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THE SEC'S SPOTLIGHT ON FOREIGN PRIVATE ISSUERS

A concept release and a new law passed by Congress may indicate that the SEC is rethinking its regulatory approach to foreign private issuers. This article discusses these developments in detail. It concludes with a note on new SEC proposals to reform public company capital raising and reporting

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When it comes to regulating companies that trade in the US capital markets, the US Securities and Exchange Commission ("SEC") primarily focuses on US domestic issuers, which constitute the large majority of public companies that trade in those markets. From time to time, however, the SEC has paid special attention to foreign companies whose securities trade in the United States, with the purpose of considering the extent to which SEC regulations should apply to foreign companies.

Over the past year, the SEC has undertaken such a periodic examination of foreign private issuers ("FPIs")¹, especially with respect to their treatment

under the principal federal securities laws of the United States that apply to publicly traded companies. While in general those laws — the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act") — do not distinguish between issuers based on whether they are incorporated under US law or non-US law, the rules adopted by the SEC under those statutes contain a number of specific provisions relating to FPIs.²

This article discusses two recent significant initiatives affecting FPIs: the SEC's Concept Release on Foreign Private Issuer Eligibility ("Concept Release");³ and the enactment by the US Congress of the Holding Foreign

¹ An FPI is an entity (other than a foreign government) incorporated or organized under the laws of a foreign jurisdiction unless: (1) more than 50% of its outstanding voting securities are directly or indirectly owned of record by US residents (commonly referred to as the shareholder test) and (2) any of the following applies: (i) the majority of its executive officers or directors are US citizens or residents; (ii) more than 50% of its assets are located in the United States; or (iii) its business is administered principally in the United States (commonly referred to as the business contacts test). Securities Act Rule 405 and Exchange Act Rule 3b-4(c). In the Concept Release, the SEC indicates that over 1,110 FPIs were registered with the SEC as of the end of 2023.

² Many of these SEC rules affecting FPIs are discussed in "Current SEC Initiatives Impacting Foreign Private Issuers," 55 Rev. of Securities & Compliance Reg'n. 179 (Sept 5, 2018), "The Unique Impact of Recent SEC Rules on Foreign Private Issuers," 56 Rev. of Securities & Compliance Reg'n. 227 (Sept 27, 2023), and "FPIs in SPAC Land — Considerations for Foreign Private Issuers in Connection with SPACs", 57 Rev. of Securities & Compliance Reg'n. 137 (Aug 21, 2024), all by the author.

³ Concept Release on Foreign Private Issuer Eligibility, Rel. No. 33-11376 (2025).

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