Governance & Securities Alert

Weil

From the Public Company Advisory Group of Weil, Gotshal & Manges LLP

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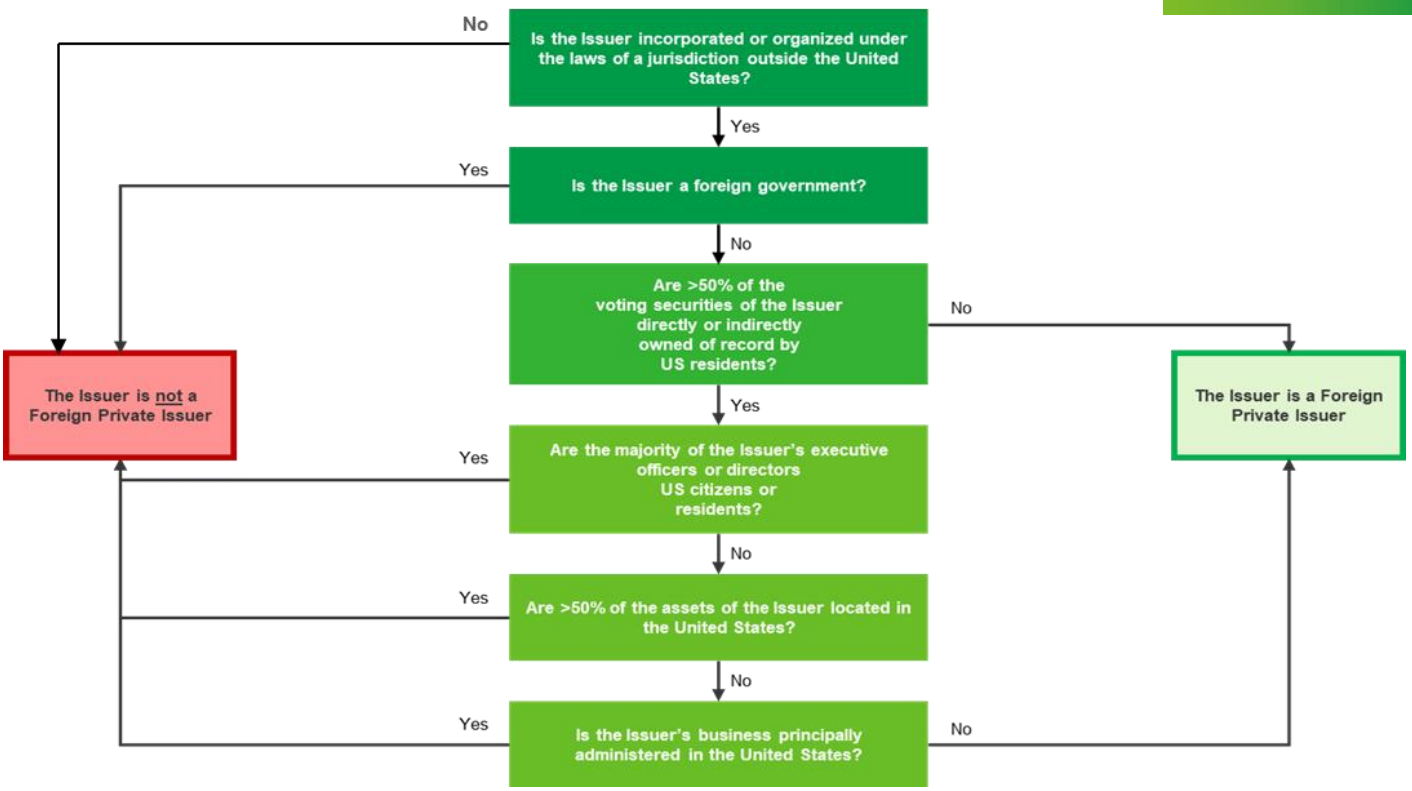
SEC Issues Concept Release Seeking Comment on the Definition of Foreign Private Issuer

What the SEC's Re-Think of FPI Status Could Mean for Non-U.S. Issuers

On June 4, 2025, the Securities and Exchange Commission ("SEC") published a wide-ranging concept release inviting public comment on whether, and if so how, to revise the definition of *foreign private issuer* ("FPI"). The FPI definition is the key to the extensive accommodations under SEC rules that reduce U.S. reporting, governance, and liability burdens for qualifying non-U.S. companies. The FPI accommodations put in place by the SEC had been based on its understanding that most FPIs would be subject to meaningful disclosure and other regulatory requirements in their home country and that their securities would be traded in foreign markets. However, in light of pronounced shifts in the composition and trading of the population of FPI companies, the SEC is questioning whether the current framework continues to preserve appropriate investor protections while balancing the need by certain non-U.S. issuers for accommodations from SEC rules to reduce burdens arising from duplicative or conflicting domestic and foreign requirements. The public comment period on the release is open until September 8, 2025. In this Alert we highlight important elements of the release and describe the significant impacts that future SEC rule changes could have on public and private non-U.S. issuers.

Current Definition and Principal Accommodations

Under current SEC rules, in order to qualify as a FPI, a company must be incorporated outside the United States and have more than 50% of its voting securities owned of record by non-U.S. residents (the "shareholder test"). If the company is domiciled outside the United States, but more than 50% of its voting securities are held by U.S. residents (i.e., the company fails the shareholder test), the company can still qualify as a FPI provided that none of the following are true (the "business contacts test"): (i) the majority of the company's executive officers or directors are U.S. citizens or U.S. residents; (ii) more than 50% of its assets are located in the United States; or (iii) the company's business is administered principally in the United States. The foregoing can be summarized by the following flowchart.



A company that continues to qualify as an FPI as of the last business day of its second fiscal quarter each year retains FPI status for the ensuing year.

As compared to FPIs, U.S. companies are subject to, among others, the following more onerous requirements under SEC rules and/or NYSE/Nasdaq exchange listing rules:

- More disclosure obligations (Forms 10-K, 10-Q, and 8-K and Schedule 14A rather than Forms 20-F/40-F and Form 6-K);
- More restrictive governance rules regarding board/committee independence and composition, and mandatory shareholder approval of certain transactions and equity incentive plans;
- Domestic proxy rules relating to solicitations of shareholders and related disclosure requirements (i.e., executive compensation, say-on-pay, pay ratio, pay-versus-performance and golden parachute);
- Required to report in U.S. dollars under U.S. GAAP, rather than in local currency under a variety of accounting standards (such as local GAAP and IFRS);
- Subject to selective disclosure rules (i.e., Regulation FD); and
- Insiders subject to Section 16 short-swing liability and reporting rules.

Why the SEC is Re-Evaluating the FPI Definition

According to the concept release, significant changes have occurred in the FPI population over the last 20 years in terms of jurisdictions of incorporation and headquarters. In 2003, Canada and the United Kingdom represented the most common FPI jurisdictions for both incorporation and headquarters. In 2023, the Cayman Islands was the most common jurisdiction of incorporation, with China being the most common jurisdiction for headquarters. The concept release also notes that a majority of FPIs trade primarily or exclusively on markets in the United States rather than in their home country. The release observes that an increasing percentage of equity securities of FPIs that file

Form 20-F "trade almost entirely in U.S. capital markets, rather than foreign markets, which raises questions about the extent to which such issuers are regulated in foreign markets. While the staff's analysis indicated that these documented trends are driven by 20-F FPIs with relatively small market capitalizations, the number of these FPIs is significant, and their share of aggregate global market capitalization may increase over time." These trends, according to the SEC Staff, "may have resulted in less information . . . being made available to U.S. investors than in the past," which 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 in FPIs' securities or competitive implications for domestic issuers and other FPIs."

Approaches on Which the SEC Seeks Input

The concept release seeks public input on the following possible approaches to the FPI definition:

- ***Update the Existing FPI Eligibility Criteria.*** The current FPI definition would be amended to lower the existing 50% threshold of U.S. holders in the shareholder test and/or revise 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.
- ***Add a Foreign Trading Volume Requirement.*** The current FPI definition would be amended, either as an alternative or in addition to updating the existing eligibility criteria, to add a foreign trading volume test. The SEC's rationale is that if a meaningful amount of an FPI's securities are traded on a non-U.S. market, the FPI could be more likely to be subject to home country oversight, disclosure and other regulatory requirements that merit accommodation than issuers whose securities are primarily traded in the United States. A number of FPIs could be affected by the trading volume requirements. According to the Staff's estimates, instituting non-U.S. trading volumes from 1% to 50% would affect 55% to 75% of sampled FPIs.
- ***Add a Major Foreign Exchange Listing Requirement.*** The current FPI definition would be amended to add a major foreign exchange listing requirement, which the SEC believes may 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. The Staff is seeking comment on what should constitute a "major" foreign exchange.
- ***Incorporate an SEC Assessment of Foreign Regulation Applicable to the FPI.*** The current FPI definition would be amended 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" and (2) subject to such securities regulations and oversight "without modification or exemption". The SEC concept release acknowledges that such an assessment could create a significant undertaking for the Staff.
- ***Establish a New Mutual Recognition Systems.*** Touting the success of Multijurisdictional Disclosure System with Canada, the Staff is seeking comments on opportunities to develop new systems of mutual recognition with other select foreign jurisdictions. However, the Staff acknowledges that it would take time to assess jurisdictions on a case-by-case basis.
- ***Add an International Cooperation Arrangement Requirement.*** The current FPI definition would be amended to add a requirement that an FPI certify that it is either incorporated or headquartered in, and subject to the oversight of the signatory authority of, a jurisdiction in which the foreign securities authority has signed the IOSCO Multilateral Memorandum of Understanding Concerning Consultation, Cooperation, and the Exchange of Information or the Enhanced MMoU.

Potential Ramifications and Considerations

Although only a concept release, the potential consequences of a narrower FPI definition could be far reaching and would impact both existing and future public and private non-U.S. issuers.

- ***Offering, Reporting and Corporation Governance Obligations.*** The potential changes to the FPI definition can impact financial statements preparation (i.e., U.S. GAAP versus IFRS), initial public offering and follow on offering planning, disclosure requirements, ongoing reporting obligations (including proxy statements and executive compensation disclosure), stock exchange governance and shareholder approval exemptions availability and other processes.
- ***Losing Section 12(g) Exemption.*** Changing the criteria that underlie FPI status could potentially cause non-U.S. listed foreign companies to no longer qualify for the Rule 12g3-2 exemption and be required to become a SEC reporting company.
- ***Foreign Exchange Forum Shopping.*** To the extent the SEC adopts either a foreign trading volume requirement or a major foreign exchange listing requirement, well developed foreign stock exchanges (i.e., Toronto Stock Exchange, London Stock Exchange, and others) may see an uptick in listings for those companies still seeking to take advantage of SEC FPI accommodations.
- ***Removing Section 16 Accommodation Available to FPIs.*** Though not explicitly discussed in the concept release, there has been recent political momentum to revoke the accommodation available to FPIs from complying with Section 16 of the Exchange Act ("Section 16"). SEC Commissioner Crenshaw echoed similar sentiments during the open meeting, noting that "[r]ecent bi-partisan legislation and studies have put on display the inequities around trading among insiders at foreign private issuers, which show opportunistic trading resulting in significant loss avoidance by foreign insiders. This appears to be the case especially in connection with foreign insiders in certain non-extradition countries such as China and Russia. Why are U.S. insiders held to account for insider trading, when (it appears) foreign insiders may do so with impunity? This does not to me seem the correct policy result." Removing the Section 16 accommodation would represent a significant change in how FPIs and their directors, officers and 10% shareholders are treated under Section 16 and would impose a substantial new compliance burden on FPIs and their officers, directors and majority shareholders, including being required to file insider reports on Form 4 with the SEC within 2 business days of most transactions in issuers' securities and being subject to Section 16(b) short-swing profit liability.
- ***Length of Transition Period.*** Although Commissioner Hester intimated that a transition period would likely be beneficial for any FPI definitional changes, the length and form of such transition accommodations will be important. For example, the SEC is seeking comment on whether the SEC should "reduce the number of years of financial statements required to be presented during the transition period or require application of U.S. GAAP only in future periods with transition provisions such as an opening balance sheet?"

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If you have questions concerning the contents of this Alert, or would like more information, please speak to your regular contact at Weil or to any of the following authors:

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