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Not Foreign Enough?: SEC Reconsiders the Definition of "Foreign Private Issuer"

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AUTHORS

John Ablan | Edward Best | Jennifer Carlson | Susan Rabinowitz

Potential changes discussed in a recent SEC concept release would tighten the eligibility criteria for qualifying as a "foreign private issuer." Non-U.S. companies with shares listed solely or traded principally in the United States are the most likely to be impacted by future changes.

On June 4, 2025, the Securities and Exchange Commission (the "SEC") published a concept release[1] (the "Concept Release") soliciting comments on the definition of a foreign private issuer ("FPI"). Recent developments within the FPI population, particularly the dramatic shift in the composition of home country jurisdictions of FPIs since 2003 as well as the fact that the majority of FPIs filing Forms 20-F have their equity securities almost exclusively traded in U.S. capital markets, have prompted the SEC to consider whether the current FPI definition (discussed below) should be revised to better represent companies that the SEC intended to benefit from current FPI accommodations while continuing to protect investors and promote capital formation. Currently, FPIs benefit from accommodations that provide full or partial relief from a number of disclosure, corporate governance and other provisions that apply to U.S. domestic issuers ("domestic issuers").

According to the Concept Release, 967 FPIs filed annual reports on Form 20-F ("20-F FPIs") covering fiscal year 2023 and 146 FPIs filed on Form 40-F for the same period, or approximately 9% of all public companies.[2]

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1 Securities and Exchange Commission, Concept Release on Foreign Private Issuer Eligibility (June 4, 2025), available at: https://www.sec.gov/files/rules/concept/2025/33-11376.pdf.

2 Form 20-F is the annual report generally filed by FPIs. Form 40-F is filed by Canadian issuers that are eligible for and elect to take advantage of the Multijurisdictional Disclosure System ("MJDS"). Under the MJDS, eligible Canadian issuers may satisfy certain securities

Background

As far back as 1935, the SEC recognized that foreign issuers face unique challenges in accessing U.S. capital markets, including the disparity between the laws, practices and accounting principles existing in foreign countries and the United States, and over the years has sought to provide such issuers with regulatory flexibilities that preserve access for U.S. investors to such issuers' securities while maintaining appropriate investor protections. Foreign issuers that qualify for FPI status under the federal securities laws benefit from accommodations that provide full or partial relief from requirements for domestic issuers. For example, FPIs are exempt from the SEC's proxy rules as well as from the reporting and short swing profit provisions of Section 16 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). According to the SEC, its accommodations were adopted and refined based on the understanding that, while legal and regulatory requirements differ across home country jurisdictions, most FPIs would be subject to meaningful disclosure and other regulatory requirements in their home country jurisdictions.

Two factors appear to have led to the SEC's consideration of potential changes in the definition of FPI: the jurisdictional makeup of 20-F FPIs and the primary trading markets of 20-F FPIs.

Jurisdictional Makeup — The SEC analyzed the 20-F population in both 2003 and 2023 and found that, while the total number of 20-F FPIs was similar, the composition of the 20-F FPI population in those two years was very different. The two jurisdictions most frequently represented among 20-F FPIs in 2003 were Canada (non-MJDS issuers) and the United Kingdom, both in terms of incorporation (24% and 11%) and the location of headquarters (23% and 11%). In contrast, in 2023, the top two countries of incorporation of 20-F FPIs were the Cayman Islands (33%) and Israel (10%) while the top two countries of headquarters were China (23%) and Israel (11%). The SEC also observed that one driver of the increased divergence between jurisdictions of incorporation and jurisdictions of headquarters was the increase in China-based issuers (i.e., companies based in mainland China, Hong Kong or Macau), almost all of which were incorporated in the Cayman Islands or the British Virgin Islands.

The SEC believes that this shift in jurisdictional makeup may have resulted in less information about 20-F FPIs being made available to U.S. investors than in the past, when more FPIs were located in countries with comprehensive disclosure regimes. This trend may also raise questions about the extent of overall regulation that such FPIs face in their home country jurisdictions, potentially resulting in increased risks to U.S. investors or competitive implications for domestic issuers and other FPIs.

Primary Trading Markets — The SEC also analyzed the percentage of 20-F FPIs' global equity trading volume occurring in U.S. capital markets and how this has changed from 2014 to 2023.[3] For 2014, the SEC noted that

registration and reporting requirements of the Commission by providing disclosure documents prepared in accordance with the requirements of Canadian securities regulatory authorities. Some FPIs voluntarily file their annual reports on Form 10-K instead of Form 20-F or Form 40-F. Those FPIs may take advantage of some, but not all, of the FPI accommodations.

[3] The Concept Release states that the SEC chose to begin this analysis in 2014, rather than 2003, based on a previous study finding that the percentage of FPIs (including MJDS) listed exclusively in U.S. capital markets appeared to increase from 2004 (15%) to 2013 (35%).

approximately 44% of 20-F FPIs had nearly all of their global trading volume in the United States with that percentage rising to 55% for fiscal year 2023. The SEC also observed that 20-F FPIs that traded exclusively in the United States ("U.S. Exclusive FPIs") tend to have lower market capitalizations and have a different composition of home country jurisdictions than other 20-F FPIs. In particular, U.S. Exclusive FPIs have a higher propensity of being incorporated in the Cayman Islands and headquartered in China.

The fact that an increasing percentage of 20-F FPIs' equity securities trade almost entirely in U.S. capital markets, rather than foreign markets, led the SEC to question whether such issuers are regulated in foreign markets. To the extent these issuers are U.S. Exclusive FPIs, the SEC is effectively the exclusive securities regulator for those issuers. Since the current regulatory accommodations for FPIs were based, in part, on the expectation that most FPIs would be subject to meaningful disclosure and other regulatory requirements in their home country jurisdictions, the increase in U.S. Exclusive FPIs has led the SEC to question whether such FPIs should continue to benefit from all or some of the accommodations.

Current FPI Definition

In order to determine whether an issuer is an FPI, it must first determine if it is a "foreign issuer." A "foreign issuer" is any issuer that is a foreign government, a national of any foreign country, or a corporation or other organization incorporated or organized under the laws of any foreign country.[4]

A "foreign issuer" that is not a foreign government may then qualify as a "foreign private issuer" under a two-part test that quantifies its percentage of U.S. ownership and the location of its business operations. Under the "shareholder test," a foreign issuer that has 50% or less of its outstanding voting securities held of record directly or indirectly by U.S. residents would qualify for FPI status, regardless of the location of its business operations. Under the "business contacts test," a foreign issuer would qualify for FPI status, regardless of its percentage of U.S. ownership, if it has none of the following contacts with the United States: (1) a majority of its executive officers or directors are U.S. citizens or residents; (2) more than 50 percent of its assets are located in the United States; or (3) its business is administered principally in the United States.[5] For issuers subject to the ongoing reporting requirements of the Exchange Act, FPI eligibility is determined annually as of the end of the issuer's second fiscal quarter. A foreign issuer filing an initial registration statement under the Securities Act or Exchange Act determines its FPI eligibility as of a date within 30 days prior to filing.[6]

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4 SEC Rule 405 under the Securities Act of 1933, as amended (the "Securities Act"), 17 CFR §230.405 and SEC Rule 3b-4 under the Exchange Act, 17 CFR §240.3b-4.

5 *Id*.

6 *Id*.

Current FPI Accommodations

Currently, FPIs benefit from accommodations that provide full or partial relief from a number of disclosure, corporate governance and other provisions that apply to domestic issuers, including the following:

- 20-F FPIs have until four months after the fiscal year-end to file annual reports on Form 20-F[7] (domestic issuers must file annual reports on Form 10-K within 60, 75, or 90 days after the fiscal year-end).[8]
- Annual reports on Form 20-F and Form 40-F require different disclosure than annual reports on Form 10-K.
- Reporting FPIs are not required to file quarterly reports (domestic issuers must file quarterly reports on Form 10-Q for their first, second and third fiscal quarters).[9]
- Reporting FPIs furnish current reports on Form 6-K promptly after the information in the report is otherwise made public (domestic issuers must file or furnish current reports on Form 8-K, typically within four business days of specified events).[10]
- FPIs may present their financial statements using (1) International Financial Reporting Standards as issued by the International Accounting Standards Board, (2) generally accepted accounting principles in the United States ("U.S. GAAP"), or (3) home country accounting principles with a reconciliation to U.S. GAAP (domestic issuers are required to use U.S. GAAP).[11]
- FPIs may register the offer and sale of securities on different Securities Act forms, which require different disclosure than Securities Act forms for domestic issuers.
- FPIs are generally exempt from the SEC's proxy[12] and "say-on-pay" rules.[13]

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7 General Instruction A.(b) to Form 20-F. Canadian FPIs that file annual reports on Form 40-F under the MJDS must file their reports "on the same day the information included therein is due to be filed with any securities commission or equivalent regulatory authority in Canada." *See* General Instruction D.(3) to Form 40-F.

8 General Instruction A.(2) to Form 10-K.

9 17 CFR §240.13a-13.

10 General Instruction A to Form 6-K. The current Form 6-K requirements for reporting FPIs are limited to the disclosures that a reporting FPI already (1) makes or is required to make public pursuant to the law of the jurisdiction of its domicile or in which it is incorporated or organized, (2) files or is required to file with a stock exchange on which its securities are traded and that were made public by that exchange, or (3) distributes or is required to distribute to its security holders.

11 17 CFR §210.4-01(a); Item 17(c) of Form 20-F. FPIs presenting their financial statements in accordance with IFRS as issued by the IASB do not need to provide a reconciliation to U.S. GAAP. However, the use of IFRS not as issued by the IASB is considered equivalent to home country GAAP and must be reconciled to U.S. GAAP.

12 17 CFR §240.3a12-3(b); Regulation 14A (17 CFR 240.14a-1 through 17 CFR 240.14b-2). FPIs also are not subject to information statement requirements. *See* Regulation 14C (17 CFR 240.14c-1 through 17 CFR 240.14c- 101).

13 17 CFR §240.3a12-3(b).

- FPIs are exempt from the insider reporting and short swing profit provisions and short sale prohibitions of Section 16 of the Exchange Act.[14]
- Sarbanes-Oxley Act CEO/CFO certifications are only required from reporting FPIs in their annual filings, whereas domestic issuers must also include such certifications on a quarterly basis.[15]
- FPIs are not subject to Regulation FD (Fair Disclosure)[16] or, in many cases, Regulation G (Non-GAAP financial measures).[17]
- FPIs are allowed to comply with certain home country corporate governance standards under NYSE and Nasdaq rules.

A foreign issuer that does not qualify for FPI status will not benefit from the foregoing accommodations and is treated as a domestic issuer under SEC rules and regulations and stock exchange listing rules.

Potential Regulatory Responses

Because of the factors noted above, the SEC is soliciting public comments on whether accommodations afforded to FPIs should continue to apply to the foreign issuers currently captured by the FPI definition or if the definition should be amended to reflect recent changes to the FPI population. The SEC is specifically soliciting public input on six possible approaches to amending the FPI definition, as detailed below. For each of these approaches, the Concept Release poses specific questions (69 in total, many of which are multiple part) on which the SEC is seeks input.

1. *Update the Existing FPI Eligibility Criteria* — Noting that the current FPI definition was intended to determine whether an issuer is an "essentially U.S. issuer," the SEC is soliciting comments as to whether it should amend the FPI definition by, for example, lowering the existing 50% threshold of U.S. holders in the shareholder test, above which a foreign issuer would need to apply the business contacts test to be eligible for FPI status and/or revising the existing list of criteria under the business contacts test by either adding new criteria or revising the existing threshold for assets located in the United States.

2. *Foreign Trading Volume Requirement* — Another potential approach to revising the FPI definition, either as an alternative or in addition to updating the existing FPI eligibility criteria, would be to add a foreign trading volume test. For example, an amended definition could require that FPIs assess their foreign and U.S. trading volume on an annual basis and have a certain percentage of the trading volume of its securities in a market or markets outside the United States over the preceding 12-month period. The SEC estimates

[14] 17 CFR §240.3a12-3(b).
[15] 17 CFR §240.3a-14; 17 CFR §240.15d-14.
[16] 17 CFR §243.101(b).
[17] 17 CFR part 244.

that if it imposed even a 1% foreign trading volume requirement, over half of current 20-F FPIs would lose their FPI status.

3. *Major Foreign Exchange Listing Requirement* — Another potential approach would be to require FPIs to be listed on a major foreign exchange, particularly if the SEC imposes a foreign trading volume requirement. Adding a major exchange listing requirement might help to ensure that FPIs are subject to meaningful regulation and oversight in a foreign market and increase the market incentives to provide material and timely disclosure to investors. In determining which exchanges fit the definition of a "major foreign exchange," one approach would be for the SEC to maintain a list of foreign exchanges whose listing requirements meet certain specific criteria, which could include a threshold of total market size, corporate governance requirements, reporting and other public disclosure requirements, enforcement authority, or other factors.

4. *SEC Assessment of Foreign Regulation* — Yet another approach suggested by the SEC would bet to require that each FPI be (1) incorporated or headquartered in a jurisdiction that the SEC has determined to have a robust regulatory and oversight framework for issuers and (2) subject to such securities regulations and oversight without modification or exemption. An example cited by the SEC would be a jurisdiction where the FPI must file annual reports with financial statements audited by an independent auditor and reports disclosing interim financial results and material events, that has liability provisions for material misstatements and omissions and an effective enforcement mechanism, and that conducts regular reviews of public filings.

5. *Mutual Recognition Systems* — The SEC also suggested developing a new system of mutual recognition, with respect to Securities Act registration and Exchange Act periodic reporting, for issuers from selected foreign jurisdictions. This would be similar to the limited mutual recognition approach for Canadian issuers under the MJDS, which permits eligible U.S. and Canadian issuers to conduct cross-border securities offerings and fulfill their reporting requirements primarily by complying with, and using disclosure documents prepared in accordance with, home country securities regulations.

6. *International Cooperation Arrangement Requirement* — The final approach outlined by the SEC would require an FPI to certify that it is either incorporated or headquartered in, and subject to the oversight of a signatory authority of, a jurisdiction in which the foreign securities authority has signed the IOSCO MMoU or the Enhanced MMoU.[18] While the MMoUs are intended to facilitate the provision of information and enforcement assistance between securities authorities, a robust disclosure system is not a prerequisite to

[18] "MMoU" stands for a Multilateral Memorandum of Understanding Concerning Consultation, Cooperation, and the Exchange of Information. 136 and 27 authorities are signatories to the MMoU and the Enhanced MMoU, respectively. *See* https://www.iosco.org/v2/about/?subSection=mmou&subSection1=signatories and https://www.iosco.org/v2/about/?subSection=emmou&subSection1=signatories.

becoming a signatory. As such, the SEC notes that this approach would likely only function as a complement to one or more of the other five approaches.

In connection with potential changes to the FPI definition, the SEC recognized that the resulting consequences to FPIs may warrant additional regulatory action. To assist in its analysis of these consequences, the SEC is also soliciting public comment on, among other things, whether the SEC should provide a longer transition period or financial reporting accommodations to former FPIs and whether certain subsets of the current FPI population should be exempt from changes to the FPI definition.

Implications for MJDS Companies

In the Concept Release, the SEC specifically notes that it excluded MJDS companies from its data analysis because it had previously compared Canadian securities regulations to U.S. regulations in adopting the MJDS and determined, at that time, that permitting certain Canadian issuers to register securities under the MJDS using their home country jurisdiction disclosure documents was in the "public interest and fully adequate for the protection of U.S. investors." In addition, the Concept Release also notes that the SEC is not currently soliciting comments for MJDS issuers, however, any changes to the definition of FPI could also impact the 140 or so current MJDS companies, particularly if the SEC updates existing FPI eligibility criteria or adds a major foreign exchange listing or foreign trading volume requirement.

Comment Process

Comments should be received on or before September 8, 2025 and may be submitted electronically through the SEC's comment form (https://www.sec.gov/rules/submitcomments.htm) or by email (rule-comments@sec.gov) or mail to: Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. All submissions should refer to File Number S7-2025-01. This file number should be included on the subject line if email is used. The SEC will post all comments on its website (https://www.sec.gov/rules/proposed.shtml).

If you are an FPI that might be impacted by any of the changes suggested by the SEC or a foreign issuer thinking of going public in the United States, you should consider submitting a comment letter, even if you don't comment on all of the SEC's questions. Please feel free to call any one of the authors of this CAPITAL LETTERS if you require additional information or would like assistance in submitting a comment letter.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

John Ablan	Edward Best	Jennifer Carlson	Susan Rabinowitz
312 728 9015	312 728 9158	312 728 9157	312 728 9087
jablan@willkie.com	ebest@willkie.com	jcarlson@willkie.com	srabinowitz@willkie.com

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