

SEC Approves PCAOB Rule Governing Determinations Under the Holding Foreign Companies Accountable Act

December 6, 2021

On November 4, 2021, the U.S. Securities and Exchange Commission (SEC) **approved** the Public Company Accounting Oversight Board's (PCAOB) Rule 6100, *Board Determinations Under the Holding Foreign Companies Accountable Act* (Rule 6100).

As outlined in our **previous alert**, the Holding Foreign Companies Accountable Act (HFCA Act), which became effective December 18, 2020, requires the SEC to prohibit trading of securities of any "covered issuer" on any national securities exchange or other method regulated by the SEC, including "over the counter" trading, if the PCAOB has been unable to "inspect or investigate completely" the covered issuer's auditor in a foreign jurisdiction for three consecutive years due to a position taken by governmental authorities in the jurisdiction.

Rule 6100 establishes a framework for the PCAOB's determination whether it is able to inspect or investigate completely registered public accounting firms located in a foreign jurisdiction because of a position taken by one or more governmental authorities in that jurisdiction. The SEC's approval of Rule 6100 is another important step in implementing the HFCA Act and follows the SEC's adoption of interim final rules earlier this year implementing the submission and disclosure requirements of the HFCA Act (see our earlier alert **here**).

Rule 6100 establishes the following facets of the PCAOB determination process: (1) the manner of the PCAOB's determinations; (2) the factors the PCAOB is required to evaluate and the documents and information it is required to consider when assessing whether a determination is warranted; (3) the form, public availability, effective date, and duration of such determinations; and (4) the process by which the PCAOB will reaffirm, modify, or vacate any such determinations.

Two types of determinations are addressed in Rule 6100: (1) determinations as to a particular foreign jurisdiction, which would apply to all registered public accounting firms headquartered in that jurisdiction, and (2) determinations as to a particular registered firm with an office in a foreign jurisdiction. PCAOB anticipates that most determinations under Rule 6100 will be jurisdiction-wide determinations.

Rule 6100 sets forth three factors to be evaluated by PCAOB in determining whether it is able to "inspect or investigate completely" registered public accounting firms in foreign jurisdictions for purposes of the HFCA Act:

- whether it can select engagements, audit areas, and potential violations to be reviewed or investigated;
- whether it has timely access to firm personnel, documents and information relevant to its inspection or investigation and the ability to retain and use such documents and information; and
- whether it can conduct inspections and investigations in a manner consistent with the provisions of the Sarbanes-Oxley Act of 2002 and PCAOB rules.

Once the PCAOB makes a determination, it is required to submit a report to the SEC. The report is required to:

- describe the PCAOB's assessment of whether the position taken by the foreign governmental authority (or authorities) impairs the PCAOB's ability to fulfill its responsibilities with respect to inspections or investigations of

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- registered public accounting firms with headquarters or offices in the jurisdiction;
- describe the basis for the PCAOB's determination; and
- identify in an annex to the report the registered public accounting firm(s) to which the determination applies.

The PCAOB's determination will become effective on the date the report is issued to the SEC under Rule 6100. The PCAOB is required to promptly post the report on its website and send a copy to each affected registered public accounting firm by electronic mail.

Under Rule 6100, a PCAOB determination will remain effective until it is reaffirmed, modified or vacated by the PCAOB. The rule requires the PCAOB to annually reassess each determination that is in effect. In addition, the PCAOB may reassess a determination at any time on its own initiative or at the SEC's request. When the PCAOB reaffirms, modifies, or vacates a determination, it will issue a report to the SEC, make the report publicly available on the PCAOB's website, and send a copy to each affected registered public accounting firm.

In its webpage, the PCAOB has identified 20 PCAOB-registered audit firms located in jurisdictions that have denied PCAOB's access to conduct inspections. All of these firms are based in either China or Hong Kong. While the information contained in the webpage does not constitute a PCAOB determination under the HFCA Act or Rule 6100, it is apparent that Rule 6100 may impact Chinese companies trading on U.S. securities exchanges that use registered public accounting firms with headquarters or offices in China or Hong Kong.

If you have any questions about the HFCA Act, Rule 6100 or other implementation rules, please contact the authors or your Miller Canfield attorney.