July 27, 2026

Ms. Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Submitted electronically

Re: Registered Offering Reform (File No. S7-2026-17)

Dear Ms. Countryman:

The Society for Corporate Governance ("Society") submits this letter to share our members' views in response to the request for public comments regarding the Securities and Exchange Commission's (the "Commission") Registered Offering Reform, Release No. 33-11418 (the "Release").

Founded in 1946, the Society is a professional membership association of approximately 3,700 corporate and assistant secretaries, chief legal officers, in-house counsel, outside counsel, and other governance professionals who serve approximately 1,600 entities, including 1,000 public, private, and nonprofit organizations of almost every size and industry. Our organization has 80 years of experience empowering professionals to shape and advance corporate governance within their organizations, in part through providing the knowledge and tools they need to advise their boards and executive management on corporate governance, regulatory and legal developments, and public company reporting and securities issuing requirements. Society members are deeply involved with and responsible for supporting issuers (both at the management and board level), underwriters and investors in a wide variety of registered and exempt capital markets transactions of all sizes.

The Society's feedback and recommendations are based on real-world experience and data gathered through multiple working group meetings with Society members, as well as a survey of Society members that represent public company registrants and law firms ("Society Survey").[1] Our members regularly engage on many of the topics covered in the Release; in fact, approximately 95% of Society Survey respondents indicated their company or, for lawyers in

[1] The Society Survey was conducted in late June and early July and attracted 21 responses from Society members. Notably, 38% of the respondents represented law firms and therefore represent the views of a large number of clients.

private practice, their typical client, regularly accesses the capital markets, with significant experience doing so through registered transactions.[2] Insights gained from the Society Survey, our working group meetings, and our members' experiences working at the intersection of the critical issues addressed by the Release, inform the recommendations in this letter.

I. Executive Summary of Recommendations

The Society agrees with the Commission's goal of modernizing the registered offering framework under the Securities Act of 1933, as amended (the "Securities Act"), and the rules promulgated thereunder. The proposed amendments demonstrate that the Commission appreciates the challenges issuers face when accessing the capital markets and is proactively responding. The Society generally supports the Commission's proposals and believes that, with some refinements, they would provide issuers of varying sizes and stages of development with greater flexibility to access the public capital markets. As described in greater detail below, the Society recommends that the Commission:

- Expand Form S-3 eligibility by eliminating the $75 million public float threshold, the related one-third limitation on primary offerings by smaller exchange-listed issuers (the "baby shelf" limitation) and other transaction-based restrictions, while replacing the existing one-year reporting history requirement with a more targeted standard under which a newly reporting issuer would become eligible upon the earlier of filing its first Form 10-K or completing six months of reporting under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), subject, for an issuer relying on the six-month alternative, to exchange listing and focused offering- and historical capital raising-specific disclosure;

- Retain current and timely Exchange Act reporting as the core Form S-3 eligibility standard, but apply that standard proportionately by providing a longer, 10-business-day cure period for a single late filing, disregarding immaterial technical failures, focusing any limitation on repeated delinquencies or substantive noncompliance, and avoiding a complete eligibility redetermination at each shelf takedown;

- Preserve Form S-3 eligibility for "ineligible issuers" under the existing Form S-3 eligibility framework, which appropriately addresses misconduct through limits on enhanced registration and communication benefits, the opportunity for Commission staff ("Staff") review, and the Commission's enforcement authority without eliminating access to short-form and shelf registration;

[2] The Society Survey indicated, in the last three years, more than 50%, 35%, 35% and 25% of respondents had accessed the capital markets through a registered debt transaction, a fully marketed underwritten equity offering, another shelf takedown transaction and an at-the-market ("ATM") offering, respectively.

- Adopt the proposed tiered expansion of the enhanced registration and communication benefits currently available to well-known seasoned issuers ("WKSI"), including broader access to automatic shelf registration ("ASR"), while preserving an independent eligibility path for seasoned registered debt issuers that do not have exchange-listed equity;

- Expand backward and forward incorporation by reference on Form S-1 and provide transition guidance permitting eligible issuers to add forward incorporation to an effective Form S-1 by post-effective amendment without reproducing unaffected disclosure or refiling current exhibits; and

- Adopt broad federal preemption of state securities law registration and qualification requirements for all Securities Act registered offerings, while preserving state authority over notice filings and fees and the investigation and enforcement of fraud, deceit and unlawful conduct.

The Society's views reflect three overarching principles.

First, investor protection and capital formation, when balanced appropriately, can be complementary objectives. More efficient access to Form S-3, ASR eligibility and incorporation by reference can reduce legal, accounting, and administrative costs; improve an issuer's ability to respond to increasingly compressed market windows; and make a registered offering more practical relative to an exempt transaction. These changes could therefore increase public-market investment opportunities without compromising Securities Act liability or the Commission's other antifraud protections.

Second, efficient registration eligibility should turn principally on whether investors have access to current and complete material information, not on public float thresholds or other proxies that often bear little relationship to access to information or disclosure quality. Public float can change with market conditions, short-term stock-price movements, and affiliate transactions, while lengthy fixed seasoning periods and transaction caps can require an issuer to repeat information that is already publicly available without improving its substance, quality or timeliness and subject each offering transaction to the uncertainty of whether there will be Staff review.

Third, identified investor protection concerns should be addressed through objective eligibility criteria and targeted, offering-specific safeguards rather than broad exclusions that deny efficient market access to entire categories of issuers. Focused disclosure regarding prior offerings, use of proceeds, capitalization, and dilution, together with proportionate seasoning and reporting requirements, would address the relevant risks more directly without recreating the arbitrary thresholds and cliff effects the Release seeks to eliminate.

Taken together, the Commission's proposals with the finetuning of the Society's recommendations would expand timely access to the registered public markets, avoid excluding large categories of longstanding Form S-3 issuers, preserve meaningful investor protections, and reduce duplicative disclosure and regulatory friction. The Society also supports a targeted transition period for existing registration statements for affected issuers that may lose eligibility or benefits and an integrated review of the Commission's related rulemakings to ensure that the final amendments operate together without unintended consequences. The following discusses the data and reasoning supporting these recommendations.

II. The Commission Should Expand Form S-3 Eligibility, Subject to Targeted Safeguards for Newly Reporting and Smaller Issuers, While Preserving Form S-3 Access for Ineligible Issuers

The Society supports the Commission's objective of making Form S-3 and shelf registration available to a broader universe of Exchange Act reporting companies. The Release's proposal would eliminate the current one-year Exchange Act reporting history requirement, the $75 million public float requirement, and the related transaction requirements, including the "baby shelf" limitation on primary offerings by smaller exchange-listed issuers. The Release would retain current and timely Exchange Act reporting as a principal eligibility condition and would prohibit specified categories of issuers from using Form S-3. The Society concurs with the Commission's belief that the proposed changes will provide issuers with greater flexibility to determine the timing and structure of their registered offerings while appropriately balancing the facilitation of capital markets transactions with investor protection.

At the same time, an issuer with no reporting history presents different considerations from an established Exchange Act reporting company. The Society Survey results support a calibrated approach with respect to the former: eliminating the public float and transaction-based barriers to Form S-3, but paired with a shorter, more targeted seasoning standard and focused disclosure protections for newly reporting and smaller issuers. With respect to the latter, the Society notes that, under the Release, newly reporting issuers and many smaller issuers would gain full, unrestricted, Form S-3 access while certain long seasoned reporting companies that currently rely on Form S-3 would lose access, solely because they are "ineligible issuers." The Society's believes that any investor protection concerns are best addressed through targeted eligibility standards, disclosure requirements, Staff review, and the existing ineligible issuer limitations rather than by eliminating Form S-3 eligibility entirely for companies that otherwise satisfy the form's longstanding eligibility requirements.

A. Broader Form S-3 Access Would Provide Meaningful Capital Formation Benefits

Society members view Form S-3 as significantly more effective than either a private offering or Form S-1 for several important aspects of capital raising. When asked which of these three financing methods, if important to the company or the respondent's typical client, best accomplishes specified objectives, Society Survey respondents selected an S-3 public offering most frequently for:

- market liquidity (78%);
- availability of a broad investor base (65%);
- the ability to respond to favorable market conditions (59%);
- offering cost or pricing (59%);
- speed of execution (56%);
- investor or underwriter preference (53%); and
- disclosure and due diligence burden (50%).[3]

These data reflect the practical benefits of being able to file a shelf registration statement and access the market when financing needs and market conditions align. Capital markets windows can be brief, particularly for smaller, development-stage, capital-intensive, or newly public companies. Shelf registration enables an issuer to respond to those windows without preparing and seeking effectiveness of a new transaction-specific registration statement each time capital is needed.

The Society Survey also illustrates the burdens associated with relying on Form S-1. Of Society Survey respondents whose company or typical client is not S-3 eligible, 86% reported that they were able to access adequate capital, but that it was raised at a higher cost and/or with other undesirable effects because of the inherent limitations of the methods used. Identified as burdensome by the majority of Society Survey respondents were:

- legal and accounting costs (73%);
- auditor consent requirements (73%);
- repetition of previously filed disclosure (53%);
- the need to update financial-statement disclosure (53%); and
- the need to update non-financial disclosure (53%).

The effects are not limited to incremental filing costs and burdens. Society Survey respondents whose company or typical client is not S-3 eligible or is subject to "baby shelf" limitations on their S-3 eligibility reported a number of adverse effects of not having access to Form S-3, including the following:

- the need to use of a private or exempt offering instead (56%);

[3] A significant number of issuers and law firms indicated that unimportant to the decision regarding the modality for their capital raising efforts were: SEC review risk (39%), Securities Act liability (39%), confidentiality (43%), or state securities law requirements (67%).

- higher cost of capital (56%);
- reliance primarily on credit facility or other line of credit borrowings (56%);
- change in the timing or structure of an acquisition (44%);
- delay of an offering (33%);
- reduction in size of offering (22%);
- declining a financing opportunity (22%); and
- establishment or more heavy reliance on an equity line or similar financing (22%).

Expanded Form S-3 access also could shift financing activity toward the registered market, providing more investment opportunities for the average investor. When asked whether access to unlimited Form S-3 offerings would make the respondent's company or typical client more likely to conduct a registered offering rather than a private placement, 53% of Society Survey respondents answered "much more likely" or "somewhat more likely." That percentage rose to 100% when excluding respondents from, or with typical clients which are, companies eligible to file an ASR or S-3 eligibility free from "baby shelf" limitations (collectively, "Unrestricted S-3 Respondents").

B. The $75 Million Public Float Requirement and "Baby Shelf" Limitation Are Imprecise Mechanisms for Investor Protection

The Society supports eliminating the $75 million public float requirement and the related one-third "baby shelf" limitation on primary offerings by smaller exchange-listed issuers. Public float is an imprecise measure of whether investors have access to material information about an issuer. Two companies providing comparable Exchange Act disclosure may have materially different Form S-3 access solely because one company's stock price places it above the threshold while the other's stock price places it below. Significant affiliate holdings, a characteristic unrelated to access to material information, can also compromise an issuer's S-3 eligibility.

The Society Survey confirms that the current one-third "baby shelf" limitation does not affect every issuer but can be a meaningful constraint when it does apply. 35% of total Society Survey respondents reported that the limitation had restricted capital raising significantly or to some extent. That percentage rose to 100% when excluding Unrestricted S-3 Respondents from the Society Survey results.

The Society does not believe that the Commission should replace the existing limitation with another public float threshold, a different percentage cap, or a general restriction on the frequency of offerings. Those alternatives would preserve many of the same cliff effects without directly addressing any identified investor protection issues. Instead, offering-specific concerns should be addressed through disclosure and targeted conduct-based rules rather than a public float limitation.

C. The One-Year Seasoning Requirement Should Be Replaced with a Shorter, Targeted Standard

While the Society supports eliminating the current fixed one-year reporting history requirement, there was reluctance among Society Survey respondents to support S-3 eligibility in the absence of any demonstrated reporting history. When asked what safeguards should apply if the one-year requirement is eliminated, respondents selected:

- completion of at least one annual report (50%);
- a shorter seasoning period, such as six months (43%);
- exchange listing (36%);
- enhanced disclosure for new reporting issuers (36%); and
- absence of unresolved material weaknesses (29%).

Only 21% of respondents indicated that no additional safeguards were needed because existing Securities Act liability and antifraud provisions were sufficient.

One possible approach is that a newly reporting issuer would become S-3 eligible upon the earlier of (i) filing its first annual report on Form 10-K or (ii) completing six months of Exchange Act reporting. An issuer relying on the six-month alternative before filing its first Form 10-K should be required to have a class of securities listed on a national securities exchange and to provide the enhanced disclosure discussed below in its initial Form S-3. Also notable is that many newly public companies and their insiders are restricted by six-month IPO underwriter lock-ups, meaning that many companies are, absent a waiver, contractually prohibited from accessing the capital markets during these first months regardless of registration form eligibility.

This approach would at least halve the waiting period under the existing rules while ensuring that a newly reporting issuer has either completed an annual reporting process on the Exchange Act mandated timeline or established at least a six-month public reporting record. The Society Survey indicates that earlier eligibility would be used by at least some newly public companies. When asked if the one-year reporting history requirement were eliminated, how soon after becoming an Exchange Act reporting company would your company or typical client likely establish a shelf registration statement, disregarding any lock-up or contractual limitations, respondents reported:

- immediately (24%);
- within three months (12%);
- within six to twelve months (12%); and
- only when a specific financing need arose (6%).

Excluding Unrestricted S-3 Respondents, 50% reported immediately, and approximately 17% reported each of: within three months, within six to twelve months, and only when a specific financing need arose.

At the same time, Society Survey respondents made clear that regulatory eligibility would not necessarily result in an immediate offering. When asked about customary six-month post-IPO lock-ups, 67% of respondents expected underwriters or other parties to grant waivers for shelf filings only as market conditions permit, consistent with current practice. Another 20% did not expect waivers to be granted, while 13% expected waivers to be granted regularly if the Commission's rules permit Form S-3 eligibility during that period.

D. Investor Protection Concerns Should Be Addressed Through Objective Eligibility Standards and Offering-Specific Disclosure

The Society recognizes the investor protection concerns associated with permitting smaller or less-followed issuers to conduct unlimited primary offerings on Form S-3. Society Survey respondents identified the following as potential concerns:

- Form S-3 access by companies that should not have such access, including distressed issuers (65%);
- Stock price volatility or downward price pressure (53%);
- excessive dilution (35%);
- inadequate issuer-specific information (35%);
- repeated small offerings (29%); and
- reduced investor confidence or interest in the company (24%).

When asked which safeguards would address these concerns without reinstating a public float requirement, Society Survey respondents reported:

- seasoning requirements for small issuers (47%);
- enhanced dilution disclosure (35%);
- minimum exchange-listing requirements (35%);
- restrictions on frequency of transactions, regardless of size (29%);
- restrictions applicable to shell or other specified companies or specified distressed issuers (24%);
- restrictions on certain highly dilutive structures (24%); and
- disclosure of prior offerings and use of proceeds (18%).

18% of respondents reported that no additional safeguards are necessary.

The Commission could consider requiring targeted disclosure for primary offerings by issuers relying on the Society's proposed six-month Exchange Act reporting history Form S-3 eligibility requirement noted above. During these issuers' first year of Form S-3 eligibility, the prospectus supplement for offerings could require affirmative disclosure of:

- the issuer's registered and exempt issuances of the same (or a linked) class of securities during the preceding 12 months, including the securities issued, pricing terms, and net proceeds;
- the use of proceeds from those prior offerings;
- current capitalization and readily understandable pro forma dilution resulting from the offering; and
- the potential dilutive effect of outstanding convertible securities, warrants, equity lines, and similar financing commitments.

This information should be presented in the prospectus supplement for the particular transaction rather than repeated in the base shelf prospectus or incorporated by reference. That approach would provide investors with current, offering-specific information without undermining the efficiency of shelf registration. Repeated offerings may be material to investors, but frequency alone does not establish abuse. Rolling disclosure of prior offerings, proceeds, dilution, and outstanding financing arrangements would address the underlying concern more directly while allowing legitimate capital needs to be met.

E. Current and Timely Reporting Should Remain the Core Eligibility Standard and Should Be Applied Proportionately

The Society supports retaining current and timely Exchange Act reporting as a central Form S-3 eligibility condition. Short-form registration depends on the availability of the reports incorporated into the registration statement. The final rule should nevertheless distinguish substantive reporting delinquency from a promptly corrected technical, non-substantive, or administrative failure, as contemplated by the Commission's proposed one-time exception. Loss of Form S-3 eligibility can delay financing, require preparation of a Form S-1, increase legal and accounting costs, and cause an issuer to miss a market window. Those consequences may be disproportionate where the underlying information was available to investors and the failure involved a technical filing issue or another immaterial omission.

The Society therefore recommends that the Commission:

- measure timeliness using a true rolling 12-month period rather than "12 calendar months and any portion of a month";
- lengthen the proposed cure period for a single late filing to 10 business days;

- exclude interactive data[4] and other technical failures from the timely-filing condition; and
- focus any limitation on repeated delinquencies on a pattern of substantive noncompliance rather than the mechanical number of filing errors.

The Commission also should not require a complete Form S-3 eligibility determination at every shelf takedown. Such a requirement would reduce the timing certainty that shelf registration is intended to provide, turning each takedown into a new legal gating event. Issuers should remain obligated to be current in their reporting, update the prospectus for material developments, and ensure that the disclosure package is not materially misleading. Offering participants also have the ability to conduct appropriate bring-down diligence. Those protections address the information available at the time of an offering without requiring the issuer to reestablish every historical eligibility condition before each transaction.

Taken together, the Commission's proposals as refined for these recommendations would materially expand access to Form S-3 while responding to potential investor concerns identified by Society members.

F. The Proposed "Ineligible Issuer" Disqualification for Form S-3 Eligibility Undermines the Stated Intent of the Release and Risks Unintended Consequences

While the Society agrees that it is not appropriate to expand Form S-3 eligibility to certain categories of issuers that pose heightened risk of non-compliance with Federal securities laws, the proposed amendments would inappropriately *contract* existing S-3 eligibility for certain issuers. For example, under the existing Form S-3 construct, a WKSI that becomes an "ineligible issuer" would lose certain offering-related accommodations, including the ability to file an ASR and utilize other enhanced registration and communication benefits, but would not be disqualified entirely from using a basic Form S-3 and conducting shelf offerings. In contrast, under the proposed rules, a WKSI that is determined to be an ineligible issuer solely because the issuer enters into certain judicial or administrative decrees or orders would be completely disqualified from the ability to use Form S-3 at all for three years. These revisions are a significant departure from the Commission's longstanding Form S-3 framework and could materially affect companies' ability to timely and efficiently access capital markets, which is vital to their ability to conduct their business.

The proposed amendments would materially expand the punitive consequences of ineligible issuer status and do so without identifying the corresponding investor protection or other concerns associated with the continued basic use of Form S-3 by those issuers that warrants such a drastic shift. Many of these issuers, including some of the leading banking organizations and

[4] The Society applauds the Commission's proposal to discontinue the Interactive Data File compliance requirement for Form S-3 eligibility. That requirement created immaterial foot faults for issuers.

captive finance companies in the United States—as well as companies across many other industries, including energy, utilities and insurance—have long relied on the frequency, timing, flexibility, and efficiency benefits of shelf registration to access the capital markets efficiently and cost-effectively; satisfy funding, capital and liquidity plans; and respond to investor demand. These companies' disclosure record and market following support continued access to the basic aspects of Form S-3 eligibility, but the contraction of basic S-3 eligibility would deny issuers (like WKSIs) that otherwise satisfy the existing Form S-3 eligibility requirements efficient access to the capital markets, a result that undermines one of the Release's primary objectives: expanding access to efficient registration.

Significantly, in addition to affecting ineligible issuers themselves, the Release's proposed S-3 eligibility contraction has the potential to capture uninvolved affiliates and the parent within the organizations, which could result in entire large organizations losing access to Form S-3. In complex corporate organizations, ineligible issuer status may arise from conduct at a subsidiary or affiliate level that has little relationship to the quality of the parent issuer's Exchange Act reporting or the availability of issuer-specific information to investors. Yet, depending on the organizational level at which a securities offering may be conducted, or consent decree is entered, the consequence could be an entity-wide loss of Form S-3 eligibility, potentially restricting access to the registered capital markets for all, or nearly all, of the organization. This result does not further investor protection.[5] To the contrary, by making Form S-3 registered offerings less available, the proposed rules would reduce access to capital and drive these seasoned issuers to Form S-1 and private financing alternatives and markets, thereby reducing opportunities for public-market participation and shifting activity away from the registered offering framework without any identified corresponding investor protection benefit.[6] The potential loss of Form S-3 access could also have a chilling effect on an issuer's ability or willingness to enter into settlement agreements with the Commission.[7]

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[5] An Existing S-3 Issuer restricted from Form S-3 could utilize a Form S-1 registration statement. Not only are they not likely to do so in practice, but requiring a large, well-followed issuer that is current and timely in its Exchange Act reporting to register an offering on Form S-1 rather than Form S-3 does not provide investors with greater protection. Form S-3 incorporates the issuer's existing reports by reference and delivers the same material information and the same Commission review ability, while allowing investors to evaluate that information in the context of the issuer's continuous disclosure record, extensive analyst coverage, and established market following.

[6] The proposed approach also appears to create an asymmetry between domestic issuers and foreign private issuers: an ineligible foreign private issuer may lose WKSI status but continue to rely on Form F-3, while a similarly situated domestic issuer could lose access to shelf registration altogether.

[7] It is not uncommon for an issuer to agree to a settlement of allegations despite their belief that they have not engaged in wrongdoing, a practice that was recognized in the Commission's May 18, 2026 recission of its policy regarding denials of settlements in enforcement actions. *See* Press Release, U.S. Sec. & Exch. Comm'n, *SEC Rescinds Policy Regarding Denials of Settlements in Enforcement Actions* (May 18, 2026), https://www.sec.gov/newsroom/press-releases/2026-45-sec-rescinds-policy-regarding-denials-settlements-enforcement-actions

The Society supports the Commission's pursuit of its investor protection mandate and believes that the existing ineligible issuer Form S-3 eligibility framework better balances the investor protection and capital formation prongs of the Commission's three-part mission. Under the existing framework, an ineligible issuer may appropriately lose enhanced registration and communication benefits, including ASR eligibility, thereby subjecting its future registration statement filings to pre-effective Commission review. The opportunity for the Staff to review Form S-3 filings on a pre-effective basis, in tandem with an issuer's Exchange Act reporting history, provides an ample bedrock of investor protection, at least commensurate to that applicable to certain newly reporting companies that would become immediately S-3 eligible under the proposed rules.[8]

A discretionary waiver process would be an inadequate substitute for continued Form S-3 eligibility.[9] Frequent issuers, such as banks and captive finance companies, which may be ineligible issuers due to historical settlement orders, rely on established shelf registration programs. A waiver process and its inherent uncertainty does not provide the predictability and timing efficiency needed to support these activities. Even a temporary loss of Form S-3 eligibility could create significant capital markets disruption, particularly for those industries such as insurance, banking, energy, and others, in which corporate structures have multiple affiliate or subsidiary issuers, each conducting numerous offerings from a single shelf registration statement, and all of which may need to access the markets quickly in response to changing market conditions, investor demand, regulatory demands, or funding needs. For these issuers, loss of shelf registration access could materially impair funding flexibility and adversely affect a company's viability, as well as capital formation in the U.S. capital markets, without corresponding investor protection benefits.

The Commission has the ability to accomplish its stated investor-protection objectives more effectively by not stripping this entire category of issuers from Form S-3 access. The Society urges the Commission to preserve basic Form S-3 eligibility for issuers that satisfy the Commission's new SELI criteria but for an ineligible issuer determination because of a settlement of any judicial or administrative decree or order arising out of a government action.[10] Any risk of misconduct for these issuers can be adequately addressed through the Commission's pre-filing review capabilities, loss of ASR and other enhanced registration and communication benefits, and the Commission's enforcement capabilities.

[8] The newly expanded S-3 immediate access to Form S-3 notably extends to issuers that have been in bankruptcy or were special purpose acquisition companies (SPAC) within the last three years.

[9] This is particularly true if all Existing S-3 Issuers are driven to a waiver process, increasing the Staff's workload.

[10] *See* 17 CFR 230.405, paragraph (1)(vi) of the definition of "ineligible issuer."

If, however, the Commission adopts the proposed approach to ineligible issuer disqualification, it should provide a meaningful grandfathering and transition period for issuers that are currently S-3 eligible. Existing Form S-3 shelf registration statements should remain usable through their normal expiration dates. An ineligible issuer should not be required to withdraw an effective Form S-3 immediately upon the effective date of the new rules, nor should an existing Form S-3 lose effectiveness solely because the issuer becomes an ineligible issuer under the proposed rules.[11] Additionally, we encourage the Commission to consider a significant transition period to provide existing basic S-3 eligible WKSIs time to plan for alternative avenues of necessary financing. Moreover, for issuers that are currently S-3 eligible, the Commission should consider applying the proposed ineligible issuer disqualification only when such issuers become ineligible issuers on or after the date on which proposed rules become effective, in recognition of the fact that some issuers may not have entered into a consent decree or settlement if they had known that they would lose Form S-3 eligibility altogether.

III. Expansion of WKSI Benefits to a Broader Universe of Registrants While Preserving an Eligibility Path for Seasoned Registered Debt Issuers

The Society supports the Commission's desire to significantly expand the universe of issuers who would receive some or all of the enhanced registration and communication benefits currently extended only to WKSIs (the "Enhanced Benefits"). The Enhanced Benefits include the ability to:

- file an immediately effective ASR;
- register securities by class without specifying a limit on the aggregate amount that may be offered;
- use "pay-as-you-go" registration statement filing fee mechanics;
- omit a broader universe of information from a base prospectus; and
- engage in broader pre- and post-filing offering communications.

Currently, to be a WKSI and receive the full suite of Enhanced Benefits, an issuer must, among other things, either have a public float of $700 million or more or have issued at least $1 billion aggregate principal amount of non-convertible securities, other than common equity, in registered primary offerings for cash (the latter, a "Registered Debt WKSI"). Under the proposed amendments, issuers would not be required to satisfy either of these requirements to utilize some or all of the Enhanced Benefits. Instead, for domestic issuers, the proposal would replace the current WKSI framework with three tiers. All Form S-3-eligible issuers would receive certain additional benefits, including broader availability of the Rule 139 research safe harbor, the ability under Rule 430B(b) to omit selling securityholder information from a resale registration statement at effectiveness, and greater flexibility to use free writing prospectuses under Rule 433. An Eligible Listed Issuer ("ELI")—generally, a Form S-3-eligible issuer with a class of common

[11] The Commission also should preserve unused fee offsets and provide clear instructions for transitioning to a new form at the end of the grandfathering period.

equity listed on a national securities exchange—would receive additional benefits under Rules 163, 163A, 164, 413, 430B(a), 456(b), and 457(r). A Seasoned Eligible Listed Issuer ("SELI")—generally, an ELI with at least 12 months of Exchange Act reporting history—would also be eligible to use an ASR. The Release estimates that the number of issuers eligible to use all of the Enhanced Benefits would more than double.

The Commission's creation of the Enhanced Benefits regime in 2005 was laudable, and the Society believes that reform has, as intended, meaningfully facilitated capital formation. More than 20 years later, the Society concurs with the Commission's belief that expanding the issuer pool eligible to leverage some or all of the Enhanced Benefits would further promote capital formation by, among other things, streamlining access to public markets and reducing the cost of capital for registered offerings. The Society Survey results confirm the practical significance of the Enhanced Benefits. When asked which benefits of WKSI status are meaningful, respondents reported:

- S-3 automatic shelf registration effective immediately upon filing (100%);
- ability to register securities in unspecified amounts (88%);
- pay-as-you-go registration fee (82%);
- ability to add securities and selling securityholders later (76%);
- omission of additional detail from base prospectus under Rule 430B (47%);
- greater flexibility in pre-filing offering-related communications, including under Rule 163 (47%); and
- greater flexibility to use free writing prospectuses (35%).

ASR eligibility was selected by every respondent. This result is consistent with the central role timing plays in public capital raising. An ASR becomes effective immediately upon filing, allowing the issuer to establish or replace a shelf without the delay or uncertainty of waiting for Staff review or requesting acceleration. That flexibility is particularly important when an issuer must refresh an expiring shelf, respond to an unexpected financing need, or preserve the ability to access a short market window. The confluence of member responses on these topics is clear—Society members are supportive of the Commission's stated intent to expand the availability of the Enhanced Benefits in an appropriate manner. The Society does note one, perhaps inadvertent, effect of the proposal with respect to registered debt WKSIs.

Crucially, the Society does not support one consequence of the proposed amendments as they relate to Registered Debt WKSIs. Registered Debt WKSIs, which are able to use all of the Enhanced Benefits under the current regime, are frequent, seasoned issuers that, typically, because of their corporate structure, do not have or need publicly-listed equity.[12] The Society

[12] Examples of corporate structures that currently include Registered Debt WKSIs are public utility holding companies, where the parent holding company issues exchange listed equity and each wholly owned subsidiary utility operating company issues public debt, often secured under a mortgage and tied to the assets of the subsidiary. Frequently, both the S-3 registration statement and Exchange Act reports are filed on a combined basis (e.g., the

believes the Registered Debt WKSI prong of the definition was intended to capture sophisticated, widely-followed debt issuers, regardless of whether they also had listed equity, because their substantial and continuing Exchange Act reporting history provides ample investor protection.[13] The Society opposes stripping Registered Debt WKSIs of the Enhanced Benefits. The Society does not believe Registered Debt WKSIs' reliance on the Enhanced Benefits has harmed investors or otherwise presents any unique investor risk.

One of the primary goals of the Release is to expand access to efficient registration and the Enhanced Benefits to substantially more issuers. Yet this consequence to Registered Debt WKSIs would do the opposite—it would narrow the categories and number of issuers to which the Enhanced Benefits are available by excluding large, seasoned, registered debt issuers even as the Commission expands flexibility and access for nearly every other class of issuer, including much smaller, less seasoned issuers. The Release's stated rationale for determining which issuers should receive these benefits—the broad availability of issuer-specific information, including through the issuer's Exchange Act reports—applies no less to Registered Debt WKSIs. In addition to a developed Exchange Act reporting history, most Registered Debt WKSIs have a deep and sophisticated institutional investor base and ongoing rating agency, underwriter, and analyst coverage. While exchange listing standards do, as the Commission notes, mandate prompt disclosure of material information, that disclosure informs high-volume, highly liquid public equity markets; registered debt securities, even those that are exchange-listed, are not traded in the same manner as exchange-listed equity securities, and the investor base is similarly distinct and insiders do not generally trade in debt securities. As a result, the Society does not believe there is any informational deficit with respect to Registered Debt WKSIs that would be advanced by requiring a class of exchange-listed equity or that is otherwise served by stripping these issuers of the Enhanced Benefits.

The Society recognizes that the Release proposes a co-registration accommodation under which a majority-owned subsidiary that will not itself be eligible for the Enhanced Benefits may rely on its parent's status for certain offerings where the parent and subsidiary are co-registrants. Those accommodations may be useful for some financing structures and should be retained. They are not, however, an adequate substitute for an independent eligibility pathway for a seasoned registered debt issuer. The Society does not believe that conditioning the Enhanced Benefits, including the ability to file an ASR, on parent-level co-registration is justified for all companies,

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parent and the subsidiaries that sell public debt), making the public information available to investors identical for the parent and subsidiary. Similar structures are found in larger corporate structures.

[13] The loss of Enhanced Benefits, including ASR eligibility, is especially significant for captive finance companies and other finance subsidiaries of large operating companies. Those entities may be independently eligible to use Form S-3, may have issued registered debt regularly for many years, and may be subject to continuous Exchange Act reporting. They generally do not have publicly-listed common equity because their equity is held by the parent as a matter of corporate structure—not because the subsidiary lacks a public-market presence or because investors lack information about it.

because it not only introduces potential investor confusion and harm by blurring the parent-subsidiary distinction—implying a parent guarantee or other backstop regardless of whether or not one exists —it also does so without providing investors with any disclosure they do not already receive. This accommodation also imposes Securities Act Section 11 liability on the parent and certain of its affiliates[14] without regard to whether the parent is obligated under the security, and layers in additional complexity and process at the parent level, including disclosure, auditor, and diligence procedures, all of which increase cost.[15]

The Society believes this result can be avoided through narrowly crafted changes that do not otherwise disrupt the Commission's proposed new Enhanced Benefits regime. The same criteria that currently qualify Registered Debt WKSIs to use the Enhanced Benefits could be appended to the new definition of SELI or, if the Commission is concerned that the $1 billion Registered Debt WKSI threshold has not been raised since the WKSI concept was first introduced in 2005, a staggered approach could be considered. For example, current Registered Debt WKSIs would qualify under the new definition of ELIs, with a higher threshold for aggregate registered debt issuances (along with the Seasoning Requirement applied to listed equity issuers) necessary to qualify as a SELI.[16] This change could be implemented as a discrete addition to the proposed definitions without reopening the broader framework.[17]

[14] Co-registration would require the parent's principal executive officer, principal financial officer, principal accounting officer and a majority of its board of directors to sign the registration statement, and the parent and those individuals would thereby assume potential liability under Section 11 of the Securities Act that would not exist but for the co-registration requirement. Requiring directors and officers of a non-obligor parent to sign a registration statement and assume potential Section 11 liability is not a ministerial consequence. Additionally, there are some corporate structures, including utility holding company structures, in which the debt-issuing subsidiary is "ring-fenced" from the parent holding company, and for rate regulator purposes, must remain "remote" for bankruptcy analysis purposes.

[15] These are particularly important governance considerations for Society members. These processes, if required, could require a parent to alter established board, disclosure committee, auditor, and transaction-approval processes merely to preserve an offering benefit that its independently-reporting subsidiary currently qualifies to use.

[16] If the Commission adopts the ELI and SELI definitions without a registered debt pathway, it should, at a minimum, provide meaningful grandfathering for Registered Debt WKSIs that do not otherwise qualify as a WKSI under the current rules, including: (i) existing ASRs should remain usable through their normal expiration dates, (ii) an issuer should not be required to replace an effective ASR immediately upon the effective date of the new rules, and (iii) an existing ASR should not lose effectiveness solely because the issuer does not have listed common equity. The Commission also should preserve unused fee offsets and provide clear instructions for transitioning to a non-ASR Form S-3 at the end of the grandfathering period.

[17] Though less desirable, another alternative to preserve Enhanced Benefits for some Registered Debt WKSIs is for the Commission to treat a registered debt issuer as an ELI or SELI, solely for offerings of non-convertible securities other than common equity, so long as the issuer has at least one class of non-convertible debt listed on a national securities exchange. A national securities exchange's listing standards and oversight apply to listed debt in much the same way as they do to listed equity, and this alternative tracks the Commission's proposal to use exchange listing as a proxy for market following and investor protection. For an issuer whose public capital raising activity consists primarily of debt issuance, listed debt would be a more relevant indication of market following as compared to a class of listed equity. Similar to the Society's other proposal, this change could be implemented as a discrete addition to the proposed definitions without reopening the broader framework.

IV. Expansion of S-1 Incorporation by Reference

The Society supports the proposed amendments regarding Form S-1 incorporation by reference as an effort to promote more streamlined and efficient filings, as well as to improve the readability of public filings for investors. Presently, to incorporate historical information by reference on Form S-1 an issuer must have, among other things, filed an annual report on Form 10-K. The ability to incorporate future filings is limited to issuers that are smaller reporting companies ("SRCs"). Under the proposed amendments, an issuer that meets Form S-1's incorporation by reference requirements would be able to backward incorporate regardless of whether it has filed a Form 10-K and forward incorporate regardless of whether it is an SRC. The Release estimates the changes would more than double the number of issuers eligible to forward incorporate on Form S-1.

The current restrictions create unnecessary distinctions among reporting companies without improving the information available to investors. An eligible issuer may already have filed audited financial statements, comprehensive business and risk disclosure, and all required subsequent Exchange Act reports. Requiring that issuer to reproduce the same disclosure in Form S-1, or to file post-effective amendments that repeat information available on EDGAR, changes the location of the information but does not increase its substance, quality, or timeliness.[18] We believe that incorporation by reference is useful for investors because it helps highlight those items that have not changed since a previous filing, which in turn can be helpful in assessing updated information. These principles hold true regardless of the size or seasoning of the issuer. Additionally, incorporation by reference, and particularly forward incorporation, allows for significant cost savings, including by eliminating the need to file regular prospectus supplements and post-effective amendments with each new Exchange Act report—a duplicative process given each document has already been filed on EDGAR under the Exchange Act.[19] These savings are important not only because they reduce the cost of an individual filing. A more efficient Form S-1 can also affect whether a registered transaction is commercially practicable at all. For a smaller offering, the incremental legal, audit, accounting, printing, filing, and internal personnel costs associated with repeated updates can represent a material portion of the proceeds. Reducing those costs may allow an issuer to conduct a registered offering rather than rely on an exempt transaction with a narrower investor base, restricted securities, registration rights obligations, or other less favorable terms.

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[18] The burden alleviated by incorporation by reference can be particularly significant for a newly public company. Such a company will have recently filed an initial registration statement containing audited financial statements and comprehensive disclosure regarding its business, properties, management, risk factors, capitalization, ownership, executive compensation, and material agreements. It also may have filed one or more Forms 10-Q and Forms 8-K after the initial registration statement became effective.

[19] Notably, forward incorporation would not eliminate auditor consent requirements where consent is required.

The Society Survey showed strong support for these proposed amendments. Half of Society Survey participants reported that expansion of forward incorporation would make their company or typical client more likely to use a registered offering rather than an exempt offering. That percentage rose to 83% when excluding Unrestricted S-3 Respondents. Similarly, 44% of Society Survey participants reported that eliminating the requirement that an issuer must have filed a Form 10-K to use backward incorporation by reference on a Form S-1 would make their company or typical client more likely to use a registered offering rather than an exempt offering. That percentage rose to 100% when excluding the Unrestricted S-3 Respondents.

Notwithstanding the Society's broad support for these changes, the final rules also should include transition guidance for registration statements that are effective on the compliance date. An otherwise eligible issuer should be permitted to elect forward incorporation for an existing effective Form S-1 through a post-effective amendment rather than filing a new registration statement. The amendment should not require the issuer to reproduce unaffected disclosure or refile exhibits that remain current. The Commission also should clarify that the staff ordinarily would not revisit unrelated portions of the registration statement solely because the issuer adds the forward incorporation language required by amended Item 12(b).

We recognize that the benefits of these proposed amendments may not be as significant as they would have been absent the proposed expansion of Form S-3 eligibility. However, the Society believes these changes remain positive, and if any aspect of the proposed Form S-3 eligibility amendments is narrowed, the proposed changes regarding Form S-1 incorporation by reference would become significantly more meaningful because a greater number of issuers would presumably remain reliant on Form S-1 registration.

V. Expansion of Federal Preemption for All Registered Offerings

The Society supports the proposed definition of "qualified purchaser" that would exempt securities offered or sold in a registered offering from all state securities law registration and qualification requirements. Currently, federal preemption applies to offerings of "covered securities," which are limited primarily to securities listed or approved for listing on a national securities exchange. A security sold to a "qualified purchaser" as defined by the Commission under Section 18(b)(3) of the Securities Act is also a "covered security;" however, the Commission to date has not defined this term. The proposed amendments would establish this more extensive federal preemption by defining "qualified purchaser" to include any person to whom securities are offered or sold pursuant to an offering registered under the Securities Act.

Registered offerings within the United States are typically made without regard to where an investor is located, making them, as the Commission points out, national in nature. State securities law registration and qualification requirements, like those under the Securities Act, are intended to protect investors. However, in addition to the Securities Act registration requirements, unlisted issuers must also comply with these state-level requirements wherever securities are offered and sold, and states often have varying frameworks based on differing substantive standards. The Commission rightfully notes that disparate Blue Sky registration and qualification requirements raise the cost of capital, sometimes significantly, and adversely affect issuers. The Society Survey results also bear this out. Asked what types of state law burdens were encountered in transactions subject to state securities law registration and qualification requirements, respondents who are not Unrestricted S-3 Respondents reported:

- state filing fees (80%);
- each of excessive number of state filings, inconsistent requirements among states, outside counsel or service provider costs, and certainty of compliance (60%);
- ongoing state reporting requirements (40%);
- merit review (20%);
- delayed qualification (20%); and
- limitations on offering geography (20%).

Asked if compliance with state securities law registration or qualification requirements affected a registered offering by their company or average client, 20% of respondents who are not Unrestricted S-3 Respondents reported some change in structure and 40% reported some cost or delay.

By extending federal preemption to all registered offerings of unlisted securities, the proposal would eliminate the patchwork of state-level review and the associated costs, delays, and disclosure for non-listed issuers without compromising investor protection because this expanded preemption would apply only in circumstances where there is already fulsome Securities Act disclosure. Also, importantly, the proposed amendments preserve state authority with respect to notice filings and fees (and the ability to suspend offerings for failure to submit any required filing or fee) and a state's ability to investigate and enforce its laws with respect to fraud, deceit, and unlawful conduct. As a result, the Society agrees with the Commission's conclusion that the proposed changes would "enhance efficiency, reduce compliance costs, and promote capital formation by reducing redundant regulatory oversight, thereby simplifying the process for conducting registered offerings of unlisted securities," as specifically intended by the Commission. Society Survey respondents who are not Unrestricted S-3 Respondents agreed. When asked what would be the likely effect of the proposed expansion of federal preemption on offering activity, 40% of these respondents reported a material increase in the likelihood of a registered offering and 60% reported transaction costs will be reduced, but financing decisions will not be affected.

VI. Transition Matters

The Society Survey indicates that implementation should be manageable for most registrants but that existing shelf registration statements and transaction processes will require attention. Society Survey respondents anticipated:

- no significant implementation challenges (60%);
- adjustments to existing shelf registration filings (40%);
- coordination with underwriters regarding the revised communication rules (33%);
- revised internal compliance processes (27%); and
- training for securities counsel and disclosure personnel (27%).

These results support a targeted transition period rather than a delay in the broader reforms. Most respondents do not expect significant implementation difficulties, but issuers with existing shelves, and particularly any issuers that will lose eligibility that they have under the current rules, should have sufficient time to assess their status, revise internal procedures, coordinate with offering participants, and transition registration statements without interrupting active funding programs.

The Society appreciates the Commission's desire to quickly implement meaningful reform, and is generally supportive of the proposals in the Release, as summarized herein. Given the extent of the proposed changes and the number of different releases, the Society also supports the Commission undertaking an integrated review of all proposed rules and amendments to be implemented as part of the current rulemaking process to ensure they will work together in practice without unintended consequences.

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Thank you for your consideration of the Society's views.

Respectfully submitted,

Paul F. Washington
President and Chief Executive Officer
Society for Corporate Governance