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SEC looks to revisit FPI definition

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The SEC has taken the first step in what could potentially be the most sweeping change in decades to its approach to foreign private issuers. Reacting to changes in the population of SEC-registered foreign private issuers over the last 20 years, including the increase in U.S.-only listed foreign private issuers, the SEC is seeking input on the characteristics of registrants organized outside the United States that should permit access to the accommodations available to foreign private issuers.

On June 4, 2025, the SEC issued a concept release, which is a forerunner to potential SEC rulemaking, seeking public comment on the definition of foreign private issuer. Federal securities laws exempt companies that qualify as foreign private issuers, or FPIs, from some of the more onerous U.S. disclosure requirements to assist a non-U.S. company's entry into the U.S. markets. The accommodations for FPIs generally are based on the premise that FPIs are subject to meaningful home jurisdiction oversight and disclosure requirements.

According to the SEC, the concept release is driven by the significant change in the population of foreign private issuers over the last two decades in terms of their jurisdictions of incorporation and headquarters. In 2003, Canada and the United Kingdom represented the most common FPI jurisdictions for both incorporation and headquarters. Twenty years later (i.e., in 2023), the Cayman Islands was the most common jurisdiction of incorporation for FPIs, and China the most common jurisdiction for headquarters. In addition, the release notes that a majority of FPIs trade primarily or exclusively on U.S. markets rather than in their home country.

Driven by these observations, the SEC is seeking comment on whether the existing FPI definition should be updated to better capture the non-U.S. issuers that the SEC intended to benefit from FPI accommodations.

The comment period runs for 90 days after publication of the concept release in the Federal Register, so at least until Labor Day.

Current definition of foreign private issuer

A foreign private issuer is a foreign issuer (other than a foreign government) with 50% or less of its shares held by U.S. holders (the shareholder test) or, if more than 50% of its shares are held by U.S. holders, a company that meets all of the following criteria (the business contacts test):

— A majority of the company's directors and officers are non-U.S. citizens or residents.

— A majority of the company's assets are held outside of the United States.

— The company's business is principally administered outside of the United States.

Like the concept release, we refer to the shareholder test and the business contacts test in this client update when discussing the SEC's proposed approaches to amending the FPI definition.

Potential approaches to changed FPI landscape

The SEC is seeking comment on whether the shift in the characteristics of the FPI population warrants revisiting the FPI definition, whether the accommodations afforded to FPIs still allow for adequate disclosure for U.S. investors, and whether domestic issuers are currently at a competitive disadvantage compared to FPIs that are exclusively listed in the United States and incorporated in jurisdictions that do not subject them to meaningful disclosure and regulatory requirements.

The concept release outlines and seeks feedback on potential approaches to revising the FPI definition, including the following:

- **FPI eligibility criteria**. The release asks whether the criteria for FPI eligibility should be amended, for example by changing the existing two-prong test and either lowering the 50% threshold of U.S. holders in the shareholder test or revising the list of criteria (or thresholds) under the business contacts test. In addition, the release questions whether the current FPI definition appropriately captures foreign issuers that are subject to home country oversight such that they should be afforded FPI accommodations.
- **Foreign trading volume requirement**. The release explores whether adding a foreign trading volume requirement (as is the case under certain other SEC rules) as a condition to FPI status eligibility is appropriate. For context, the release notes that the percentage of FPIs that trade exclusively on U.S. markets has increased from approximately 44% in 2014 to almost 55% in 2023. The release notes that issuers with a "consistent and meaningful amount of their securities traded on a non-U.S. market could be more likely to be subject to home country oversight, disclosure, and other regulatory requirements that merit accommodation" compared to issuers whose securities are traded exclusively or primarily in the United States. Among other queries, the release questions what thresholds (and methodology) are appropriate for a foreign trading volume test.
- **Major foreign exchange listing requirement**. The release seeks input on a potential requirement for FPIs to be listed on a "major foreign exchange." The release grants that while such a requirement could help ensure FPIs are subject to regulation in a foreign market, it would require significant (and ongoing) information sharing between the SEC and the relevant exchange. The release seeks feedback on several factors including what criteria should be considered to determine if a foreign exchange is "major", whether the disclosure or corporate governance requirements of an exchange should be part of the determination, and how often this determination should be assessed.
- **Assessment of robustness of foreign regulation**. The release explores whether to require each FPI to be incorporated and subject to the securities regulations and oversight of a jurisdiction that the SEC determines has a sufficiently robust regulatory and oversight framework. The SEC would need to designate and assess jurisdictions on an ongoing basis, which would require a high level of cooperation between foreign regulatory authorities and U.S. regulators and significant SEC staff time and resources. In its listed requests for comment, among other factors the release questions whether there are objective tests or key requirements that should be considered when determining which jurisdictions qualify as sufficiently robust (and recognizes attendant limitations like the staff's expertise in foreign laws).
- **System of mutual recognition**. Another approach the release considers as a means to appropriately tailor FPI accommodations is a system of mutual recognition with respect to Securities Act registration and Exchange Act periodic reporting for FPIs from selected jurisdictions, similar to the mutual recognition approach under the Multijurisdictional Disclosure System, or MJDS (which allows Canadian and U.S. issuers to conduct cross-border securities offerings primarily by complying with their home country securities laws). In considering this approach, the release requests comment, among other queries, on which jurisdictions should be considered as possible candidates for mutual recognition, and what criteria should be used when determining whether a particular jurisdiction should be considered.
- **International cooperation arrangement requirement**. The release also contemplates a potential requirement for FPIs to certify they are incorporated or headquartered in a member jurisdiction of the International Organization of Securities Commissions (IOSCO) that is a party to agreements providing for cooperation and information sharing. The release notes that while these agreements are voluntary, non-binding and do not supersede domestic laws, IOSCO member jurisdictions express their intent and legal authority to assist in enforcement matters.

  Commissioner Peirce, though in favor of the concept release, thought this a weak potential solution, noting in her remarks that these agreements do not "ensure that American investors have access to the material disclosure that is an essential part of our regulatory regime" and that such a potential solution could result in ceding regulatory authority to an international organization.

The release considers whether a combination of these potential approaches might be appropriate, and in each case seeks feedback on the potential costs and benefits to FPIs and U.S. investors of revised requirements underlying the FPI definition, including the impact on issuers that would lose FPI status. The release also questions whether changes to the FPI definition, if adopted, should apply only to new FPIs as opposed to the existing FPI population to avoid transition costs for existing FPIs.

Takeaways

The concept release comes in the context of renewed Congressional focus on the disparate treatment of U.S. domestic registrants and FPIs under U.S. securities laws, including for example recent bipartisan legislation seeking to subject FPIs to section 16 reporting, which we wrote about in a prior iteration of the bill in a client update.

It is unclear on what timing any rulemaking will take place, but we are hopeful that in issuing this concept release the SEC is signaling a considered and balanced approach to rulemaking that could have significant consequences for foreign companies that are listed or are seeking to list on a U.S. stock exchange, particularly those that are focused on the United States as their sole listing venue or are currently not subject to robust regulatory oversight in their home jurisdiction (we believe it is less likely that any resulting changes would significantly impact dual-listed FPIs or FPIs in jurisdictions with robust regulatory frameworks). In addition, changing the criteria that underlie FPI status eligibility could potentially cause non-U.S. listed foreign companies to no longer qualify for the Rule 12g3-2(b) exemption and be required to register with the SEC.[1]

While Commissioner Uyeda supported issuing the concept release and summarized in his remarks some of the underlying concerns, he also cautioned that "…it is important to note that we have not seen to date large scale market failures from the differing disclosure regimes for U.S. issuers and foreign private issuers…In balancing investor protection considerations, we should be mindful that U.S. investors benefit from the ability to diversify their holdings through ownership of foreign securities." The FPI regime was designed to ease regulatory burdens to attract foreign issuers to the U.S. capital markets, and it is our hope that the SEC does not deter foreign companies from listing in the United States and thereby diminish the competitiveness of the U.S. capital markets.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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[1] Rule 12g3-2(b) under the Exchange Act exempts an FPI from having to register a class of equity securities under Section 12(g) of the Exchange Act so long as specified criteria are met, including that the issuer maintains a listing on a foreign exchange where at least 55% of the trading in that class of securities occurs.