



Determining Foreign Private Issuer Status

A foreign private issuer (FPI) is any issuer, other than a foreign government, incorporated or organized under the laws of a jurisdiction outside of the United States, as long as the issuer meets a two-step test. We recommend keeping documentation of your FPI analysis in the form of a short memorandum to file.

Note: Many non-US companies that qualify as an FPI may nevertheless elect to file as a US domestic registrant, whether for initial public offering (IPO) optics or due to anticipated near-term transition requirements. Please discuss with your Cooley contact as to the pros and cons of filing as an FPI registrant and your company's specific circumstances.

Breaking down the FPI analysis test

The test works as follows:

Step #1: Shareholder test

Are more than 50% of the outstanding voting securities of the issuer owned of record by residents of the United States?

- If the answer is "no," then the issuer automatically qualifies as an FPI.
- If the answer is "yes," then proceed to Step #2.

Step #2: Business contacts test

If the answer to Step #1 is "yes," the issuer will remain an FPI, unless **any** of the following is true:

- The majority of the issuer's executive officers or directors are US citizens or residents.
- The majority of the issuer's assets are located in the United States.
- The business of the issuer is administered principally in the United States.

Evaluating business contacts can be complex.

Evaluating business contacts

US citizenship or residency of executive officers and directors

First, the issuer must assess separately the US residency and citizenship of its executive officers and directors to confirm whether a majority of **either** group are US residents or citizens.

The issuer must make four determinations:

- Whether a majority of its executive officers are US citizens.
- Whether a majority of its executive officers are US residents.
- Whether a majority of its directors are US citizens.
- Whether a majority of its directors are US residents.

If the answer to **any** of the above inquiries is "yes," then the issuer fails this prong of the business contacts test and, as a result, does not qualify as an FPI.

Location of assets

The issuer must then assess whether the majority of its assets are located in the United States. This assessment should include both tangible and intangible assets. To make this determination, the issuer may rely on either geographic segment information used in its financial statement preparation or any other reasonable and consistently applied methodology for evaluating the location and value of its assets. If the result of this assessment is “yes,” then the issuer fails this prong of the business contacts test and, as a result, does not qualify as an FPI.

Administration of business

For this test, the issuer must assess on a consolidated basis the location from which management of the issuer, including directors and executive officers, primarily direct, control and coordinate the issuer’s activities. If the issuer fails this prong of the business contacts test, then it does not qualify as an FPI.

SEC guidance related to FPI analysis

Analysis of your FPI status can be complex. We have included the below guidance from the Securities and Exchange Commission (SEC) to assist in your assessment, and we also recommend you get in touch with your Cooley contact to discuss further. Additional color on the FPI tests from the SEC is set forth below, and the full language of the relevant compliance and disclosure interpretations (C&DIs) are provided in the Annex.

| Test | SEC color on interpretation |
|---|---|
| Voting securities More than 50% of outstanding voting securities are directly or indirectly owned of record by US residents | <p>In determining whether more than 50% of its outstanding voting securities are owned of record by US residents, an issuer with multiple classes of voting stock with different voting rights may choose one of two methods:</p> <ul style="list-style-type: none">• Whether more than 50% of the voting power of those classes on a combined basis is directly or indirectly owned of record by US residents.• Based on the absolute number of voting securities. <p>Issuers will have to apply the determination methodology on a consistent basis. C&DI Question 203.17</p> |
| Residency/citizenship test Majority of executive officers or directors are US citizens or residents | <p>Green card holders (permanent US residents) are presumed to be US residents. For those without permanent residency, issuers may look at various factors – tax residency, nationality, mailing address, physical presence, location of significant portions of their financial and legal relationships, or immigration status – so long as these criteria are applied consistently. C&DI Question 203.18</p> <p>The citizenship and residency determinations must be made separately for executive officers and directors. In effect, you will have to make four separate determinations:</p> <ul style="list-style-type: none">• Citizenship status of executive officers• Residency status of executive officers• Citizenship status of directors• Residency status of directors <p>C&DI Question 203.19</p> |
| Asset test More than 50% of its assets are located in the US | <p>This is determined by looking at tangible and intangible assets.</p> <p>In determining whether more than 50% of the assets of an issuer are located outside the US, an issuer can use:</p> <ul style="list-style-type: none">• Geographic segment information determined in the preparation of its financial statements.• Any other reasonable methodology in assessing the location and amount of assets, applied on a consistent basis. <p>C&DI Question 203.21</p> |

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| Headquarters test Administers its business principally in the US | This is determined by location of principal operations, board and shareholder meetings, company headquarters and the location of its most influential key executives. There is no single factor or group of factors that are determinative as to whether an issuer's business is administered principally in the US. 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. C&DI Question 203.22 |
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Ongoing monitoring of FPI status

If an issuer qualifies as an FPI, it will need to monitor this status on an ongoing basis through the IPO process and on an ongoing basis beyond the IPO. An issuer retests its FPI status each year on the last business day of the second fiscal quarter.

| FPI determination date | |
|------------------------|---|
| Initial test | Within 30 days prior to the initial public filing of the IPO registration statement |
| Ongoing test | Annually on the last business day of the second fiscal quarter |

Consequences upon loss of FPI status

If an FPI ceases at any time to qualify as an FPI and satisfy the applicable FPI requirements, it will become subject to the more stringent US domestic registration, reporting and corporate governance obligations beginning on the first day of its fiscal year immediately following such determination. For example, if a public issuer fails to meet the FPI status test on June 30, 2025, it will be required to begin reporting as a US domestic issuer for the fiscal year beginning January 1, 2026. This transition period provides the FPI with approximately six months' advance notice to prepare the necessary documentation and procedures to comply with US domestic reporting requirements.

The initial major filing required would be the Form 10-K, which must be filed 60 to 75 days after the end of the issuer's fiscal year, with the specific deadline determined by the company's public market float at that time.

Annex: Compliance & Disclosure Interpretations Relating to Foreign Private Issuers

Question 203.17

Question: In applying the foreign private issuer definition in Securities Act Rule 405 and Exchange Act Rule 3b-4(c), how can an issuer that has multiple classes of voting stock with different voting rights determine whether more than 50% of its outstanding voting securities are directly or indirectly owned of record by residents in the United States?

Answer: An issuer may choose one of two methods. The issuer may look to whether more than 50% of the voting power of those classes on a combined basis is directly or indirectly owned of record by residents of the United States. Alternatively, an issuer may make the determination based on the number of voting securities. Issuers must apply a determination methodology on a consistent basis. [December 8, 2016]

Question 203.18

Question: In applying the foreign private issuer definition in Securities Act Rule 405 and Exchange Act Rule 3b-4(c), what factors should be applied to determine the status of an individual as a "US resident" for purposes of determining whether 50% of the company's outstanding voting securities are held of record by US residents?

Answer: A person who has permanent resident status in the US – a so-called green card holder – is presumed to be a US resident. Other individuals without permanent resident status may also be residents of the US for purposes of these provisions. In these circumstances, an issuer must decide what criteria it will use to determine residency and apply them consistently without changing them to achieve a desired result. Examples of factors an issuer may apply include tax residency, nationality, mailing address, physical presence, the location of a significant portion of their financial and legal relationships, or immigration status. [December 8, 2016]

Question 203.19

Question: In determining whether a majority of the executive officers or directors are United States citizens or residents under the definition of foreign private issuer in Securities Act Rule 405 and Exchange Act Rule 3b-4(c), must the calculation be made separately for each group or are executive officers and directors to be treated as a single group when making the assessment?

Answer: The determination must be made separately for each group. In effect, there are four determinations: the citizenship status of executive officers, the residency status of executive officers, the citizenship status of directors, and the residency status of directors. [December 8, 2016]

Question 203.20

Question: In determining whether the majority of the directors are United States citizens or residents under the definition of foreign private issuer in Securities Act Rule 405 and Exchange Act Rule 3b-4(c), how should the determination be made when the issuer has two boards of directors?

Answer: The issuer must make the determination with respect to the board that performs the functions most closely to those undertaken by a US-style board of directors. If those functions are divided between both boards, the issuer may aggregate the members of both boards for purposes of calculating the majority. [December 8, 2016]

Question 203.21

Question: In determining whether more than 50% of the assets of an issuer are located outside the United States under the definition of foreign private issuer in Securities Act Rule 405 and Exchange Act Rule 3b-4(c), can an issuer use the geographic segment information determined in the preparation of its financial statements?

Answer: Yes. Alternatively, an issuer may apply on a consistent basis any other reasonable methodology in assessing the location and amount of its assets for purposes of this determination. [December 8, 2016]

Question 203.22

Question: For purposes of the definition of foreign private issuer in Securities Act Rule 405 and Exchange Act Rule 3b-4(c), how does an issuer determine whether its business is administered principally in the United States?

Answer: There is no single factor or group of factors that are determinative under this clause. 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. [December 8, 2016]

Question 203.23

Question: For purposes of the definition of foreign private issuer in Securities Act Rule 405 and Exchange Act Rule 3b-4(c), would holding an annual or special meeting of shareholders or occasional meetings of the issuer's board of directors in the United States result in a determination that the issuer's business is administered principally in the United States?

Answer: No. Absent other factors indicating the location from which an issuer's officers, partners, or managers primarily direct, control and coordinate the issuer's activities on a consolidated basis, as described in [Securities Act Rules CDI 203.22/Exchange Act Rules CDI 110.07](#), there is no single factor or group of factors that is determinative of whether an issuer's business is principally administered in the United States. [December 8, 2016]