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Corporate Finance and Securities

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On December 18, 2025, President Trump signed the National Defense Authorization Act for Fiscal Year 2026 (the "NDAA"), which contains an amendment to Section 16(a) of the Securities Exchange Act of 1934 (the "Exchange Act"). As a result of this amendment, effective March 18, 2026, directors and officers of foreign private issuers ("FPIs") will be subject to Section 16(a) beneficial ownership reporting obligations.

Overview of Section 16(a)

Section 16(a) beneficial ownership reporting obligations historically have applied only to domestic reporting companies (as opposed to FPIs) with equity securities registered under either Section 12(b) or 12(g) of the Exchange Act. Section 16(a) requires "insiders" of these companies to report their pecuniary interest in securities beneficially owned by them and any changes in such beneficial ownership caused by acquisitions or dispositions (but not dilution). These insiders include the reporting company's: (i) directors, (ii) officers and (iii) stockholders who directly or indirectly beneficially own more than 10% of the company's stock.

An insider is required to report ownership of equity securities by filing the following forms with the SEC:

1. **An initial statement of ownership on a Form 3**. A Form 3 must be filed (i) at the time the company's securities are registered on a national securities exchange or by the effective date of a registration statement, or (ii) within 10 calendar days after an officer or director of the company assumes their role or becomes greater than a 10% stockholder.

2. **Any changes in ownership on a Form 4**. A Form 4 is required when there is a change in ownership (*e.g.*, the insider purchases or sells stock or exercises a stock option or warrant) and must be filed within 2 business days after the insider executes the transaction.

3. **An annual statement of beneficial ownership on a Form 5**. A Form 5 is required to be filed only in certain limited circumstances, including for small, otherwise exempt transactions (under $10,000), bona fide gifts of stock, or any transaction or event which should have been reported earlier on a Form 4 during the most recent fiscal year but mistakenly was not.

The U.S. Securities and Exchange Commission (the "SEC") has the authority to impose fines and sanctions on insiders who fail to make any Section 16 filing or who submit inaccurate or incomplete forms. The SEC may also hold a reporting company accountable if it contributes to improper filings or fails to report misconduct by its insiders. In September 2024, the SEC announced settlements resulting from its enforcement efforts focused on ownership reporting compliance. Penalties ranged from $10,000 for an individual to $750,000 for a company.

Expansion of 16(a) to FPI Directors and Officers

The amended language of Section 16(a) now explicitly requires directors and officers of FPIs to comply with the same reporting obligations as the directors and officers of domestic reporting companies.[1] However, of consequence, the amended language does not extend the reporting obligations to stockholders who own 10% or more of the FPI's shares and who are not otherwise directors or officers.

[1] The amendment includes a new section, 16(a)(5), which gives the SEC authority to exempt any person or security subject to "substantially similar requirements" in a foreign jurisdiction, although, at this stage at least, it is unclear what would be deemed to be "substantially similar requirements."

The reporting requirements become effective 90 days from enactment, which is March 18, 2026, with the SEC directed to promulgate its final rules within that same time period. By that date, all directors and officers of an existing FPI will be required to report their equity holdings on a Form 3.

FPIs' 16(b) Short-Swing Profit Exemption Survives

Importantly, the NDAA amendment to Section 16(a) applies "solely for the purposes of this subsection." As a result, FPIs and their insiders remain exempt from Section 16(b) of the Exchange Act, which imposes disgorgement liability on insiders of domestic registered issuers for profits from "short-swing" transactions. Under Section 16(b), insiders of domestic issuers are required to disgorge any profits realized from the purchase and sale of company stock occurring within a six-month period, regardless of whether the insider possessed material nonpublic information at the time of the trade.

While FPIs maintain their decades-long exemption from Section 16(b) liability, Congress's decision to amend Section 16(a) should put FPIs and their insiders on notice that there may be greater willingness than in the past to apply regulatory scrutiny to foreign companies who access the U.S. capital markets and their directors and officers. In addition, FPIs and their insiders should keep in mind that they remain subject to general securities fraud and insider trading laws.

Practical Tips

While the anticipated SEC rulemaking will hopefully provide more guidance on implementation, in the near term it is important for FPIs to consider the following:

1. **Identify all Section 16 insiders** – Typically all FPI board members will qualify as directors. However, for organizations which have additional or alternate board structures (*e.g.*, a separate supervisory board or a statutory auditors board), the analysis may be more complex. Identifying which members of management qualify as officers will involve a detailed analysis of an individual's duties and significance to the organization. "Officers" can also include the officers of any subsidiary or parent that have policy-making authority. Engaging counsel to assist with identification can be crucial to making sure all the right personnel are captured.

2. **Establish an internal compliance system** – Many domestic reporting companies maintain internal compliance systems that enable the company and its compliance team to make filings on behalf of directors and officers and to track when filings are required, including by establishing communication channels with directors' and officers' securities brokers. FPIs should consider developing similar internal systems and would be advised to consult U.S. counsel to help streamline the process. Effective compliance systems will establish a structured filing and monitoring process and provide targeted training for directors, officers and compliance personnel so that the appropriate individuals understand the new reporting obligations and the circumstances in which those obligations are triggered. FPIs should also consider reviewing and revising their insider trading policies to ensure that they align with new reporting obligations and internal compliance procedures that may be instituted to ensure that directors and officers are adhering to those obligations. Robust internal compliance systems and policies that reflect best practices can be useful for FPIs engaging with regulators.

1. **Apply for EDGAR Next codes** – Each individual identified as an insider will need to have their own unique filing code to file their Forms 3, 4 or 5. EDGAR filing codes are provided by the SEC to authorize, validate and submit documents for electronic filing and can be obtained by submitting an application via the EDGAR Filer Management system. It is important that FPIs begin this process as soon as practicable, since the process for receiving a code can be operationally cumbersome, particularly since the new reporting requirements may see an influx of applicants. FPIs again may wish to consider seeking assistance from U.S. counsel who have experience and helpful resources to create the most efficient application process possible.

If you wish to discuss any of these issues, please feel free to reach out to any member of the Milbank team.

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