

Finding the right way to deal with FPI

Do not prevent desirable securities-offers

1 Introduction

Deutsches Aktieninstitut is committed to equities – and much more: As the voice of the capital market in Germany, we have been representing the interests of listed companies and other important capital market-actors since 1953. With over 200 members, we represent more than 90 percent of the market capitalization of German companies. In addition, we host the secretariat for the Commission of the German Corporate Governance Code (“Regierungskommission Deutscher Corporate Governance Kodex”).

In its Concept Release on Foreign Private Issuer Eligibility (File Number S7-2025-01), the SEC communicated that the majority of securities offered in the US by foreign issuers are offered by issuers from jurisdictions with a protection-and supervision-level significantly lower than that in the US. Nevertheless, these issuers benefit from all exemptions applicable to FPIs. Consequently, the level of protection and supervision is circumvented.

We understand the SEC's concerns and advocate an approach that addresses the underlying problem, namely the varying levels of protection and supervision in different jurisdictions. At the same time, it is crucial that burdensome regulations are not introduced across the board for all foreign issuers in order to prevent desirable offerings from being made in the US in the future.

Deutsches Aktieninstitut suggests:

1. Jurisdiction related equivalence decisions are the best way to identify FPI eligible issuers. This is the best way to ensure investor protection, while avoiding unduly burdensome requirements that would discourage foreign companies from trading in US markets (e.g. in ADR programs).
2. Introducing new threshold values, for example for foreign trading volume, or raising the previous threshold values, would help to alleviate the symptoms, but would in substance not safeguard an appropriate level of investor protection.

2 Concept Release on Foreign Private Issuer Eligibility (FPI)

Investor protection ensures that investors in EU capital markets are effectively protected against abuse, lack of transparency, unfair business practices, and insufficient information. At the EU level, this protection is ensured by a multi-layered network of legal provisions and regulations.

Below is a non-exhaustive list of Key EU Legal Acts on Investor Protection

a) MiFID II (Markets in Financial Instruments Directive, Directive 2014/65/EU)

- **Purpose:** Harmonizes the rules on investment services and investor protection across the EU.
- **Governs in particular:**
 - Requirements for the advice and information provided to investors,
 - Product approval and transparency,
 - Conduct of business rules for investment firms,
 - Protection against conflicts of interest,
 - Provisions on best execution and suitability assessment (ensuring the product fits the investor's profile).
- **Important accompanying regulation:** MiFIR (Markets in Financial Instruments Regulation, Regulation (EU) No. 600/2014).

b) PRIIPs Regulation (Regulation (EU) No. 1286/2014)

- **Purpose:** Enhances transparency and comprehensibility of packaged investment products.
- **Protection measure:** Obliges providers to make Key Information Documents (KIDs) available so that investors can better compare products and make informed decisions.

c) Prospectus Regulation (Regulation (EU) 2017/1129)

- **Purpose:** Uniform rules for publication of securities prospectuses.

- **Protection measure:** Ensures investors receive comprehensive and accurate information about securities before investing.

d) Market Abuse Regulation (MAR, Regulation (EU) No. 596/2014)

- **Protection measure:** Prohibits insider trading and market manipulation,
- **Ensures:** Transparency and integrity of the financial markets.

e) Transparency Directive (Directive 2004/109/EC)

- **Obligations:** Disclosure requirements for listed companies to continuously inform investors.

f) Shareholder Rights Directive (SRD II, Directive (EU) 2017/828)

- **Purpose:** To enhance the long-term engagement of shareholders in listed companies within the EU.
- **Protection measures:**
 - Facilitates the exercise of shareholder rights (voting, participation in general meetings)
 - Imposes transparency requirements on institutional investors and asset managers regarding their investment strategy and voting behavior
 - Provides greater control over remuneration policies and individual board members' remuneration ("Say on Pay")
 - Regulates related party transactions
- **Objective:** To promote responsible corporate governance and ensure better protection of shareholder interests, especially those of minority shareholders.

g) Further legal frameworks

- **UCITS Directive** (Directive 2009/65/EC): Governs undertakings for collective investment in transferable securities (retail investment funds).

The aforementioned legal frameworks are supplemented by national legislation and monitored by national supervisory authorities (such as BaFin in Germany) and the European Securities and Markets Authority (ESMA).

We agree with the SEC that investor protection is important for a strong capital market. At the same time, protective regulations should not lead to excessive restrictions on the free flow of capital or to an excessive reduction in investment opportunities.

We have considered the various scenarios outlined by the SEC and carefully discussed the pros and cons. Two basic options have emerged.

1. Equivalence decisions
2. Higher or new thresholds

2.1 Equivalence decisions

Equivalence decisions, i.e., decisions by the US regulatory authority on the equivalence of investor protection in the US to that in a country, region, or stock exchange where a company is listed. In addition to the decisions of the US regulatory authority, there are various procedures for determining equivalence, such as international cooperation arrangements and expanding mutual recognition frameworks.

In our view, equivalence decisions are the best way to enable foreign issuers to access the market, while allowing appropriate exceptions to the legal framework applicable to US issuers. This preserves the offerings of companies that are subject to investor protection substantially similar to the US. It also ensures that US companies are not disadvantaged compared to companies that are not subject to such investor protection.

2.1.1 Negative recognition of equivalence

For jurisdictions where the level of protection and supervision is so low that effective investor protection is clearly not guaranteed, the SEC could recognize a lack of equivalence. These jurisdictions should be placed on a do not qualify list. Issuers only being listed in one of these jurisdictions should not be able to benefit from the exemptions for FPIs. The SEC might determine, for example, that the Cayman Islands, which the agency mentioned in the request for comment, falls into this category.

2.1.2 Positive recognition of equivalence

Alternatively, the SEC could also identify jurisdictions whose level of protection and supervision is considered substantially similar to the US. These jurisdictions could be included in a white list. Issuers admitted to trading on a regulated market in one of these jurisdictions should benefit fully from the exemptions for FPIs without providing further evidence. Alternatively, the SEC could also determine the equivalence of the respective stock exchange of the listing of an issuer. However, to the extent to which a uniform level of investor protection is provided across a jurisdiction, it seems preferable to review the jurisdiction rather than the individual stock exchange. This is particularly clear as regards the European Union (“EU”), as the regulations at the European level already ensure an established level of protection. This means that with one positive equivalence decision, every company listed on a regulated market in the EU would be considered a subject to appropriate regulations. The same would apply for listed companies from other jurisdictions with an appropriate level of protection. With respect to issuers belonging to a group of companies, the equivalence decision should also cover subsidiaries if the parent company of the group is listed on such a regulated market.

The jurisdiction-level determination is a good approach, as the above-mentioned regulation provides all the information the SEC needs to make its equivalence decision. This would also be possible at stock-exchange level, but there are several stock-exchanges in each country. That is why the SEC would have to make significantly more equivalence decisions.

2.1.3 International Cooperation Arrangement or Expanding Mutual-Recognition Frameworks

International cooperation arrangements and expanding mutual-recognition frameworks could be a way forward. However, these approaches seem to be overly time-consuming compared to the unilateral adoption of equivalence decisions. To ensure that the desired offerings do not disappear from the US market, appropriate transitional arrangements and legal certainty would have to be put in place.



Equivalence decisions are the best way forward.

2.2 New or higher thresholds

The SEC analysis shows that numerous issuers with FPI Status are registered in jurisdictions with a significantly lower level of protection and supervision than in the US. Obviously, the intention here is to circumvent the high level of protection and supervision in the US. If one does not wish to follow the path of equivalence decisions, which would certainly lead to the best result (as an equivalent level of protection would be ensured in substance), in particular thresholds for foreign trading volume could be considered. These thresholds would have to put the volume of the security traded in the US in relation to the total trading volume. Issuers would only be able to take advantage of the exceptions applicable to FPIs if the volume traded in the US did not exceed a certain percentage. Again, this should be assessed on a group basis (i.e. doing the test for the parent company of a group).

Ultimately, however, trading volume requirements would merely alleviate the symptoms. The problem of circumventing the level of protection and supervision would be reduced, but an equivalent level of protection would still not be safeguarded. For example, Companies headquartered in China and registered in the Cayman Islands could trade on markets outside the US, reach a trading threshold, but not provide for additional disclosures or investor protection measures. The same is the case for any increase in the existing thresholds.

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