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Memorandum

SEC Proposes Blue Sky Preemption and Shelf Registration Reform Significantly Impacting Non-Traded BDCs, REITs and Registered Closed-End Funds

May 27, 2026

The Securities and Exchange Commission ("**SEC**") recently proposed the most significant amendments to the registered offering framework in over 20 years, intended to facilitate capital formation in the public securities markets. The proposed amendments to its registered offering rules (the "**Proposal**")[1] would preempt state securities law registration and qualification requirements for all offerings registered under the Securities Act of 1933, as amended (the "**Securities Act**"), significantly expand access to shelf offerings and extend certain registration and offering communication flexibilities that are currently only applicable to "well-known seasoned issuers" ("**WKSIs**") to a broader group of issuers, in addition to other reforms. The Proposal is one of two rulemakings, the other being the Filer Status Proposal,[2] proposed on May 19, 2026 as a continuation of Chairman Paul Atkins's "Make IPOs Great Again" agenda.[3]

The Proposal is a product of Chairman Atkins's broader effort to reinvigorate U.S. public capital markets, which he has advanced through a series of policy addresses and rulemakings since taking office. Chairman Atkins has repeatedly pointed to the approximately 40 percent decline in U.S. public company listings since the mid-1990s—from more than 7,800 exchange-listed companies to roughly 4,761 as of September 2025—as evidence that the

[1] Sec. & Exch. Comm'n, Proposed Rule, Registered Offering Reform, Securities Act Release No. 33-11418, Exchange Act Release No. 34-105513, Investment Company Act Release No. IC-36160, File No. S7-2026-17, https://www.sec.gov/files/rules/proposed/2026/33-11418.pdf (accessed May 20, 2026).

[2] Sec. & Exch. Comm'n, Proposed Rule, Enhancement of Emerging Growth Company Accommodations and Simplification of Filer Status for Reporting Companies, Securities Act Release No. 33-11419, Exchange Act Release No. 34-105515, File No. S7-2026-18, https://www.sec.gov/files/rules/proposed/2026/33-11419.pdf (accessed May 20, 2026). (The Filer Status Proposal, among other things, would increase the public float threshold for becoming a large accelerated filer from $700 million to $2 billion and simplify the public reporting filer status framework to include only large accelerated filers, non-accelerated filers and a new sub-category for small non-accelerated filers. Non-accelerated filers would benefit from the disclosure scaling and other accommodations currently afforded to smaller reporting companies and emerging growth companies. The Filer Status Proposal would also permit BDCs that qualify as non-accelerated filers to access scaled financial statement requirements under a new proposed Rule 3-19 of Regulation S-X and the ability to defer adoption of certain new or revised financial accounting standards.)

For further details on these two rulemakings, please see our memoranda "*SEC Proposes Significant Reforms to Registered Offering Framework*" and "*SEC Proposes Significant Amendments to Filer Status and Disclosure Requirements*."

[3] See Paul S. Atkins, Chairman, Sec. & Exch. Comm'n, Statement on Proposing Releases for Enhancement of Emerging Growth Company Accommodations and Simplification of Filer Status for Reporting Companies, and Registered Offering Reform (May 19, 2026), https://www.sec.gov/newsroom/speeches-statements/atkins-statement-on-proposing-releases-for-enhancement-of-emerging-growth-company-accommodations-and-simplification-of-filer-status-for-reporting-companies-and-registered-offering-reform-051926 (accessed May 20, 2026).

regulatory framework has become an impediment to, rather than a facilitator of, capital formation. At SEC Speaks in March 2026, he characterized decades of "accretive rulemaking" as producing a "compliance labyrinth" that urgently requires modernization.[4] The Proposal operationalizes this theme in the registered offering context, providing much-needed regulatory updates for business development companies ("**BDCs**"), registered closed-end investment companies ("**registered CEFs**" and, collectively with BDCs, "**affected funds**") and non-traded REITs by broadening access to shelf registration, extending communication flexibilities to more issuers and eliminating duplicative state-by-state compliance burdens.

Key Implications for BDCs, REITs and Registered Closed-End Funds

Preemption of State Securities Laws. The Proposal preempts state securities law registration and qualification requirements ("**blue sky**" laws) for all offerings registered under the Securities Act by defining "qualified purchaser"[5] under Section 18(b)(3) of the Securities Act to include all purchasers in an offering registered under the Securities Act.[6] Note that the qualified purchaser definition in the Securities Act is different from, and unrelated to, the definition of "qualified purchaser" under the Investment Company Act of 1940, as amended (the "**Investment Company Act**"). For registered offerings, such preemption currently applies only where the securities being offered and sold are listed or approved for listing on a national securities exchange, or to offerings of securities issued by investment companies registered under the Investment Company Act.[7]

In a welcome update, this aspect of the Proposal would particularly benefit non-traded BDCs, non-traded REITs, and other issuers of unlisted securities in offerings registered under the Securities Act. Currently, these issuers must register their offerings with the SEC, which itself involves significant legal, accounting and filing costs and, because their securities are not listed on a national securities exchange and they are not investment companies registered under the Investment Company Act,[8] separately comply with the registration or qualification requirements of each state in which they intend to offer and sell securities. Practically, this often means registering the offering with every state to satisfy the demands of distribution partners.

This state-by-state process requires issuers to retain specialized blue sky counsel, prepare and file separate applications in numerous jurisdictions, pay state-level filing fees and respond to substantive review comments

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[4] See Paul S. Atkins, Chairman, Sec. & Exch. Comm'n, Prepared Remarks at SEC Speaks (Mar. 19, 2026), https://www.sec.gov/newsroom/speeches-statements/atkins-remarks-sec-speaks-031926-prepared-remarks-sec-speaks (accessed May 20, 2026).

[5] See Registered Offering Reform Proposal, *supra* note 1, at n. 437 ("The proposed new definition of 'qualified purchaser' under Section 18(b)(3) of the Securities Act does not relate to or affect the definition of the term 'qualified purchaser' under Section 2(a)(51) of the Investment Company Act and the rules thereunder.")

[6] Section 18(b)(3) of the Securities Act provides, "A security is a covered security with respect to the offer or sale of the security to qualified purchasers, as defined by the Commission by rule. In prescribing the rule, the Commission may define the term 'qualified purchaser' differently with respect to different categories of securities, consistent with the public interest and the protection of investors." A "covered security" is the term used in the Securities Act to denote a security for which blue sky preemption applies. The term "qualified purchaser" would be added to Rule 146.

[7] Securities issued in private offerings pursuant to Regulation D under the Securities Act are also preempted from blue sky laws.

[8] BDCs elect to be regulated under the Investment Company Act's provisions governing BDCs; they do not "register" as investment companies under Section 8 of the Investment Company Act.

from individual state regulators. These comments can, and often will, conflict with one another, with guidance from the SEC staff or with federal securities law requirements, and can also interfere with other states' regulation of the corporate affairs of entities organized in their jurisdictions. Because non-traded products conduct continuous offerings, this state qualification process must be repeated periodically. Follow-on qualification reviews can force existing products, which were previously cleared in those states, to make disruptive changes to their structure, operations, governance or offerings. The cumulative effect is higher cost, greater complexity, and longer timelines to bring registered offerings of unlisted securities to market and to maintain those offerings. This also places non-traded products at a competitive disadvantage relative to products offered privately under Regulation D of the Securities Act, or to investment companies registered under the Investment Company Act. The Proposal will remove a roadblock to companies conducting an offering registered under the Securities Act and is consistent with Chairman Atkins's intent for more companies to "go and stay public."[9]

In addition, as a part of a registered offering under the Securities Act, offering materials are commonly published on the internet to communicate with potential investors across state lines, which would, under the present regime, implicate state securities laws. The Proposal would solve this dilemma by facilitating multi-state communication in registered offerings and is consistent with legislative intent to "eliminate the costs and burdens of duplicative and unnecessary regulation by, as a general rule, designating the Federal government as the exclusive regulator of national offerings of securities."[10] If adopted, this change would allow non-traded BDCs, non-traded REITs and other issuers of unlisted securities to conduct registered offerings without the added expense and delay of a multi-state registration process, while continuing to benefit from the protections afforded to investors by the federal securities laws (including the Investment Company Act with respect to non-traded BDCs).

Easier Access to "Shelf" Registration; New Issuer Categories. The Proposal would eliminate several of the existing eligibility requirements of Form S-3, most notably all of the transaction requirements (including the $75 million public float threshold[11]) and the requirement that an issuer have been subject to reporting under the Securities Exchange Act of 1934, as amended (the "**Exchange Act**") for at least 12 months. An issuer that is Form S-3 eligible is permitted to conduct shelf offerings (*i.e.*, primary offerings made on a delayed basis), which allows issuers to register securities offerings prior to conducting a specific offering and once the SEC declares the "shelf" registration statement effective then conduct one or more offerings without waiting for further SEC staff action. This expanded eligibility would permit more issuers—particularly smaller companies and companies that recently went public—to conduct "shelf" offerings. This change addresses Chairman Atkins's concern, voiced at the Small Business Capital Formation Advisory Committee meeting in April 2026, that the current "baby shelf" rules for

[9] Chairman Atkins Statement, *supra* note 3.

[10] Registered Offering Reform, *supra* note 1 at 186, n. 453.

[11] SEC rules provide that an issuer's public float is the aggregate market value of such issuer's outstanding voting and non-voting common equity held by non-affiliates.

Form S-3 are "unnecessarily complex and overly restrictive, making it difficult for smaller companies to raise the necessary capital quickly."[12]

The Proposal would also replace the current WKSI framework[13] for domestic issuers with two new categories:

- "Eligible Listed Issuers" ("**ELIs**"): issuers that (i) meet Form S-3's proposed registrant requirements and (ii) have at least one class of common equity listed on a national securities exchange; and
- "Seasoned Eligible Listed Issuers" ("**SELIs**"): ELIs that have been subject to reporting requirements under the Exchange Act for at least 12 calendar months.[14]

The Proposal would continue to prohibit affected funds from using Form S-3 since affected funds register their securities offerings on Form N-2. Today, an affected fund can use a streamlined version of Form N-2 ("**Short-Form N-2**"), which works much like Form S-3 and permits affected funds to have a "shelf" and conduct one or more offerings when market conditions are favorable, but such affected fund must have a public float of $75 million or more (and satisfy other eligibility criteria including the one-year seasoning requirement). Under the Proposal, the public float requirement and the one-year seasoning requirement would both be eliminated for a Short-Form N-2 (just as they are for Form S-3). However, unlike companies using Form S-3, the Proposal adds an exchange listing requirement for an affected fund to use a Short-Form N-2, which means unlisted affected funds (such as non-traded BDCs) cannot use a Short-Form N-2 for any of their securities offerings. This is detrimental to affected funds relative both to ordinary corporate issuers that can use Form S-3 under the Proposal (which do not need to be exchange listed) and to the current regulatory framework where an unlisted affected fund may be able to use a Short-Form N-2 when it can satisfy a transaction requirement other than the public float. These disadvantages are somewhat surprising given the SEC's statement that the "proposed amendments would build on amendments the Commission adopted in 2020, as directed by Congress, that streamlined the registration process for affected funds in parity with operating companies."[15]

The Proposal rationalizes excluding unlisted affected funds from "shelf" eligibility by asserting that they do not need it because they already have an existing framework under Securities Act Rule 486 to maintain their continuous registered offerings. Rule 486 generally permits an unlisted affected fund, which include tender offer funds, unlisted interval funds and non-traded BDCs, to file post-effective amendments (or new registration statements for limited purposes) that either go effective automatically 60 days after filing or immediately upon filing, depending on the purpose for which the filing is made. However, as noted above and further described

[12] See Paul S. Atkins, Chairman, Sec. & Exch. Comm'n, Remarks at Small Business Capital Formation Advisory Committee Meeting (Apr. 28, 2026), https://www.sec.gov/newsroom/speeches-statements/atkins-042826-remarks-small-business-capital-formation-advisory-committee-meeting (accessed May 20, 2026).

[13] A "WKSI," as defined in Rule 405, is an issuer that meets all the registrant requirements of Form S-3 or Form N-2, as applicable, and either (i) has a public float of at least $700 million or (ii) has 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.

[14] ELI and SELI status would be determined on a periodic "determination date," consistent with current WKSI practice.

[15] Registered Offering Reform, *supra* note 1 at 152-53.

below, this rationalization appears to have failed to take account of all the ways in which affected funds—listed and unlisted—can and have used the parity with operating companies that Congress and the SEC have afforded them.

Under current staff interpretations, non-traded REITs otherwise required to use Form S-11 are permitted to file on Form S-3 if they meet Form S-3's eligibility requirements and provide the disclosures specified in Items 13 through 16 of Form S-11.[16] The SEC has requested comments on whether to codify that staff interpretation and whether any additional real estate-related disclosures should be required in Form S-3 for these issuers.[17] In this regard, non-traded REITs would achieve parity under the Proposal with ordinary corporate issuers for Form S-3 eligibility, and the present state of the Proposal achieves this with the elimination of the public float requirement for Form S-3 eligibility. As explained above, however, the same parity is not afforded to non-traded BDCs under the Proposal.

Benefits for New Issuer Categories: ELI and SELI. The Proposal makes benefits currently only available to WKSIs, which the SEC refers to as "**Enhanced Registration and Communication Benefits**" (which includes additional offering and communication flexibilities such as automatic shelf registration, pre-filing and post-filing communication flexibility, the ability to omit certain information from a base prospectus and pay-as-you-go fee payments), available instead to significantly more issuers that qualify as ELIs or SELIs, but only SELIs would be eligible for automatic shelf registration.

Exchange-listed affected funds that qualify as ELIs would gain access to the Enhanced Registration and Communication Benefits currently reserved for WKSIs. This means these funds would be able to:

- communicate more freely about potential offerings before and after filing a registration statement;
- omit certain information (such as the plan of distribution and description of securities) from the registration statement at the time of filing;
- register additional classes of securities through a streamlined post-effective amendment process; and
- defer payment of registration fees until the time a "shelf takedown" occurs, rather than paying upfront.

SELI affected funds (those that are exchange-listed and have been filing Exchange Act reports for at least 12 months) also would gain access to automatic shelf registration without meeting the previously required $700 million in public float requirement or one of the other transaction requirements, meaning their registration statements would become effective immediately upon filing without requiring the SEC staff to review the registration statement and declare it effective.

[16] Such disclosures required by Form S-11 include, among others, information relating to the investment policies of the registrant, certain descriptions of the registrant's real estate, certain operating data of the registrant and the tax treatment of the registrant.

[17] *Id*. at 95, Request for Comment #38.

Notably, certain unlisted affected funds (*e.g.*, non-traded BDCs) that were previously able to qualify as a WKSI due to transaction requirements that do not require a public float would not qualify as an ELI or SELI under the Proposal, as further discussed below under "Missed Opportunities for Efficiency."

Streamlined Updates via Forward Incorporation. All ELI affected funds (which do not include non-traded BDCs or non-traded REITs) would be permitted to forward incorporate by reference on Form N-2. This means that once an ELI affected fund's registration statement is effective, it would be automatically updated by such ELI affected fund's subsequent Exchange Act filings (such as current reports on Form 8-K and periodic reports on Form 10-K or Form 10-Q), eliminating the need to file post-effective amendments or supplements to the prospectus in most cases.

Once again, certain unlisted affected funds (*e.g.*, non-traded BDCs) would not benefit from this Proposal, even though similarly situated operating companies would receive this benefit, as discussed below under "Missed Opportunities for Efficiency."

Free Writing Prospectus ("FWP") Rules Not Extended. The Proposal would remove references to affected funds from Rules 164 and 433 (the free writing prospectus rules). The SEC concluded that Rule 482, which is specifically tailored to affected funds and includes provisions governing disclosure of fees and expenses, already provides affected funds with the communication tools they need. Accordingly, if adopted, BDCs and registered CEFs would no longer be able to rely on FWPs and would instead only be able to use Rule 482 communications. In the Proposal the SEC indicated that it believes affected funds do not need to utilize Rule 164 or Rule 433[18] and has requested comments on whether Rule 433 would provide any advantages to affected funds that Rule 482 does not provide.[19]

Other Proposed Amendments. The Proposal would also: (i) expand forward incorporation by reference on Form S-1 to all Exchange Act reporting companies;[20] (ii) permit an issuer that was not yet required to file a Form 10-K to incorporate by reference into Form S-1 or Form S-3 the information required by Form 10 included in a previous Securities Act or Exchange Act filing; (iii) amend Rule 482 to permit broad-based advertising for registered index-linked annuities and registered market value adjustment annuities; (iv) revise Rule 473 to eliminate the need for issuers to include a delaying amendment in their registration statements, such that

[18] *Id.* at 163 ("Affected funds may utilize Rule 482, which permits registered investment companies, including affected funds, to use advertisements or other sales materials without the requirement that such communications be accompanied or preceded by a section 10 prospectus. Unlike Rule 164 and Rule 433, however, Rule 482 includes provisions that are tailored to the unique characteristics of registered investment companies (*e.g.*, provisions governing disclosure of the fee and expense figures). Accordingly, we believe that affected funds do not need to utilize Rule 164 or Rule 433 and are proposing to remove references to affected funds in those rules.")

[19] *Id.* at 165, Request for Comment #92.

[20] As discussed above, the Proposal would permit only ELI affected funds to forward incorporate by reference on Form N-2; it does not extend forward incorporation by reference to unlisted vehicles such as non-traded BDCs. Non-traded affected funds would also not be able to use the backward incorporation by reference that Short-Form N-2 permits for affected fund eligible to use Short-Form N-2. The SEC has specifically requested comments on whether unlisted affected funds relying on Rule 486 should be permitted to forward incorporate certain Exchange Act and Investment Company Act reports into their prospectus to avoid post-effective amendments. See Registered Offering Reform, *supra* note 1 at 165-166, Request for Comment #96.

registration statements would be deemed delayed unless the issuer affirmatively opts for automatic effectiveness; and (v) update Rule 139b to simplify and broaden the safe harbor for broker-dealer publications or distributions of covered investment fund research reports to remove the minimum public float requirement in the rule.

Missed Opportunities for Improved Efficiency

While the Proposal represents meaningful progress, several aspects of the current framework remain unchanged and continue to create inefficiencies that are inconsistent with the Proposal's stated goal of facilitating capital formation. Fund sponsors should consider whether to submit comments on these topics, as the SEC has specifically solicited feedback on a number of them.

Rule 486 and Short-Form N-2. The SEC asserts in the Proposal that the Rule 486 framework "continues to offer unlisted affected funds with a comparable offering framework to that which would be afforded to exchange-listed affected funds under the proposed amendments."[21] However, under Rule 486(a), material amendments to an unlisted affected fund's registration statement do not become effective until 60 days after filing, a significant delay compared to the near immediate effectiveness available to exchange-listed affected funds using Short-Form N-2 with forward incorporation by reference. In addition, under the Proposal forward incorporation by reference on Form N-2 will only be available to ELI affected funds. Those funds relying on Rule 486 cannot forward incorporate by reference Exchange Act and Investment Company Act reports into their prospectus, requiring these funds to file repeated prospectus supplements and post-effective amendments to keep their registration statement current. The SEC has requested comments as to whether the SEC should "permit unlisted affected funds relying on Rule 486 to forward incorporate certain Exchange Act and Investment Company Act reports into their prospectus, allowing these funds to avoid the need to file post-effective amendments in many cases?"[22] We believe the answer is clearly yes.

In addition, under the Proposal the ability to defer registration fees and pay on a "pay-as-you-go" basis at the time of a "shelf takedown" would be available to ELI affected funds, but not to unlisted affected funds relying on Rule 486. The SEC has separately requested comment on whether additional categories of issuers, such as tender offer funds, should be permitted to pay registration fees on an annual net basis under Rule 24f-2 (similar to mutual funds and interval funds). Extending pay-as-you-go or annual net fee payment to a broader group of unlisted affected funds would reduce upfront costs and align fee payment with actual capital-raising activity.[23]

Unlisted Affected Funds Do Not Receive Proportional Benefits Under the Proposal. Many non-traded BDCs and other unlisted affected funds raise a significant portion of their capital through debt issuances. Many of these funds will typically issue notes in reliance on Rule 144A under the Securities Act and subsequently conduct a back-end bond exchange offer registered under the Securities Act to afford bondholders the benefits of

[21] Registered Offering Reform, *supra* note 1 at 164.

[22] *Id.* at 166, Request for Comment #96. See also *id.* at 166-167, Request for Comment #97.

[23] *Id.* at 166, Request for Comment #95.

holding registered debt securities. This process is costly and time consuming, involves separate offering documents, observing a waiting period and filing a new registration statement for the exchange offer that is subject to the SEC review process.

Currently, certain unlisted affected funds have an alternative pathway to file a "shelf" registration statement on Short-Form N-2 to more efficiently offer debt securities, but only if such affected fund has outstanding at least $750 million of non-convertible securities (other than common equity) in primary offerings registered under the Securities Act. Additionally, certain unlisted affected funds, such as large non-traded BDCs and other unlisted issuers that are prolific debt issuers, have access to an alternative pathway to qualify as a WKSI: an affected fund is currently able to qualify as a WKSI without listing its equity securities on an exchange if it has issued at least $1 billion in aggregate principal amount of non-convertible securities (other than common equity) in primary offerings registered under the Securities Act over the prior three years.

The SEC not only did not propose amendments to address this structural inefficiency for unlisted affected funds described above, but also removed these transaction requirements under which certain non-traded BDCs and other issuers could currently qualify for a Short-Form N-2 and as a WKSI and therefore could qualify for the Enhanced Registration and Communication Benefits. Under the Proposal, both ELI and SELI status (the only categories of issuers that would qualify to file registration statements on Short-Form N-2 and Enhanced Registration and Communication Benefits, which are currently benefits afforded to WKSIs) require the issuer to have at least one class of common equity listed on a national securities exchange. The elimination of the registered debt pathway to qualify for Short-Form N-2 eligibility and the Enhanced Registration and Communication Benefits means that these issuers, despite having demonstrated substantial market access and a robust reporting history, would lose access to the Enhanced Registration and Communication Benefits they currently enjoy, in opposition to the stated goals of the Proposal. The SEC has requested comments on whether to provide a transition period for such unlisted issuers, but has not asked whether these issuers should be permitted to continue to qualify for the benefits of the Enhanced Registration and Communication Benefits on a permanent basis.[24] In this respect, the Proposal has not only missed the opportunity to increase market efficiency, but would effectively reduce the efficiency available within the existing framework for unlisted affected funds to use Short-Form N-2 or qualify as a WKSI.

Conclusion

The Proposal presents a mixed picture for affected funds, particularly for unlisted affected funds such as non-traded BDCs and non-traded REITs. The proposed preemption of state securities laws should be lauded because it would eliminate duplicative compliance burdens and reduce costs for issuers of unlisted securities conducting registered offerings. However, the Proposal's other benefits are distributed unevenly. Exchange-listed affected funds stand to gain meaningfully from expanded ELI and SELI eligibility and the associated Enhanced Registration and Communication Benefits, while unlisted affected funds—particularly non-traded BDCs—would

[24] *Id.* at 131, Request for Comment #63.

not only fail to receive proportional benefits but would affirmatively lose access to Short-Form N-2 eligibility and WKSI status that certain of these issuers currently enjoy. This outcome is difficult to reconcile with the Proposal's stated objective of facilitating capital formation and the SEC's prior commitment to regulatory parity between affected funds and operating companies.

Fund sponsors—particularly those managing non-traded BDCs and other unlisted affected funds—should evaluate whether to submit comments during the 60-day comment period advocating for, among other things, retention of existing pathways (such as the registered debt transaction requirement for WKSI and Short-Form N-2 eligibility) and extension of forward incorporation by reference to unlisted affected funds presently relying on Rule 486. As Chairman Atkins stated in connection with these proposals, the Proposal and the Filer Status Proposal "are just the beginning and will work in tandem to lay the groundwork for the remainder of my Make IPOs Great Again agenda."[25] Accordingly, market participants should anticipate further rulemakings aimed at modernizing disclosure requirements and facilitating capital formation. The direction of travel, toward simplification, cost reduction, and broader access to the public capital markets, is expected to remain a consistent theme, and stakeholders who engage constructively in the comment process for the Proposal can help shape the contours of the broader reform agenda.

The public comment period will remain open until July 27, 2026.

[25] Chairman Atkins Statement, *supra* note 3.

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