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SEC Update

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Foreign private issuer directors and officers now subject to Exchange Act Section 16(a)

On December 18, 2025, President Trump signed into law the Holding Foreign Insiders Accountable Act (the Act), which amends Section 16(a) of the Securities Exchange Act of 1934 to require directors and officers of publicly traded foreign private issuers (FPIs) to file with the SEC reports of their ownership of and transactions in the issuer's equity securities. The new reporting requirement becomes effective on March 18, 2026.

The Act effectively rescinds the exemption from Section 16(a) that has existed since 1979 as part of Exchange Act Rule 3a12-3(b). The rule will continue to exempt insiders of FPIs from Sections 16(b) and 16(c) of the Exchange Act, subject to potential SEC rulemaking under authority granted by the Act.

Legislative history

An earlier version of the Act was first introduced in the Senate in 2022 (S. 4127, 117th Cong., 2d Sess.) and was intended to address the sponsors' concerns that insiders of some FPIs had engaged in "insider trading" by selling capital stock of the issuer shortly before significant declines in the issuer's stock price. The bill's sponsors asserted that U.S. investors absorb most of the losses avoided by FPI insiders in these transactions and that subjecting FPI insiders to Section 16 would alert investors to insider sell-offs and better enable U.S. law enforcement agencies to identify insider trading.

The Senate bill was not acted upon, but the sponsors reintroduced the bill in 2023 (S. 1169, 118th Cong. 1st Sess.), after which it was merged into the National Defense Authorization Act for Fiscal Year 2024. The Senate passed the defense bill, but the amendment to Section 16(a) was dropped in conference. A revised version of the amendment was included as Sec. 8103 in the National Defense Authorization Act for Fiscal Year 2026, which was signed into law on December 18.

Scope of new requirement

The new reporting requirement applies to directors and officers of any foreign private issuer (as defined in Exchange Act Rule 3b-4) that has a class of equity securities registered with the SEC under Section 12 of the Exchange Act. The requirement is applicable whether the FPI's securities trade in U.S. markets directly or as American depositary shares.

Directors and officers of FPIs will now be subject to the same reporting requirements as directors and officers of U.S. domestic issuers. In that respect, the Act achieves its purpose of exposing directors' and officers' trading activity to the scrutiny of investors and U.S. regulatory authorities. The Act, however, does not attempt to achieve parity of regulation by extending all of Section 16's provisions to FPIs. Instead, the Act retains Rule 3a12-3(b)'s permissive regulatory approach to FPI insiders in three respects.

First, by its terms, Section 16 applies not only to directors and officers of the issuer, but also to any person who owns more than 10% of any class of the issuer's equity securities that is registered under Section 12 of the Exchange Act. The Act limits the application of Section 16(a) to the directors and officers of FPIs and does not extend the reporting requirements to owners of greater than 10% of an FPI's registered class. The impact of this limitation is minimized to some extent by the existing requirement that owners of more than 5% of an FPI's registered equity securities report their beneficial ownership on Schedule 13D or 13G in accordance with Sections 13(d) and 13(g) of the Exchange Act.

Second, the Act does not subject directors and officers of FPIs to Section 16(b)'s "short-swing profit" recovery provisions. Section 16(b) imposes liability on insiders for any trading profit resulting from a purchase and a sale (or a sale and a purchase) of an equity security of the issuer within a period of less than six months. The calculation of recoverable profits under Section 16(b) can be draconian, and an aggressive plaintiffs' bar monitors insiders' Form 4 reports to uncover potential violations and pursue lawsuits to recover any alleged profit. The Act's preservation of FPI insiders' exemption from Section 16(b) continues to provide FPI insiders more trading flexibility and to expose them to less economic risk than insiders of domestic issuers.

Third, the Act does not subject insiders of FPIs to the prohibition on "short selling" in Section 16(c), which bars insiders from selling stock they "do not own" or which they fail to deliver within 20 days. Section 16(c) prohibits not only short selling of stock but also bars an insider from establishing a put equivalent position (by, for example, purchasing a put option) unless the insider owns a number of securities sufficient to cover the position until it is exercised or expires. Insiders of FPIs will continue to be free of these restrictions on their trading in issuer securities.

SEC rulemaking authority

The Act authorizes the SEC to adopt new rules or amend or rescind existing rules "as necessary to implement the intent of" the Act. However, the Act expressly nullifies Rule 3a12–3(b) to the extent that it is inconsistent with the Act, so insiders of FPIs will become subject to Section 16(a) regardless of whether the SEC amends the rule to eliminate the exemption from Section 16(a).

The Act also authorizes the SEC to exempt insiders from Section 16(a) if the laws of a foreign jurisdiction impose on them "substantially similar" reporting requirements. It is possible, therefore, that insiders of FPIs in some jurisdictions (most likely Canadian issuers and issuers listed on U.K. and EU exchanges) will be exempted from compliance with Section 16(a), although not necessarily before the March 18 effective date.

The SEC also could exercise its rulemaking authority to eliminate Rule 3a12-3(b)'s reference to Section 16 entirely and subject FPI insiders to Sections 16(b) and 16(c).

Section 16(a)'s reporting requirements

Compliance with Section 16(a) will require covered FPI insiders and their advisers to become familiar with the three reporting forms the SEC has adopted for use in reporting insiders' ownership of and transactions in issuer securities:

- *Form 3:* Every insider must file an initial report on Form 3 listing all equity securities of the issuer beneficially owned at the time the insider becomes subject to Section 16(a). Reportable securities include stock, American depositary shares and derivative securities, such as options, restricted stock units and other equity compensation awards. Reportable holdings also include those securities owned by family members who reside with the insider and securities owned indirectly through trusts or other controlled entities.
- *Form 4:* Any change in an insider's beneficial ownership as reported on Form 3 must be reported on Form 4 within two business days unless the change qualifies for an exemption from reporting or for reporting on a deferred basis. Transactions reportable on Form 4 include, for example, grants (or in some circumstances vesting) of equity awards under an equity compensation plan, option exercises, open market purchases and sales, and dispositions of securities as gifts.
- *Form 5:* Some types of transactions are not required to be reported on Form 4 and may instead be reported on a deferred basis on Form 5. If a Form 5 is required, it must be filed no later than 45 days after the end of the fiscal year in which the reported transaction occurred. Form 5 also may be used to report ownership of securities that were mistakenly omitted from the insider's Form 3 or a transaction that should have been reported earlier on Form 4.

Preparing for Section 16(a) compliance

FPIs should use the time before March 18 to develop a comprehensive approach to assisting insiders with their reporting obligations under Section 16(a). While the responsibility for complying with Section 16(a) lies solely with each insider, not the issuer, it is common practice for issuers to take charge of Section 16(a) compliance by preparing and filing insiders' Section 16(a) reports on their behalf.

Although the reporting forms themselves are essentially fill-in-the-blank forms and generally are not difficult to complete, the SEC rules governing the transactions and holdings subject to reporting and the manner in which they should be reported are complex. It therefore is important that FPIs begin now to gain an understanding of the SEC's Section 16 rules, including rules establishing exemptions from Section 16(b) (since application of a Section 16(b) exemption may affect whether and the manner in which the transaction is reported), and to develop an effective program for preparing insiders' reports accurately and filing them on time.

To develop an effective compliance program, FPIs should, at a minimum:

- *Designate the employees who will be responsible for developing and administering the issuer's Section 16(a) compliance program*. FPIs should organize an internal compliance team early, to allow time for all team members to become familiar with Section 16(a)'s requirements and their role in facilitating compliance. The team should include legal personnel responsible for determining the holdings and transactions subject to reporting, employees responsible for administering the issuer's equity compensation plans, and those responsible for preparing filings for electronic submission to the SEC.
- *Identify the individuals who will be considered insiders*. All directors and officers will be required to file Section 16(a) reports. Identifying the issuer's directors is generally a simple matter and is limited to the elected directors identified in the FPI's annual report on Form 20-F. Determining who is a Section 16 "officer" as defined in Exchange Act Rule 16a-1(f), however, often requires an assessment of the employee's duties, regardless of the employee's title. The issuer's president, chief financial officer and chief accounting officer are always considered officers. Beyond those positions, the term "officer" includes (1) any vice president in charge of a principal business unit, division or function and (2) any person performing similar or other significant policy-making functions. Generally, the persons deemed to be officers for purposes of Section 16 are the same as those identified as "executive officers" for purposes of the Exchange Act in accordance with Rule 3b-7. FPIs are already required to identify their "executive officers" for purposes of the SEC's executive compensation clawback rules, as determined based on the "officer" definition in Rule 16a-1(a), but FPIs should take a fresh look at the executive officer list to ensure that it is neither overinclusive nor underinclusive.
- *Develop a written Section 16(a) compliance program*. The deadline of two business days for filing Form 4 will require that compliance personnel receive information about insider transactions promptly. FPIs should develop written procedures for obtaining information from insiders, their brokers and their estate planners in time to prepare required reports. Compliance personnel should also implement procedures for becoming aware of reportable equity compensation awards and related transactions (such as tax withholding) before or at the time they occur. Development of an effective compliance program is important for the issuer as well as its insiders. While timely filing Section 16(a) reports is the insider's obligation, the SEC has initiated enforcement actions against issuers for "causing" insider violations where the issuer has undertaken to file insiders' reports but has failed to do so on time and with accurate information. We discussed recent enforcement actions brought on this basis in our ***SEC Update*** of November 13, 2024.
- *Educate insiders about their new filing obligations*. Insiders should be fully informed of the requirements that will be imposed on them by Section 16(a), to enable them to gather the information they will need to complete their initial Forms 3, to make them aware that their holdings and transactions will now be a matter of public record, and to inform them of the potential adverse consequences of noncompliance. The education process often will include a memorandum explaining the filing requirements, a copy of the written compliance program and, where practicable, an oral presentation at which insiders may ask questions about their individual circumstances.
- *Obtain EDGAR codes for insiders*. Section 16(a) reports must be filed electronically using the SEC's EDGAR Next system. Accordingly, every insider must have individual EDGAR codes. To obtain EDGAR codes, an insider must complete and submit to the SEC an application on Form ID. The Form ID must be notarized and must be accompanied by a notarized power of attorney specifying individuals authorized to manage the insiders' EDGAR account.

Insiders who do not have access to a U.S. notary public may use the foreign local equivalent of a notary public or obtain notarization by a remote online notary recognized by the law of any U.S. state or the District of Columbia. The SEC's recent conversion to the EDGAR Next system, together with the U.S. government shutdown in late 2025, has slowed the SEC's processing of Forms ID, which can now take several weeks. Accordingly, preparation and submission of the forms should be an early action item.

- *Prepare Forms 3 for current insiders.* Initial Form 3 filings for current directors and officers must be submitted by 10:00 p.m. Eastern time on March 18. Compliance personnel should prepare a Form 3 for each insider and have insiders review and approve them in time to allow timely filing. After March 18, newly appointed directors and officers will have ten calendar days within which to file a Form 3.

Effect on Form 20-F disclosures

Form 20-F allows compensation paid to FPI directors and officers to be disclosed on an aggregate basis unless the FPI's home country law requires public disclosure of individual compensation. In addition, Form 20-F requires disclosure of a director's or officer's individual stock ownership only if the amount owned exceeds 1% of the class or the information has otherwise been made public. Since Section 16(a) will require insiders to report on Form 4 their individual equity awards and their total stock ownership, many FPIs that have aggregated their compensation disclosure or omitted disclosure of individual stockholdings will be required to disclose each individual's compensation and stockholdings in their Form 20-F reports.

Because insiders of FPIs have not previously been subject to Section 16(a)'s reporting requirements, Form 20-F does not require FPIs to comply with the requirement of Regulation S-K Item 405, which applies to Form 10-K annual reports filed by domestic issuers, to identify insiders who filed a late Section 16(a) report or failed to file a required report during the last fiscal year. Now that insiders of FPIs will be subject to Section 16(a), the SEC may choose to amend Form 20-F to require FPIs to disclose insiders' reporting delinquencies under Item 405.

Changing regulatory landscape for FPIs

The amendment to Section 16(a) is an act of Congress and does not necessarily mean that the SEC will act on its own initiative through rulemaking to narrow further the regulatory accommodations accorded to FPIs.

As discussed in our ***SEC Update*** of June 11, 2025, however, the SEC issued a concept release last June requesting public comment on whether the definition of "foreign private issuer" in Exchange Act Rule 3b-4 should be narrowed to reduce the number of issuers who satisfy its requirements. The SEC noted in the concept release that the SEC's treatment of FPIs is designed to reduce compliance burdens that may arise from duplicative or conflicting U.S. and foreign disclosure requirements and that the current regulatory scheme was adopted with the expectation that most FPIs would be subject to meaningful oversight and disclosure obligations in their home country, and that the securities of most FPIs would trade primarily in foreign markets. The SEC underscored that this expectation has not been borne out and that many FPIs which benefit from reduced regulation trade almost exclusively in the U.S. capital markets.

The SEC has not proposed any rules based on the views expressed in the concept release. The release may suggest, however, that the SEC believes the current FPI definition could potentially disadvantage domestic issuers by allowing some foreign entities to avoid effective regulatory oversight. The extension of Section 16(a) reporting to FPIs may be the harbinger of future agency action to subject FPIs to additional regulation under U.S. securities laws.

This SEC Update is a summary for guidance only and should not be relied on as legal advice in relation to a particular transaction or situation. If you have any questions or would like any additional information regarding this matter, please contact your relationship partner at Hogan Lovells or any of the lawyers listed in this update.

Contributors

Alan Dye (co-editor)
Partner, Washington, D.C.
T +1 202 637 5737
alan.dye@hoganlovells.com

Richard Parrino (co-editor)
Partner, Washington, D.C.
T +1 202 637 5530
richard.parrino@hoganlovells.com

Richard Aftanas
Partner, New York
T +1 212 918 3267
richard.aftanas@hoganlovells.com

Rupa Briggs
Partner, New York
T +1 212 918 3024
rupa.briggs@hoganlovells.com

Kevin K. Greenslade
Partner, Northern Virginia
T +1 703 610 6189
kevin.greenslade@hoganlovells.com

Jonathan Lewis
Partner, São Paulo
T +55 11 3078 3619
jonathan.lewis@hoganlovells.com

Alex Parkhouse
Partner, London
T +44 20 7296 2889
alex.parkhouse@hoganlovells.com

Stephanie Tang
Partner, Hong Kong
T +852 2840 5026
stephanie.tang@hoganlovells.com

Additional contacts

Steven J. Abrams
Partner, Philadelphia
T +1 267 675 4671
steve.abrams@hoganlovells.com

Elizabeth (Liz) L. Banks
Partner, Washington, D.C.
T +1 202 637 2523
elizabeth.banks@hoganlovells.com

Glenn C. Campbell
Senior Counsel, Baltimore, Washington, D.C.
T +1 410 659 2709 (Baltimore)
T +1 202 637 5622 (Washington, D.C.)
glenn.campbell@hoganlovells.com

Paul Hilton
Senior Counsel, Denver, New York
T +1 303 454 2414 (Denver)
T +1 212 918 3514 (New York)
paul.hilton@hoganlovells.com

William I. Intner
Partner, Baltimore
T +1 410 659 2778
william.intner@hoganlovells.com

Michael E. McTiernan
Partner, Washington, D.C.
T +1 202 637 5684
michael.mctiernan@hoganlovells.com

Catalina Parkinson
Partner, Washington, D.C.
T +1 202 637 5767
catalina.parkinson@hoganlovells.com

Michael J. Silver
Senior Counsel, New York, Baltimore
T +1 212 918 8235 (New York)
T +1 410 659 2741 (Baltimore)
michael.silver@hoganlovells.com

Meredith Hines
Counsel, New York
T +1 212 918 3729
meredith.hines@hoganlovells.com

John B. Beckman
Partner, Washington, D.C.
T +1 202 637 5464
john.beckman@hoganlovells.com

David W. Bonser
Partner, Washington, D.C.
T +1 202 637 5868
david.bonser@hoganlovells.com

John P. Duke
Partner, Philadelphia, New York
T +1 267 675 4616 (Philadelphia)
T +1 212 918 5616 (New York)
john.duke@hoganlovells.com

J. Nicholas Hoover
Partner, Baltimore
T +1 410 659 2790
nick.hoover@hoganlovells.com

Bob Juelke
Partner, Philadelphia
T +1 267 675 4615
bob.juelke@hoganlovells.com

Stephen M. Nicolai
Partner, Philadelphia
T +1 267 675 4642
stephen.nicolai@hoganlovells.com

Leslie (Les) B. Reese, III
Partner, Washington, D.C.
T +1 202 637 5542
leslie.reese@hoganlovells.com

Andrew S. Zahn
Partner, Washington, D.C.
T +1 202 637 3658
andrew.zahn@hoganlovells.com

Tifarah Roberts Allen
Partner, Washington, D.C.
T +1 202 637 5427
tifarah.allen@hoganlovells.com

Jessica A. Bisignano
Partner, Philadelphia
T +1 267 675 4643
jessica.bisignano@hoganlovells.com

Allen Hicks
Partner, Washington, D.C.
T +1 202 637 6420
allen.hicks@hoganlovells.com

Eve N. Howard
Senior Counsel, Washington, D.C.
T +1 202 637 5627
eve.howard@hoganlovells.com

Paul D. Manca
Partner, Washington, D.C.
T +1 202 637 5821
paul.manca@hoganlovells.com

Brian C. O'Fahey
Partner, Washington, D.C.
T +1 202 637 6541
brian.ofahey@hoganlovells.com

Richard Schaberg
Partner, Washington, D.C., New York
T +1 202 637 5671 (Washington, D.C.)
T +1 212 918 3000 (New York)
richard.schaberg@hoganlovells.com

Val Delp
Counsel, Philadelphia
T +1 267 675 4649
val.delp@hoganlovells.com

Alicante
Amsterdam
Baltimore
Beijing
Berlin**
Birmingham
Boston
Brussels
Budapest*
Colorado Springs
Denver
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Dublin
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