Cooley

SEC Issues Concept Release on Foreign Private Issuer Eligibility

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On June 4, 2025, following observation of the significant increase in the foreign private issuer (FPI) population between 2003 and 2023, the Securities and Exchange Commission (SEC) published a concept release soliciting public comment with respect to potential changes to the definition of "foreign private issuer."

Background and what is a 'concept release'?

Current FPI accommodations were adopted by the SEC in 1935. At that time, the SEC believed that most eligible FPIs would be subject to meaningful disclosure and other regulatory requirements in their home country jurisdictions, and securities of FPIs would be primarily traded in markets outside the US.

However, a recent study completed by the SEC staff in December 2024, and updated in May 2025 (FPI Trends White Paper), revealed significant changes in the population of FPIs over the years in terms of country of incorporation, headquarters and primary trading market location.

In light of the data and analysis published in the FPI Trends White Paper, the SEC has expressed concern that the current FPI regulatory regime may no longer capture the type of issuers that the SEC intended to benefit from current FPI accommodations, which can be quite beneficial to issuers.

As a result, the SEC is soliciting comments on whether the current FPI definition should be amended. Comments are due by September 8, 2025.

Important note: Concept releases are published by the SEC in order to obtain public input in advance of making decisions about a possible rulemaking, and they typically outline a general topic of concern, identify different potential approaches and raise a series of questions for the public to consider and comment on. Market participants, foreign issuers and investors should closely monitor this process as the SEC evaluates potential changes to the FPI definition and accommodations.

Current framework

Under the SEC's current regulatory regime, FPIs benefit from a range of accommodations relative to US domestic issuers – including extended annual reporting deadlines and reduced annual reporting disclosure requirements, exemption from quarterly reporting on Form 10-Q, exemption from compliance with federal proxy rules and Section 16 obligations, ability to use International Financial Reporting Standards (IFRS) or home country generally accepted accounting principles (GAAP) rather than US GAAP, reduced current reporting, exemption from mandatory compliance with Regulation FD, and exemption from non-GAAP disclosure requirements under Regulation G under certain conditions.

The current FPI definition, last substantively revised in 1999, is based on a bifurcated test: A "shareholder test" (less than or equal to 50% of voting securities held by US residents) and a "business contacts test" (considering the citizenship/residency of executive officers and directors, location of assets and principal place of business administration). FPI status is determined annually for reporting issuers and within 30 days prior to filing of initial registration statements under the Securities Act of 1933 or Securities Exchange Act of 1934 for new issuers.

Recent developments in the FPI population

In connection with the concept release, the SEC staff's review focused on the population of FPIs filing annual

reports on Form 20-F from 2003 to 2023, noting several trends:

Jurisdictional shifts

The most common jurisdiction of incorporation among FPIs filing 20-Fs is now the Cayman Islands (33% of all FPIs), while the most common jurisdiction of headquarters is mainland China[1] (22% of all FPIs). The number of FPIs incorporated in the Cayman Islands increased from 13 in 2003 to 322 in 2023, while those headquartered in China[2] rose from 22 to 219. This statistic is interesting in comparison to 2003, where Canada and the United Kingdom dominated in both categories.

Divergence between incorporation and headquarters

The proportion of FPIs with differing jurisdictions of incorporation and headquarters increased from 7% in 2003 to 48% in 2023, driven in part by the rise of China-based issuers[3] utilizing offshore incorporation structures, particularly in the Cayman Islands and British Virgin Islands.

Smaller market cap companies traded primarily in US markets

A majority of FPIs filing 20-Fs now have their equity securities traded almost exclusively in US capital markets. In 2023, approximately 55% of 20-F FPIs had nearly all of their global equity trading volume in the US, an increase from 44% in 2014 and 15% in 2004. These FPIs who trade exclusively on a US exchange tend to have smaller market capitalizations. Notably, the SEC staff also found that these companies are disproportionately incorporated in the Cayman Islands and headquartered in China.

Regulatory concerns

Key concerns raised by the SEC in the concept release focus on the lack of home country regulation coupled with reduced US regulation. An increasing percentage of FPIs who follow 20-F reporting requirements have equity securities that trade almost exclusively on a US stock exchange, as opposed to stock exchanges outside the US. Many of these FPIs – particularly those incorporated in jurisdictions with limited disclosure requirements (e.g., the Cayman Islands, British Virgin Islands, Bermuda and Marshall Islands) – may not be subject to meaningful home country regulation, potentially resulting in less information being available to US investors, which would be important to an investment decision.

In addition, the application of FPI reporting requirements can become circular in some instances and end up requiring less disclosure – for example, there can be situations where an FPI is exempt from both home country reporting requirements and US reporting requirements, as some home country rules exempt issuers with US FPI status. The current regulatory accommodations for FPIs were based, in part, on the expectation that FPIs would be subject to meaningful disclosure and other regulatory requirements in their home country jurisdictions and avoid an unnecessary dual burden. However, the increasing use of offshore incorporation and the concentration of trading in US capital markets may allow issuers to benefit from FPI accommodations without being subject to robust foreign oversight, potentially creating competitive disparities with issuers subject to the US domestic issuer reporting regime.

Potential regulatory responses

The SEC is seeking comment on a range of potential regulatory responses to the issues raised in the concept release, including:

- **Updating FPI eligibility criteria** – Revising the shareholder and business contacts tests, such as lowering the US ownership threshold, adjusting asset location criteria or adding new, relevant criteria.
- **Foreign trading volume requirement** – Adding a foreign trading volume test. For example, an amended definition could require that FPIs assess their ex-US and US trading volume on an annual basis to determine continued eligibility for FPI status. A foreign trading volume test could apply in addition to the current shareholder test or business contacts test and require an FPI to have a certain percentage of the trading volume of its securities in a market (or markets) outside the US over the preceding 12-month period.

- **Major foreign exchange listing requirement** – Requiring FPIs to be listed on a "major foreign exchange" before eligibility to use the current disclosure accommodations in order to ensure meaningful foreign regulation and oversight. The designation of "major foreign exchange" could be determined by the SEC and aligned with designations the SEC currently uses in other contexts, such as Regulation S offerings.
- **Commission assessment of foreign regulation** – Limiting FPI status to issuers incorporated or headquartered in jurisdictions with regulatory regimes deemed "robust" by the SEC.
- **Mutual recognition systems** – Expanding mutual recognition arrangements, similar to the Multijurisdictional Disclosure System (MJDS) with Canada, to other jurisdictions with comparable regulatory standards.
- **International cooperation arrangement requirement** – Conditioning FPI status on the issuer's home jurisdiction being a signatory to the IOSCO[4] Multilateral Memorandum of Understanding (MMoU) or Enhanced MMoU, facilitating cross-border enforcement cooperation.

The SEC also requests input on transition issues, potential impacts on capital formation and competition, the treatment of nonreporting FPIs and American depositary receipt programs, and the costs and benefits of any changes to the FPI regime, including the impact on financial reporting requirements.

Next steps

Public comments to the SEC on this concept release are due September 8, 2025.

For current FPIs, there are no changes required at this time, and therefore no action is required. If you have any questions, please reach out to your Cooley contact.

Cooley will continue to actively monitor these developments and keep you apprised as the situation develops.

Notes

1. This does not include 45 FPIs located in Hong Kong, Special Administrative Region (SAR), or 4.7% of all FPIs.
2. This does not include 30 FPIs located in Hong Kong, SAR, in 2003 and 45 FPIs located in Hong Kong, SAR, in 2023.
3. The SEC defines a China-based issuer as an issuer incorporated or headquartered in mainland China, Hong Kong, SAR, or Macau, SAR.
4. The International Organization of Securities Commissions (IOSCO) is an association of the world's securities regulators that develops, implements and promotes internationally recognized standards for financial markets regulation.

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