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SEC CONSIDERS MODIFICATION OF FOREIGN PRIVATE ISSUER CRITERIA: MAY RESULT IN FEWER FOREIGN COMPANIES QUALIFYING AS FPIS

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On June 4, 2025, the SEC released a Concept Release seeking public comment on potential changes to the definition of foreign private issuer ("FPI"), which changes may have the effect of reducing the number of foreign companies that qualify for such status. Foreign private issuers benefit from reduced disclosure obligations and exemptions from certain Exchange Act rules, making the failure to qualify as an FPI under any modified rules significant. The comment period on potential changes to FPI criteria will remain open for 90 days following the date of the publication of the Concept Release in the Federal Register.

CURRENT FPI CRITERIA AND BENEFITS

Under Exchange Act Rule 3b-4, a foreign private issuer is a foreign issuer, excluding a foreign government, that as of the last business day of its most recently completed second fiscal quarter either:

1. Has 50% or less of its outstanding voting securities directly or indirectly held of record by residents of the U.S.; or
2. Has more than 50% of its outstanding voting securities held of record directly or indirectly by U.S. residents and none of the following apply:

   - The majority of the executive officers or directors are U.S. citizens or residents;
   - More than 50% of its assets are located in the U.S.; or
   - Its business is principally administered in the U.S.

For a new SEC registrant, FPI status is determined within 30 days prior to a company's filing of an initial registration statement under the Securities Act.

There are multiple accommodations and exemptions available to FPIs as compared to non-FPI reporting companies, which are provided by the SEC based on its understanding that most FPIs would be subject to meaningful disclosure and other regulatory requirements in their home country jurisdictions and that FPIs' securities would be traded in foreign markets. Those benefits include:

- 20-F reporting FPIs have reduced reporting obligations under the Exchange Act. Such FPIs need only file an Annual Report on Form 20-F (due within four months of the FPI's fiscal year end) and periodic Form 6-Ks to report certain specified material information regarding itself, which information (i) is disclosed or required to be disclosed pursuant to the law of its jurisdiction of domicile, (ii) the FPI filed or is required to file with stock exchange on which its securities are traded and which is made public by the exchange, or (iii) the FPI distributed or is required to distribute to its security holders, in contrast to non-reporting issuers required to file 10-Ks, 10-Qs and Form 8-Ks.

- FPIs may present their financial statements using (1) International Financial Reporting Standards ("IFRS") as issued by the International Accounting Standards Board ("IASB"), (2) generally accepted accounting principles in the United States ("U.S. GAAP"), or (3) a comprehensive set of accounting principles other than U.S. GAAP and IFRS as issued by the IASB ("home country GAAP") with a reconciliation to U.S. GAAP, whereas domestic issuers are required to use U.S. GAAP.

- FPIs are exempt from the domestic issuer proxy rules, which specify documentation and procedures for soliciting shareholder votes, and the requirements for FPIs to comply with the say-on-pay advisory vote mandate.

- FPIs are exempt from the requirements of Section 16 (including insider Form 3/4/5 reporting of holdings and transactions in the issuer's securities and the short-swing profit rules) and Regulation FD, which addresses selective disclosure.

- Non-GAAP financial measures disclosed by FPIs are exempt from compliance with Regulation G (requiring presentation of most directly comparable GAAP measure and a reconciliation of the non-GAAP financial measure to such GAAP measure), if certain conditions are met.

- Under the NYSE and Nasdaq listing rules, FPIs are exempt from most corporate governance rules in favor of allowing an FPI to comply with its local law requirements.

REASONS FOR POTENTIAL CHANGES

The Concept Release indicated that the SEC's last evaluation of whether the FPI regulatory framework appropriately served U.S. Investors and capital markets was in 2008. The Concept Release noted that significant changes in the global capital markets and characteristics of FPIs had occurred since the last review, including:

- The SEC staff determined that the two jurisdictions most frequently represented among 20-F reporting FPIs in fiscal year 2003 were Canada and the United Kingdom, both in terms of incorporation and the location of headquarters. In contrast, in fiscal year 2023 the most common jurisdiction of incorporation for 20-F reporting FPIs was the Cayman Islands and the most common jurisdiction of headquarters was mainland China. The SEC staff also found a substantial increase in Exchange Act reporting FPIs with differing jurisdictions of incorporation and headquarters, from 7% in fiscal year 2003 to 48% in fiscal year 2023.
- The SEC staff found that the global trading of 20-F reporting FPIs' equity securities has become increasingly concentrated in U.S. capital markets over the last decade. As of fiscal year 2023, approximately 55% of 20-F reporting FPIs appear to have had no or minimal trading of their equity securities on any non-U.S. market and appear to maintain listings of their equity securities only on U.S. national securities exchanges. As a result, the United States is effectively the exclusive or primary trading market for those issuers.

The SEC staff raised concerns that the significant change of FPI's home country jurisdictions may make the current FPI definition inappropriate. These concerns included that:

- Disclosure requirements under FPIs' home country jurisdiction may differ from the requirements applicable to domestic issuers and other countries where the FPI population has changed significantly in recent decades, specifically in regard to current reporting, which may have resulted in less information about FPIs being made available to U.S. investors than in the past due to the FPI disclosure accommodations and their interaction with home country requirements.
- An increasing percentage of the FPI's equity securities 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.

SEC Chairman Paul Atkins indicated in a press release issued contemporaneously with the Concept Release that it remains an objective to attract foreign companies to U.S. markets and to provide U.S. investors with the opportunity to trade in foreign companies under U.S. laws and regulations. He further indicated such "objective must be balanced with other considerations, including providing investors with material information about these foreign companies, and ensuring that domestic companies are not competitively disadvantaged with respect to regulatory requirements," and that "[t]he first step in striking this balance is to determine which foreign companies should qualify as foreign private issuers and be able to avail themselves of accommodations that go with that status."

AREAS FOR COMMENT ON FPI CRITERIA

In light of the change in characteristics of FPI population identified by the SEC, the SEC requested comment on 69 different items, including the following:

REASSESSMENT OF THE EXISTING FPI ELIGIBILITY CRITERIA

- Should the FPI definition be modified, and if so, what consideration should be taken into account in determining how to amend the FPI definition?
- Given the current reporting and other benefits afforded to FPIs, are U.S. investors in currently eligible FPIs sufficiently protected, including whether investors receive information needed to make informed investment decisions?
- Are domestic issuers presently at a competitive disadvantage as compared to reporting FPIs that are listed exclusively in the U.S. and incorporated in jurisdictions that do not impose meaningful disclosure and other regulatory requirements?
- If the current FPI definition appropriately captures foreign issuers that are subject to home country disclosure and other regulatory requirements that merit accommodation under U.S. federal securities laws?
- Should existing FPI eligibility requirements be updated, rather than adding new eligibility criteria, including an update of the exiting 50% threshold in the shareholder test by decreasing that amount to a lower percentage threshold, or changes to the U.S. business contacts test, and if so, to what amount?
- If the current FPI definition relying on ownership and business contacts remains relevant in current capital markets, or should part or all of it be removed?

FOREIGN TRADING ENVIRONMENT

- If a foreign trading volume test may be an appropriate way to determine whether a foreign issuer should be eligible for FPI accommodations, and if so, what would be the appropriate threshold and how should it be calculated?
- If investors in FPI securities that are traded primarily or exclusively in the U.S. are disadvantaged by potential delays in disclosure, different access to information, or more limited liability of FPIs (i.e. filings being furnished rather than “filed” with the SEC), which may result in a greater likelihood of FPI securities being mispriced by U.S. capital markets?

MAJOR FOREIGN EXCHANGE LISTING REQUIREMENT OR ASSESSMENT OF FOREIGN REGULATION

- Should there be a requirement that FPIs be listed on a “major foreign exchange,” and if so, what criteria should be considered to determine whether a foreign exchange is major?

- If the SEC should require that each FPI be (i) incorporated or headquartered in a jurisdiction that the SEC has determined to have a robust regulatory and oversight framework, and (ii) subject to such securities regulations and oversight without modification or exemption, and if so, how should jurisdictions be assessed for sufficient regulatory regime?
- Should there be a system for mutual recognition with respect to Securities Act and Exchange Act requirements for FPIs, as there are with Canada through the Multijurisdictional Disclosure System (MJDS), and if so, should they be specifically tailored to each jurisdiction, or should there be an umbrella system encompassing multiple jurisdictions, and whether or not an umbrella system would be feasible given the disparate regimes regulations and laws across foreign jurisdictions?

CONCLUSION

If changes are made to the definition of foreign private issuer, it is likely that less foreign companies would qualify. An additional item identified for consideration is how current reporting FPIs that cease to qualify following an amendment to the definition would be treated. Would there be an extended transition period, or alternatively, as the final item for comment provides, should any such change apply only to new FPIs registering for the first time to eliminate the transition costs for the current FPI population? We will have to wait for a rule proposal or final rule to determine whether there will be any transition period or exemptions that will apply to current FPIs.

RELATED CAPABILITIES

- Securities & Corporate Governance

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