

# SEC Division of Corporation Finance Issues New Interpretation That May Benefit Issuers Becoming Subject to Baby Shelf Rules

by Josh Erikson, Cam C. Hoang, Dan Lyman, and Megan J. Penick

On March 19, 2026, the Staff of the SEC's Division of Corporation Finance (the "Staff") issued a new Corporate Finance Interpretation ("CFI" and formerly known as Compliance and Disclosure Interpretations). The response to Securities Act Forms CFI Question 116.26 was designed to resolve an ambiguity arising from CFI Question 116.22, which provides that the capacity remaining under the 1/3 limitation under General Instruction I.B.6 of Form S-3 (known as the "baby shelf" rule), is measured immediately prior to a registered takedown and not on a rolling basis.

This interpretation is particularly important for issuers who are conducting continuous at-the-market (or "ATM") offerings under an S-3 shelf takedown, pursuant to which sales are made on an ongoing basis. The prior interpretation clarified that the time of "sale" for purposes of General Instruction I.B.6(a) is when the prospectus supplement is filed for an ATM offering and no re-measurement is required upon each subsequent sale.

For issuers who were primarily eligible under General Instruction I.B.1 who later become subject to the baby shelf rule at the time of their next Form 10-K filing, which acts as a Securities Act 10(a)(3) update to all active Form S-3 registration statements, many issuers and practitioners took the position that the issuer was then limited under an existing ATM offering prospectus and were required to file a new prospectus supplement detailing their new limited shelf capacity in order to continue selling under their existing ATM offering.

Beginning in 2024, the Staff began providing informal guidance that, absent subsequent events requiring an amendment to an active shelf offering (such as an amendment to the ATM agreement), a new prospectus supplement would not be required following the filing of the Form 10-K. Many issuers were unsure if this guidance applied where an issuer becomes baby shelf limited at the time of their 10-K filing.

CFI Question 116.26 clarifies that an issuer that becomes subject to the baby shelf rules (after its public float goes below \$75 million) may continue offering and selling the full

## Related People

- Josh Erikson
- Cam C. Hoang
- Dan Lyman
- Megan J. Penick

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amount of shares under an existing shelf takedown. In discussions with the Staff, they have confirmed that such sales will not count against an issuer's baby shelf capacity, and such I.B.6 baby shelf capacity remains available for future shelf takedowns. The full text of CFI Question 116.26 is included below.

Offerings conducted on Form S-3 entail numerous complications. Dorsey's capital markets team has the knowledge, experience and tools to assist companies with evaluating their options under Form S-3.

#### **Question 116.26**

**Question:** A company entered into a sales agreement with a named selling agent for an at-the-market offering of an amount of securities that the company reasonably expected to offer and sell. The company had an effective Form S-3 registration statement, was eligible to offer and sell securities in reliance on General Instruction I.B.1, and filed a prospectus supplement for the offering. At the time of its next Section 10(a)(3) update, the company does not meet the \$75 million public float requirement of Instruction I.B.1 but remains eligible to use Form S-3 in reliance on General Instruction I.B.6 (the "baby shelf"). Will the staff object if the company continues to offer and sell the full amount of securities covered by the prospectus supplement even if that amount would exceed the offering limits of General Instruction I.B.6?

**Answer:** Under these circumstances, the staff will not object if the company continues offering and selling the full amount of securities covered by the prospectus supplement that was filed prior to the Section 10(a)(3) update. [March 19, 2026]