BETTER MARKETS

July 27, 2026

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

Re: Registered Offering Reform, File No. S7-2026-17, 91 Fed. Reg. 31022 (May 26, 2026)

Dear Ms. Countryman:

Better Markets[1] appreciates the opportunity to comment on the above-referenced proposed rule.[2] The proposed rule would dramatically expand the number of companies that are able to sell securities to the public while providing limited disclosures. It would do so by expanding the population of companies eligible to offer their securities on Form S-3.

The problem is that the Commission itself recognizes that the proposal will weaken investor protection. The Commission acknowledges that the proposal "would result in smaller issuers that may have less publicly available information (for example, voluntary disclosures, analysts, and media coverage) and a less extensive Exchange Act reporting history becoming newly eligible for Form S-3."[3] Such issuers have not historically been eligible for Form S-3 because they "may have greater information asymmetry between themselves and investors."[4] And greater "information asymmetry between an issuer and its investors tends to increase the risk of adverse selection and moral hazard by issuers."[5] Because one "consequence of worsened adverse selection and moral hazard is an increase in issuer behavior that results in harm to investors, such as pump-and-dump schemes or other forms of fraud and insider manipulation," which "can occur more easily when there is less Commission staff review and underwriter diligence,"[6] as with shelf registration, the proposed rule unnecessarily endangers investors.

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1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

2 91 Fed. Reg. 31,022 (May 26, 2026).

3 91 Fed. Reg. 31,105.

4 Id.

5 Id.

6 *Id.* at 31,106.

Indeed, this is why the Commission has previously limited the availability of shelf registration. In 2007, although the Commission expanded the types of companies that could use Form S-3, it did not "abandon [its] longstanding prerequisite contained in the instructions to Form S-3 and allow unlimited use of this form for primary offerings by companies who do not have at least $75 million in public float."[7] The Commission, being "sensitive to the market effects of loosening the standards for shelf eligibility without limitation," and cognizant of its "well-established approach" of "restricting the class of companies eligible" to use Form S-3 and shelf-registration, said that doing so would not be "consistent with investor protection."[8] It said:

> It has been observed that 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. As we stated in the Proposing Release, although we believe that the public securities markets have benefited from advances in both technology and corporate disclosure requirements, we are nevertheless mindful that companies with a smaller market capitalization as a group have a comparatively smaller market following than larger, well-seasoned issuers and are more thinly traded. In such markets, the potential for manipulative practices is more acute.[9]

Therefore, after considering "the unique set of investment risks posed by smaller public companies in the context of shelf registration," which "may limit Commission and underwriter involvement in the registration process," the Commission determined to "retain[] public float as a factor in determining the extent of short-form eligibility."[10]

So despite acknowledging the same concerns that led the Commission to retain the public float criterion in 2007, the Commission now jettisons it. The Commission's rationale is that it is easier for investors to obtain information about companies now.[11] The fact that investors are able to obtain company filings, however, does not protect them from the "price manipulation" and "financial reporting error and abuses" that plague smaller companies and therefore does not alleviate the concerns with allowing shelf registration for smaller companies.

The Commission's attempts to address those concerns are no more persuasive. As an initial matter, the Commission cannot simply say, as it does repeatedly,[12] that its experience since it last amended the shelf registration requirements in 2007 justifies the proposal. The Commission does not explain why that experience makes investors less susceptible to the fraud

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7 Revisions to the Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3, 72 Fed. Reg. 73,534, 73,536 (Dec. 27, 2007).

8 *Id.* at 73,536-73,537.

9 *Id.* at 73,536.

10 *Id.* at 73,536-73,537.

11 91 Fed. Reg. at. 31,028.

12 *Id.* at 31,047.

and manipulation that may be more likely to occur if the Commission allows smaller companies that are vulnerable to price manipulation and reporting errors to use shelf registration.

The Commission's attempt to address the potential for fraud and manipulation if it allows these companies to use shelf registration also fails. According to the Commission, the proposal addresses this concern because it would not extend shelf registration to blank check companies, shell companies, penny stock companies, or certain "bad actors."[13] The fact that the Commission does not intend to extend shelf registration to these companies, for which shelf registration is self-evidently inappropriate, does nothing to address the concerns about potential fraud and manipulation at the companies to which the Commission does intend to extend shelf registration.

No more comforting is the Commission's suggestion that antifraud and antimanipulation rules such as Rule 10b-5 "address concerns about price manipulation in a more appropriate and targeted manner than conditioning Form S-3 eligibility on a minimum public float requirement."[14] The antifraud provisions of the securities laws prohibit fraudulent conduct and allow the SEC to prosecute violators after investor harm has occurred. They do not ensure that companies provide investors with the information they need at the outset of a registered public offering and with the benefit of SEC review before investors commit their capital.

The Commission acknowledges that its proposal "represent[s] a departure from [its] historical approach."[15] That is an understatement. That is because the Commission also recognizes that its original adoption of Form S-3 relied on the efficient market theory.[16]

That theory "suggests that all information contained in an issuer's periodic reports is immediately reflected in the price of the issuer's securities."[17] So shelf registration is justified "because the statement registering an offering need not be current if the price at which the securities will be sold reflects information contained in periodic reports filed between the time the registration statement becomes effective and the time of the offering."[18] But "the securities of smaller companies are less likely to trade in informationally efficient markets than larger

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13 Id.

14 Id.

15 91 Fed. Reg. at 31,026.

16 *Id.* at 31,032.

17 Merritt B. Fox, Shelf Registration, Integrated Disclosure, and Underwriter Due Diligence: An Economic Analysis, 70 Va. L. Rev. 1005, 1008 (1984).

18 Id.

companies."[19] The "market price of smaller companies' stock often may not reflect all publicly available information."[20] So there is no basis to extend shelf registration to smaller companies.

This is why, over 25 years ago, Duke Law Professor James D. Cox, when envisioning what the regulatory regime for securities offerings should look like, said that with respect to "securities that are not traded in an informationally efficient market" such as "small capital reporting companies" the "regulatory approach" should "largely resemble what exists today":

> The registration statement would be vetted with the SEC, its contents would be distributed widely among investors and market professionals, and the issuer and others will be subject to demanding liability standards in the case of misrepresentations that appear in the registration statement. There is little reason to retreat from these requirements for such issuers. Not only does this group of firms pose the greatest risk of fraud to companies, but they are not followed closely by analysts and institutional investors. Therefore, additional steps must be taken to assure the information in these companies registration statement has an impact on investors.[21]

There is no more reason to retreat from these requirements today.

As far back as 1982, Commissioner Thomas worried that shelf registration would reduce "the quality and timeliness of disclosure available to investors."[22] She said that "[i]ncurring these risks is antithetical to the statutory duty of the Commission to protect investors and to maintain the integrity of our capital markets."[23] By divorcing the use of Form S-3 and shelf registration from their historical underpinnings, the Commission completely abdicates that statutory duty.

Unfortunately, the Commission's retreat from longstanding investor protection requirements does not end with its expansion of Form S-3 and shelf registration. It also proposes to preempt State securities law registration and qualification requirements for all registered offerings.[24] This removes vital investor protections for retail investors.

The Commission says that its proposal to preempt State securities law registration and qualification requirements for all registered offerings is "consistent with the legislative intent

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19 Erik F. Gerding, Disclosure 2.0: Can Technology Solve Overload, Complexity, and Other Information Failures, 90 Tul. L. Rev. 1143, 1165 (2016).

20 Stephen J. Choi, Company Registration: Toward a Status-Based Antifraud Regime, 64 U. Chi. L. Rev. 567, 628 (1997).

21 James D. Cox, *Premises for Reforming the Regulation of Securities Offerings: An Essay*, 63 Law and Contemporary Problems 16-17 (2000), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1182&context=lcp.

22 *Delayed or Continuous Offering and Sale of Securities*, Securities Act Release No. 6423, 47 Fed. Reg. 39,799, 39,803 (Sept. 10, 1982) (Commissioner Thomas, dissenting).

23 Id.

24 91 Fed. Reg. at 31,077.

underlying the preemption provisions in section 18."[25] It is not. Section 18 of the Securities Act preempts state registration and qualification requirements for covered securities, and it says that a security is a covered security with respect to the offer and sale of the security to qualified purchasers, as defined by the Commission.[26] The Commission now proposes to define a qualified purchaser as any person to whom securities are offered or sold pursuant to an offering registered under the Securities Act.[27] This definition, which would render the qualified purchaser limitation meaningless by including all purchasers as qualified purchasers, nullifies Congress's intent.

"Legislative history suggests any definition should 'be rooted in the belief that "qualified" purchasers are sophisticated investors, capable of protecting themselves in a manner that renders regulation by State authorities unnecessary.'"[28] Yet the Commission proposes to define a qualified purchaser as including retail investors—the very investors who, as Congress recognized, need the protections that state registration and qualification requirements provide. The legislative history therefore contradicts the Commission's assertion that its proposal defines a qualified purchaser "in a manner that is consistent with investor protection."[29]

The Commission ignores this legislative history. It also ignores its own previous recognition of this legislative history. In 2001, the Commission proposed to define a "qualified purchaser" as an "accredited investor."[30] In so doing, the Commission said that the "legislative history indicates that qualified purchasers for purposes of Securities Act preemption of state regulation should include investors that, by virtue of their financial sophistication and ability to fend for themselves, do not require the protections of registration under the state securities laws."[31] The Commission does not explain why it ignores this limitation in the proposal.

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25 *Id.* at 31,078.

26 *Id.* at 31,077.

27 *Id.* at 31,078.

28 William K. Sjostrom, Jr., *Carving a New Path to Equity Capital and Share Liquidity*, 50 B.C. L. Rev. 639, 670 (2009) (quoting H.R. Rep. No. 104-622, at 31 (1996), as reprinted in 1996 U.S.C.C.A.N. 3877, 3893).

29 91 Fed. Reg. at 31,077.

30 Defining the Term Qualified Purchaser under the Securities Act of 1933, Securities Act Rel. No. 8041, 2001 WL 34681692 (Dec. 19, 2001).

31 *Id.* at *4.

Conclusion

We hope these comments are helpful as the Commission considers this matter.

Sincerely,

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