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ALERT MEMORANDUM

SEC Considers Narrowing Foreign Private Issuer Definition

June 11, 2025

Introduction

On June 4, 2025, the Securities and Exchange Commission ("SEC" or "Commission") unanimously voted to publish a concept release[1] (the "Concept Release") seeking public comment on issues related to the definition of a foreign private issuer ("FPI"). The definition of an FPI is important to non-U.S. companies because it determines whether such companies can be listed within the United States while benefitting from a series of regulatory accommodations. These accommodations reduce the burden of certain SEC and exchange listing rules applicable to U.S. companies, facilitating non-U.S. companies' access to the U.S. capital markets.

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The Concept Release expresses concern that the current FPI definition allows certain non-U.S. entities to avoid effective regulatory oversight, potentially disadvantaging U.S. companies, FPIs subject to meaningful home country oversight and U.S. investors. The Commission is considering whether to narrow the eligibility criteria for FPIs in an effort to ensure that non-U.S. companies selling securities and listing in the United States are subject to meaningful regulatory requirements, either in their home jurisdictions or in the United States.

This alert memo provides an overview of the existing FPI regime, summarizes the key elements of the Concept Release and discusses potential implications for FPIs, investors and other interested parties.

[1] https://www.sec.gov/files/rules/concept/2025/33-11376.pdf.

The Existing FPI Framework

An FPI[2] is currently defined as an entity incorporated outside the United States ***unless***:

1. More than 50% of its outstanding voting securities are directly or indirectly owned by U.S. residents (referred to as the "shareholder test"); and
2. Any of the following applies (referred to as the "business contacts test"):
   - The majority of its executive officers or directors are U.S. citizens or residents;
   - More than 50% of its assets are located in the United States; or
   - Its business is administered principally in the United States.

FPIs benefit from relief from certain U.S. reporting, disclosure, corporate governance and other obligations compared to domestic issuers based in part on the historical view that such companies likely face significant oversight in their home jurisdictions and that applying the full panoply of U.S. reporting and other regulations to FPIs would be tantamount to "double regulation."

The benefits of FPI status include:

— reduced annual, quarterly and current reporting obligations;

— exemption from proxy rules, say-on-pay requirements and selective disclosure rules under Regulation Fair Disclosure ("Regulation FD");

— the ability to use International Financial Reporting Standards ("IFRS") in lieu of U.S. generally accepted accounting principles ("U.S. GAAP") in the preparation of financial statements;

— increased flexibility around financial data presentation;

— narrower disclosure requirements regarding executive compensation;

— exemption from officer, director and affiliated shareholder beneficial ownership and trade reporting as well as profit disgorgement rules[3] under Section 16 of the Exchange Act ("Section 16"); and

— exemption from certain corporate governance requirements of the New York Stock Exchange ("NYSE") and Nasdaq that apply to U.S. issuers.

The Concept Release

Changing FPI Landscape

The Concept Release states that when the original FPI definition was adopted in 1967, the Commission understood that (1) most eligible FPIs would be subject to meaningful disclosure and other regulatory requirements in their home country jurisdictions and (2) the primary trading market for FPIs' securities would be outside the United States (and therefore subject to the requirements of foreign stock exchanges). The Concept Release calls these core assumptions into question. SEC staff research shows that in 2023 55% of FPIs are traded exclusively or nearly exclusively in the United States, and that many FPIs are incorporated in jurisdictions that do not impose meaningful disclosure and other regulatory requirements.

In 2003, the most common jurisdictions of incorporation for FPIs were Canada and the United Kingdom, according to the research cited by the SEC. By 2023, the most common jurisdiction of incorporation had become the Cayman Islands, representing over 30% of all FPIs. The SEC staff's analysis also shows an increased divergence between

[2] The current definitions of "foreign issuer" and "foreign private issuer" are contained in 17 CFR 230.405 ("Rule 405") under the Securities Act of 1933, as amended, and 17 CFR 240.3b-4 ("Rule 3b-4") under the Securities Exchange Act of 1934, as amended (the "Exchange Act").

[3] Under Section 16(b), insiders (directors, officers and any beneficial owner of more than 10% of any class of equity securities of an issuer) are required to disgorge any profits realized from the non-exempt purchase and sale (or sale and purchase) of any equity security of the issuer within a six-month period.

FPIs' jurisdictions of incorporation and the jurisdictions of their headquarters (7% divergence in 2003, compared to 48% in 2023)[4]. In particular, the Concept Release highlights the rise in Chinese-headquartered companies that are incorporated in jurisdictions that do not have meaningful disclosure and other regulatory requirements and are listed exclusively in the United States. The Concept Release notes that these trends suggest non-U.S. companies are increasingly accessing the U.S. capital markets without being subject to meaningful home country or other listing jurisdiction disclosure or regulatory requirements, and in some cases may be actively seeking to avoid requirements by shifting their jurisdictions of incorporation. According to the SEC, this trend away from regulation potentially has resulted in increased risks to U.S. investors in FPIs and may have competitive implications for both U.S. companies and FPIs subject to extensive regulatory oversight.

Possible Policy Approaches

The SEC is seeking public comment on several possible approaches to tailor FPI eligibility and amend the FPI regulatory regime. The SEC is considering whether a combination of these potential approaches might be appropriate and whether any such changes, if adopted, should apply to existing FPIs or only to new FPIs.

The potential approaches considered in the Concept Release are outlined below:

1. **Update the Existing FPI Eligibility Criteria**: Lowering the 50% threshold of U.S. holders in the shareholder test or revising criteria under the business contacts test by adding new criteria or revising the threshold for U.S. assets.
2. **Foreign Trading Volume Requirement**: Adding a new test requiring FPIs to have a certain percentage of trading volume outside the United States over a preceding 12-month period. At the 1% threshold, SEC staff data suggests that 519 FPIs (55.04%) would be affected, including 83.33% of Cayman Islands-incorporated FPIs and 81.94% of China-headquartered FPIs.
3. **Major Foreign Exchange Listing Requirement**: Requiring FPIs to be listed on a "major foreign exchange," whose listing requirements meet specific criteria related to market size, corporate governance, reporting and disclosure requirements, and enforcement authority.
4. **Commission Assessment of Foreign Regulation**: Requiring FPIs to be incorporated or headquartered in a jurisdiction that the Commission has determined to have a robust regulatory and oversight framework.
5. **Mutual Recognition Systems**: Developing a system of mutual recognition for issuers from selected foreign jurisdictions similar to the current Multijurisdictional Disclosure System[5] (the "MJDS") (which allows Canadian and U.S. issuers to conduct cross-border securities offerings primarily by complying with their home country securities laws and procedures).
6. **International Cooperation Arrangement Requirement**: Requiring FPIs to certify they are incorporated or headquartered in, and subject to the oversight of, a jurisdiction where the foreign securities authority has signed the International Organization of Securities Commissions Multilateral Memorandum of Understanding (MMoU) or Enhanced MMoU.

Implications and Considerations

Implications for FPIs and Other Non-U.S. Companies

It is unclear which of the above approaches, if any, will ultimately be adopted. However, three categories of non-U.S. companies are seemingly at risk of losing existing FPI status or being unable to register as FPIs in the future if some of the possible changes are adopted:

[4] Except as otherwise noted, data presented here is as of 2023 as provided in the Concept Release.

[5] 17 CFR 239.37 to 17 CFR 239.41 and 17 CFR 249.240f. The SEC is not soliciting comments on the MJDS.

1. Companies listed solely in the United States and/or whose trading market is primarily in the United States;
2. Companies incorporated in jurisdictions without robust corporate regulatory and disclosure regimes; and
3. China-based issuers falling in either or both of the first two categories (particularly those incorporated in the Cayman Islands and the British Virgin Islands).

If the SEC proceeds to narrow the definition of an FPI, non-U.S. companies that no longer qualify as FPIs would face significant consequences in the form of increased compliance costs should they choose to remain registered and listed in the United States. Potential additional regulatory burdens could include required adoption of U.S. GAAP, application of U.S. proxy and executive compensation disclosure rules, shortened filing deadlines for annual reports, new quarterly and current reporting obligations, application of selective disclosure rules under Regulation FD and officer, director and affiliate beneficial ownership and trade reporting under Section 16 (as well as the profit disgorgement requirements under Section 16(b)).[6]

Additionally, non-U.S. companies may become subject to the NYSE and Nasdaq rules as applied to domestic companies and as a consequence may lose the benefit of current exceptions from certain corporate governance and board structure requirements (including with respect to majority independent board and certain shareholder approval requirements).

Key Considerations

The Concept Release represents an inflection point that will involve the balancing of the potential benefits of the current regulatory accommodations for FPIs against any perceived investor and market risks as well as any competitive disadvantages for domestic companies posed by such accommodations. In this balancing act the SEC will likely need to consider, among other things:

- The significance of the risks posed by such accommodations, and whether they have led to materially greater risks for investors and the markets, including any risks associated with the permitted use of IFRS accounting standards as issued by the International Accounting Standards Board in lieu of U.S. GAAP for financial statements of FPIs.
- The degree to which market expectations and the disclosure and corporate governance practices driven thereby have come to fill in any perceived regulatory gaps resulting from the accommodations. For example, many FPIs that are not subject to quarterly financial statement disclosure requirements publish quarterly financial information to satisfy investor expectations. Similarly, in our experience, FPIs strive to avoid selective disclosure despite not being required to comply with Regulation FD, due to home market, U.S. legal and other considerations. Finally, many FPIs follow board independence and board structure expectations that apply to U.S. companies based on investor demands for “good governance” practices even when there are no home country requirements imposed.
- The benefits that have come to U.S. investors and the U.S. market from listings by non-U.S. issuers, including greater access to such investments by the public and the oversight of such companies by the SEC and U.S. exchanges facilitated by such listings.
- The degree to which increasing the regulatory and compliance obligations for FPIs would cause FPIs to conclude that the benefits of a U.S. listing are outweighed by the incremental costs and burdens of the changes.
- Whether changes that could have the effect of discouraging U.S. listings by non-U.S. issuers

[6] Canadian FPIs reporting on Form 20-F would have the alternative of transitioning to the MJDS.

might weaken investor protection instead of improving it if U.S. investment in non-U.S. issuers is shifted by such changes to the private (*e.g.*, Rule 144A) or offshore markets, where there will be less direct oversight by the Commission.

— Whether there are subsets of the current FPI company population that should not be subject to any additional disclosure or other requirements.

Other issues would be raised by potential amendments to FPI eligibility, including:

— Whether the existing deregistration rules should be relaxed to allow non-U.S. issuers the opportunity to deregister in light of any such amended rules and how to minimize any negative consequences of deregistration for U.S. investors.

— Depending on how an FPI is defined, how and whether non-U.S. issuers could monitor and police their U.S. shareholding and trading levels adequately to facilitate compliance with any amended requirements.

— The implications of any such changes for the existing exemption from registration of a class of equity securities under Section 12(g) of the Exchange Act if certain conditions are met. Many companies that are not listed in the United States currently rely on this exemption, contained in Rule 12g3-2(b) thereunder, and certain of the potential adjustments to the criteria for qualifying as an FPI might cause them to lose this exemption even if they have not sought a U.S. listing or attempted to offer and sell their securities publicly in the United States. Changes to Rule 12g3-2(b) could also result in depositaries finding it more difficult to establish unsponsored American Depositary Receipt “ADR” programs.

— Whether FPIs with only registered debt in the United States will be affected by any possible changes. These companies arguably involve considerations that are very different from those raised by companies whose equity is listed and traded in the United States.

Conclusion

The comment period will remain open until September 8, 2025, and various stakeholders, including practitioners, issuers, financial advisors and investors, will be interested in submitting comments. After the comment period, the SEC will review submissions and may propose rules to amend the FPI definition or make changes to the accommodations currently afforded to FPIs, including, but not limited to, those outlined in the Concept Release. There is no certainty on timing for any SEC rule-making following the public comment period, and any potential rule-making in this area will be subject to continued commentary.

Given the significance of these potential changes, investors, FPIs and other stakeholders listed or considering listing in the United States should closely monitor developments on this matter. If you have any questions or would like assistance in preparing comments on the Concept Release, please do not hesitate to contact us.

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