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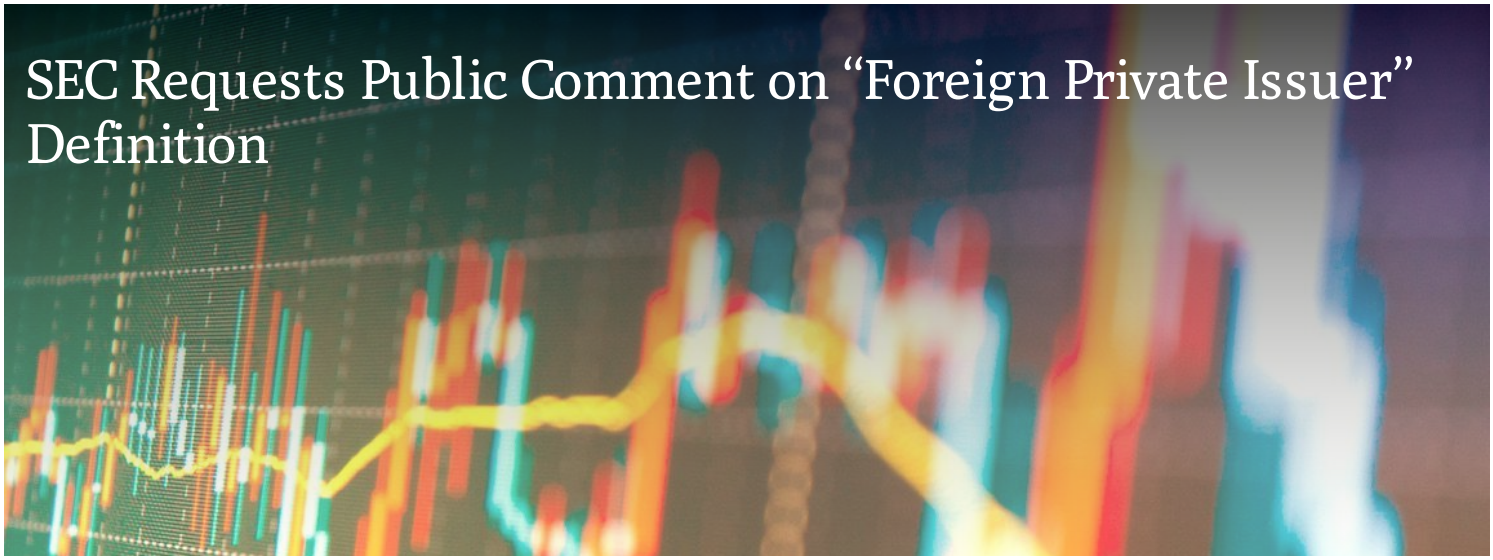

SEC Requests Public Comment on "Foreign Private Issuer" Definition

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On June 4, 2025, the Securities and Exchange Commission (the SEC) published a concept release inviting public comment on whether, and how, it should revise the definition of "foreign private issuer" (FPI) in light of changes in the demographics of FPIs in the years since the definition was originally adopted. Changes to the FPI definition could have significant implications for certain types of non-U.S. companies accessing U.S. capital markets, principally those incorporated or headquartered in jurisdictions with less meaningful disclosure and other securities regulations or less stringent oversight by regulators and stock exchanges.

Under current SEC rules, a company qualifies as an FPI:

1. if fifty percent or less of its voting securities are held, directly or indirectly, by U.S. residents (the shareholder test), or
2. if more than fifty percent of its voting securities are held by U.S. residents, none of the following conditions are satisfied: (a) a majority of its officers or directors are U.S. citizens or residents; (b) more than half of its assets are located in the United States; or (c) its business is administered principally in the United States (the business contacts test).

The SEC first introduced FPI status in the 1970s to encourage non-U.S. companies to list on U.S. exchanges. FPI status allows foreign issuers access to U.S. capital markets while avoiding the full regulatory burden imposed on U.S. companies. The principal rationale was that non-U.S. companies are already subject to regulation in their home jurisdictions and should not face duplicative compliance obligations in the United States.

FPI status provides significant regulatory relief to non-U.S. companies, including, among others:

- Exemption from the SEC's proxy rules and say-on-pay requirements allowing shareholders to have advisory votes on executive compensation;
- Ability to file financial statements using either International Financial Reporting Standards (IFRS) without reconciliation, home country GAAP with reconciliation or US GAAP;
- Later filing deadlines for annual reports, no quarterly reporting obligations and more limited current reporting obligations on Form 6-K;

- Relief from insider ownership reporting and short-swing liability rules under Section 16 of the Securities Exchange Act of 1934; and
- Exemption from Regulation FD rules on selective disclosure of material non-public information.

These accommodations reflect the belief that non-U.S. companies that are subject to meaningful disclosure and other securities regulation in their home countries should not be subject to the full scope of the U.S. disclosure and regulatory regime. While the qualifications for FPI status, and the reasoning behind it, have remained largely unchanged, the SEC's concept release highlights how the FPI population has evolved over time. The release identifies two major trends:

- The dominant jurisdictions of FPIs have shifted from Canada and the United Kingdom, in terms of jurisdiction of incorporation and location of headquarters, in 2003 to the Cayman Islands, for jurisdiction of incorporation, and China, for location of headquarters, in 2023, with 48% of FPIs having different jurisdictions for incorporation and headquarters in 2023, compared to only 7% in 2003; and
- As of 2023, approximately 55% of reporting FPIs had little to no trading on non-U.S. markets and appear to maintain their listings only on U.S. securities exchanges, effectively making the United States their exclusive or primary trading market.

These shifts suggest that FPI status and the related accommodations may no longer be serving their original purpose. In many cases, the SEC believes that companies qualifying for FPI status are not being subject to meaningful disclosure or other regulatory oversight in their home country jurisdictions. The SEC is increasingly concerned that this regulatory mismatch may undermine investor protections and reduce market transparency. In his statement on the release, Chairman Paul Atkins observed:

> When the United States is effectively a foreign company's exclusive or primary trading market and the company is not subject to meaningful disclosure requirements or securities law oversight in its jurisdiction of incorporation or headquarters, careful consideration should be given to whether the foreign company is eligible for accommodations under the federal securities laws that are unavailable to U.S. companies.

Among the broader questions the SEC raised for comment are the following:

1. Does the shift in the characteristics of the FPI population warrant a reassessment of the FPI definition, and if so, what considerations should be taken into account? Are there mitigating factors?
2. Given the accommodations afforded to FPIs, are U.S. investors in issuers currently eligible for FPI status sufficiently protected?
3. Are U.S. investors currently invested in FPIs that utilize a China-based issuer, variable interest entity (CBI VIE) structure or similar structures sufficiently protected, and do they have adequate information to evaluate the risks?
4. Are U.S. issuers currently at a competitive disadvantage as compared to reporting FPIs listed exclusively in the United States and incorporated in jurisdictions without meaningful disclosure and other regulatory requirements in their home country?
5. When U.S. investors trade in shares of non-U.S. issuers listed solely on non-U.S. exchanges, what transaction costs do they incur and are they restricted from trading on non-U.S. exchanges?

The concept release does not propose specific rule changes but outlines six potential approaches to revising the FPI definition and invites public input and comment on the following approaches:

1. Updating the existing eligibility criteria to update the shareholder test and/or the business contacts test—for example, by lowering the U.S. shareholder ownership threshold or adding new business contacts criteria.
2. Adding a non-U.S. trading volume requirement, evaluated annually, to maintain FPI status.
3. Requiring FPIs to maintain a primary listing on a major non-U.S. exchange to ensure that the FPIs are subject to meaningful regulation and oversight in a non-U.S. market.

4. Incorporating a non-U.S. regulatory assessment, which would require FPIs to be incorporated or headquartered in a jurisdiction that the SEC has determined to have a robust regulatory and oversight framework and to be subject to such securities regulation and oversight without modification or exemption. This would allow the SEC to evaluate whether the issuer's home jurisdiction provides adequate investor protections.
5. Establishing mutual recognition systems with respect to Securities Act registration and Exchange Act periodic reporting through expanded reciprocal agreements with select non-U.S. jurisdictions, like the mutual recognition approach for Canadian issuers under the Multijurisdictional Disclosure System (MJDS).
6. Conditioning FPI status on being incorporated or headquartered in a jurisdiction that is a signatory to an international cooperation arrangement, such as the IOSCO Multilateral Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information (MMoU) or the Enhanced MMoU, both of which include information-sharing protocols between the SEC and non-U.S. regulators signatory to these nonbinding protocols.

The 90-day comment period will end on September 8, 2025, and will inform the SEC's next steps and any future rulemaking. While there is no set timeline for adopting new rules, the concept release signals the Commission's growing interest in revisiting how FPI status is defined and regulated in today's capital markets.

Winston's Capital Markets & Securities Law Watch will continue to monitor developments on SEC guidance and FPI status, and we will provide our readers with additional updates as they become available.

For more information, or if you have any questions, please contact the authors of this blog post or your regular Winston contacts.

Grace Goodwin, Summer Associate, also contributed to this blog.

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