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Securities and Exchange Commission (SEC) to Review Eligibility Requirements for Foreign Private Issuers

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Latin American companies with securities registered in the United States, or with plans to register securities in the United States, take note. The SEC has issued a “concept release” suggesting measures and seeking recommendations to modify the definition of “foreign private issuer” — a definition that allows accommodations that have been relied upon by non-U.S. companies for more than 40 years.

Being a “foreign private issuer” confers a number of benefits that are unavailable to U.S. issuers, notably: (i) being able to provide financial statements in IFRS or local country GAAP with a reconciliation to U.S. GAAP, (ii) a later filing deadline for annual reports, (iii) no obligation to file quarterly reports (though translations of quarterly reports must be furnished if home country rules require such reports), (iv) reduced compensation disclosure for senior management and (v) exemptions from other rules and regulations applicable to U.S. issuers, such as Regulation FD requiring disclosure of material nonpublic information to be made available to all securityholders, proxy rules applicable to the solicitation of shareholder votes and Section 16, which requires the filing of insider ownership reports. Foreign private issuers are also able to deregister their securities more easily than U.S. issuers.

If a non-U.S. company were no longer to fall within the definition of foreign private issuer, then it would have to comply with rules and regulations applicable to U.S. companies, which would impose more disclosure and reporting requirements on the non-U.S. company and generally increase its compliance costs to access U.S. markets.

What is a concept release?

A concept release is a statement issued by the SEC soliciting public comment on potential changes to regulations before it actually proposes new rules. In this case the SEC has asked for public comments by September 8, 2025, after which the SEC could choose to issue a proposed rule release advancing new regulations to govern the requirements for foreign private issuers. A proposed rule release would also be subject to a public comment period before the SEC adopts the final version of the new requirements.

What is a foreign private issuer under today's rules?

A "foreign private issuer" is any non-U.S. issuer (other than a foreign government) *unless* it meets two conditions: (i) more than 50% of its outstanding voting securities are held directly or indirectly by U.S. residents *and* (ii) any one of the following: (A) a majority of its executive officers or directors are citizens or residents of the United States, (B) more than 50% of its assets are located in the United States or (C) its business is principally administered in the United States.

In other words, if 50% or less of a non-U.S. company's shares are held by U.S. residents, then it is a foreign private issuer. If the U.S. shareholder threshold exceeds 50%, then in order for a non-U.S. company to be a foreign private issuer, *all* of the following must be true: (i) a majority of its executive officers and directors are *not* citizens or residents of the United States, (ii) at least 50% of its assets are located *outside* the United States and (iii) its business is *not* principally administered in the United States. As the composition of the beneficial ownership of a company's shares can be difficult to calculate with certainty, and is subject to change over time, many non-U.S. companies do not rely on the 50% or less U.S. shareholder test. Rather, these companies rely on the three-factor test to establish their status as foreign private issuers.

Why is the SEC reviewing eligibility requirements for foreign private issuers?

According to the SEC, the accommodations presently offered to foreign private issuers were based, in part, on the expectation that foreign private issuers would be subject to meaningful disclosure and regulatory oversight in their home jurisdictions. Based on 2023 data, however, the SEC estimates that shares of approximately 55% of all foreign private issuers trade exclusively in the United States, while a majority of the shares of approximately 76% of all foreign private issuers trade in the United States. In addition, a growing number of issuers are located in offshore jurisdictions that do not impose rigorous regulatory and disclosure obligations on issuers of securities. These figures raise concerns that many foreign private issuers are treating the United States as their sole or principal trading market without meaningful local regulatory oversight or disclosure obligations, thereby placing U.S. issuers at a disadvantage and providing U.S. investors with insufficient information to remain adequately protected when investing in the securities of these foreign private issuers.

What changes is the SEC considering to the foreign private issuer definition?

To address its concerns, the SEC is considering a broad array of changes to the foreign private issuer definition, including:

1. Lowering the 50% threshold in the U.S. shareholder test.
2. Modifying the three-factor test by, for example, lowering the 50% threshold in the U.S. assets test or considering citizenship or residency of other persons.
3. Imposing a minimum foreign trading volume threshold.
4. Requiring a listing on a “major” non-U.S. exchange.
5. Requiring the issuer to be incorporated or headquartered in one or more of the following:
    a. a jurisdiction that the SEC has determined to have a robust regulatory and oversight framework for issuers;
    b. a jurisdiction that has a mutual recognition arrangement with the United States (as Canada does today, for example); and
    c. a jurisdiction that is party to the International Organization of Securities Commissions (IOSCO) multilateral memorandum of understanding.

Any of these measures, or a combination thereof, would increase disclosure and reporting obligations, as well as related compliance costs, for non-U.S. companies that do not fall within the revised foreign private issuer definition. In addition, some non-U.S. issuers could be required to register their securities in non-U.S. markets that impose rigorous regulatory oversight. In other cases, potential non-U.S. issuers could be dissuaded from registering their securities in the United States altogether.

Regardless of any potential rule change, non-U.S. issuers should bear in mind they are required to assess their foreign private issuer status annually on the basis of information as of the end of their most recently completed second fiscal quarter (which for companies with a fiscal year ending on December 31 would fall on June 30). If a company determines that it no longer qualifies as a foreign private issuer, it must begin complying with the reporting requirements for U.S. issuers beginning on the first day of the following fiscal year.

Proskauer's Latam team is closely monitoring these developments and will provide an update once any rule proposals are released by the SEC.

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