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SEC Update

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SEC requests public comment on the definition of foreign private issuer

On June 4, the SEC published a "concept release" seeking public comment on potential amendments to the definition of "foreign private issuer" (FPI) under the Securities Act and the Exchange Act. The SEC issued the release in response to significant changes in recent years in the composition and operations of foreign issuers currently benefiting from the FPI regime on compliance with U.S. securities regulation, including a substantial increase in FPIs whose equity securities trade almost exclusively on U.S. capital markets.

The SEC highlights that, while the FPI regime is designed to reduce compliance burdens that may arise from duplicative or conflicting U.S. and foreign disclosure requirements, the current rules were adopted with the expectation that most FPIs would be subject to meaningful oversight and disclosure obligations in their home country, and that their securities would primarily trade on foreign markets. In the SEC's view, this expectation is no longer valid with respect to a significant portion of the FPI population.

Although the SEC does not propose any rule changes, the concept release opens the door to potentially significant revisions to the FPI framework. If the SEC proceeds with a rulemaking to modify the eligibility requirements for FPI status, the rule changes most likely would be directed at companies whose equity securities are listed solely in the United States or that are not subject to a robust regulatory and oversight system in their home country.

The SEC's concept release (Rel. No. 33-11376) can be accessed **here**.

Current definition of foreign private issuer

Securities Act Rule 405 and Exchange Act Rule 3b-4(c) define an FPI as any issuer incorporated or organized under the laws of a foreign country (other than a foreign government), unless the issuer satisfies both of the following tests:

- a *shareholder test*, under which more than 50% of the issuer's outstanding voting securities are held by U.S. residents; and
- a *business contacts test*, under which any one of the following conditions is met:
  - a majority of the issuer's executive officers or directors are U.S. citizens or residents; or
  - more than 50% of the issuer's assets are located in the United States; or
  - the issuer's business is principally administered in the United States.

If both tests are satisfied, the issuer is deemed a domestic issuer and must fully comply with the U.S. public company disclosure and reporting requirements. If either test is not satisfied, the issuer qualifies as an FPI, which permits the issuer to benefit from a range of regulatory accommodations tailored to foreign companies.

For reporting issuers, FPI status is evaluated annually as of the end of the issuer's second fiscal quarter. In the case of a first-time filer — that is, a foreign company filing an initial registration statement under the Securities Act or the Exchange Act — FPI status is determined as of a date within 30 days before the filing.

The accommodations in disclosure rules and forms extended to FPIs reflect the SEC's efforts to balance the need for vigorous investor protection in U.S. public markets with the benefit to U.S. investors of access to investments in foreign companies. The SEC underscores that it adopted these accommodations in view of the differences in legal, regulatory, and accounting standards across jurisdictions and with the expectation that most FPIs would be subject to meaningful oversight and

disclosure obligations in their "home country," and that their securities would primarily trade on foreign markets. The term "home country" is defined in Form 20-F, the annual reporting form for FPIs, as the jurisdiction in which a company is legally organized, incorporated, or established and, if different, the jurisdiction of its principal securities market listing.

Benefits of foreign private issuer status

As detailed in Annex I, the U.S. securities law framework for FPIs aims to preserve appropriate investor protections while accommodating the distinct regulatory, legal, and market environments in which FPIs operate. The FPI regime is designed to reduce compliance burdens that may arise from duplicative or conflicting U.S. and foreign requirements, thereby facilitating cross-border capital formation while ensuring sufficient transparency for U.S. investors.

Function of concept release

An SEC concept release often represents an early stage in the rulemaking process. Concept releases enable the SEC to obtain public perspectives on specified issues to assist the agency in determining whether to address the issues in a rulemaking. These releases, like the FPI concept release, typically outline a topic of concern, identify different potential approaches and raise a series of questions for public comment.

Recognizing that any changes to the FPI definition could significantly affect both issuers and investors, the SEC in its new release has asked for the public's views on a range of potential regulatory responses. Although the SEC outlines multiple possible paths, it has not drawn any firm conclusions.

If the SEC decides to proceed with a rulemaking, it will issue a proposal for public comment. After considering comments on the proposal, the SEC may adopt final rule amendments.

Changes in FPI landscape

The SEC's concept release seeks public input on whether the current definition of FPI continues to encompass the types of issuers the SEC intended to benefit from FPI accommodations under U.S. securities laws. The SEC adopted the current FPI definition in 1983 and amended it in 1999. The SEC periodically assesses whether the FPI regulatory framework continues to appropriately serve U.S. investors and U.S. capital markets.

In adopting the initial regulatory framework for FPIs in 1935, the SEC recognized that foreign issuers were subject to different laws, practices, and market conditions in their home country and, as a result, deemed it appropriate to make some accommodations — such as modified reporting obligations — to account for those differences. At the time, the SEC expected that securities issued by FPIs would primarily be traded on foreign markets and that most eligible FPIs would be subject to meaningful disclosure and regulatory oversight in their home country.

A recent SEC staff review of the characteristics of FPIs subject to reporting obligations under Exchange Act Section 13(a) or 15(d) reveals substantial changes in the profile of these companies. Notably, some FPI home countries rely more heavily on the U.S. regulatory framework as the primary source of issuer regulation. In addition, many current FPIs have equity securities that are almost exclusively traded on U.S. capital markets.

The SEC is focusing its review on FPIs that file annual reports with the SEC on Form 20-F. The agency has excluded from the scope of its review Canadian companies filing on Form 40-F under the multijurisdictional disclosure system (MJDS) between the SEC and provincial securities regulators in Canada, on the basis that the Canadian disclosure framework is fully adequate to protect U.S. investors. As a result, the SEC is not soliciting comment on changes to the MJDS regime.

In its release, the SEC highlights changes in the FPI landscape during the 20-year period from 2003 to 2023. The SEC reports that, in 2003, most FPIs were Canadian companies with substantial operations and listings in Canada. The typical FPI had both its place of incorporation and headquarters in the same jurisdiction, often with meaningful public market activity outside the United States.

By 2023, according to the SEC, the composition and operations of FPIs had shifted significantly.

- The Cayman Islands had become the most common jurisdiction of incorporation, accounting for over 30% of FPIs filing on Form 20-F.
- China overtook Canada as the most common jurisdiction based on headquarters location, with 219 issuers headquartered in China.
- The number of companies that had a different jurisdiction of incorporation compared to the jurisdiction in which their headquarters was located rose sharply, from 7% in 2003 to 48% in 2023.

- A growing number of new FPIs are China-based issuers that use offshore holding structures — primarily entities incorporated in the Cayman Islands or the British Virgin Islands — to access U.S. capital markets. These companies typically have no substantive operations in their home country and rely on variable interest entity (VIE) structures to control China-based operations.

The SEC noted the following additional changes from 2003 to 2023 based on the staff's review of Form 20-F filings submitted during this period:

- In 2023, 97% of China-based issuers were incorporated in either the Cayman Islands (82%) or the British Virgin Islands (15%), and among all Form 20-F filers incorporated in the Cayman Islands or the British Virgin Islands, more than 67% were China-based issuers.
- The total number of Form 20-F filers followed a U-shape, in which the number of such filers totaled 950 in 2004, declined to 656 in 2016, and then increased to 967 in 2023.
- FPIs that had at least 99% of their equity trading transacted on U.S. capital markets (which the SEC refers to as "U.S. exclusive FPIs") grew from 44% of Form 20-F filers in 2014 to 55% of such filers in 2023, with such FPIs typically having a smaller market capitalization and often being incorporated in the Cayman Islands with headquarters in China.
- Despite constituting 55% of all Form 20-F filers in 2023, U.S. exclusive FPIs represented only about 9% of the total global market capitalization of all Form 20-F filers.

The SEC observes that many FPIs that have more recently become Form 20-F filers appear to rely on home country disclosure regimes that differ meaningfully from those applicable to domestic U.S. issuers or to issuers from jurisdictions that historically represented a larger share of the FPI population (including Canada, the U.K., EU member states, Brazil, and Japan). The latter jurisdictions tend to impose more robust and comprehensive current reporting and market transparency requirements than jurisdictions that now host a disproportionate share of newly incorporated FPIs — including the Cayman Islands, the British Virgin Islands, Bermuda, and the Marshall Islands — where current reporting obligations may be limited, narrow in scope, or largely non-public.

The current regulatory accommodations for FPIs were originally based on the assumption that most FPIs would be subject to meaningful disclosure and regulatory oversight in their home country, providing an independent basis for investor protection alongside U.S. market regulation. The SEC indicates that this assumption no longer holds true for a significant portion of the FPI population.

In some cases, jurisdictions specifically exempt FPIs from home country requirements on the basis that such companies are subject to the U.S. securities laws. The SEC notes that certain regulators, such as the Israel Securities Authority, allow FPIs listed in the United States to report exclusively under U.S. rules, effectively deferring to the U.S. regulatory framework. While this deference is not necessarily a signal of deficient foreign regulatory standards, the SEC says it has the effect of making U.S. law the primary or sole source of disclosure obligations for some FPIs. This outcome deviates from the SEC's original expectation that FPIs would face comprehensive disclosure obligations in their home country and, in the SEC's view, may reduce the overall transparency available to U.S. investors.

The SEC raises concerns that, if an FPI is not subject to timely, substantive home country reporting requirements, or if foreign regulatory oversight is otherwise limited, the FPI accommodations may be undermining investor protection or market fairness. In these cases, the SEC's regulatory framework might be functioning in isolation, without the intended regulatory complement from the issuer's home jurisdiction or primary listing venue.

SEC consideration of potential changes to the FPI definition

In light of these developments, the SEC indicates that it is considering whether revisions to the FPI definition are necessary to ensure that U.S. investors receive adequate disclosures and that competitive conditions for U.S. issuers are not distorted by regulatory discrepancies.

The SEC asks in the concept release for public comment on whether the shift in the characteristics of the FPI population — including the growing prevalence of FPIs with limited or no substantive foreign oversight — warrants a revision of the current FPI definition, whether the FPI accommodations still ensure adequate disclosure for U.S. investors, and whether domestic issuers are at a competitive disadvantage compared to

FPIs that are exclusively listed in the United States and incorporated in jurisdictions with minimal regulatory requirements.

The SEC is also soliciting comments on a range of potential approaches to amending the FPI definition to address the foregoing concerns, including whether:

- the eligibility tests included within the FPI definition should be revised or replaced;
- the eligibility tests should include a foreign trading volume requirement or a major foreign exchange listing requirement;
- the eligibility tests should include a minimum percentage of trading activity on non-U.S. exchanges;
- FPIs should be required to list on a "major" non-U.S. exchange (as designated by the SEC);
- FPI status should be subject to the SEC's assessment of the robustness of regulation in the home country;
- FPI status should be based on a system of mutual recognition; and
- FPI status should be conferred only upon issuers that are subject to oversight of a foreign securities authority that has signed an International Organization of Securities Commissions (IOSCO) international cooperation arrangement.

Annex II presents examples of the key issues on which the SEC is seeking public input.

Looking ahead

Comments solicited by the concept release must be received by the SEC on or before September 8, 2025. Following its consideration of the comments, the SEC will decide whether to initiate a rulemaking process to address matters raised in the release.

Annex I – Benefits of foreign private issuer status

Foreign private issuers benefit from a range of exemptions and other relief under the U.S. securities laws, including:

- **Extended annual reporting timeline**: FPIs that file annual reports on Form 20-F have up to four months after the end of their fiscal year to do so. By contrast, domestic issuers must file their Form 10-K annual reports within 60, 75, or 90 days after their fiscal year-end, depending on filer status.
- **No quarterly reporting**: Unlike domestic issuers, FPIs are not required to file quarterly reports on Form 10-Q, significantly reducing their ongoing disclosure burden.
- **Accounting standards**: FPIs may present financial statements using International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board, U.S. generally accepted accounting principles (GAAP), or home country GAAP with a reconciliation to U.S. GAAP. Domestic issuers, by contrast, must exclusively use U.S. GAAP.
- **Exemption from insider reporting**: FPIs are exempt from insider reporting and trading rules under Section 16 of the Exchange Act.
- **Current reporting**: FPIs submit current information on Form 6-K only when the information is disclosed in their home country, filed with a stock exchange, or distributed to shareholders. Domestic issuers must file or furnish current reports on Form 8-K within four business days after specified triggering events.
- **Corporate governance**: FPIs are generally exempt from many U.S. stock exchange corporate governance requirements, such as those relating to board independence or audit committee composition, provided that they disclose any significant differences in their practices.
- **Exemption from proxy rules**: FPIs are exempt from the U.S. proxy rules, including say-on-pay vote requirements, applicable to domestic issuers.
- **Sarbanes-Oxley certifications**: FPIs are required to provide CEO and CFO certifications under the Sarbanes-Oxley Act only in their annual reports, whereas domestic issuers must also provide the certifications in their quarterly reports.
- **Use of registration and reporting forms**: FPIs may register securities offerings using Forms F-1, F-3, and F-4, and file annual reports on Form 20-F, which have different structures and disclosure requirements than Forms S-1, S-3, and S-4, and annual reports on Form 10-K, filed by domestic issuers.
- **Interim financial statements**: FPIs are subject to more lenient requirements for updating interim financial statements in registration statements. A registration statement dated more than nine months after the end of the last audited financial year must include consolidated interim financial statements (which may be unaudited) covering at least the first six months of the current financial year. By contrast, domestic issuers generally must include interim financial statements dated no more than 134 days before the registration statement effective date.
- **Exemption from Regulation FD**: FPIs are not subject to Regulation FD, which governs the selective disclosure of material nonpublic information by domestic issuers. The exemption affords FPIs greater flexibility in communications with investors and analysts, subject to home country law.

Annex II – Key questions on which the SEC is soliciting feedback

Core Definition and Eligibility Criteria

- Should the 50% U.S. ownership threshold or the business contacts test be revised or replaced?
- Would alternative tests (e.g., based on revenue sources, place of operations, or management control) be more appropriate?
- Should the SEC consider a foreign trading volume requirement or foreign exchange listing condition to better distinguish truly foreign issuers?
- Should the existing two-pronged eligibility test be amended? For example, by lowering the 50% U.S. ownership threshold, adjusting thresholds under the business contacts test, or revising the factors considered.
- Should FPIs be required to have a minimum percentage of their trading activity occur on non-U.S. exchanges? If so, what level of trading volume (e.g., 1%, 5%, 15%) would be an appropriate threshold, and what methodology should be used?
- Should FPIs be required to list on an SEC-designated "major" foreign exchange to ensure oversight in their home countries?
- Should FPI status be contingent on incorporation or headquarters in a jurisdiction with robust regulatory and disclosure requirements?
- Should the SEC explore bilateral or multilateral recognition arrangements with certain jurisdictions, similar to the MJDS with Canada?

Enforcement and Information Sharing

- Should FPI eligibility be conditioned on the issuer being subject to a foreign regulator that is a signatory to the IOSCO Multilateral Memorandum of Understanding (MMoU) or Enhanced MMoU?

Impact on Investors and Market Structure

- Are U.S. investors adequately protected under the current FPI framework, especially where FPIs are primarily traded on U.S. markets and lightly regulated in their home countries?

Transition and Implementation Considerations

- Should existing FPIs be grandfathered in, or should all FPIs eventually be subject to any revised definition?
- What transition periods or accommodations (e.g., for accounting standards conversion or reporting deadlines) should be provided to FPIs that lose their status?

The SEC also invites views on how best to combine these regulatory approaches or rank them in order of priority, and whether other, unaddressed mechanisms might better align FPI status with the SEC's goals of investor protection, market integrity, and regulatory parity.

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