Frequently Asked Questions –

Registered Offerings and Public Company Reporting Reforms

Q. Would most public companies become eligible to use Form S-3 for primary shelf offerings?

A. The SEC estimates that the proposal could increase by over 60 percent the number of issuers eligible to offer an unlimited amount of securities on Form S-3. The proposal would eliminate Form S-3's one-year seasoning requirement and transaction requirements, including the $75 million public float requirement for registering an unlimited amount of securities, while preserving current and timely reporting requirements and ineligible issuer exclusions. These changes are expected to dramatically increase the number of issuers eligible for Form S-3.

Q. Would all Form S-3 eligible issuers be able to file automatic shelf registration statements?

A. No. The proposal would extend automatic shelf registration eligibility only to SELIs.

Q. Would the reporting proposal eliminate the ICFR auditor attestation requirement for all companies?

A. No. The proposal would limit the ICFR auditor attestation requirement to large accelerated filers. Non-accelerated filers would not be required to provide auditor attestation, but they would continue to provide management's ICFR assessment and could choose to obtain auditor attestation voluntarily.

Q. Would smaller reporting company and emerging growth company status disappear?

A. Smaller reporting company status would be eliminated as a separate filer status, and accelerated filer status would also be eliminated. Emerging growth company status would remain because it is statute-based, although many EGC-style accommodations would be extended to non-accelerated filers and separate reliance on EGC status would become less important in many circumstances. The SEC is not proposing to extend to non-EGCs the statutory EGC accommodation that protects certain nonpublic draft registration statements from production in response to FOIA requests.

Q. Would issuers still need to be current in their Exchange Act reports to use Form S-3?

A. Yes. Although the proposal would eliminate the one-year seasoning requirement for Form S-3 eligibility, it would continue to require an issuer to be current and timely in Exchange Act reporting during the applicable preceding period, and it would continue to exclude certain ineligible issuers.

Q. If an issuer is a successor registrant and the predecessor was delinquent in its Exchange Act reporting obligations, could the successor registrant still be Form S-3 eligible?

A. Yes. Under the proposal, although the successor entity would succeed to the predecessor's Exchange Act reporting obligations, the successor entity would be treated as a new Exchange Act company for purposes of determining Form S-3 eligibility. Therefore, it would only need to consider its own reporting history and would not be required to consider the predecessor's reporting history for purposes of determining Form S-3 eligibility.

Q. What if an issuer was S-3 eligible at the time it filed the Form S-3 but is subsequently late filing a periodic report? Can it keep S-3 eligibility?

A. Possibly. Under the proposal, an issuer will retain Form S-3 eligibility even if there was a late filing during the relevant lookback period, provided that: (a) the filing was made within seven calendar days of the original due date (or if the seventh calendar day falls on a weekend or holiday, the first business day thereafter) and (b) the issuer made only one late filing during the relevant lookback period. If an issuer relies on Rule 12b-25 for an extension and files within the extension period prescribed by Rule 12b-25, the filing would be deemed to be filed on the prescribed due date. Where Rule 12b-25 applies but the issuer is unable to file during the extension period, the seven-day period would be calculated from the original due date and not from the end of the extended period provided under Rule 12b-25.

Q. What if an issuer meets the new S-3 eligibility criteria at the time it files a shelf registration statement on Form S-3 but subsequently fails to file a timely periodic report prior to a shelf takedown?

A. The SEC considered but expressly rejected requiring reassessment of Form S-3 eligibility at each takedown. The Commission stated that it does not believe such reassessment is necessary or appropriate, noting that the liability provisions of the federal securities laws "sufficiently incentivize issuers to conduct takedowns only when in compliance with the form's eligibility requirements." However, if an issuer becomes delinquent in its Exchange Act reporting before a takedown, the issuer must still assess whether the registration statement contains all required information and whether the prospectus contains all information required under the Securities Act, including whether the statements made are materially accurate and not misleading. Issuers that conduct takedowns while delinquent could face significant liability exposure under Section 11 of the Securities Act, Section 12(a)(2), Section 17(a), and Section 10(b) of the Exchange Act and Rule 10b-5.

Q. If a calendar-year non-accelerated filer has public float of $1.9 billion for 2025 and $2.3 billion for 2026, would it become a large accelerated filer for its 2026 Form 10-K?

A. No. Because the issuer would have crossed the $2 billion threshold in only one year of the two-year lookback period, it would remain a non-accelerated filer for its 2026 Form 10-K. If its public float then fell back to $1.9 billion for 2027, it would remain a non-accelerated filer, and

the earliest it could become a large accelerated filer would be after two later consecutive years above the threshold, assuming the seasoning requirement is also satisfied.

Q. Can an issuer change its filer status and reporting requirements after the proposal is adopted and before the end of the fiscal year? E.g., could a current large accelerated filer move to non-accelerated filer status after the rules become effective but before its next annual report?

A. Potentially yes. Under the SEC's transition example, an existing calendar-year large accelerated filer could assess its status as early as the effective date and become a non-accelerated filer if it did not satisfy either the proposed two-year $2 billion public float test or the 60-month seasoning requirement as of the relevant prior year-end. If the issuer also had total assets of $35 million or less as of each of the two most recent second fiscal quarters, it could qualify as a small non-accelerated filer and begin using the longer periodic report deadlines with its next periodic filing.

Q. How would the proposals affect companies that frequently access the capital markets?

A. Expanded shelf eligibility, automatic shelf access for seasoned eligible listed issuers, pay-as-you-go fee flexibility, broader offering communications flexibility, and federal preemption of state securities registration requirements would materially increase the ability of issuers to access the public capital markets. At the same time, underwriters and investors may continue to expect robust voluntary disclosure, current financial information, and careful diligence, particularly for newly eligible issuers using scaled reporting accommodations and incorporation by reference.

Q. How would the proposals affect foreign private issuers?

A. FPIs would not be permitted to use Forms S-1 or S-3 under the proposals and would instead continue to use Forms F-1 and F-3, respectively. The proposal would amend the WKSI definition so that only FPIs could qualify as WKSIs, meaning FPI WKSIs would retain access to enhanced registration and communication benefits, including automatic shelf registration on Form F-3. The reporting proposal would not apply the large accelerated filer and non-accelerated filer definitions to FPIs that use FPI-specific forms, and FPIs filing on Form 20-F or Form 40-F would continue to be required to provide ICFR auditor attestation beginning at the current $75 million public float threshold, unless they qualify as emerging growth companies.

Q. How would the proposals affect SPACs and de-SPAC transactions?

A. The proposals include specific accommodations for former SPACs. Under the registered offering proposal, an issuer would not be deemed a shell company (and therefore would not be treated as an ineligible BSP for Form S-3 purposes) solely because during the prior three years,

either the issuer or any predecessor entity was a SPAC as defined in Item 1601 of Regulation S-K. This means that a company that completed a de-SPAC business combination could become Form S-3 eligible immediately upon meeting the other proposed registrant requirements (including not being an "ineligible issuer"). Importantly, other shell companies (including former operating companies who now have only nominal operations and assets) would be deemed to be BSPs and thus ineligible for Form S-3 for at least three years. For purposes of determining SELI status (12-month seasoning for automatic shelf registration), the registered offering proposal provides that a successor registrant may not take into account the Exchange Act reporting history of a predecessor for any period during which the predecessor was a SPAC. Accordingly, the 12-month SELI seasoning period would begin at the de-SPAC transaction, not at the SPAC's IPO. By contrast, in a standard reverse merger involving a predecessor that was not a SPAC or a shell company, the successor would be able to tack on the predecessor's Exchange Act reporting history for purposes of qualifying as a SELI. The reporting proposal has requested comments on whether a new seasoning period should commence upon the closing of a de-SPAC transaction for purposes of the proposed 60-month LAF seasoning requirement.

Q. When would the proposals take effect?

A. The proposals are not yet effective. The comment period for each proposal will remain open for 60 days after publication in the *Federal Register*, and any final rules would take effect on a schedule specified in the adopting releases.