

March 26, 2021

## SEC Adopts Amendments Implementing the Holding Foreign Companies Accountable Act

The SEC has published interim final amendments (the “Amendments”) (available [here](#)) to Forms 10-K, 20-F, 40-F and N-CSR that implement the congressionally mandated disclosure and submission requirements of the Holding Foreign Companies Accountable Act (the “HFCAA”). Simultaneously with the publication of the Amendments, the SEC is seeking public comments on certain related requirements of the HFCAA, including the identification process for issuers, the submission and disclosure requirements, and the trading prohibitions.

The HFCAA was passed into law on December 18, 2020 (see our prior alert, available [here](#)) and requires rulemaking by the SEC to implement its mandates to ensure that high quality financial statements are available to investors by increasing “transparency about the reliability of affected issuers’ financial statements as well as the characteristics of their ownership and control structures.”

Under the Amendments, an issuer that is audited by an accounting firm located outside the United States which the Public Company Accounting Oversight Board (“PCAOB”) is unable to inspect will be required to: (i) submit to the SEC documentation showing they are not owned or controlled by a governmental entity in that foreign jurisdiction (*submission requirement*); and (ii) provide additional specified disclosures if such issuer also meets the definition of a foreign issuer (*disclosure requirement*).

The Amendments will be effective 30 days after publication in the *Federal Register*, with comments on the Amendments due on the same day.

### Background

The HFCAA requires the SEC to identify each “covered issuer” (namely, one that has a reporting obligation under Section 13 or 15(d) of the Securities Exchange Act of 1934; the SEC generally refers to these issuers as “registrants”) that has retained a registered public accounting firm to issue an audit report where that registered public accounting firm has a branch or office that: is located in a foreign jurisdiction and the PCAOB has determined that it is unable to inspect or investigate completely because of a position taken by an authority in the foreign jurisdiction. The SEC release refers to these identified covered issuers as “Commission-Identified Issuers.”

As mandated by the HFCAA, the PCAOB will be responsible for determining which accounting firms it is unable to inspect or investigate completely. As noted in the SEC release, the PCAOB is currently in the

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process of considering its obligations under the HFCAA. Any rulemaking by the PCAOB in connection with the HFCAA's mandate will be subject to review and approval by the SEC. Once the PCAOB's determination process has been established, the SEC will use the PCAOB's list of accounting firms that it has been unable to inspect, along with information from issuers' annual reports, to identify covered issuers that will be subject to the new disclosure and submission requirements.

### **Summary of the Amendments**

The Amendments introduce a new submission requirement and a disclosure requirement by adding new Item 9C to Form 10-K, new Item 16I to Form 20-F, new paragraph B.18 to Form 40-F, and new paragraphs (i) and (j) to Item 4 of Form N-CSR.

The new requirements apply to any Commission-Identified Issuer and will require:

- any such registrant, which is not owned or controlled by a governmental entity in the covered foreign jurisdiction, to electronically submit documentation to the SEC on a supplemental basis that establishes that the registrant is not so owned or controlled; and
- any such registrant that is also a foreign issuer (*i.e.*, 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) to disclose as follows:
  - that, for the period covered by the form, the accounting firm that the PCAOB has been unable to inspect has prepared an audit report for the registrant;
  - the percentage of the shares of the registrant owned by governmental entities in the foreign jurisdiction in which the registrant is incorporated or otherwise organized;
  - whether governmental entities in the covered foreign jurisdiction have a controlling financial interest in the registrant;
  - the name of any official of the Chinese Communist Party ("CCP") who is a member of the board of directors of the registrant or the operating entity of the issuer; and
  - whether the articles of incorporation of the registrant (or equivalent organizing document) contains any charter of the CCP, including the text of any such charter.

New instructions in Forms 20-F and 40-F specify that the disclosure requirement will apply to annual reports, and not to registration statements.

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### Summary of Topics Subject to Public Comment

Based on the requirements of the HFCAA and provisions of the Administrative Procedures Act, the SEC has dispensed with the customary notice and public comment period for the Amendments. Notwithstanding the fact that the Amendments conform the specified SEC forms to the requirements of the HFCAA, the SEC is also soliciting public comment on the following aspects of the Amendments, among others, that the SEC may elect to address in subsequent releases:

- *Identification process* – the determination of whether a public accounting firm is considered to be “retained” by a registrant; the timing and frequency of the identification process; whether Commission-Identified Issuers should be publicly disclosed on the SEC website and whether structured data tagging mechanisms should apply to audit firms.
- *Disclosure requirement* – an affirmative statement by a Commission-Identified Issuer if its audit firm changes from non-inspected to inspected; clarification on what it means to be an official of the CCP; whether the Amendments should cover any other SEC forms; and the location of the required disclosure.
- *Submission requirement* – the timing for the submission requirement and whether it should be publicly filed as an exhibit; whether further clarification is needed for certain terms used; the types of documentation required; and whether an affirmative statement should be provided by Commission-Identified Issuers if they are subject to control by a foreign government entity.
- *Trading prohibition* – any specific considerations to be taken into account when delineating trading prohibition requirements.

### Timing

For fiscal years beginning after December 31, 2020, the SEC will begin identifying registrants for purposes of the HFCAA once the PCAOB has made its determinations regarding accounting firms that it has been unable to inspect. Registrants will not be required to comply with either the submission or the disclosure requirements until after the SEC identifies them as Commission-Identified Issuers. For example, if a registrant is identified based on its Form 10-K filing made in 2022 for the fiscal year ended December 31, 2021 then 2022 would be deemed a non-inspection year. Such Commission-Identified Issuer would then be required to comply with the submission and disclosure requirements, if applicable, in its Form 10-K filing covering the fiscal year ended December 31, 2022, which would be filed in 2023.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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