

Section 16 exemption for foreign private issuers remains intact—at least for now

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On December 22, President Biden signed into law the U.S. National Defense Authorization Act for Fiscal Year 2024 (NDAA). As enacted, the NDAA does not include the provision in the U.S. Senate’s version of the legislation that would have eliminated the Section 16 exemption from the Securities Exchange Act of 1934 (Exchange Act) for foreign private issuers, as we discussed in our October 24 [bulletin](#). Under the existing Section 16 regime, directors, officers and greater than 10% shareholders of domestic SEC reporting companies must comply with insider reporting requirements in respect of their ownership of equity securities of the issuer, and are subject to potential liability for “short swing” profits under Section 16(b) of the Exchange Act. However, SEC-reporting foreign private issuers—including Canadian companies who file with the SEC under the multijurisdictional disclosure system (MJDS)—are exempt from Section 16 pursuant to SEC Rule 3a12-3(b) under the Exchange Act. The U.S. Senate version of the NDAA had included a provision that would have eliminated the Section 16 exemption for foreign private issuers, but this provision was not in the U.S. House version and was eliminated in the process of reconciling the Senate and House versions. As a result of the reconciliation process, the provision that would have eliminated the Section 16 exemption for foreign private issuers did not appear in the final version of the NDAA.

What you need to know

- As we discussed in our October 24 [bulletin](#), the SEC has long exempted foreign private issuers, including Canadian issuers relying on the MJDS, from the requirements of Section 16 of the Exchange Act, along with other provisions of the Exchange Act (e.g., U.S. proxy rules), in an effort to accommodate home country practices and facilitate cross-listings by non-U.S. companies.
- In December, the U.S. House of Representatives and U.S. Senate completed a reconciliation process to resolve differences between the different versions of the NDAA that each chamber had passed. Section 6081 of the Senate version of the NDAA would have amended Section 16 of the Exchange Act to expressly indicate that it would apply to foreign private issuers and nullify the portion of Rule 3a12-3(b) that provides a Section 16 exemption for foreign private issuers.
- The House version of the NDAA, and the final version of the NDAA as enacted by Congress and signed into law, did not include Section 6081. As a result, foreign private issuers (including Canadian MJDS issuers) remain exempt from Section 16 of the Exchange Act—at least for now.

- We note that opportunistic selling by insiders of foreign private issuers, especially insiders of Russian and Chinese companies, has been a concern for certain members of the U.S. Congress and market and legal commentators, leading to the proposal to repeal the Section 16 exemption for foreign private issuers in the Holding Foreign Insiders Accountable Act in 2022 and earlier in 2023. This proposal ultimately made its way into Section 6081 of the U.S. Senate version of the NDAA, before ultimately being removed from the final version during the reconciliation process. However, it remains possible that members of Congress could try again to re-introduce legislation to repeal the Section 16 exemption for foreign private issuers—but for now, SEC-reporting companies that qualify as foreign private issuers, including Canadian companies that report under the MJDS, remain exempt from Section 16.

To discuss these issues, please contact the author(s).

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