

BE AWARE – SEC IMPLEMENTS HOLDING FOREIGN COMPANIES ACCOUNTABLE ACT (HFCA) REQUIREMENTS

Mar 31, 2021

The SEC recently announced its adoption of interim final amendments to certain forms, including Form 10-K and Form 20-F, to implement the congressionally mandated document submission and disclosure requirements of the Holding Foreign Companies Accountable Act (the “HFCA Act”) that became effective in December 2020. The amendments will become effective 30 days after publication in the Federal Register. They apply to public companies (each, a “Commission-Identified Issuer”) that are identified by the SEC as having filed an annual report that includes an audit report issued by a registered public accounting firm that (1) has a *branch or office* located in a foreign jurisdiction and (2) the PCAOB has determined it is unable to inspect or investigate completely because of a position taken by an authority in that jurisdiction. The SEC will be responsible for identifying such companies, and the PCAOB will be required to identify audit firms that have a location in such a foreign jurisdiction.

Annual Report Amendments. The new requirements will be implemented (1) with respect to Form 10-K, by the addition of Part II, Item 9C, and (2) with respect to Form 20-F, by the addition of Part II, Item 161. Each new item will be captioned “Disclosure Regarding Foreign Jurisdictions that Prevent Inspections.”

New Submission Requirement – Commission-Identified Issuers. The new rules refer to any year in which the SEC identifies a company as a Commission-Identified Issuer as a “non-inspection year.” The interim final amendments will require that each Commission-Identified Issuer submit, on or before the due date for its annual report covering such a non-inspection year, documentation establishing that the company is not owned or controlled by a governmental entity in the relevant foreign jurisdiction; provided, however, that any company that is so owned or controlled will not be required to make a submission.

The HFCA Act did not specify the type of documentation that a company should submit to the SEC to satisfy the submission requirement. Unless and until the SEC adopts rules containing such specifications or issues guidance regarding the same, Commission-Identified Issuers will have flexibility to decide on the documentation to be submitted to the SEC. It might be easier, of course, if the SEC were to provide specification or guidance to avoid, for example, excessive company time

spent on trying to determine what to submit and/or the submission of documentation that the SEC considers deficient.

Trading Prohibition. The HFCA Act provides that if, for three consecutive years, the SEC determines that a company is a Commission-Identified Issuer, the SEC will be required to prohibit trading of the company's securities. The interim final amendments do not address the trading prohibition, and the SEC is currently assessing how best to implement it.

New Disclosure Requirement - Commission-Identified Foreign Issuers Only. As required by the HFCA Act, the interim final amendments also require new disclosure by Commission-Identified Issuers that are organized in a foreign jurisdiction (such Commission-Identified Issuers, "Commission-Identified Foreign Issuers"). Specifically, a Commission-Identified Foreign Issuer will be required to disclose in its annual report covering the non-inspection year:

- that *during* the fiscal year covered by the report, a registered public accounting firm that was on the PCAOB's list prepared an audit report for the issuer;
- the percentage of shares owned by governmental entities in the foreign jurisdiction in which the company is organized;
- whether governmental entities in the applicable foreign jurisdiction with respect to the accounting firm have a controlling financial interest in the company;
- the name(s) of any Chinese Communist Party ("CCP") officials who serve on the company's (or its operating entity's) board of directors; and
- whether the company's articles of incorporation (or their equivalent) contain any CCP charter or portion thereof.

SEC Seeking Comments. In the interim final amendments, the SEC seeks comment on, among matters, the rules themselves, appropriate mechanics for identifying Commission-Identified Issuers and the implementation of the trading prohibition noted above.

RELATED PRACTICE AREAS

- Securities & Corporate Governance

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be "Attorney Advertising" under the ethics and

professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP's principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.