SEC REASSESSES FOREIGN PRIVATE ISSUER ELIGIBILITY

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US Corporate Alert

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Earlier this month, the US Securities and Exchange Commission (SEC) issued a concept release to solicit public comment on potential changes to the definition of a foreign private issuer (FPI), marking the SEC's first review of this regulatory framework since 2008. The proposed revisions introduce more stringent standards for FPI qualification, which may lead to a decrease in eligible companies.

Currently, FPIs are afforded significant accommodations, including the following:

- Reduced SEC reporting obligations.
- The ability to prepare financial statements in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board instead of US Generally Accepted Accounting Principles.
- Exemptions from Section 16 reporting requirements, federal proxy rules, and Regulation Fair Disclosure.

The potential loss of FPI status, and the resulting loss of these accommodations, could have a material impact on current and future FPIs.

The SEC noted in its release that this review was prompted by the significant changes in the FPI population over the past two decades. The current FPI definition and accommodations were adopted with the understanding that most FPIs would be subject to meaningful disclosure and regulatory requirements in their home countries, and that their securities would be traded in foreign markets. As issuers have shifted away from jurisdictions of incorporation and headquarters that have more significant regulatory requirements for issuers, such as Canada and the United Kingdom, toward jurisdictions with lesser requirements, such as the Cayman Islands and China, the SEC has raised the question as to whether the current FPI definition still benefits its intended issuers while continuing to protect investors and promote capital formation.

The SEC requested comments on 69 different proposals, including:

Updating Existing FPI Eligibility Criteria

Lowering the 50% ownership threshold in the “shareholder test” or revising the “business contacts test” criteria to better identify issuers with substantial connections to the United States.

Adding a Foreign Trading Volume Requirement

Require FPIs to have a certain percentage of their securities' annual trading volume occur in markets outside the United States.

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Adding a Major Foreign Exchange Listing Requirement

Require FPIs to be listed on a “major foreign exchange” to ensure they are subject to robust oversight in a foreign market. The SEC would define what constitutes a “major” exchange based on criteria like market size, corporate governance, disclosure, and enforcement authority.

SEC Assessment of Foreign Regulation

Limiting FPI status to issuers incorporated or headquartered in a jurisdiction that the SEC has determined has sufficient securities regulation and oversight to protect US investors.

Establishing New Mutual Recognition Systems

Similar to the current Multijurisdictional Disclosure System with Canada, new systems could be developed allowing FPIs from selected foreign jurisdictions to comply with home country securities regulations if they offer “comparable protections” to US investors.

APPLICABILITY TO NEW VERSUS EXISTING FPIS

The SEC is considering whether any of these contemplated changes should apply only to new FPIs registering for the first time to eliminate transition costs for the existing FPI population. Alternatively, existing FPIs might be permitted to rely on current FPI eligibility requirements indefinitely or become subject to any changes to the FPI definition following a transition period, the parameters of which would need to be determined.

NEXT STEPS

Although there is uncertainty surrounding the specifics of any potential changes in the FPI framework, FPIs are encouraged to track these potential changes, assess how their existing structure, trading patterns, and home country regulatory framework aligns with the proposed new criteria, and weigh the significant compliance and strategic implications of potentially losing FPI status.

The SEC invites public comments on all aspects of the concept release, including potential costs, benefits, and competitive impacts of any changes. Comments are due on or before 8 September 2025, (90 days after publication in the Federal Register).

For further information regarding the SEC's concept release or its potential impact, please contact our team.

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