

Interim Final Rules Implementing Holding Foreign Companies Accountable Act Will Be Effective Soon

April 30, 2021

The **interim final amendments (IFR)** adopted by the U.S. Securities and Exchange Commission (SEC) to Forms 10-K, 20-F, 40-F and N-CSR to implement the submission and disclosure requirements of the Holding Foreign Companies Accountable Act (HFCA Act) will become effective May 5, 2021. The SEC is seeking public comments on the IFR which are due on the same date.

Background

As explained in our earlier alert (available [here](#)), the HFCA Act was signed into law by former President Trump on December 18, 2020. The HFCA Act requires the SEC to identify reporting public companies using registered public accounting firms (auditors) with a branch or office located in a foreign country that the Public Company Accounting Oversight Board (PCAOB) determines that it is unable to “inspect or investigate completely because of a position taken by an authority in the foreign jurisdiction” (Commission-Identified Issuers). The PCAOB has not yet issued rules setting forth its process for making these determinations.

Section 2 of the HFCA Act requires Commission-Identified Issuers to submit documentation establishing that they are not owned or controlled by a governmental entity in the foreign jurisdiction of the auditor where the PCAOB is unable to inspect or investigate completely, and requires the SEC to prohibit trading of securities of such Commission-Identified Issuers in U.S. markets after three consecutive non-inspection years (generally, any year the Commission-Identified Issuer is so identified by the SEC). The SEC is expected to engage in a separate notice and comments process addressing how the trading prohibition will be implemented.

In addition, Commission-Identified Issuers that are foreign issuers (“Commission-Identified Foreign Issuers”) are subject to the additional disclosure requirements under Section 3 of the HFCA Act outlined below.

Additional Disclosure Requirements for Commission-Identified Foreign Issuers

The IFR requires a Commission-Identified Foreign Issuer to provide the following specific additional disclosures in its annual report filed for each non-inspection year:

- “That, during the period covered by the form, the registered public accounting firm has prepared an audit report for the issuer;
- The percentage of the shares of the issuer owned by governmental entities in the foreign jurisdiction in which the issuer 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 with respect to the issuer;
- 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
- Whether the articles of incorporation of the issuer (or equivalent organizing document) contains any charter of the CCP, including the text of any such charter.”

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The additional disclosures, including the requirements of the last two bullet points, evidence that a primary objective of the HFCA Act and the IFR is to address China's restrictions on the PCAOB's ability to inspect auditors of Chinese public reporting companies. The SEC is amending Form 10-K, Form 20-F, Form 40-F, and Form N-CSR (the "Forms") to add the above disclosure requirements in annual reports filed by the Commission-Identified Foreign Issuers.

Submission Requirement

The IFR requires each Commission-Identified Issuer to submit documentation to the SEC establishing that it is not owned or controlled by a governmental entity in the foreign jurisdiction where PCAOB is unable to inspect or investigate completely the auditor. The SEC is also amending the Forms to implement this requirement. In contrast to the additional disclosure requirements outlined above that apply only to Commission-Identified Foreign Issuers, this submission requirement applies to all Commission-Identified Issuers.

The IFR provides that the submissions must be made electronically through the Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system and, as an initial matter, Commission-Identified Issuers will have flexibility to determine the types of documentation to be submitted to satisfy this requirement. At the same time, the SEC is requesting comment as to whether it should require specific types of documentation or whether additional guidance would be necessary or useful.

Timing Considerations

A reporting public company will not be required to comply with the IFR until the SEC has identified it as having a non-inspection year after December 31, 2020, under a process to be established by SEC with appropriate notice. Once identified, the Commission-Identified Issuer will be required to comply with the IFR in its annual report for each fiscal year it is identified.

Request for Comment

The IFR requests comments and feedback from any interested person on any aspect of the IFR, including the identification of Commission-Identified Issuers, implementation of the HFCA Act disclosure requirements and submission requirements, and other related matters. The comments are due by May 5, 2021.

Companies that are likely to be identified by the SEC as Commission-Identified Issuers should consider providing feedback to the SEC regarding the implementation of the HFCA Act and consider how to comply with the disclosure and submission requirements.

If you have any questions about the IFR or the HFCA Act, please contact the authors or your Miller Canfield attorney.