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

July 27, 2026

Via Electronic Submission (rule-comments@sec.gov)

Re: Registered Offering Reform; Release Nos. 33-11418; 34-105513; IC-36160; File No. S7-2026-17

Dear Secretary Countryman:

Americans for Financial Reform Education Fund[1] opposes the Securities and Exchange Commission's (Commission) Registered Offering Reform proposal (the "Proposal")[2] to dismantle the eligibility architecture that has governed short-form and shelf registration for decades. Additionally, the Proposal would preempt state registration and qualification requirements for all registered offerings, eliminating the state securities protections that have historically provided a critical backstop for unlisted offerings, including non-traded real estate investment trusts (REITs) and business development companies (BDCs). And it would do all of this based on speculative and modest cost savings, without using available data or pilot-testing the changes, and on a comment schedule that makes meaningful public participation impossible.

I. The Proposal Is Part of a Cumulative Reduction in Public-Market Safeguards

This Proposal cannot be assessed in isolation. The Commission has also proposed allowing reporting companies to halve the periodic information they report by opting to replace quarterly reports with semiannual reports and extending scaled-down disclosure accommodations to a much larger share of reporting companies.[3]

This Proposal would permit many of those same issuers to conduct unlimited shelf offerings with reduced transaction-specific disclosure, without the public-float and seasoning safeguards that have governed short-form registration and, for unlisted offerings, without state registration or qualification review. Nowhere does the Commission confront what these proposals accomplish in combination: less frequent information, less

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[1] AFREF is a nonpartisan and nonprofit coalition founded by more than 200 civil rights, consumer, labor, business, investor, faith-based, and civic and community groups and is dedicated to advocating for policies that shape a financial sector that serves workers, communities and the real economy, and provides a foundation for advancing economic and racial justice.
[2] Securities and Exchange Commission (SEC). Registered Offering Reform Proposed Rule (Proposal). Release Nos. 33-11418; 34-105513; IC-36160. 91 Fed. Reg. 100. May 26, 2026 at 31022 et seq.
[3] *Ibid*.; SEC. Semiannual Reporting. Proposed Rule. Release No. 33-11414. 91 Fed. Reg. 88. May 7, 2026 at 24968 et seq. (Proposing to permit semiannual reports on Form 10-S in lieu of quarterly reports on Form 10-Q); SEC. Enhancement of Emerging Growth Company Accommodations and Simplification of Filer Status for Reporting Companies (Filer Status Proposal). Proposed Rule, Release No. 33-11419. 91 Fed. Reg. 98. May 21, 2026 at 30086 et seq. (Proposing to consolidate the filer status framework and extend scaled disclosure accommodations to a substantially larger share of reporting companies).

required information, and broader access to unlimited, lightly reviewed offerings by smaller and less seasoned issuers. The Commission has not analyzed the cumulative effect of these simultaneous proposals on the same issuers and investors.

The Proposal's technological rationale does not justify the results. The Commission argues that EDGAR, the internet, data tagging, and other technologies have made issuer information widely accessible.[4] But the relevant question is not whether an investor can retrieve a filing. It is whether a market has the following, liquidity, disclosure history, and gatekeeping needed for investors to absorb that information and price rapid and unlimited issuance. In 2007—when EDGAR, internet research, and online securities analysis were already well established—the Commission considered requests to eliminate public float as a criterion for Form S-3 eligibility and rejected that wholesale elimination. It concluded that technology can facilitate market following but cannot create it.[5] Nor can machine-readable filings transform thin, lightly followed markets into deep and efficient ones.

Importantly, the Commission's broader regulatory sequence should be considered. Over successive rulemakings, including the 2020 harmonization amendments, the Commission expanded an exempt-offering framework under which issuers may raise unlimited amounts from an ever-expanding pool of accredited investors without registering an offering: general solicitation is permitted in Rule 506 offerings, the accredited investor definition has been repeatedly enlarged, and, by the Commission's own data, capital raised in exempt offerings has for years dwarfed capital raised in registered offerings.[6] Having made remaining private easier, the Commission now treats the resulting decline in registered offerings as a reason to reduce the disclosure, seasoning, market-following, and gatekeeping requirements that distinguish public markets.

That approach does not rebuild public markets. It imports more of the opacity and investor risk of private markets into registered offerings. The Commission is now pursuing the most significant erosion of its investor-protection mandate by proposing a series of rules whose combined effect is to make it as simple as possible for the entities most likely to cause investor losses to put investors in harm's way.

II. The Economic Analysis Does Not Measure the Proposal's Central Investor-Protection Costs

The Proposal's flawed economic analysis quantifies several issuer-side benefits and compliance costs. But it repeatedly acknowledges that many important effects cannot be quantified, and it does not measure the most relevant investor harms such as increased dilution, manipulation, disclosure failures, conflicted offering terms, losses in illiquid products, or the erosion of market confidence. These effects remain unquantified even though the Commission possesses data that could inform their assessment. Much of the section consists of a literature review that does not adequately evaluate the cited studies' findings, methods, or limitations. A literature review,

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[4] Proposal at Section I (citing statistics on household internet and smartphone adoption).
[5] *See* Section VI below.
[6] *See* SEC. Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings. Final Rule. Release No. 33-9415. July 10, 2013; SEC. Accredited Investor Definition. Final Rule. Release No. 33-10824. 85 Fed. Reg. 197. October 9, 2020 at 64234 et seq.; SEC. Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets. Final Rule. Release No. 33-10884. 86 Fed. Reg. 9. January 14, 2021 at 3496 et seq. By the Commission's own data, capital raised in exempt offerings has for years substantially exceeded capital raised in registered offerings. *See* Release No. 33-10884 (Economic Analysis).

without an adequate assessment of the Proposal's principal investor-protection costs, does not satisfy the Commission's obligation to conduct a reasoned economic analysis.

Worse, the Commission possesses unique data—unavailable to outside commenters—with which an actual analysis could have been conducted. The Commission holds internal data on whistleblower reports, on referrals to the Division of Enforcement, and on the Division of Corporation Finance's disclosure-review assessments—including assessments of internal control weaknesses—for companies of precisely the size contemplated by this Proposal. These data could provide a unique view into how many companies ever provide any meaningful recovery to investors after violations of the securities laws, but the Commission did not make that assessment in this Proposal. And the Commission knows how many such cases it declined to investigate because of resource limitations—constraints that have only deepened as the agency's staffing has reportedly declined by nearly 20 percent.[7] The Proposal uses none of this information and cites no data quantifying investor harm.[8]

The contrast with the Commission's own past practice is stark. Before the 2007 expansion of Form S-3, the Division of Corporation Finance conducted an original study of actual shelf-takedown behavior, and the Commission calibrated its rule to that data.[9] No such study was conducted here.

III. The Comment Period Is Inadequate for a Proposal of This Scope

The Commission has not provided adequate time to assess the Proposal. Practitioners have described the Proposal as potentially the most significant offering reform in more than twenty years.[10] The regulatory changes would eliminate public-float and seasoning requirements that have conditioned access to short-form registration for decades, extend WKSI-like benefits, revise Forms S-1 and N-2 and the communications rules, and alter the federal-state allocation of authority over registered offerings. The Proposal itself concedes that the amendments "would, in many ways, represent a departure from the Commission's historical approach."[11]

Yet the Commission allotted 60 days—from May 26, 2026, through July 27, 2026—to analyze a 511-page release while several technically dense companion proposals affecting the same companies and investors were open for comment. The overlapping proceedings make it difficult for commenters to assess each proposal on its own terms and nearly impossible to evaluate their combined effect. The Independence Day holiday and summer vacation period—precisely the kind of window that Commissioners have repeatedly identified, on

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[7] Gillison, Douglas. "Under Trump, Wall Street regulator's headcount falls 18%, watchdog says." *Reuters*. March 27, 2026.

[8] *See* Section IV below.

[9] *See* SEC. Revisions to the Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3, Release No. 33-8878 (Baby Shelf Rule). 72 Fed. Reg. 247. December 27, 2007 at note 42 and 49 at 73534 and 73539. Describing the Division of Corporation Finance's study of 2006 shelf takedowns by moderate-float registrants and reporting that, among registrants with listed common equity, 75 percent of sample registrants took down the equivalent of one-third or less of their public float annually.

[10] Juarez, Carlos, Anna Pinedo, and Brian Hirshberg. Mayer Brown LLP. "The SEC's proposal on registered offering reform." Harvard Law School Forum on Corporate Governance. June 3, 2026. Observing that the Proposal "has the potential to be the most significant offering reform in over 20 years."; *see* also A&O Shearman. "SEC proposes major registered offering reform." May 27, 2026. Characterizing the Proposal, together with its companion release, as the most far-reaching revision of the registered offering framework since the 2005 Securities Offering Reform and the 2012 JOBS Act).

[11] Proposal at 31026.

the record, as inconsistent with soliciting meaningful public comment on dense, sweeping rulemakings[12]—further reduce the practical opportunity for participation. This schedule impairs meaningful public comment and compounds serious Administrative Procedure Act concerns.

A change of this magnitude—to a framework that has been recalibrated only incrementally, and with extensive deliberation, over six decades—warrants a comment period commensurate with its significance. We ask the Commission to extend the comment period.

IV. The Claimed Benefits Do Not Justify Eliminating the Existing Safeguards

The economic case for the Proposal rests on the assertion that existing requirements may unduly inhibit capital formation—for which the Proposal offers no evidence, no study, and no data.[13] The Commission estimates that 1,127 issuers that are currently ineligible could become eligible for unlimited primary offerings on Form S-3 and that another 1,023 issuers currently subject to the one-third "baby shelf" cap could conduct unlimited offerings. It also estimates an annual per-filing burden reduction of $388,106 for an issuer moving from Form S-1 to Form S-3—a figure that is inflated by including not just reduced preparation costs but also the assumed "benefits from faster market access."[14] These figures describe the breadth of the deregulation and potential issuer savings; they do not establish that the benefits outweigh the investor protections removed.

First, the marginal savings are smaller than the headline figure suggests. Issuers below the $75 million public float threshold are not shut out of shelf registration today: General Instruction I.B.6 already permits exchange-listed issuers to conduct primary shelf offerings of up to one-third of their public float in any 12-month period. And the Commission's own data show that this cap is not binding for most issuers: before adopting the one-third cap in 2007, the Division of Corporation Finance studied actual shelf takedowns and found that 75 percent of comparable listed registrants took down one-third or less of their public float annually.[15] The incremental benefit of the Proposal for the affected issuers is therefore not access to shelf registration; it is the removal of any limit on the amount such issuers may sell—a change whose benefits flow disproportionately to the small minority of issuers whose offering behavior most resembles the dilutive, transformative transactions the cap was built to slow down. Nor does the cap foreclose capital raising: as the

[12] See Commissioner Pierce, Hester M. SEC. "Rip Current Rulemakings: Statement on the Regulatory Flexibility Agenda." June 22, 2022. "We have abandoned our careful and considered approach to altering regulation in favor of effecting hasty and sweeping change."; Commissioner Uyeda, Mark T. "Statement on Reopening of Comment Period for Share Repurchase Disclosure Modernization." Dec. 7, 2022. Noting prior statements of concern regarding short comment periods for Commission rulemaking, and observing that when a "rule proposal is dense and the scope of the rulemaking is over-broad," it is even more challenging for the public to offer thoughtful comments.

[13] Proposal at Section I (asserting that aspects of the current rules, "while intended to help protect investors at the time they were adopted, may now have the unintended effect of unduly inhibiting capital formation in today's markets").

[14] Proposal at Section IV (Economic Analysis); see also Juarez, Pinedo & Hirshberg, supra note 9 (summarizing the Commission's estimates of approximately 1,127 newly eligible issuers and an annual per-filing benefit of $388,106 for issuers migrating from Form S-1 to Form S-3, "reflecting reduced filing preparation costs and benefits from faster market access").

[15] *See* Baby Shelf Rule at note 42 and 49 at 73534 and 73539.

2007 Commission emphasized, an issuer constrained by the cap remains free to register a primary offering on Form S-1 or to raise capital privately.[16]

Second, the Proposal contains no study suggesting that savings of this magnitude would alter any issuer's choice between the private and public markets. The advantages of remaining private under the Commission's liberalized exempt-offering framework—no ongoing disclosure obligations, no Section 11 liability, no governance mandates, effectively unlimited capital from accredited investors—are worth vastly more to issuers than $388,106 per filing. The Proposal's prediction that these amendments will draw issuers into public markets rests on an assumption about issuer behavior that the Proposal never tests.

Third, the Commission never assesses whether one or a few of its changes, standing alone, would achieve its objectives without the wholesale demolition of the framework. The Proposal's "Reasonable Alternatives" analysis considers only two variations,[17] and nowhere evaluates the incremental effect of each component—for example, whether shortening the seasoning period, or raising the one-third cap, or expanding Form S-1 incorporation alone would suffice. An agency that eliminates every safeguard simultaneously, without analyzing any of them individually, has not engaged in reasoned decision-making. Finally, and most fundamentally, the Commission adopted the very thresholds this Proposal would eliminate with full awareness that they imposed costs on smaller issuers, and it concluded—as recently as 2007—that those costs were justified because "the securities of smaller public companies are comparatively more vulnerable to price manipulation than the securities of larger public companies, and may also be more prone to financial reporting error and abuses."[18] The Proposal nowhere quantifies the cost of the manipulation, dilution, and reporting failures its own precedents predicted, and it therefore cannot credibly conclude that the modest savings it projects justify the protections it removes.

V. The Proposal Misdiagnoses the Cause of Private Capital Raising for Smaller Public Companies and Benefits of It—and Ignores the Commission's Own Role in It

The Proposal treats the fact that smaller public companies sometimes raise capital through exempt offerings and private placements as evidence that the registered offering framework is broken. That fact alone does not establish that the registered-offering framework is deficient. A smaller public company's decision to raise capital privately is ordinarily an exercise of business judgment—and often sound judgment: a negotiated private placement offers speed and certainty of execution, pricing insulated from market overhang, and, frequently, strategic investors who bring more than money. And the current framework already offers these companies a full menu of registered alternatives: a shelf offering of up to one-third of public float in any twelve months under General Instruction I.B.6, a fully reviewed offering of unlimited size on Form S-1, or a private placement—a design the 2007 Commission adopted deliberately, describing it as providing "supplemental avenues of capital formation" for issuers below the threshold.[19] The Commission's own data confirm that the

[16] Baby Shelf Rule at 73539. Noting that an issuer constrained by the cap "would not be foreclosed from registering a primary offering of securities on Form S-1 or in private placements."

[17] Proposal at Section IV.E (considering only two alternatives: retaining and modifying the public-float-based conditions, and retaining the WKSI definition with an alternative measure of whether an issuer is "well-known").

[18] Baby Shelf Rule at 73536.

[19] *Ibid.* at 73539. Describing the framework as "designed to provide added flexibility to eligible companies . . . by giving them supplemental avenues of capital formation."

menu is sufficient for the overwhelming majority of these issuers.[20] Channel choice is a feature of the framework, not evidence of a market failure requiring the elimination of investor protections.

Second—and the Proposal never considers this—the private alternative can be affirmatively better for the issuer and its investors in the long term, because private capital comes with private due diligence. A sophisticated private investor does not rely on a base prospectus that omits the plan of distribution; it negotiates for access—management meetings, data rooms, diligence materials—and it typically extracts representations, warranties, covenants, and often board representation. That scrutiny is frequently more complete than anything that accompanies a compressed shelf takedown, where, as the Commission itself recognized in 2007, "the short time horizon of shelf offerings may also reduce the time that participating underwriters have to apply their independent scrutiny and judgment."[21] And the benefits of that vetting do not stop with the investor who performs it. Much as piggyback arrangements allow later participants to ride on rights negotiated by others, the public markets piggyback on rigorous private diligence: existing and subsequent investors in a fully reporting company benefit from the validation, governance, and discipline that a negotiated private round imposes. Capital raised under scrutiny is capital raised credibly—and credibility is what lowers an issuer's cost of capital over time. The Commission itself made the converse point in 2007: offerings perceived as prone to abuse "erode investor confidence," which in turn "make[s] it more difficult for these companies to raise capital."[22] Investor confidence, not filing convenience, is the cheapest source of capital there is.

Finally, the Proposal's own record refutes its premise. The Proposal identifies no issuer harmed by raising capital privately, and no investor harmed by an issuer's choice to do so. A public company that raises capital in a private placement remains a fully reporting company—its Exchange Act disclosure continues uninterrupted—and any resale of the privately placed securities occurs through a registered resale or after a Rule 144 holding period; that is, with seasoning. The Commission's own 2020 harmonization release treated the exempt and registered frameworks as complementary components of a single capital-raising ecosystem, each with protections calibrated to its channel.[23] The Proposal inverts that logic: it cites issuers' lawful, rational use of one channel as a reason to strip the protections from the other. If the prevalence of private capital raising by smaller public companies proves anything, it is that these issuers do not lack access to capital—which further weakens the case for dismantling sixty years of safeguards to provide marginally cheaper access.

VI. The Commission's Own Adopting Releases Refute the Proposal's Premise That These Safeguards Were Merely About Access to Information—and the Commission Already Considered and Rejected This Very Proposal

The intellectual core of the Proposal is the claim that the public float and seasoning requirements were mere proxies for whether information about an issuer was available to investors—proxies that EDGAR, the internet, and smartphones have rendered obsolete. That account is inconsistent with the Commission's prior explanation of the framework, and the underlying argument is not new. In the 2007 rulemaking that produced the current framework, the American Bar Association, Morrison & Foerster, and Roth Capital Partners asked the

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[20] Baby Shelf Rule at note 42 and 49 at 73534 and 73539

[21] *Ibid*. at 73537.

[22] *Ibid*. at 73548.

[23] *See* Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets. Final Rule. Release No. 33-10884. 86 Fed. Reg. 9. January 14, 2021. Treating the exempt and registered offering frameworks as complementary components of a single capital-raising ecosystem.

Commission to do precisely what this Proposal now does: eliminate public float as a criterion of eligibility altogether.[24] The 2007 Commission fully credited the technological premise—it opened its analysis with "the great advances in the electronic dissemination and accessibility of company disclosure transmitted over the Internet" and the role of EDGAR as a central repository—and nevertheless held that technology warranted "only the limited expansion of certain offerings on Form S-3, not the wholesale elimination of public float as an important criterion of form eligibility."[25] Its reasoning was categorical: the integrated disclosure system "has, since its inception, been premised on the idea that a company's disclosure in its registration statement can be streamlined to the extent that the market has already taken that information into account," and public float measures "the degree of efficiency with which the market absorbs information and reflects it in the price of a security." The framework's premise, in other words, is market absorption—not retrievability. "Technology can facilitate and enhance market following, but it does not ensure it."[26] The Proposal re-litigates a question the Commission has already adjudicated, and its only new evidence is smartphone adoption rates. The Proposal neither acknowledges that adjudication nor explains what—other than the passage of time—has changed about the answer.

The framework's own history exposes the flaw in the Proposal's logic. Where a requirement truly was about the mechanics of information transport, the Commission eliminated it long ago: Form S-2's physical-delivery requirement was rescinded in 2005 precisely because EDGAR made delivery obsolete.[27] But Form S-2 also carried a 36-month seasoning requirement—a requirement about the quality and maturity of an issuer's disclosure record, not the medium of its transmission—and that distinction has always structured the framework. Unless the Commission believes the sole concern animating six decades of eligibility rules was the physical transport of paper documents, the arrival of instantaneous transport answers none of the questions those rules were built to answer. Three of those questions deserve particular attention: (1) whether investors in these securities have access to genuine liquidity in markets capable of absorbing and pricing rapid, unlimited issuance; (2) whether the issuer has demonstrated that it can actually comply with the securities laws; and (3) whether the market can meaningfully measure companies that are small and have little to no operating or reporting history.

The Proposal's information-availability premise also collapses under the weight of the Commission's own simultaneous actions. While this Release preaches the availability of information, the benefits it extends *subtract* information: the base-prospectus accommodations it would confer on thousands of small issuers permit omission, at effectiveness, of whether the offering is primary or secondary, the plan of distribution, and the description of the securities to be offered[28]—information that is or should be readily available to investors at the moment they need it most. And in a companion release, the Commission proposes to permit issuers to halve the frequency of the very Exchange Act reports on which the entire short-form edifice rests, replacing

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[24] Baby Shelf Rule at note 23 at 73536. Citing letters from the American Bar Association, Committees on Federal Regulation of Securities and State Regulation of Securities; Morrison & Foerster LLP; and Roth Capital Partners, LLC.
[25] *Ibid*. at 73535 to 36.
[26] *Ibid*. at 73536.
[27] SEC. Securities Offering Reform Adopting Release. Release No. 33-8591. July 19, 2005. 70 Fed. Reg. 44722, 44782. August 3, 2005. Rescinding Form S-2 because the form's physical delivery requirement had "become outdated in view of the introduction of EDGAR, other technological developments, and the rapid dissemination of information in the market").
[28] Proposal at Section II.A.1 (describing the ability to omit from the base prospectus, among other things, whether an offering is primary or secondary, the plan of distribution, and a description of the securities to be offered).

quarterly reports with semiannual ones.[29] The Commission cannot coherently justify eliminating eligibility safeguards on the ground that Exchange Act information is ubiquitous while simultaneously proposing to reduce the amount and currency of that information.

A. Investor access to liquidity.

Form S-3 was adopted "in reliance on the efficient market theory," with eligibility criteria expressly designed to "relat[e] short-form registration to the existence of widespread following in the marketplace," and with public float selected as "an appropriate measure of marketplace following."[30] When the Commission first extended short-form registration to primary cash offerings in 1978, it limited eligibility to "a small top tier of companies" whose information is "widely disseminated" because they are "widely followed by debt and equity analysts," explaining that "professional interest should help assure market reaction to material information about a company."[31] These statements are not about whether an investor can locate a Form 10-K; they are about whether a deep, professionally followed, liquid market exists to absorb and accurately price securities sold on a delayed and continuous basis—including at-the-market offerings dribbled into the market without a traditional underwriting. The empirical record before the 2007 Commission confirmed the concern: published research found that stock manipulation concentrates in markets "that are small and illiquid," with very low trading volume and market capitalization.[32] Congress has repeatedly declined to enact legislation that would have accomplished much of what this Proposal now attempts, and dissenting members of the House Financial Services Committee warned that the change "would dangerously expand the type of companies" eligible to use the form, explaining that the existing restrictions "ensure that [eligible companies] have timely information available to the public, ample liquidity, and strong corporate governance standards."[33] That legislation was never enacted nor did Congress enact similar legislation that has been considered. The Commission proposes to accomplish by administrative fiat what Congress, in reliance on the Commission's own reasoning, opted not to do. For a Commission whose recent actions increasingly subsist on the far side of the line drawn by the major questions and nondelegation doctrines, adopting by rule a deregulation of vast economic and political significance that Congress specifically considered and declined to enact—capped by the preemption of every State's registration authority through the administrative redefinition of a single statutory term—should invite, and will deserve, the most searching judicial scrutiny.[34] Smartphones make filings easier to read; they do not create any novel analyst coverage, market depth, or liquidity that did not exist in 2007.

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[29] See SEC. Semiannual Reporting. Proposed Rule. 91 Fed. Reg. 88. May 7, 2026 at 24968 et seq.; SEC. Filer Status Proposal. Fed. Reg. 98. May 21, 2026 at 30086 et seq.

[30] SEC. Adoption of Integrated Disclosure System. Final Rule. Release No. 33-6383 (Mar. 3, 1982), 47 Fed. Reg. 51. March 16, 1982 at 11380, 11382, and 11384.

[31] SEC. Short Form for the Registration of Securities. Final Rule. Release No. 33-5923. 43 Fed. Reg. 76. Apr. 19, 1978 at 16672 and 16673.

[32] Baby Shelf Rule at note 28 at 73536. Citing Rajesh Aggarwal & Guojun Wu, Stock Market Manipulations, 79 J. Bus. No. 4 (2006), whose data indicate that manipulative practices predominate in markets "characterized by very low average trading volume and market capitalization" and that manipulation is more likely "in relatively inefficient markets . . . that are small and illiquid."

[33] Accelerating Access to Capital Act of 2017. 115th Congress. H.R. Report No. 115-576. February 23, 2018 at 9. Minority Views; legislation was not enacted); *see* also Accelerating Access to Capital Act of 2015. 114th Congress. H.R. Rep. No. 114-506. April 19, 2016. Minority Views accompanying identical predecessor legislation, also not enacted.

[34] See West Virginia v. EPA. 597 U.S. 697. 2022 at 721-24. Requiring clear congressional authorization for agency assertions of authority over questions of vast economic and political significance.; FDA v. Brown & Williamson

B. Demonstrated ability to comply with the securities laws—and the gatekeeping the Proposal never mentions.

The seasoning requirement has never been merely about accumulating a stack of publicly available reports. It exists because short-form and shelf registration substitute an issuer's Exchange Act reporting—incorporated by reference and updated automatically—for the discipline of a full, staff-reviewed registration statement. When the Commission relaxed the seasoning requirement in 1976, it deliberately retained reporting-history safeguards "to assure that sufficient information about registrants using the form is available to the investing public through the Exchange Act reporting system."[35] And the 2007 Commission was explicit about what shelf registration costs investors in gatekeeping: expanded shelf access "will limit the staff's direct prior involvement in takedowns," since "individual takedowns are not conditioned on further Commission action or subject to prior selective staff review," and "the short time horizon of shelf offerings may also reduce the time that participating underwriters have to apply their independent scrutiny and judgment."[36] That is why the one-third cap exists: "the greater the magnitude of the offering, the more likely it is that the transaction will be transformative to the issuer rather than routine," and transactions exceeding one-third of float "are generally of such significance to the issuer that the opportunity for specific staff review of the transaction and a greater window for underwriter due diligence are advisable."[37] The Proposal eliminates the cap without one word about staff review or underwriter due diligence for transformative offerings by small issuers.

Nor can the Proposal's disclosure-availability theory cure this defect, because the Commission has already held that it cannot. When commenters in 2007 suggested that concerns about expansion could be addressed by requiring more detailed disclosure, the Commission responded that "requiring additional disclosure would not address the fact that the staff does not have the ability to review, in advance, individual takedowns off an effective shelf registration statement"—and that even pre-effective staff review of the Form S-3 itself "does not satisfactorily address the lack of the staff's prior involvement in shelf takedowns."[38] Disclosure, however available, is not a substitute for gatekeeping. That is not our argument; it is the Commission's.

The compliance-capability concern is not hypothetical for this cohort of issuers, and the record on this point should give the Commission particular pause. The Council of Institutional Investors—representing more than 130 pension funds, endowments, and foundations with over $5.6 trillion in assets, indexed to the very Russell 2000 companies affected—warned in 2007 that smaller public companies "have long been especially prone to financial reporting fraud," citing evidence that most financial reporting fraud occurs at companies well below $100 million in assets and that reporting errors at smaller companies "tend to be more significant" and are more

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Tobacco Corp. [529 U.S. 120](). 2000 at 144 and 147 to 149. Congress's consideration and rejection of legislative proposals bears on the scope of the authority an agency may claim.; see also Biden v. Nebraska. [600 U.S. 477](). 2023.

[35] SEC. [Adoption of Amendments to Registration Forms and Guide and Rescission of Registration Form](). Release No. 33-5791 (Dec. 20, 1976), 41 Fed. Reg. 250. December 28, 1976 at 56301 and 56302.

[36] Baby Shelf Rule at 73537.

[37] *Ibid.* at 73539.

[38] *Ibid.* at note 33 at 73537. Responding to letters from Feldman Weinstein and Smith LLP and Morrison & Foerster LLP, and to the American Bar Association's suggestion that pre-effective staff review of the registration statement itself would suffice.

likely to be sat on when they decrease earnings.[39][40] CII stated that it "would oppose any weakening of the proposed limitations on eligibility" and recommended conditioning Form S-3 eligibility on full implementation of Section 404 of Sarbanes-Oxley, including the auditor attestation requirement of Section 404(b). The Commission declined—but only because the phase-in was already scheduled, and with an express caveat: "We may revisit the limitation on our expansion of Form S-3 after full compliance with Section 404 is complete."[41] That predicate was never satisfied. It was inverted. Full compliance never came: the Dodd-Frank Act permanently exempted non-accelerated filers—companies with less than $75 million in public float, which is to say the entire cohort this Proposal newly empowers—from the Section 404(b) auditor attestation, and in 2020 the Commission expanded that exemption to smaller reporting companies with less than $100 million in revenues.[42] The companion Filer Status Proposal would extend scaled accommodations further still.[43] The 2007 Commission conditioned even a capped expansion on the expectation that these issuers' internal controls would soon be subject to independent audit; the 2026 Commission proposes an uncapped expansion for issuers whose internal control over financial reporting has never been—and under current law never will be—attested to by an auditor.

The Proposal compounds the problem in two respects. First, it never considers that investors need time—and actual performance—to assess whether an issuer's internal control over financial reporting and disclosure controls and procedures function as required. A newly public company's controls are untested assertions; only a track record of periodic reporting, restatement-free financials, and timely filings converts assertion into evidence. Under the Proposal, an issuer could register a class of securities on Form 10 and conduct an unlimited primary shelf offering the same day—before a single reporting cycle has tested anything. Second, the Proposal inverts the relationship between risk and rigor: an established public company must demonstrate twelve months of current and timely Exchange Act reporting to use Form S-3, while a brand-new registrant—the issuer that puts investors at the greatest risk—need only be current and timely "for such shorter period" as it has existed. The most dangerous issuers face the least demanding test. A prospective "current and timely" requirement measures only whether an issuer has not yet failed, not whether it can perform.

Finally, the 2007 Commission recognized that loosening these standards too far would injure the very capital formation it was meant to serve: if smaller-company shelf offerings come to be perceived as "more prone to abuse because of the lack of involvement by the Commission staff, this may erode investor confidence in these

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[39] Letter from Mahoney, Jeff, General Counsel, Council of Institutional Investors, to Nancy M. Morris, Secretary, U.S. Securities and Exchange Commission. (CII Letter). Re File No. S7-10-07. August 24, 2007.

[40] *Ibid*. at 2 Citing, inter alia, a COSO study finding that "[i]n the past decade, most fraud in financial reporting among public companies was committed by smaller corporations, with well below $100 million in assets," and an analysis of Staff Accounting Bulletin No. 108 reporting finding that errors at smaller public companies "tend to be more significant" and that such companies "are more likely to sit on errors that decrease earnings than big companies").

[41] Baby Shelf Adopting Release, 72 Fed. Reg. at 73536-37 & n.31 (acknowledging that "the companies implicated in this rulemaking are not yet fully subject to Section 404 of Sarbanes-Oxley," describing that fact as "yet another factor that we believe weighs against expanding Form S-3 eligibility further than we have in this release," and stating: "We may revisit the limitation on our expansion of Form S-3 after full compliance with Section 404 is complete."

[42] See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203. 2010 at § 989G. 124 Stat. 1376. Adding Section 404(c) to the Sarbanes-Oxley Act, permanently exempting non-accelerated filers from the Section 404(b) auditor attestation requirement); SEC. Accelerated Filer and Large Accelerated Filer Definitions. Final Rule. Release No. 34-88365. 85 Fed. Reg. 69. April 9, 2020 at 19884 et seq. Expanding the exemption to smaller reporting companies with less than $100 million in annual revenues.

[43] See Filer Status Proposal.

offerings generally," which "could, in turn, make it more difficult for these companies to raise capital and significantly negate some of the benefits of the rule."[44] Investor protection is not the enemy of capital formation; it is its foundation. The Proposal never engages with this externality.

C. The inability to measure small companies with little to no history.

The efficient-market premise of Form S-3 assumes that a security's price reflects a history of disclosure that the market has absorbed, tested, and priced. For a company with little or no operating or reporting history, there is nothing to absorb: no track record against which projections can be measured, no baseline of audited performance, and no history of management's disclosure practices. That is why the Commission concluded in 1983—in the adopting release for Rule 415 itself—that "[f]or registrants not eligible to use short form registration, . . . concerns about disclosure and due diligence outweigh the benefits of Rule 415."[45] The Proposal aggravates this problem even on Form S-1: it would permit issuers to incorporate prior filings by reference into Form S-1 without having filed an annual report for their most recently completed fiscal year[46]—inviting offerings built on stale information and depriving investors of the most current audited financial statements at precisely the moment of an investment decision. A proposal premised on the availability of current information should not be dismantling the requirements that make information current. The question these safeguards answer is not whether investors can *find* information about a new, small issuer; it is whether there is sufficient information, history, and market discipline for that issuer's securities to be sold to the public on a delayed, continuous, and unlimited basis without the protections of a full registration process. On that question—the actual question—the Commission's prior answers remain unrebutted.

VII. Extending These Benefits to Former SPACs Is Indefensible on the Proposal's Own Terms

The Proposal correctly recognizes that certain categories of issuers pose the greatest risk of abuse, and accordingly excludes blank check companies, shell companies, and penny stock issuers—and any issuer that was such an issuer within the preceding three years—from Form S-3 and the Enhanced Registration and Communication Benefits. That three-year lookback is not new: it was created in the 2005 Securities Offering Reform as a condition of WKSI status, on the Commission's express finding that the disclosure of recent shell and blank check companies "would be less reliable" and is thus "unsuited for short-form registration."[47] But the Proposal then carves former special purpose acquisition companies out of that exclusion: an issuer that was a SPAC but ceased to be a shell company within the prior three years would be permitted to use Form S-3. In other words, the Proposal claims to democratize the WKSI framework while gutting one of the protections the 2005 Commission built into it.

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[44] Baby Shelf Rule at 73548.

[45] SEC. Shelf Registration. Final Rule. Release No. 33-6499. 48 Fed. Reg. 227. November 23, 1983 52889 and 52893 to 52894.

[46] Proposal at Section II.C Proposing to eliminate the requirement that an issuer have filed an annual report for its most recently completed fiscal year in order to incorporate by reference into Form S-1.

[47] *See* 17 C.F.R. §230.405. Definition of "ineligible issuer," including issuers that within the past three years were blank check companies, shell companies, or issuers in penny stock offerings); Securities Offering Reform Adopting Release at 44746. Excluding such issuers from WKSI status on the ground that their disclosure would be less reliable and thus "unsuited for short-form registration or ineligible for disclosure-related relief."

The carve-out also cannot be squared with the Commission's treatment of former shells in 2007. There, the Commission excluded shell companies from even the capped baby shelf because "these entities may give rise to disclosure abuses," and it required that a former shell (a) have ceased shell status at least twelve months earlier, (b) have filed Form 10-level information, and (c) have twelve months of timely reporting—"to ensure that investors have the benefit of one full year of disclosure once the entity ceases to be a shell company," putting former shells "on par with the eligibility requirements of any other new company."[48] Under this Proposal, by contrast, a company that completed its de-SPAC transaction yesterday could file an uncapped Form S-3 today—no post-shell seasoning, no year of disclosure, no cap. The Proposal is thus dramatically more permissive toward former shells than the regime the 2007 Commission deemed the minimum consistent with investor protection—after fifteen years of intervening experience that argued for more caution, not less. Companies that enter the public markets through a de-SPAC transaction are, as a class, less established and have shorter operating histories than traditional IPO issuers, and the Commission itself concluded—just two years ago, in adopting its SPAC rules—that de-SPAC transactions present heightened investor-protection concerns warranting *additional*, not fewer, safeguards.[49] The record of the 2020–2022 SPAC cohort—restatements, going-concern qualifications, and catastrophic post-merger returns concentrated among retail investors—is a matter of public record. Granting recently de-SPACed companies immediate access to unlimited shelf and ATM issuance is the single most dangerous application of this Proposal, and it should be eliminated regardless of what the Commission does with the remainder.

VIII. If the Commission Believes These Changes Are Warranted, It Should Pilot Them and Gather Data Before Permanently Dismantling Sixty Years of Safeguards

The framework the Proposal would dismantle was built incrementally and with evidence.[50] The Commission introduced short-form registration as an experiment, initially adopted Rule 415 on a temporary basis, and made shelf registration permanent after observing its operation.[51] In 2007, it relied on a staff study of shelf takedowns, described the expansion as careful and modest, and preserved limitations that would permit the Commission to evaluate the change while protecting investors. [52]

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[48] Baby Shelf Rule at 73543-44. Excluding shell companies because "these entities may give rise to disclosure abuses" and requiring that a former shell company (a) not have been a shell company for at least 12 calendar months, (b) have filed Form 10 information, and (c) have been timely reporting for 12 calendar months, "to ensure that investors have the benefit of one full year of disclosure once the entity ceases to be a shell company," which "puts our treatment of former shell companies on par with the eligibility requirements of any other new company wishing to use Form S-3."

[49] SEC. Special Purpose Acquisition Companies, Shell Companies, and Projections. Final rules; guidance. Release No. 33-11265. 89 Fed. Reg. 38. February 26, 2024 at 14158 et seq.

[50] The Commission introduced short-form registration in 1967 explicitly "in the nature of an experiment." *See* Adoption of Short Form for Registration of Securities of Certain Issuers and Amendment of Rule 174, Release No. 33-4886. November 29, 1967.

[51] It adopted Rule 415 in 1982 only as a "temporary rule," and made shelf registration permanent in 1983 only after concluding, based on actual experience, that the rule "has operated efficiently and has provided registrants with important benefits." See, Shelf Registration Final Rule at 52890.

[52] Baby Shelf Rule at 73534 and 73539. Describing the expansion as "careful and modest," reserving the option to "revisit the appropriateness of the form restrictions at a later time if our experience with this revised requirement suggests" further revision, and explaining that the rulemaking was designed to "give the Commission an opportunity to consider the impact of this expansion in an environment where there are limitations in place to address investor protection."

If the Commission believes the framework is outdated, it should follow that precedent. Any expansion should be a trial period, limited at least to exchange-listed issuers and subject to a sunset absent affirmative reauthorization. The Commission should pre-commit to measuring restatements, delinquent filings, internal-control failures, enforcement actions, investor losses, dilution, announcement effects, manipulation and trading anomalies, actual cost savings, and the effect on issuers' choice of financing channel. A pilot would produce the evidence the Proposal currently lacks without permanently eliminating safeguards.

IX. The Proposal Removes Federal Safeguards and Preempts State Law at the Same Time — Leaving Investors with No Backstop

Finally, the Proposal's preemption component must be evaluated in combination with everything else the Proposal does, because the two operate together to strip investors of overlapping layers of protection simultaneously. And it would do so without any state-by-state assessment of the protections being displaced—opting for blanket preemption with little to no analysis. The Proposal would define "qualified purchaser" under Section 18(b)(3) of the Securities Act which preempts state registration and qualification requirements for *all* registered offerings—including offerings of unlisted securities that Congress deliberately left subject to state review when it enacted the National Securities Markets Improvement Act of 1996.[53] NSMIA's structure was not an oversight. Congress preempted state review for exchange-listed securities because listing standards—governance requirements, quantitative thresholds, and exchange oversight—supply a substitute layer of protection. It preserved state authority over unlisted registered offerings precisely because no such substitute exists, and it is in that segment—non-traded products and other unlisted registered offerings sold predominantly to retail investors—that state merit review has historically done its most important work.

The Commission has faced this exact question before, and its answer is precedent against this Proposal. In the 2007 rulemaking, commenters flagged the same friction the Proposal now invokes: issuers of unlisted securities using the new instruction would remain subject to state registration requirements, which "would frustrate the speed and efficacy of shelf registration." The Commission's solution was not to preempt the states. It was to require exchange listing—thereby keeping the expanded federal benefits within the category of "covered securities" Congress had already preempted, and relying on the states' continued authority over everything else.[54] Indeed, exchange listing was the express quid pro quo for raising the offering cap from the proposed 20 percent to one-third: the Commission was "comfortable making this adjustment in light of the additional protection afforded by" the listing requirement, because listing standards screen issuers for sufficient float, investor base, and trading interest, impose governance requirements including majority-independent boards, and subject securities to real-time reporting.[55] The 2007 Commission treated the line Congress drew in NSMIA as the boundary of legitimate expansion. This Proposal treats it as an inconvenience to be erased by administrative definition.

The Proposal would thus effect a double removal. At the federal level, it eliminates the float, seasoning, and transaction limits that condition access to unlimited delayed and continuous offerings. At the state level, it

[53] National Securities Markets Improvement Act of 1996. Pub. L. No. 104-290. 110 Stat. 3416. Codified in relevant part at 15 U.S.C. § 77r).

[54] Baby Shelf Rule at 73540.

[55] *Ibid*. at 73538 to 73540. "We are comfortable making this adjustment in light of the additional protection afforded by the new requirement . . . that eligibility under this instruction is contingent upon the registrant having a class of common equity securities listed and registered on a national securities exchange…."

extinguishes the registration and qualification review that would otherwise have examined precisely the offerings the federal changes newly permit. Each change is defended on the theory that the other layer of protection exists; together they leave nothing. An unlisted issuer—subject to no exchange listing standards—could register an offering with no state review of any kind, while a newly public company with no reporting history could sell unlimited securities off an automatically updating shelf. The Commission should not pretend these are independent policy choices. If the Commission proceeds with any portion of this Proposal, it should, at minimum, sever the preemption of state authority over unlisted offerings, which is not necessary to any of the Proposal's stated capital-formation objectives and which eliminates the sole remaining gatekeeper for the riskiest category of registered offerings.

X. Conclusion

For the foregoing reasons, AFREF respectfully urges the Commission to withdraw the Proposal. In the alternative, the Commission should: (1) extend the comment period to permit meaningful public participation; (2) publish the Commission's internal enforcement, whistleblower, and disclosure-review data bearing on issuers of the size contemplated, and conduct an actual, data-driven economic analysis; (3) retain the public float and seasoning requirements, or at minimum retain meaningful limits on unlimited primary issuance by issuers below the current thresholds; (4) eliminate the carve-out permitting former SPACs to access Form S-3 and the Enhanced Registration and Communication Benefits; (5) adopt any expansion only as a time-limited pilot with pre-committed metrics and a sunset; and (6) abandon the preemption of state registration and qualification authority over unlisted registered offerings. The Commission built this framework deliberately, incrementally, and on evidence, over six decades—and as recently as 2007 it examined, and rejected, the very theory on which this Proposal rests. The burden of justifying the dismantling of that framework rests with the Commission; and on this record, it has not been carried.

We appreciate the Commission's consideration of these comments. For any questions, please contact Oscar Valdés Viera, AFREF Senior Policy Analyst for Private Equity and Capital Markets at oscar@ourfinancialsecurity.org.

Sincerely,

Americans for Financial Reform Education Fund