



July 27, 2026

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: Registered Offering Reform (Release Nos. 33-11418; 34-105513; IC-36160; File No. S7-2026-17) and Enhancement of Emerging Growth Company Accommodations and Simplification of Filer Status for Reporting Companies (Release Nos. 33-11419; 34-105515; File No. S7-2026-18)

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment on the Securities and Exchange Commission’s registered offering reform proposal (the “Offering Reform Proposal”)² and its proposal to enhance disclosure accommodations and simplify the filer status framework for reporting companies (the “Filer Status Proposal”).³ SIFMA’s membership includes underwriters, placement agents and dealers for issuers of all sizes that seek to raise capital in the public markets in the United States. These are the perspectives from which SIFMA submits these comments. As further discussed in this letter, SIFMA strongly supports both proposals but recommends that the Commission make certain revisions, particularly as it relates to the proposed “ineligible issuer” concept, to further advance the Commission’s goals of promoting capital formation and encouraging companies to go and stay public.

We commend the Commission’s efforts to modernize the registered offering process and rationalize the filer status framework in a manner that facilitates capital formation while maintaining investor protection. The proposed rules, if adopted, would facilitate access to the capital markets and significantly reduce compliance burdens for newly public companies and

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² See Registered Offering Reform, Release Nos. 33-11418; 34-105513; IC-36160 (May 19, 2026), 91 F.R. 31022 (May 26, 2026).

³ See Enhancement of Emerging Growth Company Accommodations and Simplification of Filer Status for Reporting Companies, Release Nos. 33-11419; 34-105515 (May 19, 2026), 91 F.R. 30086 (May 21, 2026).

smaller issuers. Together with the Commission's other contemplated reforms, including its anticipated Regulation S-K reform,⁴ the proposed rules represent the most significant changes to the Commission's registered offering and disclosure framework since at least the securities offering reform over 20 years ago. We believe the proposed rules would advance the Commission's stated goals to facilitate capital formation and help encourage companies to go and stay public. However, we recommend revising particular aspects of the proposals to further advance these goals, and—in the case of the proposed disqualification of certain “ineligible issuers” from using Form S-3—to prevent potentially severe and disproportionate consequences for some issuers that currently are Form S-3 eligible. We agree with the Commission's fundamental proposition that Form S-3 eligibility should focus on an issuer's status as a current and timely reporting company, rather than on seasoning, public float or other qualitative criteria.⁵

We address both the Offering Reform Proposal and the Filer Status Proposal in this single letter because they share overarching objectives. Our comments are consistent with SIFMA's longstanding advocacy in favor of efficient access to the public capital markets⁶ and are intended to provide recommendations on how the Commission could, with respect to particular aspects of the proposals, achieve its objectives more effectively.

I. Overview of Comments

As discussed in more detail below, while we strongly support both the Offering Reform Proposal and the Filer Status Proposal, we offer the following comments:

- The Commission should, as proposed, retain the existing approach to assessing Form S-3 eligibility only at the time of the Form S-3 filing and at each update under Section 10(a)(3) of the Securities Act, rather than at the time of each shelf takedown.
- The Commission should reconsider the proposed “ineligible issuer” disqualification for Form S-3 eligibility, in particular with respect to paragraphs (v) and (vi) of the Rule 405 definition because it undermines the Commission's goal of facilitating capital formation.

⁴ See Paul S. Atkins, *Statement on Reforming Regulation S-K* (Jan. 13, 2026), <https://www.sec.gov/newsroom/speeches-statements/atkins-statement-reforming-regulation-s-k-011326> (File No. CLL-15).

⁵ See Offering Reform Proposal, at 50, 59, 83 (§§ II.A.2.a.i, II.A.2.a.ii, II.A.2.b.i) (proposing to eliminate the one-year seasoning requirement and the \$75 million public float requirement of Form S-3, describing certain qualitative criteria as “inconsistent with the principle of short-form registration,” and stating that “Form S-3 eligibility should be based on the ability to readily obtain issuer-specific information in Exchange Act reports and not, in part, on the amount of an issuer's public float,” which “depends on whether an issuer is current and timely with respect to its reporting obligations”).

⁶ See, e.g., Letter from Sarah M. Starkweather, Regulatory Counsel, The Bond Market Association, to Jonathan G. Katz, Secretary, SEC, re Securities Offering Reform (File No. S7-38-04): Impacts of Proposal in the Corporate Debt Markets (Jan. 31, 2005) (reflecting recommendations for streamlined issuer access to registered offerings and related registration and communication benefits); Letter from Sean Davy, Managing Director, Capital Markets Division, SIFMA to Brent J. Fields, Secretary, SEC (Jan. 2, 2018), re FAST Act Modernization and Simplification of Regulation S-K (File No. S7-08-17) (supporting scaling disclosure requirements for smaller and newly public issuers, a workable IPO on-ramp, and refocusing disclosure requirements on material information).

- We recommend expanding the Enhanced Registration and Communication Benefits (as defined in the Offering Reform Proposal) available to eligible listed issuers (“ELIs”) and seasoned eligible listed issuers (“SELIs”) to non-listed issuers that have issued, in the last three years, at least \$1 billion aggregate principal amount of registered non-convertible securities, other than common equity, in primary offerings for cash.
- Rule 430B(b)(1) should be revised to permit ELIs, not only SELIs, to omit information on selling security holders from the base prospectus even if the securities have not yet been issued, to align the secondary offering framework for ELIs with the flexibility currently afforded to well-known seasoned issuers (“WKSIs”).
- We recommend that the Commission exclude all former reporting shell companies, not only former special purpose acquisition companies (“SPACs”), from the definition of “BSP issuer.”
- We support the Filer Status Proposal, including the streamlined large accelerated filer and non-accelerated filer frameworks and the extension of smaller reporting company and emerging growth company accommodations to all non-accelerated filers.

We offer these comments to assist the Commission in implementing the proposals and suggest specific ways to implement our recommendations in *Annex A*.

II. Offering Reform Proposal

A. Retain the Existing Approach to Form S-3 Eligibility Determination

We support retaining, as proposed by the Commission, the existing approach to assessing Form S-3 eligibility only at the time of the Form S-3 filing and at each Section 10(a)(3) update, rather than at the time of each shelf takedown.

Question 8: “Should we amend our rules to require reassessing of Form S-3 eligibility each time an issuer conducts a shelf takedown to help ensure issuers remain current and timely and investors have available all required information at the time they make an investment decision?”

We agree with the Commission that a reassessment of Form S-3 eligibility at the time of each shelf takedown would impose an unnecessary burden on issuers and introduce unwarranted regulatory uncertainty. As the Commission observes,⁷ to the extent an issuer were to become delinquent before conducting a takedown from a shelf registration statement, the liability provisions of the federal securities laws sufficiently incentivize issuers to conduct takedowns only if they have assured themselves that the prospectus and registration statement do not contain any material misstatement or omission. In addition, Item 17 of Form S-3 and Item 512(a)(1)(ii) of Regulation S-K⁸ require that an issuer reflect in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereof)

⁷ See Offering Reform Proposal, at 51 & n.150 (§ II.A.2.a.i).

⁸ See Form S-3, Item 17; 17 CFR 229.512(a)(1)(ii).

that, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement. These existing requirements focus attention and effort at the individual issuer level, where disclosure judgments are most meaningfully and effectively made, consistent with Chairman Paul S. Atkins' statements on refocusing Regulation S-K's disclosure requirements on materiality as the "north star".⁹

The current approach to assessing Form S-3 eligibility is also consistent with (i) the determination of WKSJ status under existing rules, which is reevaluated only if the issuer files a shelf registration statement, at the most recent Section 10(a)(3) update, or if no shelf or Section 10(a)(3) shelf update has occurred for 16 months, when the issuer files its most recent Form 10-K, Form 20-F, or Form N-CSR, or when that report was due if not timely filed, and (ii) the proposed treatment of ELIs and SELIs, which would remain eligible to use the Enhanced Registration and Communication Benefits until the next determination date regardless of intervening events that might cause them to lose ELI or SELI status.¹⁰

B. Reconsider the Proposed Form S-3 "Ineligible Issuer" Disqualification

The Commission should reconsider the proposed "ineligible issuer" disqualification for Form S-3 eligibility, in particular with respect to paragraphs (v) and (vi) of the Rule 405 definition, and permit ineligible issuers that are not BSP issuers to continue using Form S-3. We believe such a requirement would otherwise undermine the Commission's capital formation objective and have significant adverse consequences for access to the public markets by disqualifying many issuers—including large, seasoned issuers that are currently eligible to use Form S-3—from continuing to use shelf registration. It would also impose a disproportionately severe penalty that is not necessary to achieving the Commission's investor-protection objectives.

1. The Proposed Disqualification Would Significantly Impair Market Access for Many Issuers That Are Currently Form S-3 Eligible

Question 15: "We are proposing to prohibit use of Form S-3 by certain 'ineligible issuers,' including BSP issuers, issuers previously convicted of certain felonies and misdemeanors, issuers subject to a decree or order involving a violation of the antifraud provisions of the Federal securities laws, issuers that have been subject to any refusal order or stop order under section 8 of the Securities Act within the past three years, and issuers that are subject to pending proceedings or examinations under section 8 or 8A of the Securities Act. Should

⁹ See Paul S. Atkins, Remarks at the Texas Stock Exchange Event: Welcome to the Boom Belt: A Return to First Principles in Public Markets (Apr. 7, 2026), <https://www.sec.gov/newsroom/speeches-statements/atkins-remarks-boom-belt-040726>; Paul S. Atkins, Remarks at the Texas A&M School of Law Corporate Law Symposium (Feb. 17, 2026), <https://www.sec.gov/newsroom/speeches-statements/atkins-02-17-2026-remarks-texas-am-school-law-corporate-law-symposium>.

¹⁰ See Offering Reform Proposal, at 115 (§ II.B.2.a) (stating that the proposed ELI and SELI determination dates "would be consistent with those currently applied to WKSJs" and that, "[a]s is the case with WKSJs today, because eligibility would be determined only on these dates, an issuer would remain eligible . . . between determination dates").

we adopt the amendments as proposed? If not, please explain why and suggest alternative methods for protecting investors the Commission could consider.”

Since its introduction in 2005,¹¹ the “ineligible issuer” concept has applied to certain registration and communication accommodations associated with WKSJ status, but never to Form S-3 eligibility.¹² In the Offering Reform Proposal, the Commission reasons that extending Form S-3 eligibility and shelf registration to a broader population of issuers warrants restricting access to those benefits for issuers that may present a heightened risk of reporting non-compliance and therefore should be subject to staff review.¹³ We agree that appropriate staff review and Commission oversight should be preserved. However, the proposed changes would significantly expand the consequences associated with “ineligible issuer” status by disqualifying issuers from Form S-3 eligibility altogether. The result would impose a substantially more severe restriction on capital markets access than is necessary to achieve the Commission’s investor-protection objectives. The Commission’s rationale to extend access to Form S-3 and shelf offerings to a broader population of issuers does not justify imposing disproportionately punitive restrictions on issuers that already satisfy, and have long relied upon, the existing Form S-3 eligibility framework. Notably, the Offering Reform Proposal does not identify any specific investor protection concern relating to “ineligible issuers” that are currently eligible to use Form S-3 that would justify imposing additional restrictions on their continued use of Form S-3.

The disproportionate nature of these restrictions is illustrated by their significant practical consequences for issuers that depend on Form S-3 and shelf registration to conduct their financing activities. The Offering Reform Proposal would exclude many issuers that are currently Form S-3 eligible from raising capital through SEC-registered shelf offerings, including large corporate issuers and financial institutions that depend on uninterrupted access to the public markets, if they are deemed “ineligible issuers.” These issuers regularly access the public markets through a variety of offerings and rely on shelf registration to support these offerings on compressed timelines in response to changing market conditions, investor demand, as well as capital and funding needs. Many of these issuers also rely on shelf registration to operate continuous funding programs, including ongoing programs such as structured notes programs that operate with highly frequent issuances, often multiple issuances on a single day, and in some instances close to one hundred issuances on a single day. By way of illustration, according to Bloomberg data, financial institutions alone issued \$435 billion principal amount of SEC-registered benchmark debt in 2025, and \$320 billion in the first half of 2026 (excluding structured note programs). Potentially

¹¹ See Securities Offering Reform, Release Nos. 33-8591; 34-52056; IC-26993 (July 19, 2005), 70 F.R. 44722, 44729, 44745-47, 44751 (Aug. 3, 2005).

¹² See the section entitled “2. The Commission Should Permit ‘Ineligible Issuers’ That Are Not BSP Issuers to Continue Using Form S-3” below for further discussion.

¹³ See Offering Reform Proposal, at 70-71 (§ II.A.2.a.iv) (noting that “[t]his is due to the additional accommodations that would be afforded by our proposed amendments and our view that these categories of issuers may pose a greater risk of non-compliance with Exchange Act reporting requirements and, therefore, present greater potential for abuse. We believe these types of issuers, therefore, should not be eligible to conduct offerings that are not subject to staff review (i.e., shelf offerings). Instead, we believe the staff should have the opportunity to review those issuers’ offerings (by requiring, for example, those issuers to use Form S-1 rather than Form S-3), as staff review may mitigate risks of non-compliance and potential abuse.”).

disqualifying these issuers, if they are deemed “ineligible issuers,” from using Form S-3 altogether rather than simply denying access to automatic shelf registration, would substantially impair their ability to conduct SEC-registered offerings and therefore materially impact their ability to respond to investor demand and manage their funding and capital plans. Conducting these offerings on a Form S-1, which would be subject to Commission review and have to be declared effective by the Commission for each individual offering, would not be workable. In particular, use of Form S-1 would (i) significantly delay market access for offerings, (ii) heighten exposure to market risk due to those delays, (iii) adversely affect issuers by signaling potential offerings well in advance of going to market, and (iv) substantially increase issuance costs for issuers and strain Commission staff resources. As a result, loss of Form S-3 eligibility would likely cause these funding programs to transition to the private markets. Further, registered structured note programs would be impossible without access to Form S-3 and therefore would become unavailable to public investors, thereby significantly reducing the marketability of such continuous funding programs. These outcomes would be contrary to the Commission’s goals of expanding public market access and investor choice. When the practical choice is between a registered and an exempt offering, we believe the Commission’s rules should encourage the registered alternative, as a registered offering brings the offering within the applicable Securities Act registration, disclosure and liability framework, thereby enhancing investor protection. A rule that redirects frequent issuers toward exempt offerings with the effect of significantly reducing marketability would undermine the Commission’s stated objective of facilitating capital formation.

The consequences of losing Form S-3 eligibility could be amplified during periods of market stress, when market conditions may deteriorate rapidly, funding windows may be limited, and the ability of large issuers to raise capital quickly may be critical. For financial institutions, including systemically important banking organizations, restricting Form S-3 access could materially impair their ability to manage capital and funding needs and could have broader implications for safety and soundness as well as market stability. Funding flexibility is a core component of the framework that supports the safety and soundness of individual financial institutions and the stability of the broader financial system. Restrictions on banking organizations’ timely access to capital markets could create funding frictions when speed and certainty are most critical. Regulatory changes that materially impair such access may have consequences beyond the affected issuer and could ultimately undermine, rather than advance, broader public-interest objectives.

2. The Commission Should Permit “Ineligible Issuers” That Are Not BSP Issuers to Continue Using Form S-3

Question 16: “[S]hould these issuers be permitted to use Form S-3 if they meet the other conditions of the Form, but not be permitted to avail themselves of the Enhanced Registration and Communication Benefits that we propose to extend to Form S-3 eligible issuers, as discussed in section II.B.2 below?”

Question 24: “Under the proposed new Form S-3 eligibility criteria, an issuer would be ineligible to use Form S-3 if, within the past three years, the issuer or any entity that at the time was a subsidiary of the issuer was convicted of certain felonies or misdemeanors or was made the subject of judicial or administrative decrees or orders arising out of certain

governmental actions. Should this criterion apply to both the issuer and its subsidiaries, as proposed, or should it apply only to the issuer itself? Alternatively, should it apply to certain, but not all, subsidiaries? If so, how should we differentiate between subsidiaries?”

We believe that modifications to the disqualification events in Rule 405, such as having the disqualifications in paragraphs (v) and (vi) apply “only to the issuer itself” and not with respect to a subsidiary,¹⁴ would not adequately address our concerns related to the proposal. While these modifications may reduce the probability of unintended consequences, they would not address the fundamental problem: the loss of Form S-3 eligibility would impose consequences that are significantly more severe than the loss of WKSI-related accommodations. The proposal would also result in domestic issuers being disproportionately affected relative to “ineligible” foreign private issuers, which would lose WKSI status but continue to be permitted to use Form F-3 and be afforded the benefits of shelf registration.¹⁵

As noted above, prohibiting “ineligible issuers” from using Form S-3 would not only be inconsistent with the Commission’s capital formation objectives, but also with its long-standing approach to both Form S-3 eligibility and ineligible issuer status. The Commission historically has applied the “ineligible issuer” concept to certain registration and communication accommodations associated with being a WKSI,¹⁶ but it has never denied these issuers (other than BSP issuers) access to Form S-3 altogether. When the Commission repropose the integrated disclosure system in the early 1980s, it explained that the proposed shelf registration framework premised eligibility generally on information dissemination, reporting history and public float, rather than qualitative criteria.¹⁷ Similarly, when the Commission initially proposed ineligible issuer criteria in the 1998 “Aircraft Carrier” release, it intended to identify circumstances in which certain ineligible issuers would be disqualified from automatic shelf registration because investors needed the additional

¹⁴ We also recognize that, for purposes of Form S-3 eligibility, the Commission proposes that paragraph (1)(vi) of Rule 405 (*i.e.*, governmental decrees or orders relating to violations of the antifraud provisions of the federal securities laws) would make an issuer an “ineligible issuer” *only if* the order or decree is “based on an untrue, false or misleading statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, in each case in violation of the applicable antifraud provision and arising from a registration statement filed under the Securities Act, the Investment Company Act or Section 12 of the Exchange Act, any offering materials provided to purchasers in connection with an offering exempt from Securities Act registration requirements, or a filing required by Section 13(a), 14(a), 14(c) or 15(d) of the Exchange Act. *See* Offering Reform Proposal at 66, 69, 75 (§ II.A.2.a.iv).

¹⁵ *See* Offering Reform Proposal, at 78 & nn.211-14 (§ II.A.2.a.v) (noting that, under the proposed amendments, “FPIs would continue to be able to use Form F-3,” and that “the continued availability of Form F-3 would further mitigate any impact from the proposed amendment prohibiting FPIs from using Form S-3”).

¹⁶ *See* Securities Offering Reform, Release Nos. 33-8591; 34-52056; IC-26993 (July 19, 2005), 70 F.R. 44722, 44729, 44745-47, 44751 (Aug. 3, 2005).

¹⁷ *See* Reproposal of Comprehensive Revision to System for Registration of Securities Offerings, Release Nos. 33-6331; 34-18007; IC-11888 (Aug. 6, 1981), 46 F.R. 41902, 41904, 41907, 41912 (Aug. 18, 1981) (noting that “the proposed framework markedly reduces or eliminates those criteria relating to the ‘quality’ of the registrant, and premises eligibility generally on dissemination of information in the market place, as represented by the length and nature of compliance by the company with the reporting requirements of the Exchange Act, and, with respect to proposed Form S-3, on the registrant’s float.”).

protections associated with “possible staff review” and “greater Commission control over effectiveness.”¹⁸ We recommend that the Commission retain this historical approach. Absent automatic effectiveness, the Commission retains review authority over the Form S-3 registration statement and the Exchange Act reports incorporated by reference therein before the Commission declares the Form S-3 effective, and thereafter retains broad examination and enforcement authorities, including the ability to periodically review Exchange Act reports and prospectuses subsequent to any securities offering. Furthermore, the antifraud and liability provisions of the securities laws, including Sections 11, 12(a) and 17(a) of the Securities Act and Rule 10b-5 under the Exchange Act, apply with respect to each securities offering, thereby providing meaningful investor protections and incentivizing compliance.

For these reasons, we recommend that the Commission not depart from its historical approach and not deny “ineligible issuers” as defined in Rule 405 (other than BSP issuers) access to Form S-3 eligibility.¹⁹ If the Commission decided not to follow this approach, it should at least retain Form S-3 eligibility for “ineligible issuers” under paragraphs (v) and (vi) of the Rule 405 definition, which we believe is critical.

Accordingly, in response to Question 16 above, we urge the Commission to revise the Offering Reform Proposal in one of three ways:

First, the Commission should permit ineligible issuers that are not BSP issuers to become ELIs (but not SELIs), affording them Form S-3 access and the Enhanced Registration and Communication Benefits available to ELIs,²⁰ but not automatic shelf registration. This approach would preserve Commission oversight, as discussed above, because an ELI’s Form S-3 would not become automatically effective and therefore would remain subject to review and assessment by the Commission and its staff before the issuer could access the shelf registration process and thereafter through the Commission’s broad examination and enforcement authorities.²¹ This

¹⁸ See The Regulation of Securities Offerings, Release Nos. 33-7606A; 34-40632A; IC-23519A (Dec. 4, 1998); International Series Release No. 1167A (Nov. 13, 1998), 63 F.R. 67174, 67193 (Dec. 4, 1998).

¹⁹ The Commission has proposed that certain ineligible issuers as defined in Rule 405 be permitted to use Form S-3, but eligibility would be severely limited, to ineligible issuers as specified in paragraph (1)(i), (1)(iii), (1)(iv), or (1)(ix) of such definition. See Offering Reform Proposal, at 391 (Appendix B—Form S-3).

²⁰ These benefits would include, if the Offering Reform Proposal is adopted, Rules 163, 163A, 164(g), 413(b), 430B(a) and 456(b)/457(r) under the Securities Act, which would be available to ELIs and SELIs. Consistent with this approach, the Commission should consider excluding Form S-3 eligible issuers (or ELIs) from Rule 164(e)(1)’s independent ineligible issuer disqualification. Automatic shelf registration (Rule 462) would be available only to SELIs. Rules 139, 430B(b) and 433 under the Securities Act would be available to all issuers eligible to use Form S-3, even if they are neither ELIs nor SELIs.

²¹ With respect to the scope of the disqualification for SELIs (or ELIs if the Commission were not amenable to making these “ineligible issuers” ELIs), we expect that it would be limited—as proposed by the Commission—to issuers previously convicted of certain felonies and misdemeanors, issuers subject to a decree or order involving a violation of the antifraud provisions of the Federal securities laws, issuers that have been subject to any refusal order or stop order under section 8 of the Securities Act within the past three years, and issuers that are subject to pending proceedings or examinations under section 8 or 8A of the Securities Act (*i.e.*, it would exclude issuers as specified in paragraph (1)(i), (1)(iii), (1)(iv), or (1)(ix) of the Rule 405 definition). See Question 24 above and Offering Reform Proposal, at 70, n.199 (noting that “[u]nder our proposed amendments, these issuers would not be precluded from using Form S-3 because . . . we believe concerns related to these entities have been adequately

regulatory approach could be incorporated seamlessly into the Commission's proposed framework while advancing its capital formation objective.

Second, if the Commission were not amenable to making these "ineligible issuers" ELIs, it should at least afford them Form S-3 eligibility, which would preserve market access for these issuers without extending to them the Enhanced Registration and Communication Benefits available to ELIs.²²

Third, the Commission could preserve Form S-3 eligibility under the existing framework for issuers that are not BSP issuers and satisfy the current Form S-3 seasoning and transaction requirements. Under this approach, the Commission would adopt alternative pathways to Form S-3 eligibility. An issuer could be Form S-3 eligible under the Commission's proposed framework, without seasoning and transaction requirements, but subject to all of the proposed "ineligible issuer" disqualifications. Alternatively, an issuer could also be Form S-3 eligible by satisfying the requirements of the existing Form S-3 framework, with the current seasoning and transaction requirements, but without losing Form S-3 eligibility as a result of "ineligible issuer" status. In that case, "ineligible issuer" status would affect only the issuer's SELI status. This regulatory approach would most directly preserve the Commission's capital formation objective by ensuring that issuers that would qualify under the existing Form S-3 framework continue to qualify under the new Form S-3 framework. We note, for clarity, that this approach would not be a "grandfathering" approach or contemplate a transition period. Instead, the "ineligible issuer" disqualification would apply only to unseasoned or smaller issuers, *i.e.*, those issuers that benefit from the Commission's proposed expansion of access to Form S-3. Large, seasoned issuers that are Form S-3 eligible under the existing framework, on the other hand, could continue to qualify for use of Form S-3 on that basis, regardless of whether they are deemed "ineligible issuers."

3. The Possibility to Seek Waivers Would Not Resolve the Issues Presented by the Proposed "Ineligible Issuer" Disqualification for Form S-3

Question 26: "Under Rule 405, an issuer may seek a waiver of ineligible issuer status 'upon a showing of good cause that it is not necessary under the circumstances that the issuer be considered an ineligible issuer.' Currently, issuers may seek such waivers for purposes of qualifying as a WKSI. As discussed in footnote 175, under the proposed amendments, issuers would be able to seek such waivers for purposes of Form S-3

addressed by other Commission rules. Paragraph (1)(i) of the definition of 'ineligible issuer' covers issuers that have not filed all Exchange Act reports required to be filed during the preceding 12 months (or such shorter period that the issuer was required to file such reports). Proposed General Instruction I.A.1.b to Form S-3 would require an issuer to have filed all reports and other materials required to be filed under sections 13(a), 14(a), 14(c), and 15(d) of the Exchange Act. While the scope of filings required to be filed under proposed General Instruction I.A.1.b is narrower than what is required under paragraph (1)(i) of the definition of 'ineligible issuer,' we believe an issuer that has provided the filings specified in proposed General Instruction I.A.1.b would have provided the type of information necessary to qualify for Form S-3 eligibility.").

²² In this alternative approach, we believe it would be appropriate to retain the proposed Enhanced Registration and Communication Benefits available to Form S-3 eligible issuers, which must be current and timely in their reporting obligations; however, with or without these benefits, we believe that retaining Form S-3 access is essential.

eligibility. Should issuers be permitted to request such a waiver for purposes of Form S-3 eligibility, as proposed? Is there an alternative approach we should take that would avoid the need for such waivers? For example, should issuers remain eligible to use Form S-3 despite being classified as an ineligible issuer, provided they have not held that status during a specified prior period?”

The Commission suggests that issuers may seek waivers of their ineligibility status for purposes of Form S-3 eligibility.²³ However, the Division of Corporation Finance (acting by delegated authority) would need to determine, in each case, whether there is “a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer.” This would not only strain issuer and Commission resources but, fundamentally, would fail to provide potentially affected issuers with the necessary degree of certainty, particularly given (i) the significant consequences for issuers and investors of losing Form S-3 eligibility, as compared with the consequences of losing WKSII status under the current framework, and (ii) the possibility that the Commission’s waiver practices, including those of the Division of Corporation Finance, may evolve over time.

C. Large Debt Issuers Should Qualify for the Enhanced Registration and Communication Benefits

We recommend expanding the Enhanced Registration and Communication Benefits (as defined in the Offering Reform Proposal) available to ELIs and SELIs to non-listed issuers that have issued, in the last three years, at least \$1 billion aggregate principal amount of registered non-convertible securities, other than common equity, in primary offerings for cash.

Question 61: “For purposes of the proposed definition of ‘eligible listed issuer,’ the term ‘exchange-listed’ would mean that an issuer has a class of common equity securities listed on a national securities exchange. Is it appropriate to limit ‘exchange-listing’ to only those issuers with a class of common equity securities listed on a national securities exchange, or should ‘exchange-listed’ also include issuers with another class of securities (e.g., debt or preferred equity) listed on a national securities exchange?”

Question 63: “Although the net result of the proposed amendments would be to expand the number of issuers eligible for the Enhanced Registration and Communication Benefits, we recognize that some issuers today may be WKSIs but not qualify as an ELI or SELI because they do not have a class of common equity securities listed on a national securities exchange. For those issuers, should we provide a transition period during which they would remain eligible for the Enhanced Registration and Communication Benefits but after which their eligibility would be assessed anew? If so, what is the appropriate duration of that transition period?”

²³ Offering Reform Proposal, at 64, n.175 (noting that “the Commission may grant waivers of ineligible issuer status ‘upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer.’ . . . We recognize that the number of waiver requests could increase due to the proposed amendments.”).

As noted by the Commission in Question 63, although the net result of the proposed amendments would be to expand the number of issuers eligible for the Enhanced Registration and Communication Benefits, some issuers that are WKSIs today would not qualify as an ELI or SELI because they do not have a class of common equity securities listed on a national securities exchange. The Commission estimates that, based on the population of WKSIs, up to 184 WKSIs could potentially lose some of the Enhanced Registration and Communication Benefits because they would not be ELIs under the proposed amendments,²⁴ an effect that the Commission states “would be mitigated, however, to the extent that these WKSIs are majority-owned subsidiaries of ELIs or SELIs under the proposed amendments and are conducting certain specified registered offerings,” and “would be mitigated further to the extent these issuers choose to list on a national securities exchange.”²⁵

However, many issuers, including most captive finance issuers and utility operating companies, are WKSIs because they have issued \$1 billion aggregate principal amount of non-convertible securities, and they do not have parent guarantees. These issuers are independently reporting companies, qualify as WKSIs irrespective of their parent’s status, and do not—and may not, absent a parent guarantee—rely on Rule 12h-5 under the Exchange Act.²⁶ These issuers perform significant financing functions, and we believe preserving access to the Enhanced Registration and Communication Benefits for these large, non-listed debt issuers is important. Excluding these issuers from the ELI and SELI benefits would also contradict the Commission’s stated goal for the amendments to “expand the population of issuers eligible for some or all of the Enhanced Registration and Communication Benefits currently available to WKSIs and certain other issuers, thereby reducing the costs of engaging in registered offerings for these newly eligible issuers.”²⁷ The exclusion of non-listed debt issuers would limit the population of debt issuers that are currently eligible for these benefits and increase their compliance costs, thereby disadvantaging them when compared to the treatment of equity issuers. Furthermore, the proposal would disproportionately affect domestic debt issuers relative to foreign private issuers, as foreign private issuers that satisfy the aggregate debt issuance test would continue to be permitted to use automatic shelf registration (and the other registration and communication benefits available to WKSIs).

The Commission has explained the exchange-listing condition for ELI status by reference to the qualitative and quantitative listing standards imposed by national securities exchanges and has noted that it no longer believes the extent of an issuer’s market following is a necessary consideration for ELI or Form S-3 eligibility.²⁸ We believe that the basic premise for treating large,

²⁴ See Offering Reform Proposal, at 215 & nn.501-03 (§ IV.B.1.a) (estimating that, based on 2,039 WKSIs and 1,855 WKSIs that currently are WKSIs and would likely be ELIs, “up to 184 WKSIs could potentially lose some of the Enhanced Registration and Communication Benefits because they would not be ELIs under the proposed amendments”).

²⁵ Offering Reform Proposal, at 215 & nn.501-03 (§ IV.B.1.a).

²⁶ See 17 CFR 240.12h-5.

²⁷ Offering Reform Proposal, at 113-14 (§ II.B.2).

²⁸ See Offering Reform Proposal, at 122-3 (§ II.B.2.a) (noting that “we believe it would be appropriate to limit eligibility for most of the Enhanced Registration and Communication Benefits to exchange-listed issuers. Exchanges, through their continued listing standards, may help further facilitate and promote dissemination of

seasoned debt and equity issuers alike remains valid—before becoming eligible to file an automatically effective shelf registration statement, an issuer will have been subject to the Commission’s reporting regime for at least one year, giving the Commission an opportunity to assess the issuer’s reporting compliance and disclosures, including those made in registered offerings.²⁹ For debt issuers, we believe the use of automatic shelf registration should be narrowly tailored as it is for WKSIs today—*i.e.*, issuers that are eligible based only on their registered non-convertible security issuances could use automatic shelf registration only for non-convertible securities, other than common equity, unless they are also listed on a national securities exchange.

In response to Question 61 above, we believe that expanding the ELI definition to issuers of listed debt securities or preferred stock would fall short of addressing the concerns described above, as the fixed income market is an institutional market. These issuers therefore rarely list their debt securities or preferred stock on a national securities exchange. Accordingly, the Enhanced Registration and Communication Benefits should continue to be available to non-listed issuers that satisfy a \$1 billion aggregate registered non-convertible securities issuance test, as they are today for WKSIs.

D. Permit ELIs to Omit Selling Security Holder Information Under Rule 430B(b)(1)

The Commission should revise Rule 430B(b)(1) to permit an ELI (and not only a SELI) to omit the identities of selling security holders and the amounts of securities to be registered on their behalf in the base prospectus without being required to satisfy the additional conditions in Rule 430B(b)(2), for example, by replacing the reference to “an automatic shelf registration statement” with a reference to “a registration statement on Form S-3 or on Form N-2 filed by an eligible listed issuer.”

Question 64: “Under the proposed amendments, all Form S-3 eligible issuers would be eligible to rely on Rules 139, 430B(b), and 433 . . . ; ELIs would be eligible to rely on Rules . . . 430B(a) . . . , in addition to the rules available to all Form S-3 eligible issuers . . . ; and SELIs would be eligible to use automatic shelf registration statements, in addition to all benefits available to all Form S-3 eligible issuers and ELIs. Should we adopt the amendments as proposed?”

As proposed, Rule 430B(a) would permit an ELI (rather than a WKSI) to omit from the base prospectus whether the offering is a primary or a secondary offering, and to provide that information subsequently in a prospectus supplement.³⁰ This would generally permit ELIs to file

material information about an issuer into the marketplace allowing investors to readily obtain issuer-specific information, thereby adding an additional layer of investor protection.”).

²⁹ See Offering Reform Proposal, at 124 (§ II.B.2.a.) (noting that “[r]etaining the seasoning requirement for the ability to file automatic shelf registration statements would give the staff an opportunity to monitor an issuer’s Exchange Act reporting compliance during that first year. This incremental expansion also would give the Commission an opportunity to evaluate the appropriateness of a seasoning requirement and to consider whether future revision or elimination of this requirement would be appropriate.”).

³⁰ See Offering Reform Proposal, at 250 (§ IV.C.2.a.) (noting that “[t]he ability to rely on Rule 430B(a), which is currently limited to WKSIs and would be extended to all ELIs and SELIs under the proposed amendments, facilitates an issuer’s ability to conduct a shelf offering.”).

a universal shelf registration statement after an initial public offering or another initial Exchange Act registration, subject to contractual clear-market periods, and then use a prospectus supplement for a primary or secondary offering. However, while Rule 430B(a) would permit an ELI to use this unallocated shelf procedure, proposed Rule 430B(b) would retain the existing reference to automatic shelf registration. Rule 430B(b) would therefore permit the omission of selling security holder identities and amounts only if (1) the registration statement is an automatic shelf registration statement as defined in Rule 405 (*i.e.*, the ELI is also a SELI), or (2) the conditions in Rule 430B(b)(2)(i)–(iv) are satisfied. These conditions include, among others: (i) the initial offering transaction of the securities (or securities convertible into such securities) the resale of which are being registered on behalf of each of the selling security holders was completed; (ii) the securities (or securities convertible into such securities) were issued and outstanding prior to the original date of filing the registration statement covering the resale of the securities; and (iii) the registration statement refers to any unnamed selling security holders in a generic manner by identifying the initial offering transaction in which the securities were sold. Because these conditions require that the securities to be resold were outstanding and the offering completed at the time of the filing of the registration statement, an ELI that intends to file a universal shelf using the unallocated shelf procedure could omit whether the offering is a primary or a secondary offering pursuant to Rule 430B(a), but it would still be required to file a post-effective amendment to add selling security holder information. Unless Rule 430B(b) is expanded to cover “a registration statement on Form S-3 or on Form N-2 filed by an eligible listed issuer” (rather than an automatic shelf registration statement), the requirements of Rule 430B(b) would effectively eliminate the flexibility for ELIs to use the unallocated shelf procedure under Rule 430B(a).

The Commission has noted that, under the proposed amendments, ELIs would be eligible for WKSI-equivalent treatment with respect to the Enhanced Registration and Communication Benefits, reserving only automatic shelf registration for SELIs.³¹ As proposed, however, Rule 430B(b) would permit the omission of selling security holder identities and amounts for ELIs that are not SELIs only if they satisfy the additional conditions in Rule 430B(b)(2)(i)–(iv). This creates an inconsistency between paragraphs (a) and (b) of Rule 430B, as discussed above. If an ELI shelf registration statement can omit whether the offering is a primary or a secondary offering (as for WSIs under existing rules), then the ELI should also be permitted to omit selling security holder identities and amounts under Rule 430B(b) without being required to satisfy the additional conditions in Rule 430B(b)(2)(i)–(iv) (as for WSIs under existing rules). This could be achieved, for example, by replacing the reference to “an automatic shelf registration statement” in proposed Rule 430B(b)(1) with a reference to “a registration statement on Form S-3 or on Form N-2 filed by an eligible listed issuer.”

³¹ See Offering Reform Proposal, at 116-17 (§ II.B.2.a) (stating that “ELIs also would be eligible for all the benefits available to Form S-3 eligible issuers,” and that “ELIs would be eligible to rely on Rules 163, 163A, 164, 413, 430B(a), 456(b), and 457(r),” with automatic shelf registration reserved for SELIs).

E. Exclude Former Reporting Shell Companies from the BSP Issuer Definition

The Commission should exclude all former “reporting shell companies” (as defined in Rule 145a), and not only former SPACs, from the definition of “BSP issuer” to realign the treatment of former SPACs and other former shell companies.

Question 17: “Are there any categories of issuers we are proposing to prohibit from using Form S-3 that should not be prohibited solely on the basis of issuer type? Are there any categories of issuers we are not proposing to prohibit from using Form S-3 that should be excluded?”

We agree with the Commission’s view that Form S-3 eligibility should focus on an issuer’s status as a current and timely Exchange Act reporting company because “investors can readily obtain issuer-specific information that is incorporated by reference into a prospectus and the related registration statement to make an informed investment decision”.³² While we recognize that the Commission’s SPAC rules imposed certain descriptive line item disclosure requirements for de-SPAC transactions that do not apply to an ordinary reverse merger, we believe that investors receive equivalent protections in either type of transaction. Similar to SPACs, a reporting shell company that ceases to be a shell company as a result of a reverse merger must file comprehensive “Form 10 information” (as defined in paragraph (i)(3) of Rule 144) reflecting its status as an entity that is no longer an issuer described in paragraph (i)(1)(i) of Rule 144, and pursuant to Rule 145a, the shell company’s reverse merger must be registered on Form S-4 as a “sale” under the Securities Act,³³ irrespective of whether the reporting shell company’s securities change hands in the transaction. Investors therefore receive substantially the same level of decision-useful information that they would receive in a spin-off (after which the spun-off company would immediately become Form S-3 eligible) or a de-SPAC transaction (after which the de-SPACed company would immediately become Form S-3 eligible), which information will be incorporated by reference into the issuer’s subsequent registration statement on Form S-3. The registration statements that are required to be filed in connection with these transactions, as well as the subsequent Form S-3, would be subject to Commission review and would have to be declared effective by the Commission. Accordingly, while we believe that former reporting shell companies should be distinguished from penny stock issuers or blank check companies, we see no investor protection objectives that would justify drawing a substantive distinction, for Form S-3 eligibility purposes and for purposes of the availability of the Enhanced Registration and Communication Benefits, between former reporting shell companies and former SPACs. Rather, former reporting shell companies and former SPACs should receive access to the public markets on equal terms, which would reduce costs and facilitate capital formation, in a manner consistent with investor protection.

If the Commission declined to follow this suggested approach, we would recommend that the Commission exclude a former reporting shell company from the definition of “BSP issuer” if the combined company has at least one class of common equity securities traded on a “trading

³² Offering Reform Proposal, at 21 (§ I.B).

³³ 17 CFR 230.145a.

market” (as defined in proposed Rule 415(a)(4)).³⁴ This alternative approach would help ensure a sufficient level of market liquidity, consistent with the Commission staff’s historical position that at-the-market offerings may be registered on Form S-3 if the issuer’s securities are listed on a national securities exchange or qualify for the OTCQX Best Market tier or OTCQB Venture Market tier of the OTC Link alternative trading system. We believe this concept, which the Offering Reform Proposal would retain,³⁵ aligns well with the Commission’s stated rationale when it defined “trading market” in amended Rule 415(a)(4)—*i.e.*, that the eligibility criteria of these markets protect investors “by helping to ensure both adequacy of information about the issuer and sufficient market liquidity”.³⁶ Having suggested this alternative approach, however, we continue to believe that excluding all former reporting shell companies from the definition of “BSP issuer”, as proposed above, would more effectively realign the treatment of former SPACs and other former shell companies. It would more broadly permit effective market access for these companies, as compared to the existing practice of filing a Form S-1 shelf registration shortly after Form S-4 effectiveness, with substantially similar disclosure. More fundamentally, a broader approach, as proposed above, would be consistent with the baseline principle expressed in the Offering Reform Proposal that the Commission should focus on the availability of information about the issuer, rather than on criteria tied to seasoning or liquidity, as indicia of the appropriateness of Form S-3 eligibility. Accordingly, these issuers, consistent with the treatment of former SPACs, should be eligible to rely on Rules 139, 430B(b) and 433 under the Securities Act. Furthermore, as for former SPACs, subject to listing and seasoning requirements, these issuers should qualify as ELIs and SELIs and therefore benefit from the other Enhanced Registration and Communication Benefits.

³⁴ See 17 CFR 230.144(i)(3), (i)(1)(i); proposed Rule 415(a)(4).

³⁵ See Offering Reform Proposal, at 107 (§ II.A.2.d) (“Based on the proposed attributes and their current eligibility criteria, we believe that an offering of securities that qualify for the OTCQX Best Market tier or OTCQB Venture Market tier of the OTC Link ATS would continue to qualify as offerings into an existing ‘trading market’ for purposes of Rule 415(a)(4)”).

³⁶ *Id.*

III. Filer Status Proposal

Our comments on the Filer Status Proposal are informed by the same principles that guided our comment letter on the Commission's FAST Act Modernization and Simplification of Regulation S-K, dated January 2, 2018,³⁷ namely, we generally support scaling disclosure requirements for smaller and newly public issuers, a workable IPO on-ramp, and refocusing disclosure requirements on material information. We support the Filer Status Proposal and the expansion of the non-accelerated filer category, together with the concurrent extension of smaller reporting company and emerging growth company disclosure accommodations to all non-accelerated filers (including all public companies in their first five years), which we believe would result in a lower cost burden for most issuers.

Overall, the proposed amendments under the Filer Status Proposal would offer meaningful disclosure rationalization for a wide range of issuers, and we offer the following targeted comments.

Question 3: "Is the proposed LAF threshold of \$2 billion in public float, which would capture approximately 93.5 percent of the total market public float and would result in approximately 20 percent of existing public companies being classified as LAFs, appropriate? If not, what other threshold should the Commission consider and why?"

We support the proposed increase in the large accelerated filer public float threshold from \$700 million to \$2 billion. The \$700 million threshold has not been updated since large accelerated filer status was adopted in 2005,³⁸ and an increase is appropriate to reflect the substantial growth in equity market capitalization over the intervening two decades. We believe that calibrating the most comprehensive disclosure requirements and the earliest filing deadlines to the largest issuers, which represent the vast majority of U.S. equity market capitalization, balances the Commission's goals of facilitating capital formation and investor protection.

Question 9: "[T]he proposal contemplates a two-year period after transitioning into or out of LAF status during which a registrant's filer status cannot change. Should we adopt this two-year minimum period, as proposed?"

We support the proposed seasoning period before a registrant becomes a large accelerated filer, together with the two-year minimum period following a transition into or out of non-accelerated filer status. These features will provide registrants and the markets with consistency and predictability regarding the reporting and disclosure frameworks to which a registrant is subject, and would allow companies to plan their disclosure controls and procedures and associated costs ahead of a transition, which is particularly valuable for newly public companies. We believe the proposed amendments will further the Commission's goal of encouraging companies to go and stay public.

³⁷ See Letter from Sean Davy, Managing Director, Capital Markets Division, SIFMA to Brent J. Fields, Secretary, SEC (Jan. 2, 2018), re FAST Act Modernization and Simplification of Regulation S-K (File No. S7-08-17).

³⁸ See Revisions to Accelerated Filer Definition and Accelerated Deadlines for Filing Periodic Reports, Release Nos. 33-8644; 34-52989 (Dec. 21, 2005), 70 F.R. 76626, 76628 (Dec. 27, 2005).

Question 13: “Should we extend, as proposed, the SRC and/or EGC accommodations to NAFs? Would the proposed reporting requirements for NAFs, including proposed accommodations and disclosure scaling, promote investor protection and permit investors in these filers to make informed investment and voting decisions?”

We support extending the smaller reporting company and emerging growth company accommodations to all non-accelerated filers. Consolidating the current, overlapping filer statuses into a streamlined filer status framework, and extending scaled disclosure and other accommodations, including relief from the internal control over financial reporting auditor attestation requirement and the ability to provide two rather than three years of audited financial statements,³⁹ to all non-accelerated filers would reduce compliance costs for the substantial majority of registrants while preserving the timely, material information investors need to make informed investment and voting decisions. Further, we would encourage the Commission to consider whether certain of the scaled disclosure accommodations currently available to smaller reporting companies and emerging growth companies should be expanded not only to non-accelerated filers under this rule but also to all large accelerated filers. If a disclosure requirement yields limited additional investor benefit relative to its costs, providing relief regardless of issuer size would be consistent with the Commission’s objectives of capital formation, public company participation, and appropriately tailored regulation. We agree that streamlining the framework so that registrants no longer need to assess multiple, overlapping filer-status entry and exit thresholds each year would meaningfully simplify compliance.

³⁹ See Filer Status Proposal, at 16, 18 (§ II.B) (proposing to extend to non-accelerated filers the scaled disclosure and other accommodations currently available to smaller reporting companies and emerging growth companies, including relief from the internal control over financial reporting auditor attestation requirement imposed by Section 404(b) of the Sarbanes-Oxley Act, 15 U.S.C. 7262(b); the exemption from that auditor-attestation requirement for issuers that are neither large accelerated filers nor accelerated filers is provided by Section 404(c) of the Sarbanes-Oxley Act, 15 U.S.C. 7262(c)).

IV. Conclusion

We thank the Commission for the opportunity to comment on the Offering Reform Proposal and the Filer Status Proposal, which together represent a significant and welcome step toward modernizing the registered offering process and streamlining the filer status framework in a manner that advances capital formation while preserving investor protection. While we have included certain recommendations with respect to the proposals, we strongly support the proposals and believe the proposed rules will advance the Commission's stated goals. We hope our comments prove helpful to the Commission as it considers ways to further these objectives. We welcome the opportunity to discuss our comments or to provide any additional information that would be helpful to the Commission and its staff.

* * *

If you have any questions or need any additional information, please contact Joseph Corcoran at 202-962-7300 or SIFMA's outside counsel on this matter, Mario Schollmeyer, Sullivan & Cromwell LLP, at 212-558-4000.

Sincerely,



Kenneth E. Bentsen Jr.
President & CEO
SIFMA

cc:

The Honorable Paul S. Atkins, Chairman
The Honorable Hester M. Peirce, Commissioner
The Honorable Mark T. Uyeda, Commissioner

Illustrative Proposed Rule Text

The following illustrative blacklines are intended to assist the Commission in implementing the revisions suggested in this letter. Additions to the proposed rules are shown as bold underlined text and deletions are shown as struck-through text. These blacklines are illustrative and subject to further refinement. SIFMA would be pleased to work with the Commission staff on implementing the revisions suggested in this letter.

Reconsider the Proposed Form S-3 “Ineligible Issuer” Disqualification

The Commission should reconsider the proposed “ineligible issuer” disqualification for Form S-3 eligibility and permit ineligible issuers that are not BSP issuers to continue using Form S-3.

Appendix B—FORM S-3

GENERAL INSTRUCTIONS

I. Eligibility Requirements for Use of Form S-3

A registrant meeting the following criteria may use this Form to register offers and sales of securities under the Securities Act of 1933 (“Securities Act”), except that this Form may not be used for exchange offers or business combination transactions.

A. Registrant Requirements.

* * * * *

2. *Prohibition on Use of Form S-3 by Certain Ineligible Issuers.* A registrant may not use this Form if it is **a BSP issuer, as defined in Rule 405 (17 CFR 230.405)**~~an ineligible issuer, as defined in Rule 405 (17 CFR 230.405); provided that a registrant will not be prohibited from using this Form if the registrant is an ineligible issuer only as specified in paragraph (1)(i), (1)(iii), (1)(iv), or (1)(ix) of such definition.~~

* * * * *

*The Commission should permit issuers that are not BSP issuers and would be otherwise disqualified under the Rule 405 definition to become ELIs (but not SELIs), affording them Form S-3 access and the Enhanced Registration and Communication Benefits available to ELIs, but not automatic shelf registration.*⁴⁰

§ 230.405 Definitions of terms.

* * * * *

Eligible listed issuer and seasoned eligible listed issuer. The terms eligible listed issuer and seasoned eligible listed issuer have the following meanings:

* * * * *

(2)

(i) A *seasoned eligible listed issuer* is an eligible listed issuer, as defined in paragraph (1), that **is not an ineligible issuer, as defined in Rule 405 (17 CFR 230.405), unless the issuer is an ineligible issuer only as specified in paragraph (1)(i), (1)(iii), (1)(iv), or (1)(ix) of such definition, and** has been subject to the requirements of section 12 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78l or 78o(d)) and, in the case of a registered closed-end investment company, section 30 of the Investment Company Act of 1940 (15 U.S.C. 80a-29), for a period of at least twelve calendar

* * * * *

If the Commission were not amenable to making these “ineligible issuers” ELIs, it should at least afford them Form S-3 eligibility, which would preserve market access for these issuers without extending to them the Enhanced Registration and Communication Benefits available to ELIs.

§ 230.405 Definitions of terms.

* * * * *

Eligible listed issuer and seasoned eligible listed issuer. The terms eligible listed issuer and seasoned eligible listed issuer have the following meanings:

(1) An *eligible listed issuer* is an issuer with at least one class of common equity securities listed for trading on a national securities exchange registered under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f) that meets the registrant requirements of General Instruction I.A of Form S-3 (§ 239.13 of this chapter) or General Instruction A.2 of Form N-2 (§§ 239.14 and 274.11a-1 of this chapter) **and is not an ineligible issuer, as defined in Rule 405 (17 CFR 230.405), unless the issuer is an ineligible issuer only as specified in paragraph (1)(i), (1)(iii), (1)(iv), or (1)(ix) of such definition;**

* * * * *

⁴⁰ Consistent with this approach, the Commission should consider excluding Form S-3 eligible issuers (or ELIs) from Rule 164(e)(1)'s independent ineligible issuer disqualification.

Large Debt Issuers Should Qualify for the Enhanced Registration and Communication Benefits

We recommend expanding the Enhanced Registration and Communication Benefits (as defined in the Offering Reform Proposal) available to ELIs and SELIs to non-listed issuers that have issued, in the last three years, at least \$1 billion aggregate principal amount of registered non-convertible securities, other than common equity, in primary offerings for cash.

§ 230.405 Definitions of terms.

* * * * *

Eligible listed issuer and seasoned eligible listed issuer. The terms eligible listed issuer and seasoned eligible listed issuer have the following meanings:

- (1) An eligible listed issuer is an issuer with at least one class of common equity securities listed for trading on a national securities exchange registered under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f) that meets the registrant requirements of General Instruction I.A of Form S-3 (§ 239.13 of this chapter) or General Instruction A.2 of Form N-2 (§§ 239.14 and 274.11a-1 of this chapter); **provided that an issuer shall be treated as an eligible listed issuer if such issuer:**

(i) Meets the registrant requirements of General Instruction I.A of Form S-3 (§ 239.13 of this chapter) or General Instruction A.2 of Form N-2 (§§ 239.14 and 274.11a-1 of this chapter);

(ii) As of a date within 60 days of the date of determination, has issued in the last three years at least \$1 billion aggregate principal amount of non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Act; and

(iii) Will register only non-convertible securities, other than common equity, and full and unconditional guarantees of such securities, unless, at the date of determination, the issuer also has at least one class of common equity securities listed for trading on a national securities exchange registered under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f).

* * * * *

Permit ELIs to Omit Selling Security Holder Information Under Rule 430B(b)(1)

The Commission should revise Rule 430B(b)(1) to permit an ELI (and not only a SELI) to omit the identities of selling security holders and the amounts of securities to be registered on their behalf in the base prospectus without being required to satisfy the additional conditions in Rule 430B(b)(2), for example, by replacing the reference to “an automatic shelf registration statement” with a reference to “a registration statement on Form S-3 or on Form N-2 filed by an eligible listed issuer.”

§ 230.430B Prospectus in a registration statement after effective date.

(a) A form of prospectus filed as part of a registration statement on Form S-3 (§ 239.13 of this chapter) or on Form N-2 (§§ 239.14 and 274.11a-1 of this chapter) filed by an eligible listed issuer, as defined in Rule 405 (§ 230.405 of this chapter), or as part of an automatic shelf registration statement on Form F-3 (§ 239.33 of this chapter) for offerings pursuant to Rule 415(a) (§ 230.415(a) of this chapter), other than Rule 415(a)(1)(viii) (§ 230.415(a)(1)(viii) of this chapter), may omit information as to whether the 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. Each such form of prospectus shall be deemed to have been filed as part of the registration statement for the purpose of section 7 of the Act.

(b) A form of prospectus filed as part of a registration statement for offerings pursuant to Rule 415(a)(1)(i) (§ 230.415(a)(1)(i) of this chapter) by an issuer eligible to use Form S-3, an issuer eligible to use Form F-3 for primary offerings pursuant to General Instruction I.B.1 of such form, or an issuer eligible to register a primary offering under General Instruction A.2 of Form N-2 (§§ 239.14 and 274.11a-1 of this chapter), may omit the identities of selling security holders and amounts of securities to be registered on their behalf if:

(1) The registration statement is **a registration statement on Form S-3 or on Form N-2 filed by an eligible listed issuer or an automatic shelf registration statement, as defined in Rule 405 (§ 230.405 of this chapter), on Form F-3 (§ 239.33 of this chapter);** or

(2) * * *

(i) * * *

(ii) * * *

(iii) * * *

(iv) The issuer is not a BSP issuer, as defined in Rule 405.

Exclude Former Reporting Shell Companies from the BSP Issuer Definition

The Commission should exclude all former “reporting shell companies” (as defined in Rule 145a), and not only former SPACs, from the definition of “BSP issuer” to realign the treatment of former SPACs and other former shell companies.

§ 230.405 Definitions of terms.

* * * * *

BSP issuer. The term BSP issuer means an issuer that is, or during the past three years either the issuer or any of its predecessors was:

- (1) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2) of this chapter);
- (2) A shell company, other than a business combination related shell company, each as defined in this section, provided, however, that an issuer, other than a foreign private issuer, as defined in this section, shall not be deemed to be a shell company solely because during the past three years either the issuer or any of its predecessors was a **shell company that when it ceased to be a shell company was a reporting shell company, as defined in Rule 145a (§ 230.145a of this chapter)** ~~special purpose acquisition company (SPAC), as defined in Item 1601(b) of Regulation S-K (§ 229.1601 of this chapter);~~ or
- (3) An issuer for an offering of penny stock as defined in Rule 3a51-1 of the Securities Exchange Act of 1934 (§ 240.3a51-1 of this chapter).

* * * * *

If the Commission declined to follow this suggested approach, we would recommend that the Commission exclude a former reporting shell company from the definition of “BSP issuer” if the combined company has at least one class of common equity securities traded on a “trading market” (as defined in proposed Rule 415(a)(4)).

§ 230.405 Definitions of terms.

* * * * *

BSP issuer. The term BSP issuer means an issuer that is, or during the past three years either the issuer or any of its predecessors was:

- (1) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2) of this chapter);
- (2) A shell company, other than a business combination related shell company, each as defined in this section, *provided, however*, that an issuer, other than a foreign private issuer, as defined in this section, shall not be deemed to be a shell company solely because during the past three years either the issuer or any of its predecessors was:
 - (i) a special purpose acquisition company (SPAC), as defined in Item 1601(b) of Regulation S-K (§ 229.1601 of this chapter); **or**
 - (ii) **a shell company that when it ceased to be a shell company was a reporting shell company, as defined in Rule 145a (§ 230.145a of this chapter), and such issuer has at**

least one class of common equity securities traded on a “trading market” (as defined in Rule 415(a)(4) (§ 230.415(a)(4) of this chapter)).

(3) An issuer for an offering of penny stock as defined in Rule 3a51-1 of the Securities Exchange Act of 1934 (§ 240.3a51-1 of this chapter).

* * * * *