

## Registered Offering Reform



The Securities and Exchange Commission proposed amendments to significantly enhance public companies' ability to conduct registered offerings. The proposed amendments would:

- Revise Form S-3's eligibility criteria to enable a greater number of public companies to conduct shelf offerings, which allow quicker access to the public capital markets.
- Extend registration and offering communication flexibilities, many of which currently are reserved only for "well-known seasoned issuers," to a broader set of issuers.
- Preempt state securities law registration and qualification requirements for all registered offerings.
- Maintain parity between certain Form N-2 filers and operating companies across registration, offering, and communication provisions.
- Expand access to broad-based advertising for certain insurance products.
- Modernize Form S-1 by expanding the ability to incorporate information by reference into that form.

### Background

The public securities markets offer benefits to issuers and investors alike. Issuers often can raise capital through the public markets on more favorable terms as compared to private markets, and investors in offerings registered under the Securities Act of 1933 (Securities Act) can benefit from the required disclosures and protections provided under the federal securities laws. The proposed amendments are intended to promote the benefits associated with increased capital formation in the public markets in a manner that is consistent with investor protection.

### Form S-3 Eligibility

The proposed amendments would revise Form S-3's eligibility requirements by, among other changes, removing the requirement that issuers be subject to the reporting requirements of the Securities Exchange Act of 1934 (Exchange Act) for 12 months before using the form and eliminating all of the form's transaction requirements, including the instruction that requires issuers to have at least \$75 million in public float to register an unlimited amount of securities on the form. Form S-3 would continue to require that issuers be current and timely in their Exchange Act reporting requirements and would prohibit certain "ineligible issuers" from using the form.

Taken together, the proposed amendments are intended to allow a greater number of issuers flexibility to access the public securities markets quickly by using Form S-3 while also ensuring that investors remain appropriately protected. The release states that, under the proposed amendments, there could be an increase of over 60 percent in the number of issuers eligible to offer an unlimited amount of securities on Form S-3. These newly eligible issuers would benefit from the cost savings and capital raising efficiencies and flexibilities associated with the ability to use Form S-3 and conduct shelf offerings.

## Enhanced Registration and Communication Benefits

Currently, certain registration and communication benefits are reserved for “well-known seasoned issuers” (WKSIs). In order 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 in registered offerings. Under the proposed amendments, issuers would not be required to meet either of these metrics in order to qualify for the enhanced registration and communication benefits. Instead, under the proposed amendments, issuers would qualify for all of those benefits — other than the ability to use an automatic shelf registration statement — if they are eligible to use Form S-3 and have at least one class of common equity securities listed on a national securities exchange. Issuers would have to be subject to the Exchange Act’s reporting requirements for 12 months before being able to use an automatic shelf registration statement.

These proposed amendments are intended to provide a greater number of issuers the flexibility to access the public securities markets on demand using automatic shelf registration statements and to benefit from other offering-related flexibilities while also ensuring that investors remain appropriately protected. The release states that, under the proposed amendments, there could be an increase of over 200 percent in the number of issuers eligible for all of the enhanced registration and communication benefits.

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## Preemption of State Securities Law Registration and Qualification Requirements

The proposed amendments would define “qualified purchaser” under Section 18(b)(3) of the Securities Act and preempt state securities law registration and qualification requirements with respect to any registered offering. Such preemption currently applies to registered offerings in which the securities being offered and sold are listed or approved for listing on a national securities exchange. Preemption currently does not, however, apply to registered offerings of unlisted securities.

The proposed amendments, therefore, would eliminate the costs associated with complying with numerous states’ registration and qualification requirements for registered offerings of unlisted securities. The proposed amendments are intended to lower the cost of a registered offering of unlisted securities and, as a result, facilitate capital formation in a manner that is consistent with investor protection.

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## Business Development Companies and Closed-End Funds

Consistent with the proposed amendments relating to operating companies, other proposed amendments would extend to a broader group of business development companies (BDCs) and registered closed-end funds eligibility to use short-form shelf registration statements on Form N-2, in part by removing related seasoning and public float requirements. Other proposed amendments would extend certain enhanced registration and communication benefits that currently are primarily reserved for a WKSI to a broader set of BDCs and closed-end funds.

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## Insurance Product Advertising

The proposed amendments would amend the advertising rule available for variable annuities (Rule 482) to permit its use by insurance companies advertising registered index-linked annuities and registered market value adjustment annuities under certain circumstances. This proposal would permit the use of that rule for broad-based advertising, and provide for a consistent advertising framework, for these products.

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## Incorporation by Reference on Form S-1

The ability to incorporate by reference information into Form S-1 filed before the effective date of the registration statement (backward incorporate) currently is limited to issuers that, among other things, have filed an annual report for their most recently completed fiscal year. Further, the ability to incorporate by reference information filed after the effective date of a Form S-1 (forward incorporate) currently is limited to issuers that are smaller reporting companies (SRCs). Under the proposed amendments, issuers would be able to backward incorporate regardless of whether they had filed an annual report for their most recently completed fiscal year and forward incorporate regardless of whether they are an SRC. The proposed amendments would, therefore, allow a greater number of issuers to enjoy the cost savings associated with incorporation by reference, with an estimated increase of up to 106 percent in the number of issuers eligible to forward incorporate on Form S-1.

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## Additional Information:

The public comment period will remain open for 60 days following publication of the proposing release in the Federal Register.