

Holding Foreign Companies Accountable Act: Final Amendments



In March 2021, the SEC adopted interim final rules to implement the **Holding Foreign Companies Accountable Act (HFCAA)**, which requires the agency to identify certain issuers that filed annual reports with audit reports issued by registered public accounting firms located in foreign jurisdictions and that the Public Company Accounting Oversight Board (PCAOB) is unable to inspect or investigate completely because of a position taken by an authority in those jurisdictions (Commission-Identified Issuers).

On December 2, 2021, the SEC issued amendments to finalize the interim final rules. Specifically, the SEC implemented the HFCAA's submission and disclosure requirements by amending Forms 20-F, 40-F, 10-K, and N-CSR.

Further, the SEC established procedures to identify issuers and prohibit the trading of the securities of certain registrants as required by the HFCAA.

Submission and Disclosure Requirements

Consistent with the HFCAA, the final amendments require Commission-Identified Issuers to submit documentation to the SEC through the EDGAR system on or before its annual report due date that establishes that it is not owned or controlled by a governmental entity in its public accounting firm's foreign jurisdiction. The final amendments also require an Commission-Identified Issuer that is also a "foreign issuer," as defined in Exchange Act Rule 3b-4, to provide certain additional specified disclosures in their annual report for itself and its consolidated foreign operating entity or entities, including any variable-interest entity or similar structure that results in additional foreign entities being consolidated in the registrant's financial statements.

The required disclosures include:

- 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 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 Chinese Communist Party, including the text of any such charter.

Determination of Commission-Identified Issuers

The SEC will identify a registrant as a Commission-Identified Issuer as early as possible after the registrant files its annual report and on a rolling basis. The SEC will “provisionally identify” a registrant as a Commission-Identified Issuer on the SEC’s website at www.sec.gov/HFCAA. For 15 business days after this provisional identification, a registrant may email the SEC if it believes it has been incorrectly identified, providing evidence supporting its claim. After reviewing the information, the registrant will be notified whether the SEC will “conclusively identify” the registrant as a Commission-Identified Issuer.

If the registrant does not contact the SEC to dispute the provisional identification within 15 business days, the SEC will conclusively identify the registrant as a Commission-Identified Issuer. The SEC will publish a list on its website identifying Commission-Identified Issuers, indicating the number of years a Commission-Identified Issuer has been published on the list, and noting whether the Commission-Identified Issuer has been subject to any prior trading prohibitions.

Process for Trading Prohibition

The HFCAA requires the SEC to prohibit the trading of the securities of certain Commission-Identified Issuers on a national securities exchange or through any other method that is within the jurisdiction of the SEC to regulate, including through over-the-counter trading. As a result, the SEC will impose an initial trading prohibition on a registrant as soon as practicable after it is conclusively identified as a Commission-Identified Issuer for three consecutive years. If the SEC ends the initial trading prohibition and, thereafter, the registrant is again determined to be a Commission-Identified Issuer, the SEC will impose a subsequent trading prohibition on the registrant for a minimum of five years.

To end an initial or subsequent trading prohibition, a Commission-Identified Issuer must certify that it has retained or will retain a registered public accounting firm that the PCAOB has determined it is able to inspect or investigate. To make that certification, the Commission-Identified Issuer must file financial statements that include an audit report signed by such a registered public accounting firm.

Additional Information:

The SEC will identify registrants pursuant to the HFCA Act based on the PCAOB’s determination and a registrant’s annual report for fiscal years beginning after Dec. 18, 2020. Visit sec.gov to find for more information about the adopted amendments and the full text of the final rules. The final rules will be published on SEC.gov and in the Federal Register.