Clifford Chance

BRIEFING

SEC Proposes to Expand Eligibility for Key Registered Offering Accommodations

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In May 2026, the U.S. Securities and Exchange Commission (SEC) released for public comment a proposal ("**Proposal**") that would significantly reform how many public companies register securities offerings under the U.S. Securities Act of 1933, as amended ("**Securities Act**"). (The proposing release for the Proposal is available here.) If adopted, these proposed reforms would substantially broaden the number of issuers eligible to register continuous or delayed offerings of securities on Form S-3. Importantly, more issuers would be permitted to register these offerings without prior staff review. In addition, the SEC is proposing to extend offering-communication related accommodations to more issuers. The Proposal also contemplates enhancing the incorporation by reference mechanics for long-form registration statements on Form S-1 and extending federal preemption of state blue sky registration requirements across all registered offerings. The Proposal is subject to public comment and may be different if adopted. The comment period will remain open through July 27, 2026.

Key takeaways

1. The one-year reporting history requirement and $75 million public float threshold would both be eliminated.
2. The WKSI designation for domestic issuers would be replaced by two new tiers — ELIs and SELIs — with SELIs gaining eligibility for automatic shelf registration (Form S-3ASR) effectiveness upon filing after 12 months of reporting history.
3. Newly public companies could establish shelf registration statements immediately upon entering the reporting system, enabling proactive capital raising from the outset.
4. Forward incorporation by reference in Form S-1 would be extended to all eligible issuers, with the SEC projecting the number of qualifying issuers could increase by as much as 106%.

Background

The Proposal reflects the SEC's view that the benefits of efficient shelf registration and enhanced communications flexibility should no longer be reserved for only well-known seasoned issuers ("**WKSIs**"), which represent a small segment of the issuer population. While only approximately 36% of Securities Exchange Act of 1934, as amended ("**Exchange Act**") reporting companies qualified as WKSIs in 2024, the SEC estimates that roughly 76% would take advantage of the Proposal framework.

Under the current reporting regime, WKSIs can take advantage of the following accommodations:

- Automatic shelf registration on Form S-3ASR;
- Disclosure flexibility in base prospectuses;
- Ability to register an unspecified amount of securities;
- Flexibility surrounding offering communications;
- Registering securities for subsidiaries who are also registrants; and
- Pay-as-you-go filing fees.

Elimination of 12-Month Reporting Experience Requirement and $75 Million Public Float Threshold for Form S-3 Eligibility

Form S-3 is the preferred form for registered offerings by existing registrants compared to Form S-1. Its principal advantages over Form S-1 include fewer pages of disclosure, the ability to incorporate Exchange Act filings by reference on a forward-looking basis (automatically keeping the prospectus current), shelf registration eligibility that allows securities to be offered on a delayed or continuous basis as market conditions permit, and the ability to establish at-the-market ("**ATM**") offering programs. Issuers that fall outside Form S-3's eligibility requirements are confined to Form S-1, which is longer, carries more intensive SEC staff review, and lacks the shelf and ATM capabilities that facilitate rapid, efficient capital raising.

Under the current rules, two requirements have historically served as the primary gatekeepers to Form S-3 eligibility — the one-year reporting history requirement and the $75 million public float threshold. The proposed amendments, discussed in more detail below, would eliminate both.

- ***Newly public companies would no longer need to wait 12 months before becoming eligible to use Form S-3***. The existing rule conditioning Form S-3 availability on 12 months of Exchange Act reporting history would be removed. Going forward, an issuer's eligibility to use Form S-3 would be established as soon as it has a class of securities registered under the relevant provisions of the Exchange Act or becomes subject to its reporting obligations (after filing of a Form S-1 or Form 10), assuming it remains current and timely in those obligations. In the SEC's view, what matters is whether investors have access to meaningful disclosure about the issuer, not how long that disclosure has been available.

- ***Companies with public floats below $75 million would gain full Form S-3 eligibility and would no longer be limited by the "baby shelf" one-third public float cap***. Currently, issuers with less than $75 million in public float that are exchange-listed are only allowed to sell up to one-third of their public float over any rolling 12-month period. The proposed amendments would do away with both the float threshold and the baby shelf cap, allowing any issuer meeting the revised registrant requirements to register any amount of securities for primary or secondary offerings. The SEC's own data indicates that over 1,100 issuers unable to use Form S-3 entirely would gain eligibility, and more than 1,000 additional issuers currently subject to the baby shelf cap would have that constraint removed.
- ***Foreign private issuers (FPIs) would not be eligible to use Form S-3***. The proposed amendments would exclude FPIs from Form S-3 eligibility, even those that voluntarily file periodic reports using U.S. domestic forms (10-K, 10-Q and 8-K). This represents a significant change as compared to the current Form S-3 eligibility framework. FPIs would only be eligible to use Form F-3 for delayed or continuous offerings. FPIs that currently qualify as WKSIs would continue to be able to file Form F-3ASR with automatic effectiveness.
- ***Form S-3 eligibility would still require the issuer***:
  - be a U.S. corporation;
  - have a class of securities that is registered under the Exchange Act;
  - not to have failed **to** pay any dividend or sinking fund installments on preferred stock since the end of the most recent fiscal year; and
  - not to have defaulted on any material debt or long-term lease since the end of the most recent fiscal year.
- ***Certain issuers would not be eligible to use Form S-3.*** The Proposal would exclude certain issuers that the SEC views as carrying elevated potential for noncompliance with the federal securities laws. These include "BSP issuers" (a term encompassing blank check companies, penny stock issuers, and shell companies, other than business-combination-related shell companies) as well as issuers subject to certain disqualifying criminal convictions, anti-fraud orders, or pending SEC proceedings. Notably, however, a company that previously operated as a SPAC would not be treated as a disqualified shell company under the three-year lookback, meaning former SPAC targets that have successfully completed their business combination would remain eligible to file a Form S-3, provided they are not otherwise disqualified.

New ELI/SELI framework

A central structural feature of the Proposal is the replacement of the WKSI category for domestic issuers with two new tiers of issuer classification.

- ***"Eligible Listed Issuers" (ELIs)*** — the baseline enhanced category, open to any issuer that satisfies the revised Form S-3 registrant requirements and has at least one class of common equity listed on a national securities exchange. There is no public float requirement and no minimum period of reporting history required for ELI status. ELIs would gain eligibility to a meaningful set of accommodations currently reserved for WKSIs, though they would not be eligible for automatically effective shelf registration.
- ***"Seasoned Eligible Listed Issuers" (SELIs)*** — the more senior tier, available to ELIs that have additionally accumulated at least 12 months of Exchange Act reporting history. SELIs would enjoy the full package of enhanced accommodations, including the ability to file automatic shelf registration statements ("**Form S-3ASRs**") that go effective immediately upon filing, without awaiting SEC staff review or action.

Lower qualification thresholds

A defining feature of the proposed new framework is that the qualifying criteria for ELI and SELI status would be substantially less demanding than those for WKSI status under current rules.

Qualification for ELI/SELI status would not depend on:

- **Public float** — under existing rules, a WKSI must have at least $700 million in public float. No analogous threshold would apply under the proposed framework; an issuer with a modest float could qualify as an ELI or SELI as readily as a large-cap company, provided the other conditions are met.
- **Prior non-convertible debt issuance** — currently, an issuer that has not reached the $700 million float threshold can still qualify as a WKSI by demonstrating that it has issued at least $1 billion in aggregate principal amount of nonconvertible securities in registered offerings over the prior three years. This alternative pathway would disappear for domestic issuers under the Proposal.

Instead, eligibility would primarily depend on:

- **Exchange listing** — at least one class of the issuer's common equity must be listed on a national securities exchange. This condition replaces public float as the primary market-presence indicator and reflects the SEC's view that listing status, rather than float size, is the more relevant indicator of an issuer's visibility and investor access.
- **Timely Exchange Act reporting compliance (with a new grace period added)** — issuers must be current and timely in their periodic and current report filings. The Proposal would codify a narrow but meaningful

accommodation: a single late filing submitted within seven calendar days of its original due date (not the extended Rule 12b-25 deadline) would not result in loss of eligibility, provided it is the only untimely filing during the relevant lookback period.

Summary of ELI / SELI regulatory accommodations

ELIs and SELIs would be granted regulatory accommodations currently available only to WKSIs, including:

- **Pay-as-you-go filing fees** — rather than calculating registration fees based on a stated offering amount at the time of the initial shelf filing, ELIs and SELIs would be able to defer fee payment to the time of each actual takedown.
- **Expanded prospectus omission flexibility** — ELIs and SELIs would be permitted to omit certain categories of information from the base prospectus included in a shelf registration statement, with the expectation that such information will be supplied through prospectus supplements at the time of individual offerings.
- **Ability to add additional securities or classes post-effectiveness** — under current rules, the ability to expand a shelf registration statement to cover additional types or classes of securities through a post-effective amendment, rather than a new registration statement, is available only to WKSIs. The Proposal would extend this capability to ELIs and SELIs, allowing them to broaden the scope of an existing registration statement as their capital structure evolves without the friction and cost of starting a new filing.
- **Expanded free writing prospectus flexibility** — ELIs and SELIs would gain eligibility to expanded permissions governing the use of free writing prospectuses, including the ability to use free writing prospectuses following the filing of a registration statement in connection with certain employee benefit plan registrations.
- **Greater communications flexibility before and after filing** — the Proposal would extend to ELIs and SELIs the prefiling communications safe harbors currently available only to WKSIs, as well as enhanced flexibility to communicate with investors after filing.

Expanded ability to incorporate information by reference in a Form S-1

If a company registers an offering on Form S-1 (i.e., because it is not S-3 eligible), the Proposal would:

- **Eliminate the requirement to have filed a Form 10-K before incorporating SEC-filed reports by reference**. Under the existing rules, an issuer must have filed at least one annual report on Form 10-K before it can use backward incorporation by reference in a Form S-1. The proposed amendments would remove that prerequisite, opening up incorporation by reference to companies during their initial period as public reporting companies — before they have had the opportunity to file an annual report. This is a particularly meaningful change for companies in the months immediately following their IPO.

- **Permit broader "forward" incorporation by reference.** Forward incorporation by reference — the ability to automatically update a registration statement by reference to Exchange Act reports filed after the registration statement's effective date — is currently available on Form S-1 only to smaller reporting companies. The Proposal would extend this accommodation to all issuers meeting Form S-1's incorporation by reference requirements, substantially reducing the need for post-effective amendments triggered by subsequent filings. The SEC has projected that the number of issuers able to take advantage of forward incorporation on Form S-1 could increase by as much as 106%.
- **Important limitation**. Delayed offerings and ATM offerings cannot be registered on Form S-1. These types of offerings would continue to require the issuer to separately qualify for primary shelf registration under Form S-3.
- **Foreign Private Issuers**. Note that the Proposal also amends Form S-1 to prohibit use by FPIs, regardless of whether the FPI voluntarily files on domestic forms (Form 10-K, Form 10-Q, and Form 8-K).

Expanded blue sky preemption

- ***Blue sky preemption would become available for all securities registered with the SEC, providing a new, additional basis for "covered security" preemption***. Under current law, federal preemption of state securities registration and qualification requirements applies to registered offerings of securities that are listed or approved for listing on a national securities exchange, but not to registered offerings of unlisted securities. As a result, issuers selling unlisted securities through registered offerings must navigate a patchwork of state-level registration requirements across every jurisdiction in which they offer securities. The proposed amendments would address this by defining "qualified purchaser" under Section 18(b)(3) of the Securities Act to encompass any buyer of securities in a registered offering, thereby preempting state registration and qualification requirements across the board — regardless of whether the securities in question are exchange-listed.
- ***The Proposal would not eliminate the currently available preemption for securities that are listed on a national securities exchange or rank senior to such a class of securities.*** The existing exchange-listing-based preemption under Section 18(b)(1) would remain fully intact. The new qualified purchaser preemption would include any purchase of securities offered or sold in a registered offering, and would function as an

additional, complementary ground for federal preemption, expanding coverage beyond what the exchange-listing preemption alone can reach.

Implications for current WKSIs

For the large majority of current WKSIs, the proposed transition from the WKSI framework to the ELI/SELI structure should be largely seamless in operational terms. Those that are exchange-listed (which represents the overwhelming majority of today's WKSI population) would be expected to qualify as SELIs and carry forward substantially all of the accommodations they currently enjoy, including automatic shelf registration. For the vast majority of WKSIs, the Proposal would be a seamless reclassification rather than a meaningful change in substantive eligibility. The SEC's data confirms that over 90% of companies that self-reported as WKSIs in 2024 would satisfy the SELI requirements.

FPIs that are also WKSIs would not transition to being classified as either ELIs or SELIs. The WKSI definition in Rule 405 would be preserved exclusively for these issuers, which would continue to enjoy their existing enhanced accommodations under the surviving WKSI framework. They would not gain eligibility to any of the new accommodations the Proposal creates. FPIs would continue to use Form F-3 and Form F-1 for their registered offerings.

Implications for companies considering an IPO or currently ineligible to Use Form S-3

1. Capital raising flexibility

If adopted, the Proposal would permit newly public issuers to establish shelf registration statements early in their lifecycle as public companies. With the seasoning requirement gone, companies would be free to put a Form S-3 shelf registration statement in place as soon as they join the reporting system, as long as they are otherwise eligible. This would allow newly public companies to take a proactive approach to capital structure management from the outset of their tenure as a public company, rather than being locked out of the most flexible capital raising vehicle for their first year.

Shelf registration would permit:

- **Follow-on offerings** — registered securities offerings drawn down off a standing shelf, executable far more rapidly and with considerably less preparation than a full Form S-1 process;
- **Secondary resale offerings** — registered sales by existing holders such as pre-IPO investors or private placement participants, which under the current framework often necessitate a separate Form S-1;
- **ATM offerings** — gradual, ongoing sales of equity into the open market at prevailing prices, without the need to structure and execute a discrete

offering, giving companies a low-friction mechanism for incremental capital raising; and

- **Other delayed offerings —** the advance registration of securities for sale at unspecified future dates, preserving optionality and allowing issuers to move when market timing is advantageous.

2. Greater ability to opportunistically access capital markets

If the Proposal is adopted, newly public companies and smaller public companies would be better positioned to react to volatile market conditions without preparing full Form S-1 registration statements. Today, a company without Form S-3 eligibility that wants to raise capital through a registered offering must go through the full Form S-1 process, a more time-consuming and expensive undertaking that is also subject to more intensive SEC staff scrutiny. A company with an effective Form S-3 shelf registration statement already in place could instead act within a compressed timeframe to respond to:

- **Market windows** — brief openings of favorable pricing or investor sentiment;
- **Acquisition opportunities** — deploying registered shares as deal consideration on an accelerated basis;
- **Liquidity needs** — addressing capital requirements quickly in response to operational or financial developments; or
- **Strategic growth initiatives** — funding new business activities as they arise, without being constrained by the lead time of a new registration process.

3. Automatic shelf registration after 12 months

- ***After 12 months as an Exchange Act reporting company, ELIs would become SELIs***. SELI status would build on ELI status by adding a single further requirement: the issuer must have been subject to Exchange Act reporting obligations for at least 12 calendar months. Notably, this 12-month seasoning condition — eliminated for Form S-3 eligibility generally — would be preserved specifically as the threshold for automatic shelf registration. The SEC estimates that approximately 74% of Exchange Act reporting companies would qualify as SELIs.
- ***SELIs would be permitted to file S-3ASRs, which become effective upon filing without requiring SEC staff review or action***. The Proposal would extend this capability to all SELIs, meaning any exchange-listed company with at least 12 months of reporting history that is in good standing with its filing obligations could access the capital markets immediately upon filing its shelf registration statement.
- ***This would significantly accelerate registered offering execution timelines for listed companies that currently are not WKSIs.*** SELI status would remove the constraint of SEC review entirely, enabling

companies to respond to market conditions with a speed and certainty that is currently unavailable to them.

4. Appointing Designated Underwriters' Counsel to Support Offering Readiness

Companies that will become newly eligible for Form S-3 should consider designating underwriters' counsel at the outset and establishing a program of periodic due diligence in advance of any specific transaction. Unlike a traditional Form S-1 offering, where the registration process itself provides a structured framework for legal, financial, and disclosure diligence prior to closing, a shelf-based offering is designed to move quickly. The compressed timelines associated with shelf takedowns, particularly for SELIs using automatic shelf registration, leave little room to conduct diligence from a standing start. By retaining underwriters' counsel on an ongoing basis and scheduling periodic bring-down due diligence calls (typically with the filing of annual and quarterly reports), companies can maintain a state of continuous offering readiness, ensuring that comfort letters, legal opinions, and disclosure updates can be delivered on the compressed schedules that market-window transactions demand. Companies that prepare in this regard will be better positioned to act decisively when market conditions are favorable.

Practical considerations

- ***Form S-3 eligibility would still depend heavily on being current and timely in Exchange Act reporting.*** Although the proposed amendments strip away many of Form S-3's existing eligibility conditions, the SEC would preserve and continue to enforce the requirements that issuers remain current and timely in their Exchange Act reporting obligations. The availability of accurate, up-to-date issuer information is the cornerstone of the entire Form S-3 framework, and that availability depends on consistent reporting compliance.
- ***A single late filing generally could jeopardize Form S-3 eligibility, subject to the Proposal's limited seven-day grace period***. The Proposal would codify a narrow safety valve for isolated filing delays: an issuer would remain eligible for Form S-3 notwithstanding a single untimely filing within the lookback period, provided the filing was submitted within seven calendar days of the original due date (not the extended due date available under Rule 12b-25) and no other late filings occurred during the same period. Beyond this limited accommodation, even one additional untimely filing would render an issuer ineligible.
- ***Newly public issuers may file shelf registration statements shortly after IPO closing.*** The removal of the seasoning requirement creates a strong incentive for companies to file a Form S-3 in the immediate aftermath of their IPO. While the customary 180-day lock-up imposed in connection with IPOs would continue to restrict actual securities sales during that period, having an effective shelf already in place when the

lock-up expires would give issuers a significant head start. Given the expectation that SEC staff review of newly public companies' shelf filings would be rare under the proposed framework, this would likely become standard post-IPO practice.

- ***Smaller issuers would have the ability to maintain "unlimited" S-3 registration statements, providing more flexibility to scale offerings as they grow.*** Without the public float threshold or the baby shelf cap, smaller exchange-listed companies could file Form S-3s no longer constrained to a figure tied to the size of their float at the time of filing. This structural change removes an inherent ceiling on smaller companies' registered capital raising capacity and allows the shelf to serve as a standing, scalable instrument that can accommodate their financing needs as those needs evolve.
- ***Transaction participants in IPOs may revisit lock-up structures and post-IPO financing strategies in light of expanded shelf registration eligibility.*** The prospect of newly public issuers having functional shelf registration statements in place shortly after their IPO is likely to prompt underwriters, institutional investors, and company management to reassess the terms of lock-up agreements and the timing and structure of post-IPO follow-on financing activity. Lock-ups will likely become an increasingly prominent topic of negotiation and planning during the IPO process itself.
- ***Investors and underwriters may begin expecting newly public companies to maintain active shelf registration statements***. As expanded shelf registration eligibility becomes available to a much broader group of issuers, maintaining a current and effective shelf registration statement may evolve from a best practice into a baseline expectation among investors and underwriters evaluating a company's capital markets readiness and its ability to respond efficiently to financing opportunities.
- ***Newly public companies will want to evaluate and monitor whether they qualify as ELIs and familiarize themselves with the related regulatory regime.*** ELI status carries a meaningful package of enhanced communications and offering accommodations, but it requires ongoing satisfaction of both the Form S-3 registrant requirements and the exchange listing conditions. Companies with characteristics that could implicate the ineligible issuer provisions — including those with prior SPAC histories or that have undergone business combinations — should undertake a careful eligibility assessment to ensure they are tracking the relevant conditions on an ongoing basis.

Conclusion

If adopted substantially as proposed, the SEC's registered offering reform Proposal would materially expand eligibility to shelf registration for domestic issuers and extend automatic shelf registration to a broader population of exchange-listed companies. The Proposal would also reduce communication related restrictions for many registered offerings. The most significant practical impact is likely to be increased use of shelf-based capital-raising strategies by issuers that do not currently qualify as WKSIs

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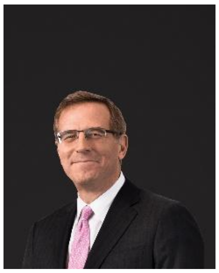

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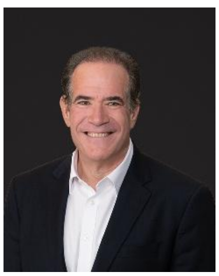

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