

**MEMO# 33399**

April 30, 2021

# **SEC Adopts Form Amendments to Implement the Disclosure and Submission Requirements of the Holding Foreign Companies Accountable Act**

[33399]

March 29, 2021 TO: ICI Members

ICI Global Members SUBJECTS: Audit and Attest

Compliance

Disclosure

International/Global RE: SEC Adopts Form Amendments to Implement the Disclosure and Submission Requirements of the Holding Foreign Companies Accountable Act

The US Securities and Exchange Commission (SEC or Commission) has adopted interim final form amendments<sup>[1]</sup> to implement the disclosure and submission requirements of the Holding Foreign Companies Accountable Act (HFCA Act).<sup>[2]</sup> The amendments will apply to registrants, including investment companies, that the SEC identifies as having filed an annual report with an audit report issued by a registered public accounting firm that is located in a foreign jurisdiction that the Public Company Accounting Oversight Board (PCAOB) cannot inspect. The HFCA Act requires the submission of documentation to the SEC establishing that such registrant is not owned or controlled by a governmental entity in that foreign jurisdiction and disclosure in the registrant's annual report regarding audit arrangements and governmental influence. The interim final form amendments are effective 30 days after publication in the Federal Register.

As discussed below, a registrant will not be required to comply with the amendments until it has been identified by the Commission as having a non-inspection year pursuant to a process to be established by the SEC. Furthermore, the Release indicates that, based on a review of Form N-CEN data filed with the SEC, no registered investment company reported having retained a registered public accounting firm located in a foreign jurisdiction to prepare an audit report.

## **HFCA Act**

The HFCA Act requires the Commission to identify covered issuers<sup>[3]</sup> that have retained a registered public accounting firm to issue an audit report that has a branch or office that is located in a foreign jurisdiction that the PCAOB is unable to inspect because of a position

taken by an authority in the foreign jurisdiction (Commission-Identified Issuer). Issuers so identified are required to submit documentation to the SEC that establishes that they are not owned or controlled by a governmental entity in the foreign jurisdiction. If a Commission-Identified Issuer is identified for three consecutive years, then the HFCA Act directs the Commission to prohibit trading in the issuer's securities. Identified issuers that are foreign issuers<sup>[4]</sup> are subject to disclosure requirements intended to inform investors about the inability of the PCAOB to inspect the auditor and foreign governmental entity ownership of the issuer.

## **Form Amendments**

The interim final amendments modify Form 10-K, Form 20-F, Form 40-F, and Form N-CSR to instruct Commission-Identified Issuers to submit to the Commission documentation establishing that the issuer is not owned or controlled by a governmental entity in the foreign jurisdiction of the registered public accounting firm that the PCAOB is unable to inspect. Such documentation must be submitted to the Commission electronically on a supplemental basis on or before the due date for the form. For purposes of these requirements the Release indicates that the terms "owned or controlled" are intended to reference a person's or governmental entity's ability to "control" the registrant as that term is used in the Exchange Act and the Exchange Act rules.<sup>[5]</sup>

The interim final amendments modify the forms to require Commission-Identified Issuers that are foreign issuers to disclose information about the auditor and foreign governmental entity ownership and influence of the registrant. Specifically, the registrant must disclose:

- That for the immediately preceding annual financial statement period, a registered public accounting firm that the PCAOB was unable to inspect issued an audit report for the registrant;
- The percentage of 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 applicable foreign jurisdiction with respect to that registered public accounting firm have a controlling financial interest in the registrant;
- The name of each official of the Chinese Communist Party who is a member of the board of directors of the registrant or the operating entity with respect to the registrant; and
- Whether the articles of incorporation of the registrant contains any charter of the Chinese Communist Party, including the text of any such charter.

## **Timing Considerations**

A registrant will not be subject to a non-inspection year determination for any fiscal year ending on or prior to December 31, 2020. For fiscal years beginning after December 31, 2020, and once the PCAOB has made its determinations, the Commission will identify registrants based on their annual reports. The Commission will issue appropriate notice once it has established the process for identifying registrants as required by the HFCA Act.

A registrant will not be required to comply with the submission or disclosure requirements until it is identified as having a non-inspection year. Once identified, the registrant will be required to provide the disclosure in its annual report for the non-inspection year. 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 as being a Commission-Identified Issuer, then 2022 would be deemed a non-inspection year. Such registrant would be required to comply with the submission, and if applicable, the disclosure requirements in its Form 10-K filing covering

the fiscal year ended December 31, 2022, which would be filed with the SEC in 2023.

## Request for Comment

The Release requests comment on the interim final amendments and the establishment of a process for identifying registrants with non-inspection years. Comments are due 30 days after the interim final rules are published in the Federal Register.

The SEC asks a number of questions on both the submission and disclosure requirements, including questions specific to investment companies.<sup>[6]</sup> The questions include the following:

- Should the determination of non-inspection years be made annually shortly after the due date for annual reports for registrants that have December 31 fiscal year ends? Should the determination be made more frequently (e.g., semi-annually or quarterly)?
- Should the SEC require structured data tagging in the auditor report identifying the auditor name and jurisdiction? For investment companies, are there any circumstances in which that information would be different than the identification of the fund's auditor as currently required in Item B.17 of Form N-CEN?
- For investment companies, should the requirements appear in a different form, such as Form N-CEN to cover unit investment trusts? Are the amendments to Form N-CSR located in the appropriate form item (i.e., Item 4, Principal Accountant Fees and Services)?
- For investment companies, should the terms "owned and controlled" be read with reference to how the term control is used in the Investment Company Act and Investment Company Act rules?

## Additional Actions

If a registrant is determined to be a Commission-Identified Issuer for three consecutive years, Section 2 of the HFCA Act directs the Commission to prohibit trading of the registrant's securities. The Commission plans to separately address implementation of the trading prohibitions in a future notice and comment process.

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### endnotes

<sup>[1]</sup> Holding Foreign Companies Accountable Act Disclosure, Release No. 34-91364, IC-34227 (March 18, 2021) *available at* <https://sec.gov/rules/interim/2021/34-91364.pdf> (Release).

<sup>[2]</sup> The HFCA Act, which became law on December 18, 2020, directs the SEC within 90 days to adopt rules establishing the manner in which issuers are to submit documentation establishing that they are not owned or controlled by a governmental entity in a jurisdiction where the PCAOB cannot inspect auditors.

[3] The Release explains that Sarbanes-Oxley Act Section 104(i)(1)(A) defines “covered issuer” as an issuer that is required to file reports under Section 13 or Section 15(d) of the Exchange Act, and that issuers filing reports under the Exchange Act are referred to in Commission forms as “registrants.” In the Release, the Commission uses the term “issuers” when referring to the HFCA Act, but “registrants” when discussing the forms and form requirements.

[4] See Exchange Act rule 3b-4.

[5] See Exchange Act Section 13(d), Regulation S-X rule 1-02(g), and Exchange Act rule 12b-2.

[6] As noted above, no registered investment company reported having retained a registered public accounting firm located in a foreign jurisdiction to prepare an audit report.

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