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Via Email

Ms. Vanessa Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: Exchange Act Release No. 34-91364; IC-34227; File No. S7-03-21

Dear Ms. Countryman,

The New York Stock Exchange LLC and its affiliated securities exchanges¹ (“NYSE Exchanges”) respectfully submit this comment on the Securities and Exchange Commission’s (“Commission”) implementation of the Holding Foreign Companies Accountable Act (“HFCA Act”), which became law on December 18, 2020.²

The NYSE Exchanges’ comments below on the interim final amendments are limited to seeking clarity on the application of the Commission’s non-inspection year determination. Relatedly, the NYSE Exchanges also seek clarity on the earliest that a registrant could be determined to have a non-inspection year and thus subject to the disclosure and submission requirements. Finally, the NYSE Exchanges respond to the Commission’s request for comment on what it should consider in implementing the trading prohibition, including the importance of certainty regarding the when the trading prohibition applies.

Clarifying Application of “Non-Inspection Year”

The Commission adopted interim final amendments to implement the disclosure and submission requirements of the HFCA Act.³ As required by the HFCA Act, these disclosure and submission requirements apply to those registrants that the Commission 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 is unable to inspect or investigate completely because of a position taken by an authority in that jurisdiction (“Commission-Identified Issuers”). The year during which the Commission identifies the registrant as a Commission-Identified Issuer is a “non-inspection year” for that registrant. Based on its discussions with issuers, the NYSE Exchanges believe that further clarity is necessary regarding whether the “non-inspection year” is (i) the calendar year in which the Commission makes its determination that a registrant is a Commission-Identified Issuer or (ii)

¹ NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc. and NYSE National, Inc.

² Pub. L. No. 116-222, 134 Stat. 1063 (Dec. 18, 2020).

³ Exchange Act Release 91364 (Mar. 18, 2021), 86 FR 17528 (Apr. 5, 2021), (“HFCA Act Disclosure Interim Final Rules”).

the fiscal year covered by the registrant's annual report on which the Commission based its determination.⁴

Clarifying the Earliest Fiscal Year that a Registrant Could be Subject to the HFCA Act Disclosure and Submission Requirements

The NYSE Exchanges also believe that the issuer community and the marketplace more generally would benefit from clarity about the first fiscal year that the Commission intends to identify registrants as Commission-Identified Issuers, which would then be the first non-inspection year. The Commission states that “[a] registrant will not be required to comply with the disclosure requirement or the submission requirement until the Commission identifies it as having a non-inspection year,” and that “[o]nce identified, a registrant will be required to provide the HFCA Act disclosure in its annual report for each non-inspection year, *i.e.*, the report covering the fiscal year in which the registrant was included in the list of Commission Identified Issuers.”⁵ Thus, for registrants with December 31 fiscal year-ends, we believe this language means that the Commission intends for the first possible “non-inspection year” to be 2022 and that annual reports of a registrant determined to be a Commission-Identified Issuer for fiscal year 2022, filed in early 2023, would be the first possible annual report required to include the disclosures and submissions required by the HFCA Act.

On the other hand, the Commission also states that “a registrant will not be subject to a non-inspection year determination for any fiscal year ending on or prior to December 31, 2020, and accordingly, a registrant will not have to provide either the HFCA Act’s Section 3 disclosure or the Section 2 submission for those years.”⁶ This language implies that a registrant could be subject to a non-inspection year determination for its fiscal year ending after December 31, 2020 (*i.e.*, in 2021) and that, if determined to be a Commission-Identified Issuer, its annual report for 2021, filed in early 2022, would be required to include the disclosure and submission requirements.

Suggested Considerations Regarding Implementation of the Trading Prohibition

Finally, if the Commission determines that a registrant has three consecutive non-inspection years, the HFCA Act directs the Commission to prohibit the securities of such registrant from being traded in the U.S. market.⁷ The Commission requested comment on considerations it should take into account while determining how to best implement the trading prohibition requirements of the HFCA Act. In addition to the clarifications discussed above, the NYSE Exchanges strongly recommend that the precise date on which any trading prohibition applies to an issuer’s securities be made public by the Commission as soon

⁴ Based on an example provided by the Commission, the NYSE Exchanges believe that the “non-inspection year” is the calendar year in which the Commission makes its determination that a registrant is a Commission-Identified Issuer: “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.” *Id.* at 86 FR 17528, 17531. Nonetheless, the matter remains sufficiently unclear that it merits Commission resolution.

⁵ HFCA Act Disclosure Interim Final Rules, *supra* note 3, at 86 FR 17528, 17532.

⁶ *Id.* at 86 FR 17528, 17531.

⁷ See HFCA Act, Section 2.

as possible and that there be no flexibility or ambiguity in the date on which the trading prohibition applies.

In this regard, market participants would benefit from understanding the Commission's view on whether any trading prohibition for a registrant's securities would commence (i) on January 1 of the third year following the Commission's determination that a registrant is a Commission-Identified Issuer or (ii) three years after the date on which the Commission makes its determination that a registrant is a Commission-Identified Issuer. In addition, the HFCA Act's trading prohibition only prohibits the trading of securities of the Commission-Identified Issuer. In implementing this trading prohibition, the Commission should be clear whether this trading prohibition also includes derivatives, such as options and swaps based on the Commission-Identified Issuer's securities. The NYSE Exchanges also recommend that the Commission clearly establish the impact on any other securities market activities, such as clearance and settlement and options exercise and assignment, of the trading prohibition.

If you have any questions regarding the foregoing, please do not hesitate to contact us.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Elizabeth K. King". The signature is fluid and cursive, with a prominent initial "E" and a long, sweeping underline.

Elizabeth K. King