

SEC STARTS THE ROLL-OUT OF THE HOLDING FOREIGN COMPANIES ACCOUNTABLE ACT

The Securities and Exchange Commission (SEC) has taken its first step to implement the Holding Foreign Companies Accountable Act (“HFCA Act”).¹ The SEC adopted interim final rules that will assist the SEC in identifying issuers that filed an annual report with an audit report issued by a registered public accounting firm that has a branch or office located in a foreign jurisdiction and that the Public Company Accounting Oversight Board (“PCAOB”) has determined that it is unable to inspect or investigate completely because of a position taken by an authority in that jurisdiction (“Commission-Identified Issuers”).²

DISCLOSURE REQUIREMENTS

A Commission-Identified Issuer will be required to submit electronically supplemental documentation to the SEC that it is not owned or controlled by a governmental entity in the foreign jurisdiction of the registered accounting firm that the PCAOB is unable to inspect or investigate completely.³

The HFCA and the interim final rules have a focus on foreign issuers, particularly Chinese issuers. A Commission-Identified Issuer that is a foreign issuer (“Commission-Identified Foreign Issuer”)⁴ must additionally disclose in its annual report for a non-inspection year: (1) that the registered public accounting firm prepared an audit report for the issuer; (2) the percentage of the shares of the issuer owned by governmental entities in the foreign jurisdiction where the issuer is incorporated or organized; (3) whether governmental entities in the foreign jurisdiction have a controlling financial interest with respect to the issuer; (4) the name of each official of the Chinese Communist Party (“CCP”) who is a member of the board of directors of the issuer or the operating entity with respect to the issuer; and (5) whether the articles of incorporation of the issuer contain any charter of the CCP, including the text of such charter.

IMPLEMENTATION TIMING

The SEC has determined that a registrant will not be subject to a non-inspection year determination for any fiscal year ending on or prior to December 31, 2020. Accordingly, the above disclosures will be required for fiscal years beginning after that date for registrants that have been identified by the SEC based upon the PCAOB’s determination about a lack of inspection or investigation access concerning the issuer’s audit report and the



The Securities and Exchange Commission (SEC) has taken its first step to implement the Holding Foreign Companies Accountable Act (“HFCA Act”). This Client Alert details disclosure requirements and implementation timing.

FOR MORE INFORMATION
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¹ Release 34-91364 (March 18, 2021), <https://www.sec.gov/rules/interim/2021/34-91364.pdf>. The SEC published the rule on March 24, 2021. SEC Press Rel. 2021-53, <https://www.sec.gov/news/press-release/2021-53>. The interim final rules become effective 30 days after publication in the Federal Register and the SEC has requested comment on the rules by that date. Our previous alerts on this legislation can be found at https://www.mmlawus.com/newstitem/pdf/client_alert_us_unanimously_passes_s945_950.pdf.

² The period relating to such a report would be deemed a “non-inspection year.” The PCAOB is developing the process for making such determinations.






³ The interim final rules amend the content of Forms 20-F, 40-F, 10-K, and N-CSR. An SEC registrant that is owned or controlled by a foreign government is not required to submit such documentation. However, Request for Comment 3.d. asks whether such and issuer should be required to state affirmatively that it is owned or controlled by a foreign governmental entity.

⁴ i.e., an issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country, as defined in Rule 3b-4 under the Securities Exchange Act of 1934.

registrant’s annual report. The SEC is developing the process to identify such registrants and will issue a notice once it has been established.⁵ After a registrant is included on the list of Commission-Identified Issuers,⁶ it must make the above disclosures in each annual report for each non-inspection year.

TRADING PROHIBITIONS

The SEC noted that the HFCA also requires the SEC to prohibit trading in the securities of a foreign issuer if it is a Commission-Identified Issuer for three consecutive non-inspection years. Specifically, the SEC must prohibit the securities of the issuer from being traded on a national securities exchange or through any other method that is within the jurisdiction of the Commission to regulate, including through “over-the-counter” trading. Although the SEC was required to implement the above disclosure aspects of the HFCA within 90 days of enactment, implementation the required trading prohibition is not subject to the 90-day rulemaking deadline. The SEC indicated that it would seek public comment on that aspect in the future.

				
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⁵ The SEC requested comment on the process.

⁶ The SEC apparently has not made a determination as to whether the list would be made public. See Request for Comment 2.c. See also Request for Comment 3.b. relating to supplemental submissions relating to governmental ownership or control.