would increase access to Form S-3 shelf Registration Statements, which would allow more companies to access the public markets faster and at lower cost. Expanding access to WKSI benefits would also increase an issuer's offering flexibility. Furthermore, the Form S-1 proposed amendments would simplify offerings for many companies.

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