



## SEC Staff Issues Guidance on Definition of Foreign Private Issuer

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### Definition of an FPI

Both Rule 405 of the Securities Act and Rule 3b-4(c) of the Exchange Act define an FPI as an issuer organized outside of the United States that meets one of two tests—the Shareholder Test or the Business Contacts Test. Under the Shareholder Test, a non-U.S. issuer will qualify as an FPI if 50 percent or less of its outstanding voting securities are held of record by U.S. residents. In general, voting securities are those that entitle the holders to vote for the election of directors at the time of such determination. If more than 50 percent of a non-U.S. issuer's securities are held of record by U.S. residents, then, to qualify as an FPI, the issuer must pass the Business Contacts Test. To qualify under the Business Contacts Test, (i) the majority of the non-U.S. issuer's executive officers or directors must be non-U.S. citizens or residents, (ii) no more than 50 percent of its assets can be located in the United States, and (iii) its business must be administered principally outside of the U.S.

In these latest C&DIs, the SEC Staff provided the following clarifications regarding both the Shareholder Test and the Business Contacts Test:

### Shareholder Test

- Multiple Classes of Voting Stock (C&DI 110.02 and C&DI 203.17): When an issuer has multiple classes of voting stock outstanding with different voting rights, according to the SEC Staff, the issuer may use one of two methods for purposes of calculating the level of U.S. ownership under the Shareholder Test. One method is for the issuer to determine whether more than 50 percent of the voting power of all classes of outstanding securities **on a combined basis** is directly or indirectly owned of record

by residents of the United States. The second method is for an issuer to make the determination based on the total number of voting securities outstanding on a combined basis without regard to the voting power of those securities. Importantly, the methodology selected by the issuer must be applied on a consistent basis.

- Shareholder Status as U.S. Resident (C&DI 110.03 and C&DI 203.18): According to the SEC Staff, an individual that has permanent resident status in the United States (e.g., a green card holder) is presumed to be a United States resident. Other individuals can still be U.S. residents for the purpose of the Shareholder Test, but the issuer must decide what criteria it will consistently apply to determine the residency status of its shareholders. The criteria cannot be manipulated to achieve a particular result. Factors an issuer might consider include tax residency, nationality, mailing address, physical presence, location of a significant portion of the individual's financial and legal relationships, or immigration status.

## **Business Contacts Test**

- Separate Determinations for Executive Officers and Directors (C&DI 110.04 and C&DI 203.19): In determining whether a majority of an issuer's executive officers or directors are U.S. citizens or residents for purposes of the Business Contacts Test, it is the SEC Staff's view that the determination must be made separately for each group. Effectively, an issuer must make four determinations: (1) the citizenship status of executive officers, (2) the residency status of executive officers, (3) the citizenship status of directors and (4) the residency status of directors.
- Two Boards of Directors (C&DI 110.05 and C&DI 203.20): When an issuer with two boards of directors is applying the Business Contacts Test, the SEC Staff takes the position that the issuer must make the determination of whether the majority of directors are U.S. citizens or residents by examining the composition of the board that performs the functions most closely related to those undertaken by a U.S.-style board of directors. Importantly, if those functions are divided between both boards, then the issuer may aggregate the members of the boards for purposes of calculating the percentage of U.S. citizens or residents under the Business Contacts Test.
- Location of Assets (C&DI 110.06 and C&DI 203.21): According to the SEC Staff, when determining the location of assets for purposes of the Business Contacts Test, an issuer may use the geographic segment information determined in the preparation of its financial statements. The SEC Staff also takes the position that any other

reasonable methodology would be acceptable to assess the location and amount of an issuer's assets so long as such methodology is applied consistently. The SEC Staff, however, does not provide examples of other methodologies that it would consider to be reasonable.

- Principal Location of Administration of Business (C&DI 110.07 and C&DI 203.22): When determining whether an issuer's business is administered principally in the United States, the SEC Staff acknowledges that there is no single factor or group of factors that is determinative. According to the SEC Staff, the issuer must assess, on a consolidated basis, the location from which its officers, partners or managers primarily direct, control and coordinate the issuer's activities.
- Shareholder Meetings and Board Meetings (C&DI 110.08 and C&DI 203.23): The SEC Staff provides guidance that holding an annual or special meeting of shareholders or occasional meetings of the issuer's board of directors in the United States would not necessarily lead to the determination that an issuer's business is administered principally in the United States. This determination is consistent with the SEC Staff's guidance under C&DI 110.07 and C&DI 203.22 (discussed above) that no single factor or group of factors is determinative when analyzing whether an issuer is principally administered in the United States.

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