

## SEC Approves PCAOB Framework for Determinations under Holding Foreign Companies Accountable Act

NOVEMBER 17, 2021

On November 5, 2021, the SEC approved Rule 6100, *Board Determinations Under the Holding Foreign Companies Accountable Act*, of the Public Company Accounting Oversight Board (PCAOB). Rule 6100 establishes a framework for the PCAOB's determinations under the Holding Foreign Companies Accountable Act (HFCAA) that the PCAOB is unable to inspect or investigate completely registered public-accounting firms located in a foreign jurisdiction because of a position taken by an authority in that jurisdiction. Rule 6100 is effective immediately.

The HFCAA was enacted in December 2020 and requires foreign companies and their auditing firms to submit to U.S.-regulator inspections of their audits—or face trading prohibitions on U.S. stock exchanges and over-the-counter markets for failure to have an inspection for three consecutive years. Although the HFCAA is applicable to all foreign jurisdictions, China-based companies are significantly affected because China has not permitted the PCAOB routine access to auditors of Chinese companies for review of the quality of the issuers' financial accounting.

Rule 6100 establishes:

- the process for the PCAOB's determinations under the HFCAA;
- the factors the PCAOB will evaluate and the documents and information it will consider when assessing whether a determination is warranted;
- the form, public availability, effective date, and duration of such determinations; and
- the process by which the PCAOB will reaffirm, modify, or vacate its determinations.

Under Rule 6100, the PCAOB may make two types of determinations:

- a jurisdiction-wide determination with respect to all registered public-accounting firms headquartered in a particular foreign jurisdiction; or
- a determination with respect to a particular registered public-accounting firm with an office in a foreign jurisdiction.

In making its determinations, the PCAOB will evaluate the following factors:

- the PCAOB's ability to select engagements, audit areas, and potential violations to be reviewed or investigated;

- the PCAOB’s timely access to, and the ability to retain and use, any document or information (including through conducting interviews and testimony) in the possession, custody, or control of the firm(s) or any associated persons thereof that the PCAOB considers relevant to an inspection or investigation; and
- the PCAOB’s ability to conduct inspections and investigations in a manner consistent with the provisions of the HFCAA and the rules of the PCAOB, as interpreted and applied by the PCAOB.

Under Rule 6100, the PCAOB’s determination will be issued in a report to the SEC. The report will analyze the factors and describe the basis of the PCAOB’s conclusions and will include an appendix listing the firms subject to the determination. A copy of the report will promptly be made publicly available on the PCAOB’s website and will be sent by email to each registered public-accounting firm listed in the appendix to the report. The determination will remain in effect until it is reaffirmed, modified, or vacated by the PCAOB, which is required to reassess the determination annually, or sooner on its own initiative or at the SEC’s request.

In a statement announcing approval of the new rules, SEC Chair Gary Gensler stated, “I believe it is critical that the Commission and the PCAOB work together to ensure that the auditors of foreign companies accessing U.S. capital markets play by the same rules.” He also noted that the SEC remains on track to finalize the required rulemaking under the HFCAA before the end of the year.

We will continue to monitor developments under the HFCAA and provide updates on Winston’s Capital Markets & Securities Law Watch.

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