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SEC Proposes Major Reforms to Public Offering and Reporting Regime

May 2026



Proposals aim to reduce regulatory burdens on U.S. public companies, while leaving any changes to the FPI framework for later

Not long after publishing its semiannual reporting proposal, the U.S. Securities and Exchange Commission (the "SEC") has issued two other major proposals, focused on reforming filer status and registered offerings, that would further transform the public company offering and reporting framework by:

- creating a minimum five-year IPO on-ramp during which all new registrants, regardless of public float, are provided significant accommodations, including an exemption from the auditor attestation on internal controls over financial reporting ("ICFR") requirement;
- reforming the filer status categories such that potentially 80% of public companies are deemed "non-accelerated filers"; and
- significantly expanding the category of issuers eligible to use Form S-3 and rely on certain well-known seasoned issuer ("WKSI") benefits.

Notably, the SEC has not proposed extending these changes to foreign private issuers[1] ("FPIs"), as the SEC intends to focus on FPIs in separate rulemakings that will be based on the FPI eligibility concept release issued in 2025.

The public comment period for both proposals will remain open for 60 days following their publication in the Federal Register.

Overview

The SEC intends to reform the public offering and reporting rules in order to incentivize companies, particularly small and mid-sized companies, to go public and stay public. While many of the proposed amendments focus on revising, removing or creating filer status categories, the practical impact of the changes, if adopted as proposed, would be to significantly ease the regulatory burden on public companies or companies in the process of going public.

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[1] A "foreign private issuer" is a foreign issuer other than a foreign government, except for an issuer that as of the last business day of its most recently completed second fiscal quarter has more than 50% of its outstanding voting securities directly or indirectly held of record by U.S. residents and meets any of the following: a majority of its executive officers or directors are citizens or residents of the United States, more than 50% of its assets are located in the United States, or its business is principally administered in the United States.

Filer status proposal

The first proposal focuses on streamlining the various filer categories and significantly increasing the number of issuers that are eligible for scaled disclosure and other accommodations.

Simpler filer categories

The proposal would eliminate the existing five-category public company filer status framework, currently consisting of large accelerated filers, accelerated filers, non-accelerated filers, smaller reporting companies and emerging growth companies ("EGCs"),[2] leaving just two main filer categories: large accelerated filers ("LAFs") and non-accelerated filers ("NAFs"). The SEC is also proposing a "small non-accelerated filer" sub-category, to be defined as a NAF that at the end of each of its two most recent second fiscal quarters had total assets of $35 million or less, which would be given extended deadlines for filing certain reports.

Large accelerated filer thresholds

The proposed rule amendments would significantly raise the threshold for a public company to be classified as an LAF such that only about 19.2% of current public companies (compared to 35.4% currently) would be LAFs. The proposal would change the LAF definition by:

- Raising the threshold for being classified as an LAF from the current $700 million to $2 billion in public float, calculated based on the average of the registrant's stock price over the previous 10 trading days ending on the last business day of its second fiscal quarter, multiplied by the number of shares held by non-affiliates, rather than only considering public float on the last trading day of the registrant's most recent second fiscal quarter;
- Requiring that the public float threshold be met for two fiscal years consecutively before transitioning between LAF and NAF status so that a one-year swing alone does not change filer status; and
- Increasing the seasoning threshold for being classified as an LAF to 60 consecutive calendar months following an issuer's IPO regardless of its public float, as opposed to the current threshold of being a public company for at least 12 calendar months.

Non-accelerated filer status as default

The NAF category would become the default category for most issuers, to be defined as "an issuer that is not a large accelerated filer." As proposed, every registrant would be an NAF beginning at the time of its initial public offering or registration and for at least five years following as a result of the seasoning requirement. Even after an NAF qualifies as an LAF, it could regain its NAF status if its public float is less than $2 billion for two consecutive years. The SEC estimates that more than 80% of current

[2] The SEC cannot eliminate the EGC category, as it is a statutory creation. However, under the proposal, separate reliance on the EGC category would be unnecessary because almost all EGC accommodations, as discussed below, would be extended to all NAFs. Consequently, the SEC has proposed removing references to EGCs and would instead refer to NAFs in many of its rules. The SEC would, however, continue to require the EGC status check boxes in certain filings.

Filer status definitions

Under current SEC rules, the various Exchange Act filer categories are mainly differentiated by their public float (i.e., the aggregate worldwide market value of the company's voting and non-voting common equity held by non-affiliates) at a specific date and how long/whether it has filed certain Exchange Act reports.

A *smaller reporting company* has either:

- a public float of less than $250M; or
- less than $100M in annual revenues for its most recently completed fiscal year and either no public float or public float of less than $700M (the "revenues requirement").

A company will not be deemed an *accelerated* or *large accelerated filer* until it:

- has been subject to Section 13(a) or 15(d) reporting for at least 12 calendar months;
- filed at least one annual report; and
- is not eligible for SRC status because it does not meet the revenues requirement.

An *accelerated filer* has a public float of $75M or more but less than $700M, while a *large accelerated filer* has a public float of $700M or more.

reporting companies would be NAFs and entitled to the scaled disclosure accommodations.

Extension of accommodations to all NAFs

NAFs would be given the benefit of nearly all the scaled disclosure and other accommodations currently available to EGCs and smaller reporting companies ("SRCs"). These would include:

- Auditor attestation exemption – All NAFs would be exempt from the requirement to obtain an ICFR auditor's attestation under Section 404(b) of the Sarbanes-Oxley Act. NAFs would, however, remain subject to the SEC's rules under Section 404(a), which require management's assessment and report on ICFR effectiveness. NAFs would also continue to be required to obtain a financial statement audit by a registered public accounting firm in which the auditor is required to obtain an understanding of ICFR as part of its risk assessment procedures.
- Scaled financial statement disclosure – NAFs would be permitted to rely on Article 8 of Regulation S-X for scaled financial disclosure, which would among other things allow them to:
  - Provide only two rather than three years of audited statements and related MD&A disclosure;
  - Not comply with certain form and presentation requirements related to the financial statements; and
  - Provide a slightly more condensed format for interim financial statements, financial statements for businesses and real estate operations acquired or to be acquired, and pro forma financial statements;
- Deferred compliance with new FASB standards – All NAFs would have the option to elect deferred compliance with new or revised financial accounting standards issued by the Financial Accounting Standards Board ("FASB"), but only for their first five years after initial registration with the SEC.
- Executive compensation disclosures –NAFs would be subject to significantly reduced executive compensation disclosure, including:
  - Two (instead of three) years of summary compensation table information;
  - Executive compensation disclosure regarding three (instead of five) named executive officers;
  - Exemptions from:
    - Providing a Compensation Discussion and Analysis,
    - Pay ratio disclosure, pay-versus-performance disclosure, and compensation committee report requirements;

What is an EGC?

A company qualifies as an emerging growth company if it has total annual gross revenues of less than $1.235B during its most recently completed fiscal year.

A company continues to be an EGC for the first five fiscal years after it completes an IPO, unless one of the following occurs:

- its total annual gross revenues are $1.235B or more;
- it has issued more than $1B in non-convertible debt in the past three years; or
- it becomes a large accelerated filer.

- the requirements to conduct a shareholder advisory vote to approve executive compensation, on frequency of say-on-pay, and on golden parachute compensation; and
- providing disclosure on golden parachute compensation.

Additional disclosure accommodations

Under the proposal, NAFs would also be permitted to forgo the following disclosures:

- Risk factor disclosure in Forms 10-K and 10-Q pursuant to Item 1A of Form 10-K and Item 1A of Form 10-Q;
- Performance graph disclosure pursuant to Item 201(e) of Regulation S-K, except in the case of NAFs that are investment companies;
- Supplementary financial information pursuant to Item 302(a) of Regulation S-K;
- Quantitative and qualitative disclosures about market risk pursuant to Item 305 of Regulation S-K;
- Policies and procedures for the review, approval, or ratification of related party transactions pursuant to Item 404(b) of Regulation S-K;
- Audit committee financial expert disclosure in a registrant's first annual report; and
- Certain payments made by resource extraction issuers.

Extension of unresolved staff comment disclosure

One of the few proposed new requirements (as opposed to an accommodation) would be an extension to all issuers (including NAFs) the requirement to disclose on Form 10-K or Form 20-F the substance of material unresolved staff comments regarding the periodic or current reports received at least 180 days before a registrant's fiscal year end.

Exclusion of FPIs and asset-backed issuers

The SEC has proposed excluding FPIs that elect to use FPI rules and forms from the determination and application of LAF and NAF filer status, since other accommodations are available to those FPIs, and the SEC is currently conducting a separate review of the FPI framework.

The SEC has also proposed revising Form 20-F to continue to require a registered public accounting firm's attestation report on ICFR for filers with a public float of $75 million or more as of the last business day of the FPI's most recently completed second fiscal quarter, unless they qualify as an EGC. The proposal would not revise the way an FPI filing on Form 20-F performs the public float determination for purposes of this assessment to align with the proposed amendments to the way a registrant determines its public float for purposes of the LAF definition (i.e., based on average of the stock price over the last 10 trading days of the second quarter). As a result, there will be differences between the two public float determinations.

The SEC has also proposed excluding asset-backed issuers from the determination and application of LAF and NAF, since they are subject to a separate disclosure regime.

Transition rules

Under the proposal, existing registrants as of the effective date of the rules would be required to assess their LAF or NAF status as of the end of their fiscal year prior to the effectiveness of the final rules. Registrants would be allowed to assess their status at any time after effectiveness of the final rules, but no later than the day prior to the last day of their fiscal year in which the final rules go into effect. Notably, a company that is a LAF prior to the effectiveness of the rules could be deemed a NAF after effectiveness.

If an existing registrant does not make this initial assessment by the deadline, then it would be deemed to be either (1) a LAF until the next assessment date, if it was a LAF prior the final rules' effectiveness or (2) a NAF until the next assessment date, in each other case. An existing registrant that does not make its initial assessment by the deadline and is therefore deemed to be an NAF would not be deemed to be a smaller NAF even if its total assets would otherwise qualify.

A registrant that qualifies as a NAF after the initial assessment could use NAF accommodations in its next Securities Act or Exchange Act filing made after the assessment is completed.

Registered offering reform proposal

The second proposal allows for reduced registration and communication requirements for eligible domestic public companies, other than certain "ineligible issuers", conducting registered offerings. Importantly, these proposed changes would expand the availability of Form S-3 to issuers immediately after going public and allow incorporation by reference from the issuer's Form S-1 registration statement.

Expansion of form S-3 eligibility

Form S-3 is a short-form registration statement that allows eligible issuers to register offerings under the Securities Act. The SEC has proposed eliminating many of the current Form S-3 eligibility requirements, including the one-year "seasoning" requirement, the $75 million public float requirement, and the no failure to make a payment/default requirement.

The remaining eligibility requirements would be that the issuer must be current and timely[3] in filing their required Exchange Act reports and not be a "BSP issuer" (i.e., blank check companies, shell companies and penny stock issuers). However, a company that goes public through a deSPAC transaction would be eligible to use Form S-3 if it meets the other eligibility criteria. The proposing release estimates that the eligibility changes would mean a more than 60% increase in the number of issuers eligible to use Form S-3.

What is a WKSI?

A WKSI is an issuer that meets the following criteria during a 60-day period preceding the determination date (the later of the date that the issuer files its Form S-3 and the date the issuer files its most recent annual report):

- It must be eligible to use Form S-3 or Form F-3 by timely filing all SEC reports within the preceding 12 calendar months and not having any material defaults on indebtedness or leases;
- As of a date within 60 days of its eligibility determination date, it must have had an outstanding minimum $700M in public float or have issued in the last three years at least $1B aggregate amount of non-convertible debt securities in primary offerings for cash; and
- It must not be an "ineligible issuer" (e.g., a blank check or a shell company, a company that has filed for bankruptcy in the last three years, etc.).

Under the proposal, the WKSI definition would only be relevant with respect to FPIs.

[3] However, an issuer would remain Form S-3 eligible notwithstanding an untimely filing so long as the filing was made within seven calendar days of the original due date and the issuer made only one untimely filing during the relevant lookback period.

The proposed elimination of the $75 million public float threshold would also eliminate the so-called "baby shelf" limitation, which currently restricts companies with a public float below $75 million to offering no more than one-third of their public float in primary offerings in a rolling 12-month period.

Extension of WKSI benefits

The proposed amendments would extend certain registration and communication benefits currently only available to WKSIs to all issuers that are eligible to use Form S-3 and have at least one class of common equity securities listed on a U.S. national securities exchange. The SEC has proposed eliminating the WKSI, seasoned issuer and unseasoned issuer categories (as they relate to all issuers other than FPIs) and establish two new categories of issuers:

- an Eligible Listed Issuer (“ELI”), which is an issuer that meets Form S-3’s proposed registrant requirements and is exchange-listed; and
- a Seasoned Eligible Listed Issuer (“SELI”), which is an ELI that has been subject to the Exchange Act’s reporting requirements for a period of at least 12 calendar months.

The SEC estimates that in 2024, approximately 36% of Exchange Act reporting issuers were WKSIs, while approximately 74% of Exchange Act reporting issuers in 2024 would qualify as SELIs under the proposed changes.

SELIs would be the only type of issuer eligible for automatic shelf registration, but the other WKSI benefits would be available to all ELIs. Specifically, ELIs would be eligible for the following benefits, regardless of how long they have been subject to Exchange Act reporting requirements:

- The ability to exercise greater flexibility with respect to pre-filing and post-filing communications;
- The ability to register additional securities or additional classes of securities, including securities of majority-owned subsidiaries, by filing a post-effective amendment to a non-automatic shelf registration statement before the issuer satisfies the 12-month Exchange Act reporting requirement to be a SELI;
- The ability to omit information as to whether an offering is a primary offering or an offering on behalf of persons other than the issuer, or a combination thereof, the plan of distribution for the securities, a description of the securities registered other than an identification of the name or class of such securities, and the identification of other issuers; and
- The ability to pay-as-you-go filing fees at the time of the takedown, rather than at the time of filing a Form S-3.

Rules 139, 430B(b), and 433, which are currently available to both WKSIs and certain non-WKSIs, would be available to all Form S-3 eligible issuers regardless of whether they are exchange-listed. These rules would provide Form S-3 eligible issuers with the following benefits:

- The ability of broker-dealers participating in a distribution of securities to issue an issuer-specific research report about the issuer or any of its securities without such report constituting an "offer";
- The ability to omit the identities of selling security holders and amounts of securities to be registered on their behalf; and
- The ability to use a free writing prospectus without it being preceded or accompanied by a prospectus.

Incorporation by reference in Form S-1

The SEC has also proposed revising Form S-1 to expand issuers' abilities to incorporate by reference information filed before (i.e., backward incorporation by reference) and after (i.e., forward incorporation by reference) the effective date of the registration statement. Currently, the ability to backward incorporate is limited to issuers that, among other things, have filed an annual report for their most recently completed fiscal year, and the ability to forward incorporate currently is limited to issuers that, among other things, are SRCs.

Under the proposed amendments, issuers that meet Form S-1's requirements to incorporate by reference 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.

Exclusion of FPIs

Currently, foreign issuers, other than foreign governments, may use Form S-3 if they satisfy all the registrant requirements (other than being a domestic issuer), provided they file the same Exchange Act reports as domestic registrants.

Under the proposed amendments, however, all FPIs would be prohibited from using Form S-3, including FPIs that report on domestic Exchange Act forms. Foreign issuers that are not foreign governments or FPIs would remain eligible to use Form S-3 if they satisfy the form's eligibility requirements. FPIs undertaking a shelf registration may continue to use Form F-3 rather than Form S-3. The SEC has not proposed changes to the eligibility requirements for Form F-3 in this proposal.

The SEC has also proposed prohibiting FPIs from using Form S-1, though FPIs can continue to use Form F-1. The SEC has not proposed similar incorporation by reference changes to Form F-1 in this proposal.

FPIs would also not be eligible for the extension in WKSI benefits unless they satisfy the WKSI requirements. The SEC has proposed retaining the WKSI definition in Rule 405 but amending it to clarify that only FPIs may qualify as WKSIs. The proposed amendments would apply, however, to foreign issuers that are not foreign governments or FPIs.

Federal preemption of state "Blue Sky" requirements for all registered offerings

The SEC has proposed to pre-empt state securities law registration and qualification requirements for all registered offering. Currently, federal pre-

emption of state law only applies to registered offerings where the securities being offered and sold are listed or approved for listing on a national securities exchange, but not to registered offerings of unlisted securities.

The proposal would add the term “qualified purchaser” to Rule 146 and define the term to include any person to whom securities are offered or sold pursuant to an offering registered under the Securities Act. As a result, these securities would be “covered securities” and, consequently, exempt from state securities law registration and qualification requirements. States would continue to have the authority to bring actions against registrants for fraud and to require notice filings and fees.

Eliminating the need for delaying amendments

The proposal would also amend Rule 473 to no longer require issuers to include a “delaying amendment” legend on the face of a registration statement to prevent it from becoming automatically effective on the 20th day after filing. Under the proposal, effectiveness would automatically be delayed without the inclusion of the legend.

* * *

These proposals, combined with the earlier proposal to move away from quarterly reporting, represent the most significant change to the public offering and reporting regime since the JOBS Act of 2012. If adopted as proposed, all new domestic registrants – including those who would not qualify for EGC accommodations under the current system – would benefit from scaled disclosure and other significant accommodations for at least the first five years after an IPO. Further, potentially 80% of current reporting companies would have the benefit of these accommodations perpetually, unless and until their public float reaches or exceeds $2 billion for two consecutive fiscal years, significantly reducing the compliance costs of becoming and staying a public company.

The SEC has not indicated whether it is inclined to provide parallel revisions to the FPI framework, and these issues were not addressed in the FPI eligibility concept release.

We will continue to monitor developments in this area and invite our clients to contact us with their views on the proposals.

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