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THE SEC'S SPOTLIGHT ON FOREIGN PRIVATE ISSUERS

A concept release and a new law passed by Congress may indicate that the SEC is rethinking its regulatory approach to foreign private issuers. This article discusses these developments in detail. It concludes with a note on new SEC proposals to reform public company capital raising and reporting

By Paul M. Dudek *

When it comes to regulating companies that trade in the US capital markets, the US Securities and Exchange Commission ("SEC") primarily focuses on US domestic issuers, which constitute the large majority of public companies that trade in those markets. From time to time, however, the SEC has paid special attention to foreign companies whose securities trade in the United States, with the purpose of considering the extent to which SEC regulations should apply to foreign companies.

Over the past year, the SEC has undertaken such a periodic examination of foreign private issuers ("FPIs")[1], especially with respect to their treatment under the principal federal securities laws of the United States that apply to publicly traded companies. While in general those laws — the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act") — do not distinguish between issuers based on whether they are incorporated under US law or non-US law, the rules adopted by the SEC under those statutes contain a number of specific provisions relating to FPIs.[2]

This article discusses two recent significant initiatives affecting FPIs: the SEC's Concept Release on Foreign Private Issuer Eligibility ("Concept Release");[3] and the enactment by the US Congress of the Holding Foreign

[1] An FPI is an entity (other than a foreign government) incorporated or organized under the laws of a foreign jurisdiction unless: (1) more than 50% of its outstanding voting securities are directly or indirectly owned of record by US residents (commonly referred to as the shareholder test) and (2) any of the following applies: (i) the majority of its executive officers or directors are US citizens or residents; (ii) more than 50% of its assets are located in the United States; or (iii) its business is administered principally in the United States (commonly referred to as the business contacts test). Securities Act Rule 405 and Exchange Act Rule 3b-4(c). In the Concept Release, the SEC indicates that over 1,110 FPIs were registered with the SEC as of the end of 2023.

[2] Many of these SEC rules affecting FPIs are discussed in "Current SEC Initiatives Impacting Foreign Private Issuers," 55 Rev. of Securities & Compliance Reg'n. 179 (Sept 5, 2018), "The Unique Impact of Recent SEC Rules on Foreign Private Issuers," 56 Rev. of Securities & Compliance Reg'n. 227 (Sept 27, 2023), and "FPIs in SPAC Land — Considerations for Foreign Private Issuers in Connection with SPACs", 57 Rev. of Securities & Compliance Reg'n. 137 (Aug 21, 2024), all by the author.

[3] Concept Release on Foreign Private Issuer Eligibility, Rel. No. 33-11376 (2025).

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Insiders Accountable Act ("HFIA Act").[4] This article also notes two recent SEC rule-writing proposals, which "are among the first important steps towards transforming the SEC's regulatory framework for public companies,"[5] and the SEC's determination to exclude FPIs from those proposals.

BACKGROUND

Since its early days, the SEC has considered how the US federal securities laws should apply to non-US companies whose securities may trade in the United States.[6] One of the key early determinations by the SEC was to exempt foreign companies from the provisions of the proxy rules and Section 16 under the Exchange Act.[7] Another was the development of the SEC's approach with respect to the registration requirement under Exchange Act Section 12(g) and the implementation of the exemptive scheme under Exchange Act Rule 12g3-2.[8]

In general, the Securities Act and the Exchange Act, and the SEC's regulations under those laws, are directed at companies that are incorporated or organized under the laws of one of the 50 states, the District of Columbia, or a US territory or possession. The SEC has observed that issuers which are organized or incorporated outside the United States (referred to generally as non-US companies or foreign companies) face a number of unique challenges with respect to such laws and rules. In that light, the SEC has crafted a number of special provisions designed to address those challenges. A threshold question with this approach, therefore, is identifying the companies that should be eligible (and conversely those that should not be eligible) for this approach.

CONCEPT RELEASE ON FOREIGN PRIVATE ISSUER ELIGIBILITY

On June 4, 2025, the SEC published the Concept Release, requesting public comment on the eligibility criteria for companies to be considered an FPI.[9] These eligibility factors are important because companies rely on these criteria when making the determination that they qualify as an FPI and can use the special provisions that the SEC allows for FPIs.[10]

History and Data Relating to FPIs. The Concept Release begins with a brief history of the SEC's approach to foreign issuers. That approach has not remained static but has evolved to preserve appropriate investor protections and to implement certain accommodations for FPIs that are designed to reduce burdens from duplicative or conflicting requirements. The Concept Release indicates that the foundation of the current FPI eligibility criteria dates from 1983, when the SEC formally adopted criteria under which a foreign

[4] Sec. 8103 of the National Defense Authorization Act for Fiscal Year 2026 (cited as the Holding Foreign Insiders Accountable Act), Pub. L. No. 119060 (Dec 18, 2025).

[5] Paul S. Atkins, Chairman, SEC, *Statement on Proposing Releases for Enhancement of Emerging Growth Company Accommodations and Simplification of Filer Status for Reporting Companies, and Registered Offering Reform,* May 19, 2026, *available at* https://www.sec.gov/newsroom/speeches-statements/atkins-statement-on-proposing-releases-for-enhancement-of-emerging-growth-company-accommodations-and-simplification-of-filer-status-for-reporting-companies-and-registered-offering-reform-051926.

[6] Data is scarce from this time period, but SEC releases indicate that some non-US companies were listed on US stock exchanges at the time of enactment of the Securities Act and the Exchange Act.

[7] Rel. No. 34-412 (1935).

[8] Rel. No. 34-8066 (1967).

[9] A concept release is a regulatory publication that does not formally propose new rules but instead is a means by which the SEC describes a specific question arising under its regulations and seeks public input on alternative approaches to addressing the question at hand.

[10] For example, an FPI is permitted to use International Financial Reporting Standards as issued by the International Accounting Standards Board as its basis of accounting in financial statements filed with the SEC. The consequence of not qualifying as an FPI, and having to prepare financial statements in accordance with US generally accepted accounting standards, could be time-consuming and costly.

issuer would be considered an "essentially US issuer" (*i.e.,* although incorporated in a non-US jurisdiction was primarily owned and/or operated in the United States) and therefore treated in the same fashion as US domestic companies, and those foreign issuers which would qualify as an FPI.

The historic rationale for providing certain accommodations to FPIs has been an implicit assumption that a company meeting the FPI attributes would be listed on a stock exchange outside the United States and thus subject to disclosure and other regulatory requirements in a foreign jurisdiction. Although the SEC never published data at the time, it appears that the vast majority of registrants that qualified as FPIs were in fact listed outside the United States and that US stock exchanges mostly served as a second market for FPIs.

The Concept Release, then, contains an in-depth analysis of how the characteristics of the FPI population registered with the SEC has changed over the past 20 years, and especially over the last few years. Among other matters, the analysis looked at the jurisdictional makeup of FPIs registered with the SEC and the percentage of FPIs' global trading volume that occurred in the United States, and how these characteristics have changed over the years.

The analysis found, among other trends and changes, that companies incorporated in the Cayman Islands now account for a large number and percentage of FPI registrants and that companies headquartered in China now account for a large number and percentage of FPI registrants. Perhaps most significant was the finding that nearly 55% of registered FPIs were solely listed in the United States.

Reassessment of FPI Eligibility. As explained in the Concept Release, these changes in the FPI population led the SEC to consider whether the current eligibility criteria under the FPI definition continue to be appropriately tailored. Especially with respect to the large percentage of FPIs for which the United States is the primary trading market, the implicit assumption that FPIs are subject to disclosure requirements and meaningful oversight outside the United States may no longer be valid.

As part of this consideration, the Concept Release seeks comments on whether the current FPI eligibility conditions should be modified in light of the changes to the population of FPIs that are registered with the SEC. The Concept Release outlines several alternative approaches to changing the FPI definition:

- Update the current FPI eligibility criteria. The SEC could revise the conditions — *i.e.,* the shareholder test and one or more parts of the business contacts test in the FPI definition — by (1) reducing the percentage of US holders in the shareholder test (now at 50%) or (2) changing the criteria under the business contacts test to (a) add new conditions or (b) revise the current test for assets located in the United States or the test relating to citizenship and residency of officers and directors.

- Add a foreign trading volume requirement. The SEC could require that a certain percentage of worldwide trading volume in an FPI's shares must take place outside the United States. The SEC estimates that requiring that at least 1% of a company's share trading volume be on a foreign stock exchange would cause over half of current FPI registrants to lose FPI status.

- Add a major foreign stock exchange listing requirement. Similar to the foreign trading volume requirement, the SEC could require an FPI to be listed on a major foreign stock exchange, which would help ensure that FPIs are subject to meaningful regulation. The SEC solicited comment on how major stock exchanges would be designated by the Commission or its Staff and the appropriate criteria to be used in such designation.

- Add an SEC assessment of foreign regulation. Similar to the major foreign stock exchange listing requirement, the SEC could require an FPI to be incorporated or headquartered in a jurisdiction that it has determined to have a robust oversight and regulatory framework for issuers.

- Establish new mutual recognition arrangements. Somewhat separate from the discussion of FPI eligibility, the SEC requested comment on whether it should implement additional mutual recognition arrangements for issuers similar to the existing US-Canadian Multijurisdictional Disclosure System ("MJDS"), which allows Canadian and US issuers to conduct securities offerings and fulfill their periodic reporting obligations by complying with, and using disclosure documents prepared under, home country requirements.

- Add a requirement for international cooperation arrangements. The SEC could require FPIs to certify that they are incorporated or headquartered, and subject to oversight, in a jurisdiction in which the securities regulator has signed either the Multilateral Memorandum of Understanding

("MMOU"), or the Enhanced MMOU adopted by the International Organization of Securities Commissions.

Future Action? The data analyzed by the SEC related to FPIs that are registered with the SEC and thus file documents on the SEC's EDGAR system, from which the SEC Staff could readily obtain relevant information. Of course, there are many thousands of foreign companies that are not registered with the SEC and that rely on the current FPI eligibility criteria, for example, when conducting an offering under Regulation S or Rule 144A under the Securities Act or when maintaining the registration exemption provided by Rule 12g3-2(b) under the Exchange Act. If the SEC moves forward with its examination of the FPI regime, it might potentially look to change its rules only for companies that are registered with the SEC rather than the much larger population of FPIs that are not registered with the SEC.

The Concept Release does not commit the SEC to move forward with a formal proposal to revise the FPI definition. The SEC has received over 80 comment letters on the Concept Release, and the SEC Staff has held a number of meetings with interested parties, including trade groups and other associations of FPIs. Since the publication of the Concept Release, Congress enacted the HFIA Act, which may impact the SEC's consideration of whether to make changes relating to FPI eligibility.

HOLDING FOREIGN INSIDERS ACCOUNTABLE ACT

In late December 2025, Congress enacted the HFIA Act, which requires directors and officers of FPIs that have equity securities registered with the SEC to file ownership reports under Section 16(a) of the Exchange Act. Previously, insiders of FPIs were exempt from this filing requirement. Highlights of the legislation include the following:

- The law became effective on March 18, 2026, 90 days after the legislation was signed into law by President Trump.

- The disclosure and filing requirements under Section 16(a) now apply to directors and officers of FPIs but, unlike for US companies, not to persons who beneficially own more than 10% of the class of registered equity securities.

- The law relates only to reporting obligations under Section 16(a) but not to the short-swing profit recapture provisions under Section 16(b) or the short-sale prohibition under Section 16(c) of the Exchange Act.

SEC Rule-writing Under the HFIA Act. The provisions of the HFIA Act became effective by their terms on March 18, 2026, without the need for the SEC to adopt any enabling rules. Nonetheless, under the HFIA Act, Congress directed the SEC to issue final regulations, or wholly or partially amend or rescind existing regulations, to carry out the new law. To that end, on February 27, 2026, the SEC published final rules relating to the HFIA Act.

The regulatory changes effected by the SEC in its rule-writing were largely technical in nature, such as amending Exchange Act rules and the Section 16 forms to make them consistent with the HFIA Act and adding EDGAR fields to the forms for a foreign trading symbol, a postal code, and a country code. The adopting release did give the SEC with an opportunity to provide guidance and address other questions under the HFIA Act. For example:

- The SEC noted in the adopting release that some commenters had suggested that the SEC extend the HFIA Act's new requirements to beneficial owners of more than 10% of the class of registered equity securities of an FPI, as is applicable for US issuers. In a lengthy footnote, the SEC discussed the legislative history of the HFIA Act to support its determination not to do so.

- The SEC clarified that although Section 16(b) does not apply to the directors and officers of FPIs, such directors and officers should not broadly read provisions under Exchange Act Rule 16a-3(g) and Form 4 that provide general relief from reporting certain transactions by reference to "all transactions not exempt from Section 16(b)" (or similar language) as exempting them from reporting transactions otherwise required by Section 16(a).

- For FPIs that have a two-tier board structure such as with a supervisory (non-management) board and a management board, the SEC highlighted that whether an individual serving as a director on either type of board is required to make filings under Section 16(a) would be based on a factual determination based on the definition of "director" under Exchange Act Section 3(a)(7).[11]

[11] Under that definition, a director "means any director of a corporation or any person performing similar functions with

Exemptions, Other Relief, and Guidance relating to the HFIA Act. The HFIA Act broadly allows the SEC to grant exemptions from the new Section 16(a) filing requirement if the SEC determines that a foreign jurisdiction's laws apply substantially similar requirements as under Section 16(a). The SEC has established an internet intake form under which requests for an exemption can be submitted.

Shortly before the March 18 effective date, and then in late May 2026, the SEC published two orders covering certain jurisdictions exempting FPI directors and officers from Section 16(a) reporting.[12] In order to take advantage of the exemption, the FPI must be incorporated in a "qualifying jurisdiction," the insider must be subject to a "qualifying regulation," and any relevant report must be available in English within two business days of home country reporting. The first exemptive order clarified that this public availability could be satisfied through availability on the FPI's website or a foreign regulator's website if the report is in English.

Under the two exemptive orders, the qualifying jurisdictions are:

Australia

Canada

Chile

India

Singapore

South Korea

Switzerland

The United Kingdom

The 30 Member States of the European Economic Area[13]

With respect to qualifying regulations, the exemptions require that directors and officers be subject to and make timely filings under specified requirements in one of those jurisdictions. This includes Article 19 of the European Market Abuse Regulation ("MAR"), as incorporated into the domestic law of each European Economic Area state. The first exemptive order helpfully points out that it is possible to "mix and match" jurisdictions for purposes of relying on the exemptive orders; for example, an insider of a Canadian company that was listed in Germany and who was subject to and made ownership reporting filings under the MAR regime could rely on the exemption.

In addition to the exemptive orders, the SEC Staff also published FAQs addressing a number of transition matters (such as whether transactions in subject securities before the effective date of the HFIA Act were reportable on Form 4) and providing short-term relief for insiders of FPIs (and insiders of US issuers as well) who were stuck in the queue for obtaining EDGAR filing codes in the run-up to March 18.[14] The SEC Staff also provided no-action relief to give an extension for directors and officers of FPIs impacted by the Iran war.[15]

Practice Tips. FPIs can consider taking a number of actions in connection with the new requirements.

Identify directors. In general, identifying persons who serve as directors of an FPI should be a straightforward process. These would be the individuals who serve on the board of directors of the company that is registered with the SEC under the Exchange Act. These individuals may have been elected by the shareholders or appointed to the board through a procedure under home country law or the company's

footnote continued from previous page…

respect to any organization, whether incorporated or unincorporated."

[12] Orders Granting Directors and Officers of Certain Foreign Private Issuers an Exemption from the Filing Requirements of Section 16(a) of the Exchange Act, Rel. Nos. 34-104931 and 34-105517 (2026).

[13] This group includes the 27 Member States of the European Union — Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden — plus Iceland, Lichtenstein, and Norway.

[14] Division of Corporation Finance, Holding Foreign Insiders Accountable Act Frequently Asked Questions, *available at* https://www.sec.gov/about/divisions-offices/division-corporation-finance/holding-foreign-insiders-accountable-act-frequently-asked-questions.

[15] Division of Corporation Finance, no-action letters *Tower Semiconductor* (March 13 and April 17, 2026).

governing documents. As the SEC noted in the adopting release, a more in-depth analysis may be in order if a company has a dual-board structure. A more in-depth analysis may also be in order if a company has individuals who serve as alternate directors, such as those who may serve in a director capacity in the absence of another board member.

Identify officers. SEC rules specify the officers who are subject to Section 16. FPIs will look to make their own determination of which of their senior management are subject to the new filing requirement. Exchange Act Rule 16a-1(f) defines "officer" as "an issuer's president, principal financial officer, principal accounting officer (or, if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer." In this regard, FPIs will want to evaluate the functions of their senior management team to assure that the list of individuals who are required to make Section 16(a) filings as officers is not over-inclusive or under-inclusive.

For example, Item 6.A of Form 20-F requires FPIs to identify their "senior management," which is defined more broadly than under Rule 16a-1(f).[16] In addition, an FPI's public website and its "glossy" annual report to shareholders may name many individuals who serve important roles with respect to the company's operations but who are not necessarily officers who should be subject to Section 16.

Establish an internal compliance regime to assist insider reporting. Virtually any change in beneficial ownership (regardless of how small) must be reported on a Form 4 that is required to be filed with the SEC within two business days of the transaction. Consistent with the approach of US companies, FPIs should develop controls and procedures to assist their insiders in complying with the filing requirements. Although the filing obligation under Section 16(a) is on the individual director or officer, US companies that are registered with the SEC have a long practice of providing support to insiders for these filings. Importantly, if an FPI is listed on a stock exchange outside the United States, any internal compliance process should address purchases and sales of shares on stock exchanges outside the United States.

Develop expertise with respect to reporting conventions. The disclosure requirements under Section 16(a) as applied to the beneficial ownership of securities are complex, especially with respect to employee benefit plans, derivative securities, and various forms of ownership (*e.g.*, trusts, shares held by a spouse or children, etc.). There are key differences between the interpretation of what constitutes beneficial ownership between filings under Section 16(a) and filings under Exchange Act Section 13(d). Under the Section 16(a) disclosure regime, directors and officers must report their "beneficial ownership" of the subject securities, which under Exchange Act Rule 16a-1(a)(2) is defined to include any "pecuniary interest," meaning "the opportunity, directly or indirectly, to profit or share in any profit derived from a transaction in the subject securities."

In contrast, for purposes of making filings under Section 13(d), "beneficial ownership" is defined by reference to Exchange Act Rule 13d-3, meaning voting power or investment power relating to the subject security. As a result, a director or officer may have a pecuniary interest in an issuer's securities (*e.g.,* being the beneficiary of a trust that holds the issuer's securities) that is reportable under Section 16(a) but not reportable under Section 13(d) (*e.g.,* if the director or officer is not a trustee of the trust); and the opposite result is also possible depending on the terms of the trust instrument. Trusts are frequently used in connection with estate planning, and directors and officers of FPIs will want to be aware of how the new application of the Section 16(a) reporting rules will impact this planning.

Further, transactions in subject securities that are reported on Form 4 must be identified with one of 20 specific Transaction Codes (some transactions such as derivatives will have two codes), which requirement is intended to indicate the nature of the transaction in a standardized format. These Codes often refer to specific rules under Section 16, which may not align with share transactions for FPI directors and officers. For example, some rules contemplate shareholder approval that is done in compliance with Exchange Act Section 14, from which FPIs are exempt; other rules refer to qualified plans under the US Internal Revenue Code, which may not be applicable to a non-US share plan for an FPI. Because Form 4s are due to be filed with the SEC within two business days of the subject transactions, FPIs may want to determine the appropriate Transaction Code in advance to avoid last-minute questions and the possibility of missing a deadline.

[16] Form 20-F defines senior management as including members of the company's administrative, supervisory, or management bodies as well as others, including founders for recently established companies.

SEC PROPOSALS TO REFORM PUBLIC COMPANY CAPITAL RAISING AND REPORTING

On May 19, 2026, the SEC proposed sweeping reforms to the process by which US public companies raise capital in SEC-registered offerings and to the filing and disclosure requirements for public companies under the Exchange Act.[17] Among other matters, these proposals, if adopted, would introduce dramatic changes to the shelf registration process in the United States and ease compliance burdens associated with Form 10-K annual reports for a broad range of US public companies.

With respect to both proposals, in light of the Concept Release and the SEC's continuing examination of the FPI regime, the SEC did not propose revisions for FPIs that would parallel those proposed for US companies. In one of the proposing releases, the SEC stated: "Given our ongoing evaluation in this area, we believe it is prudent to limit the effect of the proposed amendments on FPIs at this time, prior to completion of our more comprehensive review of the FPI framework."[18]

CONCLUSION

The SEC has a large number of matters on its rule-writing agenda, including addressing digital assets and the crypto market, promoting capital formation, overseeing disclosure reform for public companies, revisiting the shareholder proposal process, and much more. These matters are in addition to its day-to-day work of enforcement, examinations, and review of filings. Given these other important priorities, further work related to the Concept Release may take some time for the SEC to develop. Yet it is evident that interest in the regulation of FPIs by the SEC continues to remain strong, perhaps as part of a broader initiative that parallels the shelf registration and filer status reforms referred to above.[19] The SEC published its 2026 Regulatory Agenda on July 7, 2026, which included that the SEC Staff is considering recommending that the SEC propose to enhance the regulatory framework governing foreign private issuers. Whether they are already registered with the SEC or planning an IPO, FPIs and their counsel should continue to monitor the SEC's actions for future developments. ■

[17] Registered Offering Reform, Rel. No. 33-11418 (2026); Enhancement of Emerging Growth Company Accommodations and Simplification of Filer Status for Reporting Companies, Rel. No. 33-11419 (2026) (EGC Proposal).

[18] EGC Proposal.

[19] Notably, in the early 1980s, rules adopting modern day shelf registration and incorporation by reference through Securities Act Form F-3 followed similar rules for US companies by several months.