Governance & Securities Alert

Weil

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SEC Proposes Broad Reporting Reforms and Significant Enhancements to Capital Markets Access

Two Proposals, One Mission: Lighter Disclosure Burdens and Broader Capital Markets Access

The U.S. Securities and Exchange Commission ("SEC") has proposed two sets of rule amendments aimed at easing regulatory burdens for domestic public issuers and expanding access to the public markets. The first proposal, Enhancement of Emerging Growth Company Accommodations and Simplification of Filer Status for Reporting Companies, would significantly streamline the current Exchange Act filer status framework and related disclosure rules. The second proposal, Registered Offering Reform would broaden eligibility for Form S-3 and shelf offerings to nearly all public issuers and enhance the flexibility and efficiency of Form S-1 for follow-on and resale offerings. Together, these proposals would reshape core elements of the disclosure and registered offering regime, with meaningful implications for reporting obligations, capital raising, and compliance costs for the majority of U.S. domestic public issuers. This Alert summarizes the key proposed changes covered by both rulemakings. The public comment period for both proposals will remain open for 60 days following publication in the Federal Register.

Key Takeaways

The proposed rules, if adopted, would have broad implications such as:

- **Large Accelerated Filer Threshold Raised and Reporting Burdens Reduced**. The proposal would substantially reduce the number of companies that will qualify as a large accelerated filer by, among other things, increasing the public float threshold to $2 billion. All other filers would fall into the non-accelerated filer category and benefit from a meaningfully reduced disclosure and reporting regime.
- **Broad Access to Form S-3**. Smaller and newer public companies would gain access to Form S-3 and shelf registration, enabling capital raising faster and at lower cost.
- **WKSI Flexibility for Most Issuers**. The vast majority of domestic SEC reporting issuers would gain access to benefits currently only available to Well-Known Seasoned Issuers ("WKSIs"), including automatic shelf registration after 12 months of reporting for exchange listed issuers, use of free writing prospectuses ("FWPs") without being accompanied by a statutory prospectus, expanded pre-filing communications, and pay-as-you-go registration fees.
- **Expanded Incorporation by Reference for Form S-1**. All issuers would be permitted to incorporate by reference (forward and backward) into Form S-1, significantly reducing duplicative disclosure and complexity of follow-on and resale offerings.
- **State Securities Law Preemption**. The proposed redefinition of "qualified purchaser" under Section 18(b)(3) of the Securities Act would extend state securities law preemption to all registered offerings (not only those involving exchange-listed securities), thereby eliminating blue-sky registration and qualification compliance costs for registered offerings of unlisted securities.

Simplified Filer Status Framework and Reduced Disclosure

Large Accelerated Filer

- The proposed rules would raise the public float threshold for large accelerated filers from $700 million to $2 billion. The SEC estimates that a $2 billion threshold would cover approximately 20% of existing reporting companies, compared to 35.4% today (as measured in calendar year 2024).
- The proposed rules would replace the current single-day measurement date at the end of an issuer's second fiscal quarter with an average of the closing prices over the last 10 trading days of the registrant's second fiscal quarter, multiplied by the number of shares of common equity held by non-affiliates as of the last day of that quarter.
    - Additionally, the $2 billion public float threshold must be met for two consecutive fiscal years.
- The proposed rules would extend the minimum seasoning period before a registrant could become a large accelerated filer from 12 calendar months to 60 consecutive calendar months (5 years) following the date the registrant became subject to Exchange Act reporting requirements.

Non-Accelerated Filer

- The proposed rules define "non-accelerated filer" as any issuer that is not a large accelerated filer.
- The proposed rules create a new subcategory of non-accelerated filer called "small non-accelerated filers," consisting of non-accelerated filers that report total assets of $35 million or less in their financial statements as of the end of each of their two most recent second fiscal quarters.
    - A registrant would qualify as a small non-accelerated filer upon initial registration if it reported total assets of $35 million or less in each of its two most recent fiscal year balance sheets. Once classified as a small non-accelerated filer, a registrant would retain that status until it becomes a large accelerated filer or reports total assets above $35 million as of the end of each of its two most recent second fiscal quarters.
    - Small non-accelerated filers would receive extended deadlines for periodic reports:
        - 120 days after fiscal year end for Form 10-K (compared to 90 days for other non-accelerated filers).
        - 50 days after fiscal quarter end for Form 10-Q (compared to 45 days for other non-accelerated filers).
    - Presumably, if the SEC's recent proposal to permit semi-annual reporting is adopted (discussed in our prior alert here), Form 10-S will have the same deadlines as Form 10-Qs, except within 40 days (large accelerated filers), 45 days (non-accelerated filers), or 50 days (small non-accelerated filers) from the end of the issuer's semiannual period.

Accelerated Filer and Smaller Reporting Company

- The proposed rules eliminate existing accelerated filer and smaller reporting company definitions.

Transition Period

- The proposed rules will allow issuers to assess their filer status at any time after effectiveness of the final rules, looking back to as of the end of their fiscal year prior to the effectiveness of the final rules (i.e., if the final rules are effective in August 2026, calendar year issuers would look to the year ended December 31, 2025). The assessment must be completed no later than the day prior to the last day of their fiscal year in which the final rules go into effect. Therefore, an issuer that qualifies as an non-accelerated filer after its filer status assessment will be able to take advantage of the scaling and other accommodations available to non-accelerated filers immediately (i.e., in its next Securities Act or Exchange Act filing made after the assessment is completed).

Key Exemptions and Scaled Disclosure Options Available to Non-Accelerated Filers

- *No Sarbanes-Oxley Section 404(b) Auditor Attestation.* Non-accelerated filers will not be required to obtain auditor attestation of internal control over financial reporting.
- *Two Years of Financial Statements and MD&A*. Non-accelerated filers would be permitted to (i) prepare financial statements in accordance with Article 8 of Regulation S-X, providing 2 years of audited statements of comprehensive income, cash flows, and changes in stockholders' equity and (ii) provide 2 years of MD&A pursuant to Item 303 of Regulation S-K.
  - Non-accelerated filers would also benefit from less stringent age of financial statements requirements and slightly condensed formats for interim and pro forma financial statements.
- *Scaled Executive Compensation*. Non-accelerated filers would not be required to provide (i) CD&A, (ii) grant of plan-based awards table, (iii) options exercises and stock vested table, (iv) pension benefits table, (v) nonqualified deferred compensation table, (vi) description of compensation policies and practices related to risk management, (vii) pay-versus-performance disclosure, and (viii) pay ratio disclosure.
  - Additionally, executive compensation disclosure will be required for only 3 named executive officers (principal executive officer and next two highly compensated officers), and would also only need to provide 2 years of summary compensation table.
- *No Shareholder Advisory Votes*. Non-accelerated filers would be exempt from the requirements to hold shareholder advisory votes on executive compensation ("say-on-pay"), votes on the frequency of say-on-pay, and golden parachute compensation arrangements.
- *Scaled Related Party Transactions*. Non-accelerated filers would be subject to the $120,000 threshold, but would not be required to describe policies and procedures for the review, approval, or ratification of related party transactions.
  - The more rigorous specific thresholds in current Item 404(d) of Regulation S-K (including the lesser of $120,000 or 1% of total assets and the two year look back) would be eliminated.
- *Additional Scaled Disclosure*. Non-accelerated filers are also permitted to omit:
  - Risk factor disclosure in Forms 10-K and 10-Q.
  - Performance graph disclosure pursuant to Item 201(e) of Regulation S-K (except for 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.
  - Compensation Committee Interlocks and Insider Participation disclosure, and the Compensation Committee Report disclosure pursuant to Item 407(e)(4) and (e)(5) of Regulation S-K.
  - The audit committee financial expert disclosure in a registrant's first annual report.
  - Certain payments made by resource extraction issuers.
- *Other Disclosure Changes for Non-Accelerated Filers.* The proposed rules also (i) extend to all registrants the requirement to disclose on Form 10-K the substance of any material unresolved written staff comments that have been outstanding for at least 180 days before fiscal year end and (ii) apply most emerging growth company accommodations to non-accelerated filers, including the extended transition period for complying with new or revised financial accounting standards (as applied to private companies).
- *Foreign Private Issuers.* The proposed rules provide that the new definitions of large accelerated filer and non-accelerated filer, and any related scaled disclosure or auditor attestation accommodations, would not apply to

foreign private issuers ("FPIs") that elect to comply with the rules and use the forms designated for FPIs (*i.e.*, Forms 20-F and 40-F).

Significant Expansion of Access to Shelf-Registration

The proposed rules make Form S-3 eligibility easier for most issuers and will help facilitate access to U.S. capital markets (The SEC estimates that the proposed changes could increase the number of issuers eligible to offer an unlimited amount of securities on Form S-3 by more than 60%):

- *Elimination of All Transaction Requirements*. The proposed rules would eliminate all transaction requirements of General Instruction I.B of Form S-3, including the requirement that an issuer have at least $75 million in public float to be eligible to register an unlimited amount of securities on Form S-3.
- *Elimination of One-Year Seasoning Requirement*. Under the proposed amendments, an issuer would immediately become eligible to use Form S-3 upon having a class of securities registered pursuant to section 12(b) or 12(g), or becoming subject to section 15(d), of the Exchange Act. The proposed rules eliminate the requirement in current General Instruction I.A.3(a) of Form S-3 that an issuer must have filed all materials required under sections 13, 14, or 15(d) of the Exchange Act for at least 12 calendar months immediately preceding the filing of a Form S-3 registration statement.
  - Form S-3 eligibility would continue to require that an issuer be subject to Exchange Act reporting requirements and be current and timely in all materials required to be filed under sections 13(a), 14(a), 14(c), and 15(d) of the Exchange Act during the preceding 12 calendar months (or such shorter period as the issuer has been subject to the reporting requirements).
    - The proposal also provides a limited exception: an issuer would remain eligible despite an untimely filing if (a) the filing was made within seven calendar days of the original due date and (b) the issuer had only one untimely filing during the relevant lookback period.
- *Elimination of Other Requirements*. The SEC proposes to eliminate:
  - "Certain Failures to Make Payments and Defaults" requirement.
  - The electronic filing and Interactive Data File requirements.
- *Protections Against Use by Certain Ineligible Issuers*. The proposed rules would prohibit certain issuers from being able to use Form S-3:
  - Any issuer that is, or during the past 3 years was (i) a blank check company, (ii) a shell company (other than a business combination related shell company), subject to a separate carveout under which an issuer would not be deemed a shell company solely because it or any of its predecessors was a special purpose acquisition company ("SPAC") during the prior three years (provided the issuer is not a shell company at the time of filing the Form S-3), or (iii) an issuer engaged in offerings of penny stock;
  - Issuers convicted of certain felonies or misdemeanors within the past 3 years;
  - Issuers subject to, within the past 3 years, a judicial or administrative decree or order arising from a violation of the antifraud provisions of the federal securities laws in connection with a registration statement, exempt offering materials, or Exchange Act filings;
  - Issuers subject to a refusal order or stop order under Section 8 of the Securities Act within the past 3 years; and
  - Issuers subject to pending proceedings or examinations under Sections 8 or 8A of the Securities Act.

- In addition, the following categories of issuers would be prohibited from using Form S-3 at any time: (i) FPIs (who would continue to use Form F-3), (ii) asset-backed issuers, (iii) investment companies (registered under the Investment Company Act), and (iv) business development companies ("BDCs").
- Corresponding changes are also proposed for Form S-4 to align with the liberalization of Form S-3 eligibility. In particular, more issuers using Form S-4 in stock-for-stock M&A transactions would be eligible to incorporate by reference issuer and target information from Exchange Act reports.

Elimination of WKSI Framework for Domestic Issuers

The proposed rules would delete the current definition of WKSI for domestic issuers (existing WKSI rules would remain in place for FPIs) and replace it with following three new tiers that will provide the former WKSI benefits reserved for larger domestic issuers to almost all domestic issuers:

- Form S-3 eligible issuers: any issuer that meets the proposed Form S-3 registrant requirements but does not have any common equity listed on a national securities exchange.
- Eligible Listed Issuer ("ELI"): any issuer that (i) meets the proposed Form S-3 registrant requirements (*i.e.*, is subject to Exchange Act reporting and reports are current and timely) and (ii) has at least one class of common equity securities listed on a national securities exchange).
- Seasoned Eligible Listed Issuer ("SELI"): any ELI that has also been subject to Exchange Act reporting requirements for at least 12 calendar months.
    - The proposed rules would not permit former SPACs (post business combination) to take into account the reporting history of the SPAC for purposes of determining whether it qualifies as a SELI.

The new categories of issuers would be eligible for the following new benefits:

- *Perks Available to Form S-3 Eligible Issuers*. All Form S-3 eligible issuers would be eligible to: (i) benefit from the broker-dealer research report exemption (permitting broker-dealers participating in a distribution to issue issuer-specific research reports without those reports constituting an "offer"); (ii) omit the identities of selling security holders and the amount of securities to be registered on their behalf; and (iii) use a FWP without the FWP being preceded or accompanied by a statutory prospectus.
- *Additional Perks Available to ELIs.* ELIs would additionally be eligible to: use pre-filing offers; use pre-filing offers for Form S-8 offerings; use post-filing FWPs for Form S-8 offerings; register additional classes of securities or securities of a majority-owned subsidiary via a post-effective amendment; omit certain information from a base prospectus; and use pay-as-you-go fee payment.
- *Additional Perks Available to SELIs.* SELIs would additionally be eligible to file automatic shelf registration statements.

Form S-1 Modernization and Expansion of Incorporation by Reference

- *Incorporation by Reference.* The proposed rules would amend Form S-1's incorporation by reference provisions by allowing all issuers to incorporate by reference, forwards and backwards, into Form S-1 (whether before or after filing its first Annual Report on Form 10-K).
    - Issuers that have not yet filed a Form 10-K would instead be required to incorporate by reference a Securities Act or Exchange Act filing containing Form 10 information.
    - The proposal would also prohibit foreign private issuers from using Form S-1, consistent with the proposed prohibition on use of Form S-3 by foreign private issuers.

Other Proposed Changes

- The proposed rules would change the definition of "qualified purchaser" under Section 18(b)(3) of the Securities Act to apply to any registered offering (not just securities listed on a national securities exchange), thereby preempting state securities law registration and qualification requirements.
- The proposed rules would extend to a broader group of BDCs and registered closed-end funds eligibility to use short-form shelf registration statements on Form N-2, in part by removing related seasoning and public float requirements.

What To Do Now?

- **Consider Benefits of Going Public**. Private companies, regardless of size or profitability, could remain non-accelerated filers for at least the first five years post-IPO, allowing them to rely on scaled disclosures and avoid ICFR auditor attestation under SOX 404(b). This would meaningfully reduce SOX-related compliance costs during the early years as a public company. Coupled with immediate access to Form S-3s, this could incentivize issuers to go public and access U.S. capital markets sooner, while also potentially avoiding for extended periods some of the more onerous U.S. reporting obligations.
- **Prepare for Potential Filer Status Changes**. Current emerging growth companies and smaller reporting companies preparing for a change in filer status, and current accelerated filers and large accelerated filers that have less than a $2 billion public float, could become non-accelerated filers, and should review the scope and cost of SOX and disclosure compliance and consider the timing and practicability of compliance onramp/offramp.
- **Monitor Final Rule Adoption**. If adopted, these rules will have timing considerations; issuers should be prepared to pivot if timing does not align with the issuer's overall capital raising/reporting strategy.

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If you have questions concerning the contents of this Alert, or would like more information, please speak to your regular contact at Weil or to any of the following authors:

Authors

Lyuba Goltser	View Bio	lyuba.goltser@weil.com	+1 212 310 8048
Howard Dicker	View Bio	howard.dicker@weil.com	+1 212 310 8858
Heather Emmel	View Bio	heather.emmel@weil.com	+1 212 310 8849
Kaitlin Descovich	View Bio	kaitlin.descovich@weil.com	+1 202 682 7154
Steven Bentsianov	View Bio	steven.bentsianov@weil.com	+1 212 310 8928
Julie Rong	View Bio	julie.rong@weil.com	+1 650 802 3101