



# Milbank Insights

## **Corporate Finance and Securities Group**

### SEC Concept Release on Foreign Private Issuer Eligibility

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By Adam Brenneman, David Dexter, Tobias Stirnberg and  
Mackenzie Martin



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- The SEC is considering changes to the definition of Foreign Private Issuer (FPI).
- These changes are focused on companies that maintain listings only in the United States, many of which are domiciled in offshore jurisdictions.
- The changes, if adopted, could potentially result in a loss of FPI status for some issuers.

On June 4, 2025, the Securities and Exchange Commission released a [concept release](#) on Foreign Private Issuer Eligibility aimed at soliciting comments on the definition of “foreign private issuer.”

The current regulatory framework for Foreign Private Issuers (FPIs), which was originally adopted in 1990, was aimed at addressing challenges faced by FPIs in accessing US capital markets. In recent years, however, the SEC has noted that the composition of FPIs has changed and may no longer reflect the issuers that the SEC intended to benefit from the accommodations.

In particular, the SEC has raised concerns that FPIs are increasingly incorporated in jurisdictions with limited or more flexible disclosure requirements, such as some Caribbean jurisdictions. As a result, the SEC has noted that those companies may not be subject to meaningful home country regulation, particularly where they are not listed in the stock market of their home country. In addition, the SEC is concerned that FPI reporting requirements could be circular in cases where an FPI is exempt from reporting regulations in their home country because they report in the US but the FPI is also exempt from certain reporting requirements applicable to domestic issuers in the US because US regulation defers to home country reporting requirements.

### Current Foreign Private Issuer definition

Under the current definition, an FPI is any issuer that is a corporation or other organization incorporated or organized under the laws of any foreign country, which meets either the “shareholder test” or the “business contacts” test. Under the “shareholder test,” a foreign issuer qualifies as an FPI if it has 50% or less of its outstanding voting securities held of record, directly or indirectly by US residents. Under the “business contacts test,” a foreign issuer qualifies as an FPI (even if it does not meet the shareholder test) if none of the following apply: (1) a majority of its executive officers or directors are US citizens or residents, (2) more than 50% of its assets are located in the United States, or (3) its business is administered principally in the United States.

### Current Benefits Associated with FPI Status

FPIs benefit from a number of accommodations compared with domestic US issuers. A few of the accommodations that FPIs have are:

1. Reduced obligations for annual, quarterly and period reporting requirements:
  - a. The annual report on Form 20-F for FPIs is due within four months after fiscal-year end compared with 60, 75 or 90 days for domestic issuers filing an annual report on form 10-K;
  - b. FPIs are not required to file quarterly financial statements unless required by home country regulation, whereas domestic issuers must file 10-Qs;
  - c. Domestic issuers must make quarterly Sarbanes-Oxley certifications, however, FPIs are only required to make these annually;
  - d. The requirements for the 6-K filing by FPIs is limited to disclosures that an FPI makes public or is required to make public in its home domicile; and

2. Increased flexibility around financial data presentation, including that:
  - a. FPIs are able to use IFRS as adopted by IASB, local GAAP with reconciliation to US GAAP or US GAAP, while domestic issuers must use US GAAP; and
  - b. Interim financials for a registration statement are not required to be updated as soon for FPIs as they are for domestic issuers.
3. FPIs are exempt from Section 16 reporting and short-swing profit rules, proxy rules (including compensation disclosure), say-on-pay rules, and Regulation FD; and
4. With limited exceptions, FPIs are able to follow corporate governance rules in their home country and are eligible for certain cross-border exemptions for tender offers.

## Potential Changes

The SEC is seeking input on (1) whether the accommodations afforded to FPIs today should continue to apply to all foreign issuers currently captured by the FPI definition, (2) whether the definition of “foreign private issuer” should be amended to reflect the changes in population, and (3) if the definition should be amended, which approach should be taken. The SEC has proposed the below amendment options.

### 1. Update Existing FPI Eligibility Criteria

The current FPI definition was set forth to determine whether an issuer is “essentially a US issuer.” One potential update the SEC is considering is to amend the bifurcated test, by either lowering the threshold included in the “shareholder test” so that a smaller percentage of U.S. shareholders would disqualify a company from being an FPI or by revising the existing list of criteria under the “business contacts test,” and/or adding additional criteria to the “business contacts test” to increase the situations where contacts with the US would disqualify a company from being an FPI.

### 2. Foreign Trading Volume Requirement

Another approach under consideration by the SEC is to add a foreign trading volume test to assess the foreign and US trading volume on an annual basis to determine eligibility for FPI status. This test could apply in addition to the current tests and require a certain percentage of trading on non-US markets over a 12-month period. Based on the SEC’s review, a requirement of at least 1% non-US trading would cause more than half of current FPIs to lose their status.

### 3. Major Foreign Exchange Listing Requirement

The SEC could also require that FPIs be listed on a major non-US exchange. This requirement could be used in connection with the prior requirement and could help ensure that FPIs are subject to meaningful regulation and oversight in foreign markets and increase material and timely disclosure to investors. The SEC could maintain a list of eligible exchanges or prescribe certain criteria for classification of a foreign exchange as “major” that could include certain required reporting or disclosure requirements in that jurisdiction.

### 4. Commission Assessment of Foreign Regulation

Another approach could be to require that FPIs be incorporated or headquartered in a jurisdiction that the SEC determines has a robust regulatory and oversight framework or require that the FPI be subject to securities regulations and oversight without modification or exemptions in their home country. The SEC could designate certain jurisdictions that would meet these criteria; however, this could require analysis of disclosure in other countries or the effectiveness of their enforcement programs which could require considerable resources.

### 5. Mutual Recognition Systems

Another tailored approach would be to apply systems similar to the current limited mutual recognition system with Canada, which allows eligible US and Canadian issuers to conduct cross-border securities offerings and fulfill their reporting requirements primarily by complying with home country securities regulations. This system would require a review case-by-case and could require regulatory changes in some jurisdictions, so may be cumbersome.

### 6. International Cooperation Arrangement Requirement

A final option could be to require that an FPI certify that it is either incorporated or headquartered in, and subject to the oversight of, a signatory authority to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation, Cooperation, and the Exchange of Information.

## Why Issuers and Investors Should Care

- Changes to the definition of Foreign Private Issuer could result in significant numbers of issuers losing FPI status, thereby becoming domestic issuers in the United States (which would result in a significantly higher regulatory burden for those issuers).
- The changes under discussion could drive some issuers to seek listings in their home countries or “markets of convenience” to ensure that they comply with minimum non-US trading volume or disclosure requirements.
- It is important for issuers to pay close attention to this rule proposal to ensure that any actions they need to take to maintain FPI status can be carefully coordinated, as they will likely have knock-on tax and regulatory effects.

The comment period for this concept release will remain open until September 8, 2025. After the comment period ends, the SEC may choose to propose rules to amend the FPI definition, may make changes to the accommodations afforded, or may decide not to make any changes.

## Corporate Finance and Securities Partner Contacts

**Adam Brenneman**, Partner  
+1 212.530.5155  
[ABrenneman@milbank.com](mailto:ABrenneman@milbank.com)

**David Dixter**, Partner  
+44 20.7615.3120  
[DDixter@milbank.com](mailto:DDixter@milbank.com)

**Tobias Stirnberg**, Partner  
+55 11.3927.7702  
[TStirnberg@milbank.com](mailto:TStirnberg@milbank.com)

**Carlos Albarracín**, Partner  
+1 212.530.5116  
[CAlbarracin@milbank.com](mailto:CAlbarracin@milbank.com)

**Paul Denaro**, Partner  
+1 212.530.5431  
[PDenaro@milbank.com](mailto:PDenaro@milbank.com)

**Antonio Diaz-Albertini**, Partner  
+1 212.530.5002  
[ADiaz-Albertini@milbank.com](mailto:ADiaz-Albertini@milbank.com)

**Apostolos Gkoutzinis**, Partner  
+44 20.7615.3074  
[AGkoutzinis@milbank.com](mailto:AGkoutzinis@milbank.com)

**James Grandolfo**, Partner  
+852 2971.4848  
[JGrandolfo@milbank.com](mailto:JGrandolfo@milbank.com)

**Ana Grbec**, Partner  
+44 20.7615.3809  
[AGrbec@milbank.com](mailto:AGrbec@milbank.com)

**Jonathon Jackson**, Partner  
+1 212.530.5503  
[JJackson@milbank.com](mailto:JJackson@milbank.com)

**Giles Kennedy**, Partner  
+65 6428.2425  
[GKennedy@milbank.com](mailto:GKennedy@milbank.com)

**Philipp Klöckner**, Partner  
+49 69.71914.3430  
[PKloeckner@milbank.com](mailto:PKloeckner@milbank.com)

**Rebecca Marques**, Partner  
+44 20.7615.3099  
[RMarques@milbank.com](mailto:RMarques@milbank.com)

**Rod Miller**, Partner  
+1 212.530.5022  
[RDMiller@milbank.com](mailto:RDMiller@milbank.com)

**Marcelo Mottes**, Partner  
+1 212.530.5602  
[MMottes@milbank.com](mailto:MMottes@milbank.com)

**Brett Nadritch**, Partner  
+1 212.530.5301  
[BNadritch@milbank.com](mailto:BNadritch@milbank.com)

**Terry O'Donnell**, Partner  
+65 6428.2439  
[TODonnell@milbank.com](mailto:TODonnell@milbank.com)

**Paul Pery**, Partner  
+852 2971.4808  
[PPery@milbank.com](mailto:PPery@milbank.com)

**Tim Peterson**, Partner  
+44 20.7615.3106  
[TPeterson@milbank.com](mailto:TPeterson@milbank.com)

**Fabiana Sakai**, Partner  
+55 11.3927.7781  
[FSakai@milbank.com](mailto:FSakai@milbank.com)

**Trevor Truman**, Partner  
+44 20.7615.3186  
[TTruman@milbank.com](mailto:TTruman@milbank.com)

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