

File No. PCAOB-2021-01
Consists of 285 Pages

SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

Form 19b-4

Proposed Rule

By

Public Company Accounting Oversight Board

In accordance with Rule 19b-4 under the
Securities Exchange Act of 1934

1. Text of the Proposed Rule

(a) Pursuant to the provisions of Section 107(b) of the Sarbanes-Oxley Act of 2002 (the “Act”), the Public Company Accounting Oversight Board (the “Board” or “PCAOB”) is filing with the U.S. Securities and Exchange Commission (the “Commission”) PCAOB Rule 6100, *Board Determinations Under the Holding Foreign Companies Accountable Act* (the “proposed rule”), which would provide a framework for the Board’s determinations under the Holding Foreign Companies Accountable Act. The proposed rule is attached as Exhibit A to this filing.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Board

(a) The Board approved the proposed rule, and authorized it for filing with the Commission, at the Board’s open meeting on September 22, 2021. No other action by the Board is necessary for the filing of the proposed rule.

(b) Questions regarding this rule filing may be directed to Liza McAndrew Moberg, Director, Office of International Affairs (202-591-4375, mcandrewmobergl@pcaobus.org); Beth Colleye, Associate Director, Office of International Affairs (202-591-4163, colleyeb@pcaobus.org); or Drew Dropkin, Senior Associate General Counsel (202-591-4393, dropkind@pcaobus.org).

3. Board’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule

(a) Purpose

The Act mandates that the Board inspect registered public accounting firms and investigate possible statutory, rule, and professional standards violations committed by those

firms and their associated persons. That mandate applies with equal force to the Board's oversight of registered firms in the United States and in foreign jurisdictions.

Over the course of more than a decade, the Board has worked effectively with authorities in foreign jurisdictions to fulfill its mandate to oversee registered firms located outside the United States. With rare exceptions, foreign audit regulators have cooperated with the Board and allowed it to exercise its oversight authority as it relates to registered firms located within their respective jurisdictions. The norms of international comity have guided those efforts and allowed the Board to work cooperatively across borders, to resolve conflicts of law, and to overcome other potential obstacles. The Board benefits greatly from cross-border cooperation with its international counterparts and has built constructive relationships that facilitate meaningful oversight. Authorities in a limited number of foreign jurisdictions, however, have taken positions that deny to the Board the access it needs to conduct its mandated oversight activities.

Recognizing the ongoing obstacles to Board inspections and investigations in certain foreign jurisdictions, Congress enacted the Holding Foreign Companies Accountable Act ("HFCAA").¹ The HFCAA requires that the Board determine whether it is unable to inspect or investigate completely registered public accounting firms located in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction. The HFCAA, among other things, also mandates that, after the Board makes such a determination, the Commission shall require covered issuers² who retain such firms to make certain disclosures in their annual

¹ Pub. L. No. 116-222, 134 Stat. 1063 (Dec. 18, 2020).

² See HFCAA § 2(i)(1)(A), 15 U.S.C. § 7214(i)(1)(A) (defining "covered issuer").

reports and, eventually, if certain conditions persist, shall prohibit trading in those issuers' securities.³

Following public comment, the Board adopted the proposed rule, with some modifications after consideration of comments, to establish a framework for the Board to make its determinations under the HFCAA. The proposed rule establishes the manner of the Board's determinations; the factors the Board 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 Board will reaffirm, modify, or vacate any such determinations.

(b) Statutory Basis

The statutory basis for the proposed rule is Title I of the Act.

4. Board's Statement on Burden on Competition

The Board's consideration of the economic impacts of the proposed rule is discussed in Section V of Exhibit 3.

5. Board's Statement on Comments on the Proposed Rule Received from Members, Participants, or Others

The Board released a proposed rule for public comment on May 13, 2021. *See* Exhibit 2(a)(A). On June 10, 2021, the Board conducted a webinar for investors on international issues, during which the Board discussed the proposed rule. *See* Exhibit 2(a)(B). The comment period

³ *See generally* Holding Foreign Companies Accountable Act Disclosure, SEC Exchange Act Release No. 91364 (Mar. 18, 2021).

closed on July 12, 2021. The Board received eight written comment letters relating to the initial proposed rule. *See* Exhibit 2(a)(C).

6. Extension of Time Period for Commission Action

The Board does not consent to an extension of the time period specified in Section 19(b)(2) of the Securities Exchange Act of 1934.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rules Based on Rules of Another Board or of the Commission

Not applicable.

9. Exhibits

Exhibit A – Text of the Proposed Rule.

Exhibit 1 – Form of Notice of Proposed Rule for Publication in the Federal Register.

Exhibit 2(a)(A) – PCAOB Release No. 2021-001 (Proposing Release).

Exhibit 2(a)(B) – Alphabetical List of Comments and Written Comments on the rule proposed in PCAOB Release No. 2021-001.


Exhibit 2(a)(C) – Transcript of June 10, 2021 Webinar for Investors on International Issues.

Exhibit 3 – PCAOB Release No. 2021-004 (Adopting Release).

10. Signatures

Pursuant to the requirements of the Act and the Securities Exchange Act of 1934, as amended, the Board has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Public Company Accounting Oversight Board

By: 

Phoebe W. Brown
Secretary

September 23, 2021

Exhibit A – Text of the Proposed Rule

The Board is amending Section 6 of its rules by adding new PCAOB Rule 6100, which is set forth below.

RULES

SECTION 6. International

* * * * *

Rule 6100. Board Determinations Under the Holding Foreign Companies Accountable Act

(a) Determinations as to Inability to Inspect or Investigate Registered Firms Completely

(1) Determinations as to Registered Firms Headquartered in a Particular Foreign Jurisdiction

The Board may determine that it is unable to inspect or investigate completely registered public accounting firms headquartered in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction.

(2) Determinations as to a Particular Registered Firm With an Office in a Foreign Jurisdiction

The Board may determine that it is unable to inspect or investigate completely a registered public accounting firm that has an office that is located in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction.

(3) Timing of Board Determinations

Promptly after the effective date of this rule, the Board will make determinations under subparagraph (a)(1) or (a)(2) to the extent such determinations are appropriate. Thereafter, the

Board will consider, at least annually, whether changes in facts and circumstances support any additional determinations pursuant to subparagraph (a)(1) or (a)(2). The Board will make additional determinations under subparagraph (a)(1) or (a)(2), as and when appropriate, to allow the Commission on a timely basis to identify covered issuers pursuant to the Commission's rules.

(b) Factors for Board Determinations

When making a determination described in subparagraph (a)(1) or (a)(2), the Board will assess whether the position taken by the authority (or authorities) impairs the Board's ability to execute its statutory mandate with respect to inspections or investigations of such firm(s) in one or more of the following respects:

- (1) the Board's ability to select engagements, audit areas, and potential violations to be reviewed or investigated;
- (2) the Board'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 Board considers relevant to an inspection or investigation; and
- (3) the Board's ability to conduct inspections and investigations in a manner consistent with the provisions of the Act and the Rules of the Board, as interpreted and applied by the Board.

(c) Basis for Board Determinations

The Board may consider any documents or information it deems relevant when making the assessment described in paragraph (b), including, but not limited to:

- (1) laws, statutes, regulations, rules, ordinances, and other legal authorities purporting to have or treated as having the force of law in the foreign jurisdiction or any political subdivision thereof, and interpretations and applications thereof;
- (2) the existence or absence of any agreement (and, if applicable, the terms thereof) between the Board and any relevant authority in the foreign jurisdiction regarding the conduct of inspections and investigations, as well as the authority's (or authorities') interpretations of and performance under any such agreement; and
- (3) the Board's experience with respect to the foreign authority's (or authorities') other conduct and positions taken relative to Board inspections or investigations.

(d) Commencement of Inspection or Investigation Not Required

A determination pursuant to subparagraph (a)(1) or (a)(2) need not depend on the Board's commencement of, but inability to complete, an inspection or investigation of a registered public accounting firm located in the foreign jurisdiction.

(e) Form and Publication of Board Determinations

(1) Board Reports to the Commission

When the Board makes a determination pursuant to subparagraph (a)(1) or (a)(2), its determination will be issued in the form of a report to the Commission. The report will describe the Board's assessment under paragraph (b) and the basis for the determination. An appendix to the report will identify the registered public accounting firm(s) to which the determination

applies by (i) the name under which the firm is registered with the Board and (ii) the firm's identification number with the Board.

(2) Publication of Board Reports

Promptly after the issuance of a report pursuant to subparagraph (e)(1), a copy of the report will be made publicly available on the Board's website; provided, however, that the report's contents will be redacted to the extent required by Section 105 of the Act and applicable laws relating to the confidentiality of proprietary, personal, or other information.

(3) Transmittal of Board Reports to Subject Firms

Promptly after the issuance of a report pursuant to subparagraph (e)(1), a copy of the report will be sent by electronic mail to each registered public accounting firm that is listed in the appendix; provided, however, that the report's contents will be redacted to the extent required by Section 105 of the Act and applicable laws relating to the confidentiality of proprietary, personal, or other information. The electronic mail will be directed to the electronic mail address of the firm's primary contact with the Board.

(4) Updating the Appendix to a Board Report

A registered public accounting firm identified in an appendix to a report as referenced in subparagraph (e)(1) shall notify the Secretary of any change to the firm's information contained in the appendix within 5 days of such a change. The Board may issue an updated appendix to a report at any time. An updated appendix will be transmitted to the Commission, made publicly available in accordance with subparagraph (e)(2), and sent to registered public accounting firms that are listed in the appendix in accordance with subparagraph (e)(3). The issuance of an updated appendix does not constitute a reassessment of a determination under paragraph (h).

(f) Effective Date of Board Determinations

A determination pursuant to subparagraph (a)(1) or (a)(2) becomes effective on the date the Board issues its report to the Commission referenced in subparagraph (e)(1).

(g) Duration of Board Determinations

A determination pursuant to subparagraph (a)(1) or (a)(2) remains in effect until it is reaffirmed, modified, or vacated by the Board.

(h) Reassessment of Board Determinations

The Board, on its own initiative or at the Commission's request, may at any time reassess a determination that is in effect, and will do so at least annually. When reassessing such a determination, the Board will conduct the assessment set forth in paragraph (b). Based on such reassessment, the Board will reaffirm, modify, or vacate the determination.

(i) Reaffirmed, Modified, and Vacated Board Determinations

When the Board reaffirms, modifies, or vacates a determination, the Board will issue a report to the Commission in accordance with subparagraph (e)(1), and in the case of a reaffirmed or modified determination, will update the appendix to the report referenced in subparagraph (e)(1). The Board also will make a copy of that report publicly available in accordance with subparagraph (e)(2) and send a copy of that report to registered public accounting firms in accordance with subparagraph (e)(3). A reaffirmed or modified determination, or the vacatur of a determination, will become effective on the date the Board issues its report to the Commission. The reassessment procedures described in paragraph (h) apply to a reaffirmed or modified determination, and a reaffirmed or modified determination will remain in effect until it is reaffirmed, modified, or vacated by the Board.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-#####; File No. PCAOB-2021-01)

[Date]

Public Company Accounting Oversight Board; Notice of Filing of Proposed Rule on Board Determinations Under the Holding Foreign Companies Accountable Act

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the “Act”), notice is hereby given that on September 23, 2021, the Public Company Accounting Oversight Board (the “Board” or “PCAOB”) filed with the Securities and Exchange Commission (the “Commission” or “SEC”) the proposed rule described in items I and II below, which items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

I. Board’s Statement of the Terms of Substance of the Proposed Rule

On September 22, 2021, the Board adopted PCAOB Rule 6100, *Board Determinations Under the Holding Foreign Companies Accountable Act* (the “proposed rule”). The text of the proposed rule appears in Exhibit A to the SEC Filing Form 19b-4 and is available on the Board’s website at <https://pcaobus.org/about/rules-rulemaking/rulemaking-dockets/docket-048-proposed-rule-governing-board-determinations-under-holding-foreign-companies-accountable-act> and at the Commission’s Public Reference Room.

II. Board’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rule and discussed comments it received on the proposed rule. The text of these statements may be examined at the places specified in

Item IV below. The Board has prepared summaries, set forth in Sections A, B, C, and D below, of the most significant aspects of such statements. In addition, the Board is requesting that the Commission determine that Section 103(a)(3)(C) of the Act does not apply to the proposed rule. The Board's conclusion in this regard is set forth in Section D.

A. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule

(a) Purpose

The Act mandates that the Board inspect registered public accounting firms and investigate possible statutory, rule, and professional standards violations committed by those firms and their associated persons. That mandate applies with equal force to the Board's oversight of registered firms in the United States and in foreign jurisdictions.

Over the course of more than a decade, the Board has worked effectively with authorities in foreign jurisdictions to fulfill its mandate to oversee registered firms located outside the United States. With rare exceptions, foreign audit regulators have cooperated with the Board and allowed it to exercise its oversight authority as it relates to registered firms located within their respective jurisdictions. The norms of international comity have guided those efforts and allowed the Board to work cooperatively across borders, to resolve conflicts of law, and to overcome other potential obstacles. The Board benefits greatly from cross-border cooperation with its international counterparts and has built constructive relationships that facilitate meaningful oversight. Authorities in a limited number of foreign jurisdictions, however, have taken positions that deny the Board the access it needs to conduct its mandated oversight activities.

Recognizing the ongoing obstacles to Board inspections and investigations in certain foreign jurisdictions, Congress enacted the Holding Foreign Companies

Accountable Act (“HFCAA”).¹ The HFCAA requires that the Board determine whether it is unable to inspect or investigate completely registered public accounting firms located in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction. The HFCAA, among other things, also mandates that, after the Board makes such a determination, the Commission shall require covered issuers² who retain such firms to make certain disclosures in their annual reports and, eventually, if certain conditions persist, shall prohibit trading in those issuers’ securities.³

Following public comment, the Board adopted the proposed rule, with some modifications after consideration of comments, to establish a framework for the Board to make its determinations under the HFCAA. The proposed rule establishes the manner of the Board’s determinations; the factors the Board 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 Board will reaffirm, modify, or vacate any such determinations.

(b) Statutory Basis

The statutory basis for the proposed rule is Title I of the Act.

B. Board’s Statement on Burden on Competition

¹ Pub. L. No. 116-222, 134 Stat. 1063 (Dec. 18, 2020).

² See HFCAA § 2(i)(1)(A), 15 U.S.C. § 7214(i)(1)(A) (defining “covered issuer”). An “issuer,” as that term is used here, is distinct from a “covered issuer,” and is defined in Section 2(a)(7) of the Act.

³ See generally *Holding Foreign Companies Accountable Act Disclosure*, SEC Exchange Act Release No. 91364 (Mar. 18, 2021).

Not applicable. The Board’s consideration of the economic impacts of the proposed rule is discussed in Section D below.

C. Board’s Statement on Comments on the Proposed Rule Received from Members, Participants or Others

Rulemaking History

On May 13, 2021, the Board proposed a new rule that would establish a framework for the Board’s determinations under the HFCAA.⁴ The Board received eight comments on the proposal from commenters across a range of affiliations.⁵ Commenters generally noted that the Board’s statutorily mandated oversight activities—including the Board inspections and investigations referenced in the HFCAA—promote audit quality and enhance the quality of financial reporting, which serve to protect investors and further the public interest. The proposed rule is informed by the comments received. The proposed rule also takes into account observations based on PCAOB oversight activities.

Background

The Board’s Oversight of Non-U.S. Registered Public Accounting Firms Through Board Inspections and Investigations

Section 102 of the Act prohibits public accounting firms that are not registered with the Board from preparing or issuing, or from participating in the preparation or

⁴ See PCAOB Rel. No. 2021-001, *Proposed Rule Governing Board Determinations Under the Holding Foreign Companies Accountable Act* (May 13, 2021).

⁵ The comment letters on the proposal are available on the Board’s website in Rulemaking Docket No. 048, available at <https://pcaobus.org/about/rules-rulemaking/rulemaking-dockets/docket-048-proposed-rule-governing-board-determinations-under-holding-foreign-companies-accountable-act>. During the comment period, Board members and staff discussed the proposal during a webinar for investors on international issues, a transcript of which also is available in Rulemaking Docket No. 048.

issuance of, audit reports with respect to issuers, brokers, or dealers.⁶ Implementing this prohibition, PCAOB Rule 2100, *Registration Requirements for Public Accounting Firms*, provides that each public accounting firm that prepares or issues an audit report with respect to an issuer, broker, or dealer, or plays a substantial role in the preparation or furnishing of such a report, must be registered with the Board.⁷

These provisions apply equally to U.S. and non-U.S. public accounting firms. Section 106 of the Act provides that any non-U.S. public accounting firm that prepares or furnishes an audit report with respect to an issuer, broker, or dealer is subject to the Act and to the Board's rules "in the same manner and to the same extent" as a U.S. public accounting firm.⁸ Therefore, non-U.S. firms issuing such reports must register with the Board. Section 106 of the Act further authorizes the Board to require non-U.S. firms that do not issue such reports but that play a substantial role in the preparation or furnishing of such reports to register with the Board,⁹ and the Board exercised that authority when it adopted Rule 2100.¹⁰

⁶ See Section 102(a) of the Act; *see also* Section 2(a)(7) of the Act & PCAOB Rule 1001(i)(iii) (defining "issuer"); Section 110(3) of the Act & PCAOB Rule 1001(b)(iii) (defining "broker"); Section 110(4) of the Act & PCAOB Rule 1001(d)(iii) (defining "dealer").

⁷ See PCAOB Rule 2100; *see also* PCAOB Rule 1001(p)(ii) (defining "play a substantial role in the preparation or furnishing of an audit report").

⁸ Section 106(a)(1) of the Act.

⁹ See Section 106(a)(2) of the Act.

¹⁰ See PCAOB Rule 2100. Section 106(c) of the Act allows the Board, subject to Commission approval, to exempt a non-U.S. firm or any class of such firms from any provision of the Act or the Board's rules, upon a determination that doing so is necessary or appropriate in the public interest or for the protection of investors. In connection with the launch of its oversight system in 2003, the Board received numerous requests that non-U.S. firms be exempted from the Board's oversight requirements, but

Thus, by virtue of Section 106 of the Act and Rule 2100, non-U.S. firms are subject to the same registration requirements as U.S. firms, and, once registered, they are subject to the same oversight as U.S. firms. This oversight includes Board inspections at mandated regular intervals and Board investigations.

The Board's Inspection Mandate

The Act mandates that the Board administer a continuing program of inspections that assesses registered firms' and their associated persons' compliance with the Act, the rules of the Board, the rules of the Commission, and professional standards in connection with the performance of audits, the issuance of audit reports, and related matters involving issuers.¹¹ Board inspections are the Board's "primary tool of oversight."¹²

In accordance with the Act, and as set forth in the Board's rules, the Board periodically inspects the audits of registered public accounting firms.¹³ Board inspections

the Board declined to adopt any such exemptions, finding such exemptions to be inconsistent with its mandate to protect investors. *See, e.g., Registration System for Public Accounting Firms*, PCAOB Rel. No. 2003-007, at 13, 17-20 (May 6, 2003); *see also, e.g., Final Rule Concerning the Timing of Certain Inspections of Non-U.S. Firms, and Other Issues Relating to Inspections of Non-U.S. Firms*, PCAOB Rel. No. 2009-003, at 9 n.23 (June 25, 2009).

¹¹ *See* Section 104(a)(1) of the Act; *see also* Section 101(c)(3) of the Act; PCAOB Rule 4000(a), *General*. The Act also permits the Board to establish, by rule, a program of inspection with respect to registered firms that provide one or more audit reports for a broker or dealer. *See* Section 104(a)(2) of the Act. The Board's rules provide for an interim inspection program related to audits of brokers and dealers. *See* PCAOB Rule 4020T, *Interim Inspection Program Related to Audits of Brokers and Dealers*.

¹² PCAOB Rel. No. 2009-003, at 8-9; *see also Order Approving Proposed Amendment to Board Rules Relating to Inspections*, SEC Exchange Act Release No. 61649, at 5 (Mar. 4, 2010) (observing that inspections are "the cornerstone of the Board's regulatory oversight of audit firms").

¹³ *See* Section 104(a)(1) of the Act. Generally, a registered firm's issuance of an audit report triggers a PCAOB inspection, subject to certain limited exceptions. *See* Section 104(b)(1) of the Act; PCAOB Rules 4003(a)-(b), *Frequency of Inspections*; *see*

must be performed annually with respect to each registered firm that regularly provides audit reports for more than 100 issuers, and at least triennially with respect to each registered firm that regularly provides audit reports for 100 or fewer issuers.¹⁴ The Board also may conduct special inspections on its own initiative or at the Commission's request.¹⁵

During an inspection, the Board reviews audit engagements "selected by the Board."¹⁶ The Board also evaluates the sufficiency of the firm's quality control system (and the documentation and communication of that system), and may perform other testing of the firm's audit, supervisory, and quality control procedures as deemed necessary or appropriate in light of the purpose of the inspection and the responsibilities of the Board.¹⁷

To conduct an inspection, the Board must obtain documents and information from the firm and its associated persons, and when the Board requests such documents or

also PCAOB Rules 4003(c) & (e) (identifying certain circumstances in which the Board has discretion to forgo an inspection of a firm). Additionally, the Board conducts inspections of firms that have not issued an audit report with respect to an issuer but have played a substantial role in the preparation or furnishing of such a report. *See* PCAOB Rule 4003(h).

¹⁴ *See* Section 104(b)(1) of the Act; *see also* PCAOB Rules 4003(a)-(b). The Act provides that the Board, by rule, may adjust the annual and triennial inspection schedules if the Board finds that different schedules are consistent with the purposes of the Act, the public interest, and the protection of investors. *See* Section 104(b)(2) of the Act; *see also* PCAOB Rules 4003(d)-(g) (adjusting the inspection schedule in certain circumstances).

¹⁵ *See* Section 104(b)(2) of the Act.

¹⁶ Section 104(d)(1) of the Act.

¹⁷ *See* Sections 104(d)(2) and 104(d)(3) of the Act.

information, registered firms and their associated persons must comply. In this regard, the Act provides that a firm's cooperation in and compliance with document requests made in furtherance of the Board's authority and responsibilities under the Act are a condition to the continuing effectiveness of the firm's registration with the Board.¹⁸ Furthermore, PCAOB Rule 4006, *Duty to Cooperate With Inspectors*, imposes on registered firms and their associated persons a duty to cooperate with PCAOB inspectors, which includes complying with requests for access to, and the ability to copy, any record in their possession, custody, or control, and with requests for information by oral interviews, written responses, or otherwise.¹⁹

The Board's Investigation Mandate

The Act also authorizes the Board to conduct investigations (and, relatedly, disciplinary proceedings) with respect to registered firms and their associated persons.²⁰ The Board may investigate any act, practice, or omission to act by a registered firm or

¹⁸ See Section 102(b)(3) of the Act. Section 102(b)(3)(A) of the Act specifies that each registration application shall contain "a consent executed by the . . . firm to cooperation in and compliance with any request for . . . documents made by the Board in the furtherance of its authority and responsibilities" under the Act. Section 102(b)(3)(B) of the Act, in turn, provides that each registration application shall contain a statement that the firm "understands and agrees that [such] cooperation and compliance . . . shall be a condition to the continuing effectiveness of the registration of the firm with the Board."

¹⁹ See PCAOB Rule 4006; *see also Gately & Assocs., LLC*, SEC Exchange Act Release No. 62656, at 9 (Aug. 5, 2010) ("The obligations under Rule 4006 are unequivocal, and apply to 'any request[] made in furtherance of the Board's authority and responsibilities.'" (quoting Rule 4006)). Documents and information prepared or received by or specifically for the Board in connection with an inspection are confidential and privileged as an evidentiary matter, but the Board may share them with the Commission and, under certain circumstances, with the Attorney General of the United States, certain federal regulators, state attorneys general, certain state regulators, and certain self-regulatory organizations. *See* Section 105(b)(5)(B) of the Act.

²⁰ *See* Section 101(c)(4) of the Act; *see also* Section 105(a) of the Act.

associated person that may violate the Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards, regardless of how the act, practice, or omission came to the Board's attention.²¹

As with inspections, the Board's ability to conduct investigations depends on the Board's ability to obtain documents and information from registered firms and their associated persons. Pursuant to the Act,²² the Board has adopted rules under which the Board may (1) require testimony of a registered firm or an associated person thereof with respect to any matter that the Board considers relevant or material to an investigation;²³ (2) require production of audit work papers and any other document or information possessed by a registered firm or associated person, wherever domiciled, that the Board considers relevant or material to an investigation;²⁴ (3) inspect the books or records of a registered firm or associated person to verify the accuracy of any documents or information supplied;²⁵ (4) request the testimony of, or any document in the possession of, any other person that the Board considers relevant or material to an investigation,

²¹ See Section 105(b)(1) of the Act.

²² See Section 105(b)(2) of the Act.

²³ See PCAOB Rule 5102, *Testimony of Registered Public Accounting Firms and Associated Persons in Investigations*.

²⁴ See PCAOB Rule 5103, *Demands for Production of Audit Workpapers and Other Documents from Registered Public Accounting Firms and Associated Persons*.

²⁵ See PCAOB Rule 5104, *Examination of Books and Records in Aid of Investigations*.

subject to certain limitations;²⁶ and (5) seek issuance by the Commission, in a manner established by the Commission, of a subpoena requiring the testimony of, or the production of any document in the possession of, any person that the Board considers relevant or material to an investigation.²⁷

Pursuant to the Act, a firm's cooperation in and compliance with requests for testimony and for the production of documents made in furtherance of the Board's authority and responsibilities are a condition to the continuing effectiveness of the firm's registration with the Board.²⁸ Moreover, if a registered firm or associated person refuses to testify, produce documents, or otherwise cooperate with a Board investigation, the Board can impose sanctions, which may include suspending or revoking a firm's registration and suspending or barring an individual from associating with a registered firm.²⁹ As the Commission has observed, failing to cooperate in a Board investigation is "very serious misconduct."³⁰

The Act requires the Board to coordinate its investigations with the Commission. The Board must notify the Commission of any pending Board investigation that involves a potential violation of the securities laws, and must thereafter coordinate its work with

²⁶ See PCAOB Rule 5105, *Requests for Testimony or Production of Documents from Persons Not Associated with Registered Public Accounting Firms*.

²⁷ See PCAOB Rule 5111, *Requests for Issuance of Commission Subpoenas in Aid of an Investigation*.

²⁸ See Section 102(b)(3) of the Act.

²⁹ See Section 105(b)(3) of the Act; PCAOB Rule 5110, *Noncooperation with an Investigation*.

³⁰ *R.E. Bassie & Co.*, SEC Accounting and Auditing Enforcement Release No. 3354, at 11 (Jan. 10, 2012).

the Commission's Division of Enforcement as necessary to protect any ongoing Commission investigation.³¹ The Act also authorizes the Board to refer an investigation to the Commission, a self-regulatory organization, certain other federal regulators, and, at the Commission's direction, certain attorneys general and state regulators.³²

The Board's Cooperative Framework for International Oversight

The Board has long observed that certain aspects of its inspection and investigation mandates raise special concerns for non-U.S. firms, including potential conflicts with non-U.S. law.³³ Acknowledging these challenges early on, the Board affirmed its commitment "to finding ways to accomplish the goals of the Act without subjecting non-U.S. firms to conflicting requirements."³⁴ The Board then worked with its international counterparts where necessary or appropriate, based on norms of international comity, to develop arrangements and working practices to enable the Board and other audit regulators to achieve their respective mandates in a manner responsive to

³¹ See Section 105(b)(4)(A) of the Act; see also PCAOB Rule 5112(a), *Commission Notification of Order of Formal Investigation*. Documents and information prepared or received by or specifically for the Board in connection with an investigation are confidential and privileged as an evidentiary matter, but the Board may share them with the Commission and, under certain circumstances, with the Attorney General of the United States, certain federal regulators, state attorneys general, certain state regulators, and certain self-regulatory organizations. See Section 105(b)(5)(B) of the Act.

³² See Section 105(b)(4)(B) of the Act; see also PCAOB Rule 5112(b), *Board Referrals of Investigations*; PCAOB Rule 5112(c), *Commission-directed Referrals of Investigations*.

³³ See, e.g., *Proposed Rules Relating to the Oversight of Non-U.S. Public Accounting Firms*, PCAOB Rel. No. 2003-024, at 3 (Dec. 10, 2003).

³⁴ *Inspection of Registered Public Accounting Firms*, PCAOB Rel. No. 2003-019, at 5, A2-15-A2-16 (Oct. 7, 2003).

the potential conflicts of law that non-U.S. firms might confront.³⁵ The Board’s cooperative approach to oversight of registered firms located outside the United States did not, however, entail any abandonment of the Board’s inspection or investigation mandates or any relinquishment of the Board’s statutory authority to obtain the documents and information it needs from non-U.S. firms in order to execute those mandates.³⁶

When the Board adopted its cooperative framework for overseeing non-U.S. registered firms,³⁷ it rejected calls to afford non-U.S. firms that elected to register with the Board a legal-conflict accommodation during inspections and investigations.³⁸ In so doing, the Board reiterated that “[p]reserving the Board’s ability to access audit work papers and other documents or information maintained by registered public accounting firms, including non-U.S. registered public accounting firms, is critical to the Board

³⁵ See, e.g., Briefing Paper, *Oversight of Non-U.S. Public Accounting Firms*, PCAOB Rel. No. 2003-020, at 1-2 (Oct. 28, 2003) (“[T]he PCAOB seeks to become partners with its international counterparts in the oversight of the audit firms that operate in the global capital markets. . . . [A]n arrangement based on mutual cooperation with other high quality regulatory systems respects the cultural and legal differences of the regulatory regimes that exist around the world.”); PCAOB Rel. No. 2003-024, at 8 (“The Board also believes its [cooperative] arrangements may reduce potential conflicts of law . . .”).

³⁶ PCAOB Rel. No. 2003-020, at 5 (“The Board believes that it is appropriate that a cooperative approach respect the laws of other jurisdictions, to the extent possible. At the same time, every jurisdiction must be able to protect the participants in, and the integrity of, its capital markets as it deems necessary and appropriate.”); *accord Final Rules Relating to Oversight of Non-U.S. Firms*, PCAOB Rel. No. 2004-005, at 3, A2-17 (June 9, 2004).

³⁷ See generally PCAOB Rel. No. 2004-005.

³⁸ See *id.* at A2-15-A2-16.

carrying out its obligations under the Act.”³⁹ For that reason, the Board did not believe that it would be “in the interests of U.S. investors or the public for the Board to adopt a rule of general application that would limit its ability to access such documents or information regardless of the circumstances or need for those documents or information.”⁴⁰

The Commission approved the Board’s rules regarding oversight of non-U.S. firms, which embody the cooperative approach described above.⁴¹ The Commission observed that the PCAOB was discussing potential conflicts of law with foreign audit oversight bodies and encouraged the PCAOB to continue those discussions and to consider ways to work cooperatively with its international counterparts.⁴²

Those discussions have continued, and nearly all have been fruitful. The Board’s oversight programs take into account the possibility that a non-U.S. firm’s obligations under the Act or the Board’s rules might conflict with non-U.S. law. The Board has established procedures that enable non-U.S. firms to assert legal conflicts during the registration and periodic reporting processes so that such firms are not prevented from completing a registration application or complying with periodic reporting requirements.⁴³ The Board also seeks to coordinate and cooperate with its international

³⁹ *Id.* at A2-16.

⁴⁰ *Id.* at A2-16-A2-17.

⁴¹ *See Order Approving Proposed Rules Relating to Oversight of Non-U.S. Registered Public Accounting Firms*, SEC Exchange Act Release No. 34-50291, at 3 (Aug. 30, 2004).

⁴² *See id.* at 3.

⁴³ PCAOB Rule 2105, *Conflicting Non-U.S. Laws*, permits a non-U.S. firm to withhold required information from its registration application based on an asserted

counterparts when conducting inspections or investigations in other countries.⁴⁴

Nevertheless, in all respects, the Board has made clear that its statutory authority to obtain the documents and information it needs to conduct inspections and investigations has not been relinquished, surrendered, forfeited, or otherwise vitiated.⁴⁵

Resolution of Obstacles to Inspections and Investigations in Non-U.S. Jurisdictions

The practices and approaches the Board has successfully developed with foreign regulators to resolve conflicts and to complete inspections and investigations under the Act can differ from jurisdiction to jurisdiction, but they all implement three core principles:

- (1) The Board must be able to conduct inspections and investigations consistent with its mandate;⁴⁶

conflict with non-U.S. law. That rule allows the Board to treat a registration application as complete if the firm, among other things, submits a copy of the purportedly conflicting non-U.S. law and an accompanying legal opinion. But Rule 2105 does not provide a vehicle for resolving conflicts of law during registration, nor does it apply “to potential conflicts of law that may arise subsequent to registration.” PCAOB Rel. No. 2004-005, at A2-16-A2-18; *see also* PCAOB Rule 2207, *Assertions of Conflicts with Non-U.S. Laws* (establishing a similar process for registered firms’ annual and special reports to the Board).

⁴⁴ *See, e.g., Rules on Periodic Reporting by Registered Public Accounting Firms*, PCAOB Rel. No. 2008-004, at 32 (June 10, 2008).

⁴⁵ *See, e.g., id.* at 41 (“The Board has consistently maintained that, although it will seek to work cooperatively with and through non-U.S. regulators, and although it is willing to accommodate a non-U.S. firm’s reluctance (rooted in an asserted conflict of law) to provide the required written consent to cooperate, each firm ultimately has an obligation to cooperate with the Board to the extent that the Board requires cooperation. The Board does not view this statutory obligation as limited or qualified by non-U.S. legal restrictions.”).

⁴⁶ *See, e.g.,* Section 104(a)(1) of the Act (requiring a “continuing program of inspections”); Section 104(b)(1) of the Act (establishing inspection frequency requirements); Section 104(c) of the Act (requiring identification of non-compliant acts,

- (2) The Board must be able to select the audit work and potential violations to be examined;⁴⁷ and
- (3) The Board must have access to firm personnel, audit work papers, and other information and documents deemed relevant by Board staff.⁴⁸

The Board has been able to accommodate the legal requirements of most non-U.S. jurisdictions without compromising on these three core principles, which the Board

practices, or omissions to act, and providing for reporting of such conduct to the Commission and appropriate state regulatory authorities, when appropriate); Section 105(b)(1) of the Act (authorizing Board investigations); Section 105(b)(3) of the Act (authorizing the imposition of sanctions for noncooperation with an investigation); Section 105(b)(4) of the Act (requiring coordination with the Commission’s Division of Enforcement and authorizing referrals of investigations in certain circumstances); Section 105(b)(5)(B)(i) of the Act (authorizing the Board to share with the Commission documents received in connection with an inspection or investigation).

⁴⁷ *See, e.g.*, Section 104(d)(1) of the Act (directing the Board to inspect and review audit and review engagements “as selected by the Board”); Section 104(d)(3) of the Act (authorizing the Board to perform other testing of audit, supervisory, and quality control procedures as are necessary or appropriate in light of the purpose of the inspection and the responsibilities of the Board); Section 105(b)(1) of the Act (authorizing the Board to conduct an investigation of “any” act, practice, or omission to act by a registered firm or an associated person thereof that may violate “any” provision of the Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission under the Act, or professional standards).

⁴⁸ *See, e.g.*, Section 104(d)(1) of the Act (directing the Board to inspect and review audit and review engagements); Section 104(d)(2) of the Act (directing the Board to evaluate the sufficiency of a registered firm’s quality control system, including the manner of the documentation and communication of that system); Section 105(b)(2)(A)-(B) of the Act (authorizing the Board to require the testimony of, and the production of audit work papers and any other documents or information from, registered firms and their associated persons, wherever domiciled, and to inspect the books and records of such firm or associated person to verify the accuracy of any documents or information supplied).

considers to be fundamental to its ability to inspect and investigate non-U.S. firms completely.

Building collaborative working relationships with international counterparts based on these principles has taken considerable time and substantial effort, but the Board believes that “it is in the interests of the public and investors for the Board to develop efficient and effective cooperative arrangements with its non-U.S. counterparts.”⁴⁹ The Board now has extensive experience with cooperative arrangements that successfully resolve conflicts and allow the PCAOB and its international counterparts to satisfy their respective oversight mandates.

Board Inspections of Non-U.S. Firms

Inspections of non-U.S. firms began in 2005,⁵⁰ and the Board quickly identified obstacles that required negotiation with its international counterparts. When a registered firm issuing audit reports for an issuer is located in a non-U.S. jurisdiction that has an auditor oversight authority of its own, the Board seeks to engage with that local regulator. The PCAOB conducts many inspections of non-U.S. firms jointly with local authorities, using approaches that take into consideration the laws and practices of the local jurisdiction. The Board also developed a specific regulatory framework for assessing the degree, if any, to which the Board may rely on the inspection work of the local regulator in an effort to reduce redundancy.⁵¹ Even where the Board conducts its own inspection

⁴⁹ PCAOB Rel. No. 2009-003, at 4-5.

⁵⁰ *See Rule Amendments Concerning the Timing of Certain Inspections of Non-U.S. Firms, and Other Issues Relating to Inspections of Non-U.S. Firms*, PCAOB Rel. No. 2008-007, at 4 (Dec. 4, 2008).

⁵¹ *See* PCAOB Rel. No. 2009-003, at 5-6. Non-U.S. firms may formally request that the Board rely on a non-U.S. inspection to the extent deemed appropriate by

rather than a joint inspection with a local auditor oversight authority, the Board may communicate with its international counterpart regarding the Board's inspections in the jurisdiction.⁵²

By December 2008, the Board had inspected non-U.S. firms in 24 jurisdictions.⁵³ But the Board also observed that home-country legal obstacles and sovereignty concerns were impeding the Board's ability to conduct inspections of some non-U.S. firms.⁵⁴ Given these obstacles, the Board, in 2009, adjusted the schedule for its first inspections of non-U.S. firms in certain jurisdictions so that the Board could continue its efforts to reach cooperative arrangements with those firms' home-country regulators.⁵⁵

In so doing, however, the Board expressly rejected the suggestion that it should exempt from inspection non-U.S. firms "that cannot cooperate with PCAOB inspections due to legal conflicts or sovereignty-based opposition from their local governments," finding that exempting such firms from inspections is not in the interests of investors or

the Board, and the Board will examine certain factors to determine the degree, if any, to which the Board may rely on the non-U.S. inspection. *See* PCAOB Rule 4011, *Statement by Foreign Registered Public Accounting Firms*; PCAOB Rule 4012, *Inspections of Foreign Registered Public Accounting Firms*; PCAOB Rel. No. 2009-003, at 5. In contrast to an exemption, reliance on a non-U.S. inspection pursuant to Rule 4012 is a cooperative approach that can be used when efficient and appropriate.

⁵² *See* PCAOB Rel. No. 2009-003, at 5.

⁵³ *See* PCAOB Rel. No. 2008-007, at 4 & n.9 (inspections had been conducted in Argentina, Australia, Bermuda, Brazil, Canada, Chile, Colombia, Greece, Hong Kong, India, Indonesia, Ireland, Israel, Japan, Kazakhstan, Mexico, New Zealand, Panama, Peru, Singapore, South Africa, South Korea, Taiwan, and the United Kingdom).

⁵⁴ PCAOB Rel. No. 2009-003, at 5.

⁵⁵ *See id.* at 9.

the public.⁵⁶ Instead, the Board reaffirmed the ultimate obligation of all registered firms, including non-U.S. firms, to be subject to inspection and to comply with the Board’s inspection-related requests.⁵⁷

The Commission, in approving the Board’s extension of the deadline for the first inspections of certain non-U.S. firms, recognized that “the adjustment would provide additional time [for the Board] to continue discussions on outstanding matters and work towards cooperation and coordination with authorities in all relevant jurisdictions.”⁵⁸ And in connection with its approval of other adjustments to the inspection schedule of non-U.S. firms, the Commission stated that “the PCAOB should continue to work toward cooperative arrangements with the appropriate local auditor oversight authorities where it is reasonably likely that appropriate cooperative arrangements can be obtained.”⁵⁹

⁵⁶ *See id.* at 8-9.

⁵⁷ *See id.* at 13-14 (“[F]irms must register with the Board in order to engage in certain professional activity directly related to, and affecting, U.S. financial markets, and all registered firms are subject to the Act and the rules of the Board irrespective of their location. A registered firm is subject to various requirements and conditions, including PCAOB Rule 4006’s requirement to cooperate in an inspection. In addition, as reflected in Section 102(b)(3) of the Act, a firm’s compliance with Board requests for information is a condition of the continuing effectiveness of the firm’s registration with the Board.”). The Board also reiterated that it “does not view non-U.S. legal restrictions or the sovereignty concerns of local authorities as a sufficient defense in a Board disciplinary proceeding . . . for failing or refusing to provide information requested in an inspection.” *Id.* at 14; *accord* PCAOB Rel. No. 2008-007, at 16 n.35.

⁵⁸ *Order Approving Proposed Amendment to Board Rules Relating to Inspections*, SEC Exchange Act Release No. 34-59991, at 3 (May 28, 2009).

⁵⁹ *Id.* at 5.

By the end of 2009, the Board had conducted inspections of non-U.S. firms in an additional nine jurisdictions, bringing the cumulative total to 33 jurisdictions.⁶⁰ The Board, however, was still prevented from inspecting registered firms in mainland China, Hong Kong (to the extent an audit encompassed a company's operations in mainland China), Switzerland, and the European countries required to follow the European Union's Directive on Statutory Auditors.⁶¹

The Board responded to these obstacles in several ways⁶² and, since 2010, the Board has inspected non-U.S. firms in an additional 20 jurisdictions, bringing the total

⁶⁰ See *Jurisdictions in Which the PCAOB Has Conducted Inspections (as of Dec. 31, 2009)* (Feb. 3, 2010), available at https://pcaob-assets.azureedge.net/pcaob-dev/docs/default-source/inspections/documents/12-31-jurisdictions.pdf?sfvrsn=2c09bd73_0 (adding Belize, Bolivia, Cayman Islands, Norway, Papua New Guinea, Philippines, Russia, Ukraine, and United Arab Emirates).

⁶¹ See *PCAOB Publishes Updated Staff Guidance Related to Registration Process for Applicants from Certain Non-U.S. Jurisdictions* (June 1, 2010), available at https://pcaobus.org/news-events/news-releases/news-release-detail/pcaob-publishes-updated-staff-guidance-related-to-registration-process-for-applicants-from-certain-non-u-s-jurisdictions_289.

⁶² In 2009, the Board began publishing a list of registered firms whose first inspections were overdue, which identified the jurisdiction in which each firm was located. See PCAOB Rel. No. 2009-003, at 10-11. In 2010, the Board expanded the publication to include a list of non-U.S. public companies with securities traded in U.S. markets that had retained a registered firm the Board could not inspect because of asserted restrictions based on non-U.S. law or objections on grounds of national sovereignty (the "Denied Access List"). See *PCAOB Publishes List of Issuer Audit Clients of Non-U.S. Registered Firms in Jurisdictions where the PCAOB is Denied Access To Conduct Inspections* (May 18, 2010), available at https://pcaobus.org/news-events/news-releases/news-release-detail/pcaob-publishes-list-of-issuer-audit-clients-of-non-u-s-registered-firms-in-jurisdictions-where-the-pcaob-is-denied-access-to-conduct-inspections_284 ("The auditors of the issuers appearing on this list are located in [mainland] China, Hong Kong, Switzerland, and 18 European Union countries. The PCAOB continues to work to eliminate obstacles to inspections in these jurisdictions.").

Also, in October 2010, the Board modified its approach to registration applications from firms in jurisdictions where there were unresolved obstacles to inspections, stating that "its consideration of new applications from firms in those

number of non-U.S. jurisdictions in which the PCAOB has conducted inspections to 53.⁶³ Where needed, the Board enters into formal bilateral cooperative agreements with non-U.S. regulators, and has done so with authorities in 25 jurisdictions.⁶⁴ The Board continues to publish its Denied Access List, which identifies the jurisdictions where the PCAOB cannot conduct inspections because foreign authorities have denied access, the auditors from those jurisdictions that issued audit reports filed with the Commission, and those auditors' non-U.S. public company clients.⁶⁵ The Board also still adheres to the

jurisdictions will no longer be premised on an expectation that those obstacles will be resolved without undue delay to any necessary PCAOB inspection of the firm.” *Consideration of Registration Applications From Public Accounting Firms in Non-U.S. Jurisdictions Where There Are Unresolved Obstacles to PCAOB Inspections*, PCAOB Rel. No. 2010-007, at 2-3 (Oct. 7, 2010). A list of those jurisdictions is maintained on the PCAOB’s website. See *Frequently Asked Questions Regarding Issues Relating to Non-U.S. Accounting Firms* (Apr. 20, 2021), available at https://pcaobus.org/oversight/registration/non_us_registration_faq (FAQ 6).

⁶³ See *Non-U.S. Jurisdictions Where the PCAOB has Conducted Oversight*, available at <https://pcaobus.org/oversight/international/international/pcaob-inspections-of-registered-non-u-s-firms> (adding Austria, Bahamas, Denmark, Finland, France, Germany, Hungary, Italy, Jamaica, Luxembourg, Malaysia, Netherlands, Nicaragua, Nigeria, Pakistan, Spain, Sweden, Switzerland, Thailand, and Turkey).

⁶⁴ See *PCAOB Cooperative Arrangements with Non-U.S. Regulators*, available at <https://pcaobus.org/oversight/international/regulatorycooperation>. Although a formal bilateral agreement is not necessarily a prerequisite to a PCAOB inspection in a non-U.S. jurisdiction, the PCAOB often enters into such agreements with foreign audit regulators to minimize administrative burdens and potential legal or other conflicts that non-U.S. firms might face in their home countries.

⁶⁵ See *Audit Reports Issued by PCAOB-Registered Firms in Jurisdictions where Authorities Deny Access to Conduct Inspections*, available at <https://pcaobus.org/oversight/international/denied-access-to-inspections> (identifying jurisdictions where the Board has been denied access to conduct inspections).

registration approach it adopted in 2010 and maintains a public list of the jurisdictions whose applicants are subject to that approach.⁶⁶

All told, more than 840 non-U.S. firms from more than 80 jurisdictions are registered with the Board. Over 200 of those firms, from more than 40 jurisdictions, are presently subject to PCAOB inspection on a triennial basis because they have chosen to audit issuers.⁶⁷ As of the date of this release, as reflected on the Board's website,⁶⁸ the Board can conduct inspections everywhere it needs to do so except in mainland China and Hong Kong.

Board Investigations of Non-U.S. Firms

The Board has conducted numerous investigations in which it appeared that an act, practice, or omission to act by a non-U.S. firm or its associated persons might have violated an applicable law, rule, or standard. In the course of those investigations, the Board has used a variety of tools, provided for in the Act and the Board's rules, to access relevant documents and information. Using those tools, the Board has requested and

⁶⁶ See Frequently Asked Questions Regarding Issues Relating to Non-U.S. Accounting Firms (Apr. 20, 2021), *available at* https://pcaobus.org/oversight/registration/non_us_registration_faq (FAQ 6, identifying jurisdictions where obstacles to inspection exist). This list of jurisdictions is broader than the Denied Access List, because this list includes certain European jurisdictions where the Board presently does not need to conduct inspections because no registered firms in the jurisdiction are issuing audit reports, but where an agreement regarding inspections would need to be reached before any future inspections could take place.

⁶⁷ Currently, there are no non-U.S. firms that the PCAOB is required by the Act to inspect on an annual basis.

⁶⁸ See International, *available at* <https://pcaobus.org/oversight/international> (providing a map showing where the Board currently is able to conduct oversight of registered firms and where the Board currently is denied the necessary access to conduct oversight activities).

obtained audit work papers and other documents and information from non-U.S. firms and associated persons, and has conducted interviews and testimony of non-U.S. firm personnel.

In many of those instances, the Board coordinated its investigation with a non-U.S. regulator with which it had entered a bilateral cooperative arrangement. Those cooperative arrangements have allowed the Board and its international counterpart to communicate and share information, facilitating the Board's access to the documents and information it needed to conduct the investigation. In some but not all circumstances, in parallel with the Board's investigation, a non-U.S. regulator may conduct its own investigation of the same firm or associated persons for possible violations under the regulator's laws and standards.

Many of the Board's investigations of non-U.S. firms or their associated persons remain confidential, because Board investigations are non-public and cannot be disclosed unless they have resulted in the imposition of disciplinary sanctions.⁶⁹ The Board does, however, disclose its settled and adjudicated disciplinary orders imposing sanctions.⁷⁰ To date, the Board has sanctioned more than 50 non-U.S. registered firms and more than 60 associated persons of such firms, from 24 non-U.S. jurisdictions.⁷¹ In addition to the

⁶⁹ See Section 105(b)(5)(A) of the Act.

⁷⁰ When the Board imposes sanctions, the Board's disciplinary action is stayed if the respondent applies for Commission review of the Board's order or if the Commission initiates such review on its own. In either situation, the Board's sanctions remain stayed (and non-public) unless and until the Commission lifts the stay. See Section 105(e)(1) of the Act. After the stay is lifted, the Board's order may be made public. See Section 105(d)(1)(C) of the Act.

⁷¹ See Enforcement Actions, available at <https://pcaobus.org/oversight/enforcement/enforcement-actions>.

investigations that resulted in the imposition of sanctions, the Board also has conducted investigations that did not result in sanctions in numerous other non-U.S. jurisdictions. Yet despite these results, the Board has been unable to complete some investigations of non-U.S. firms or their personnel because they refused to cooperate with an investigation based on a position taken by non-U.S. authorities in their jurisdiction.⁷²

The Holding Foreign Companies Accountable Act

Against this backdrop, Congress enacted the HFCAA. The HFCAA, which amends Section 104 of the Act, calls for the Board to determine whether it is unable to inspect or investigate completely registered firms located in a foreign jurisdiction because of a position taken by an authority in that jurisdiction.⁷³ The HFCAA, among other things, also mandates that after the Board makes such a determination, the Commission shall require covered issuers that retain firms subject to the Board's determination to make certain disclosures in their annual reports and, eventually, if certain conditions persist, shall prohibit trading in those issuers' securities.⁷⁴

⁷² See, e.g., *Crowe Horwath (HK) CPA Limited*, PCAOB Rel. No. 105-2017-031 (July 25, 2017) (noncooperation with a Board investigation based on positions taken by Chinese authorities); *Kim Wilfred Ti*, PCAOB Rel. No. 105-2016-004 (Jan. 12, 2016) (same); *Derek Wan Tak Shing*, PCAOB Rel. No. 105-2016-003 (Jan. 12, 2016) (same); *Edith Lam Kar Bo*, PCAOB Rel. No. 105-2016-002 (Jan. 12, 2016) (same); *PKF [Hong Kong]*, PCAOB Rel. No. 105-2016-001 (Jan. 12, 2016) (same).

⁷³ See HFCAA § 2(i)(2)(A), 15 U.S.C. § 7214(i)(2)(A) (requiring that the Commission identify certain issuers that “retain[] a registered public accounting firm that has a branch or office that . . . is located in a foreign jurisdiction . . . and . . . the Board is unable to inspect or investigate completely because of a position taken by an authority in [that] foreign jurisdiction . . . , as determined by the Board”).

⁷⁴ See HFCAA §§ 2(i)(2)(B), 2(i)(3), 3(b), 15 U.S.C. §§ 7214(i)(2)(B), 7214(i)(3), 7214a(b).

The Board's determinations under the HFCAA supplement, rather than supplant, the Board's other authorities under the Act. A registered firm's cooperation in and compliance with Board requests during inspections and investigations continues to be a condition to the continuing effectiveness of its registration with the Board. Failure to cooperate with a Board inspection or investigation still can result in the imposition of disciplinary sanctions, including civil money penalties and revocation of the firm's registration. Therefore, firms must consider their obligations to comply with PCAOB inspection and investigation demands when they choose to become and remain registered with the Board and when they accept or continue client engagements.

Discussion of the Proposed Rule

The HFCAA does not specify the procedure the Board should follow when making determinations. Nor does the HFCAA specify the content of the Board's determinations; the manner in which any such determination should be shared with the Commission; how, and in what format, any such determination should be made publicly available; the effective date or duration of any such determination; or the manner in which any such determination can be reaffirmed, modified, or vacated. The proposed rule establishes those facets of the Board's determination process.

Although the HFCAA does not expressly require the Board to adopt a rule governing the determinations it makes under the statute, the Board believes that a rule will inform investors, registered firms, issuers, audit committees, foreign authorities, and the public at large as to how the Board will perform its functions under the statute. Furthermore, a Board rule will promote consistency in the Board's processes regarding

determinations under the HFCAA.⁷⁵ Commenters generally agreed that a rule governing the Board’s determination process would promote transparency and consistency and reduce regulatory uncertainty.

Two Types of Board Determinations Under the HFCAA

The HFCAA requires that the Board determine whether it is unable to inspect or investigate completely registered public accounting firms that have a branch or office that is located in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction. The proposed rule provides that the Board may make two types of determinations: determinations as to a particular foreign jurisdiction and determinations as to a particular registered firm. Those two types of determinations are addressed in subparagraphs (a)(1) and (a)(2) of proposed Rule 6100.

Determinations as to Registered Firms Headquartered in a Particular Foreign Jurisdiction

The Board believes that firms headquartered in a foreign jurisdiction necessarily have a branch or office that is located in that jurisdiction. Taking that into account, subparagraph (a)(1) of the proposed rule provides that the Board may determine that it is unable to inspect or investigate completely registered firms⁷⁶ headquartered in a foreign

⁷⁵ The Act states that “[t]he rules of the Board shall, subject to the approval of the Commission[,] . . . provide for the operation and administration of the Board, the exercise of its authority, and the performance of its responsibilities under this Act.” Section 101(g)(1) of the Act.

⁷⁶ The HFCAA refers to a firm’s “branch or office” that the Board is unable to inspect or investigate completely. HFCAA § 2(i)(2)(A)(i), 15 U.S.C. § 7214(i)(2)(A)(i). The Board does not inspect or investigate branches or offices. Rather, the Board inspects registered firms and investigates potential violations by registered firms or their associated persons. Accordingly, the proposed rule refers to the Board’s inability to inspect or investigate registered firms.

jurisdiction because of a position taken by one or more authorities in that jurisdiction. In other words, a jurisdiction-wide determination under subparagraph (a)(1) would apply to all firms *headquartered* in that jurisdiction.

The Board adopted subparagraph (a)(1) as proposed. Commenters generally supported the Board's proposed approach to jurisdiction-wide determinations. Several commenters noted that jurisdiction-wide determinations would be consistent with the HFCAA or otherwise appropriate, and several other commenters stated that having such determinations apply to firms that are headquartered in the jurisdiction would likewise be appropriate. No commenter asserted that jurisdiction-wide determinations would be inconsistent with the HFCAA or otherwise inappropriate.

The Board believes that a jurisdiction-wide approach to its determinations under the HFCAA is consistent with the structure of the statute. The statute requires the Board's determinations to be based on "a position taken by an authority in the foreign jurisdiction." It follows that if a foreign authority articulates or maintains a position that applies generally to PCAOB inspections or investigations in a foreign jurisdiction, that position could provide the basis for a jurisdiction-wide determination. Hence, the statute, in the Board's view, can reasonably be interpreted to allow the Board to make jurisdiction-wide determinations.⁷⁷

Having a jurisdiction-wide approach at the Board's disposal is important for consistency and efficiency. When the obstacles to completing inspections and

⁷⁷ See, e.g., 166 Cong. Rec. H6033 (daily ed. Dec. 2, 2020) (statement of Rep. Gonzalez) ("[T]he act should be read to apply to companies where the auditor that signs the audit report is located in a jurisdiction that does not permit PCAOB inspection access.").

investigations are not specific to individual registered firms, but instead reflect threshold or general positions taken by a foreign authority, the Board believes that it should be able to address those obstacles on a jurisdiction-wide basis in a consistent manner and in a single determination. Under those circumstances, separate determinations as to each registered firm in the jurisdiction should not be required.

The proposed rule provides that jurisdiction-wide determinations would be limited to registered firms that are “headquartered” in the jurisdiction. The Board believes that a position taken by a foreign authority will impact registered firms headquartered in the jurisdiction, but its impact on firms that are headquartered elsewhere can turn on multiple factors, including the extent of a firm’s presence in the jurisdiction and the nature and extent of the audit work it performs in that jurisdiction. Limiting jurisdiction-wide determinations to firms that are headquartered in the jurisdiction is intended to ensure that these determinations are appropriately tailored and do not encompass firms that have a physical presence of any kind, or personnel of any number, in the jurisdiction. Consistent with the scope of the HFCAA, however, the proposed rule provides that the Board may make individualized determinations as to firms that have an “office” in a noncooperative jurisdiction but are headquartered elsewhere, as discussed below.

A firm is “headquartered,” as that term is used in the proposed rule, at its principal place of business (i.e., where the firm’s management directs, controls, and coordinates the firm’s activities).⁷⁸ The Board would presume that a firm is

⁷⁸ See, e.g., *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010) (defining “principal place of business” in the context of federal diversity jurisdiction, and further explaining that “in practice it should normally be the place where the corporation

headquartered at the physical address reported by the firm as its headquarters to the Board in the firm's required filings.⁷⁹ Absent an indication that the headquarters address reported by a firm may not be its principal place of business, the Board would use that address to determine where the firm is "headquartered" for purposes of the proposed rule. If questions arise as to whether a firm's reported headquarters address is the firm's principal place of business, however, the Board may consider other relevant and reliable information regarding the firm and may request additional information from the firm pursuant to the Board's rules when determining where a firm is headquartered.⁸⁰

Several commenters stated that it was appropriate for the Board to look at a firm's required filings with the Board in the first instance for information as to where the firm is headquartered. One commenter suggested that the Board look beyond such filings and also consider a firm's filings with its home-country regulator as well as other facts and circumstances regarding the firm. As noted in the preceding paragraph, the Board retains

maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, *i.e.*, the 'nerve center,' and not simply an office where the corporation holds its board meetings").

⁷⁹ When registering with the Board, an applicant must provide its "HEADQUARTERS PHYSICAL ADDRESS" in Item 1.2.1 of its application for registration on Form 1. Each year thereafter, in Item 1.2.a of its annual report on Form 2, a firm must provide the "Physical address of the Firm's headquarters office."

⁸⁰ See PCAOB Rule 4000(b) ("In furtherance of the Board's inspection process, the Board may at any time request that a registered public accounting firm provide to the Board additional information or documents relating to information provided by the firm in any report filed pursuant to Section 2 of these Rules, or relating to information that has otherwise come to the Board's attention."). This approach aligns with the Board's decade-long practice when assessing registration applications from firms located in non-U.S. jurisdictions where there are obstacles to PCAOB inspections. This approach has been applied to applicants that are headquartered in such jurisdictions, and the Board has sought additional information from applicants when necessary to assess where they are headquartered.

the ability to request and consider additional information—including the information identified by the commenter—if any questions arise regarding the location of a firm’s headquarters. Another commenter, contemplating that the Board might look to filings of Form AP for information as to where a firm is headquartered, cautioned that such forms may not be timely filed.⁸¹ The Board intends to rely on annual reports on Form 2 rather than Form APs for such information, though the Board is not precluded from considering information on Form APs or any other relevant and reliable information.⁸²

In some instances, a member firm of an international firm network might be headquartered in a jurisdiction that becomes subject to a jurisdiction-wide determination of the Board. In such a circumstance, if that member firm is a separate legal entity from the other member firms in the network and signs audit reports in its own name, the Board would not treat other member firms in the network as being “located” or having an “office” in that jurisdiction merely because they are part of the same network as a member firm subject to the jurisdiction-wide determination.⁸³ One commenter addressed this topic and agreed with this approach.

Based on its experience with inspections and investigations in foreign jurisdictions, the Board anticipates that most determinations made under proposed Rule

⁸¹ Item 3.1.7 of Form AP identifies the office (not the headquarters) of the firm that issued the audit report for the referenced audit engagement, but Item 4.1 of Form AP identifies the headquarters’ office location of the other accounting firms that contributed 5% or more of the total audit hours.

⁸² In any event, PCAOB Rule 3211, *Auditor Reporting of Certain Audit Participants*, already requires timely filing of accurate Form APs, and the failure to comply with that rule can provide the basis for inspection findings or disciplinary sanctions.

⁸³ See SEC Exchange Act Release No. 91364, at 4 n.8.

6100 would be jurisdiction-wide determinations under subparagraph (a)(1). Historically, the positions taken by foreign authorities have impaired the Board's ability to conduct inspections or investigations in the jurisdiction generally.

Some of the positions taken by foreign authorities have been based upon "gatekeeper" laws, which provide that a registered firm can transfer its audit work papers to the Board only via a local non-U.S. regulator. (By contrast, no audit oversight law in the U.S. requires foreign auditor oversight authorities to involve the PCAOB when seeking audit work papers from a U.S. firm.) As noted above, the Board has considerable experience resolving conflicts that arise from gatekeeper laws using bilateral arrangements, or statements of protocol, whereby the non-U.S. regulator facilitates the PCAOB's access to audit work papers and associated information that registered firms are obligated to provide to the Board upon request. The Board's ability to conduct inspections or investigations could become impaired in any of these jurisdictions, however, if such an arrangement were terminated; if non-performance under an arrangement were significant; or if, in the case of countries within the European Economic Area, an arrangement were rendered ineffective because the European Commission revoked or failed to renew its "adequacy decision" regarding the PCAOB.⁸⁴

⁸⁴ Article 47 of the Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts requires that the European Commission issue an adequacy decision regarding a third country audit regulator (such as the PCAOB) and that regulator's ability to safeguard audit work papers and related confidential information before a European Union member state audit regulator can execute a working arrangement allowing firms to provide access to such information. *See* Directive 2014/56/EU, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0056>. The European Commission's July 2016 adequacy decision with respect to the PCAOB is set to expire in July 2022.

The resulting impairment would have jurisdiction-wide impact, and thus could give rise to a jurisdiction-wide determination under subparagraph (a)(1) of the proposed rule. The Board believes that a jurisdiction-wide determination would be an efficient, appropriate response to such an impairment.

Apart from gatekeeper laws, foreign authorities' positions also may be based on other substantive laws (e.g., personal data protection laws, state secrecy laws, banking secrecy laws, or commercial secrecy laws) that impair the Board's ability to conduct inspections or investigations by obstructing the Board's access to firm personnel, audit work papers, or other documents or information relevant to an inspection or investigation. The Board also has considerable experience working collaboratively with non-U.S. regulators to employ working practices that enable compliance with such non-U.S. laws without impairing the Board's ability to complete inspections or investigations. The proposed rule contemplates circumstances in which a cooperative resolution to those legal conflicts might not be achieved.

In those circumstances, the Board believes that investors and the public interest would be best served by making a jurisdiction-wide determination under the HFCAA, even if the foreign jurisdiction's law (or interpretation or application of that law) affects the Board's ability to inspect or investigate only certain types of audit engagements. For instance, a foreign jurisdiction might deny to the PCAOB access to critical parts of the audit work papers for entities operating in a particular business sector (e.g., financial services) or with particular business models (e.g., state-owned enterprises). In such a case, even if only a few registered firms in that jurisdiction presently are auditing issuers in that sector or with that business model, the Board would assess whether its access

would be equally impaired should any registered firm in the jurisdiction perform the restricted engagements. If the foreign authority's position applies generally to firms within the jurisdiction, then it impairs the Board's ability to conduct inspections or investigations completely on a jurisdiction-wide basis, regardless of the differences among registered firms' client portfolios at the time of the Board's determination. No commenter challenged this reasoning, nor did any commenter suggest that investors or the public interest would be better served if the Board were to make determinations as to particular firms, rather than jurisdiction-wide determinations, in such circumstances.

In the situation described above, the Board does not believe that firm-by-firm determinations would be appropriate. While the Board could make a determination as to particular firms under subparagraph (a)(2) of the proposed rule based, for instance, on the composition of each firm's client portfolio at a moment in time, the Board believes that such an approach may not effectively accomplish the HFCAA's objectives. For instance, it might incentivize an issuer whose audit engagement cannot be inspected or investigated by the Board (a financial institution or state-owned enterprise in the example) to switch audit firms frequently. Specifically, if the issuer's audit firm were made subject to a Board determination under the HFCAA, the issuer could switch to another audit firm in the jurisdiction that had not previously handled a restricted engagement and, when the Board subsequently issued a determination under the HFCAA as to the issuer's new audit firm, the issuer could switch yet again. Such purposeful migration by issuers could trigger a perpetual cycle of Board determinations as to particular audit firms, while the issuers potentially evade some or all of the intended consequences of the HFCAA. A

jurisdiction-wide determination, by contrast, would eliminate these concerns. No commenter disagreed with this analysis or the Board’s rationale.

The jurisdiction-wide determinations contemplated by subparagraph (a)(1) of the proposed rule also comport with the historical practice of identifying publicly the jurisdictions where there are unresolved obstacles to Board inspections or investigations. Since 2010, information of this kind has been posted on the PCAOB’s website, for two purposes: to notify investors and potential investors of the public companies whose audit reports were issued by firms from those jurisdictions, and to notify firms considering potential registration with the Board of the consequences of obstacles to inspections in their jurisdictions.⁸⁵

Jurisdiction-wide determinations would rest, as the HFCAA directs, on whether the Board is able “to inspect or investigate completely” firms in the jurisdiction. The HFCAA, however, does not define what it means “to inspect or investigate completely.” The Board does not view that phrase as limited to instances where the Board started, but was unable to finish, an inspection or investigation of a registered firm, because foreign authorities’ positions also can make it impossible or infeasible, as a practical matter, for the Board to attempt to commence such inspections or investigations in the first place. In other words, the Board may make a determination under the HFCAA under a range of

⁸⁵ See Audit Reports Issued by PCAOB-Registered Firms in Jurisdictions where Authorities Deny Access to Conduct Inspections, *available at* <https://pcaobus.org/oversight/international/denied-access-to-inspections>; Frequently Asked Questions Regarding Issues Relating to Non-U.S. Accounting Firms (Apr. 20, 2021), *available at* https://pcaobus.org/oversight/registration/non_us_registration_faq (FAQ 6); *see also* International, *available at* <https://pcaobus.org/oversight/international/> (providing map showing where the Board currently can and cannot conduct oversight activities).

circumstances, including when it is not able to commence an inspection or investigation or when, based on the Board's knowledge and experience, it has concluded that commencing an inspection or investigation would be futile as a result of the position taken by a foreign authority.

With that in mind, the proposed rule ties the Board's ability to "inspect or investigate completely" to the three core principles that guide the Board's framework for international cooperation. Specifically, the Board will consider whether it (1) can select the audits and audit areas it will review during inspections and the potential violations it will investigate; (2) has timely access to firm personnel, audit work papers, and other documents and information relevant to its inspections and investigations, and the ability to retain and use such documents and information; and (3) can otherwise conduct its inspections and investigations in a manner consistent with the Act and the Board's rules. For a further discussion of how these three principles would inform the Board's assessment of whether it can "inspect or investigate completely," see below.

The Board's jurisdiction-wide determinations under the proposed rule would be based on "a position taken by one or more authorities" in the foreign jurisdiction. While the proposed rule refers to a singular "position," that term encompasses all of the various positions taken by authorities in the jurisdiction that, when aggregated together, collectively constitute the position of authorities in the jurisdiction. In a similar vein, the proposed rule's reference to "one or more authorities" acknowledges that, in some jurisdictions, multiple authorities can take positions that impair the Board's ability to conduct inspections or investigations. Those "authorities" are not limited to a "foreign

auditor oversight authority,” as that phrase is defined in the Act,⁸⁶ but rather include any authority whose position can obstruct the Board’s oversight. Such authorities may include, for example, securities regulators, industry regulators, data protection authorities, national security bodies, foreign ministries, or authorities of political subdivisions (e.g., a provincial authority).

Determinations as to a Particular Registered Firm With an Office in a Foreign Jurisdiction

Although the Board anticipates that most determinations under the proposed rule would be jurisdiction-wide determinations, the Board cannot anticipate every scenario that it might encounter when conducting oversight of firms in foreign jurisdictions. In light of that practical limitation, subparagraph (a)(2) of the proposed rule provides that the Board may determine that it is unable to inspect or investigate completely a particular registered firm that has an office⁸⁷ located in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction. This provision would complement the Board’s ability to make jurisdiction-wide determinations in two important respects.

First, if a foreign authority obstructs a Board inspection or investigation of a particular firm headquartered in the jurisdiction—but does not obstruct inspections or

⁸⁶ See Section 2(a)(17) of the Act.

⁸⁷ The HFCAA authorizes the Board to make determinations as to firms having a “branch” or “office” in a foreign jurisdiction where the Board is unable to inspect or investigate completely because of a position taken by an authority in that jurisdiction. HFCAA § 2(i)(2)(A), 15 U.S.C. § 7214(i)(2)(A). Unlike in other contexts (such as banking), however, there is no commonly recognized distinction between a “branch” and an “office” with respect to accounting firms. Accordingly, the proposed rule refers only to an “office,” which is a term commonly used by the Board in connection with its oversight programs. A majority of the commenters who addressed this rationale agreed with it.

investigations in a more general manner that might apply to all firms in the jurisdiction— subparagraph (a)(2) provides the Board with an avenue for making a more tailored determination under the HFCAA when a jurisdiction-wide determination might be inappropriately broad.

Second, subparagraph (a)(2) allows the Board to make determinations under the HFCAA as to firms that are not headquartered in the foreign authority’s jurisdiction but have an office located there. In this respect, a determination under subparagraph (a)(2) can supplement a jurisdiction-wide determination under subparagraph (a)(1) that applies to firms headquartered in the jurisdiction. Furthermore, the reach of subparagraph (a)(2) ensures that the Board’s determinations under the proposed rule can match the scope of its mandate under the HFCAA.

The Board’s approach to determining where a firm’s offices are located is similar to the Board’s approach to determining where a firm is headquartered. The Board will look principally to the firm’s filings with the Board,⁸⁸ but if there is any uncertainty as to whether a firm has an office in a jurisdiction, the Board may consider other information regarding the firm and may request additional information from the firm pursuant to Rule 4000(b).

Apart from those two distinguishing features (namely, that determinations are directed to a particular firm and can reach firms that have an office in the foreign jurisdiction but are not headquartered there), subparagraph (a)(2) mirrors the operation of subparagraph (a)(1). The Board’s inability “to inspect or investigate completely” is tied

⁸⁸ Firms are required to identify all of their offices when they first register with the Board (in Item 1.5 of the application for registration on Form 1) and annually thereafter (in Item 5.1 of the annual report on Form 2).

to the three principles that guide the Board’s approach to international cooperation, as noted above and discussed further below. The phrase “position taken by one or more authorities” has the same meaning as in subparagraph (a)(1). Finally, if a member firm of an international firm network becomes subject to a Board determination under subparagraph (a)(2), and is a separate legal entity from the other member firms in the network and signs audit reports in its own name, the Board would not treat it as an “office” of other member firms within the network, and accordingly the other member firms would not be subject to that Board determination under subparagraph (a)(2).

The Board adopted subparagraph (a)(2) as proposed, except for one addition to the subparagraph’s title.⁸⁹ Commenters generally supported the Board’s proposed approach to determinations as to a particular registered firm and stated that the distinction between those determinations and the jurisdiction-wide determinations contemplated in subparagraph (a)(1) is clear. Several commenters also stated that it is appropriate for the Board to look at a firm’s required filings with the Board in the first instance for information as to where the firm’s offices are located, though two commenters suggested that the Board look beyond such filings to ascertain or validate the location of a firm’s offices. As previously noted, the Board retains the ability to consider other relevant and reliable information, including the information identified by the commenters, when determining where a firm’s offices are located.

⁸⁹ The phrase “Particular Registered Firm in a Foreign Jurisdiction” has been revised to “Particular Registered Firm With an Office in a Foreign Jurisdiction” to mirror more closely the text of subparagraph (a)(2), create a parallel structure between the titles of subparagraphs (a)(1) and (a)(2), and provide a clearer contrast between the scope of those two subparagraphs.

One commenter requested guidance about the application of the proposed rule when a firm that is headquartered in a cooperative jurisdiction uses local personnel in a noncooperative jurisdiction to perform an audit for an issuer located in the noncooperative jurisdiction. In such a circumstance, the firm could not be subject to a jurisdiction-wide determination under subparagraph (a)(1) because it is not headquartered in a noncooperative jurisdiction, but it could be subject to a determination under subparagraph (a)(2) if it has an office in the noncooperative jurisdiction.

Timing of Board Determinations

Subparagraph (a)(3) of the proposed rule addresses the timing of the Board's determinations under the HFCAA. Promptly after the Board's proposed rule becomes effective upon the Commission's approval, the Board will make any determinations under subparagraph (a)(1) or (a)(2) that are appropriate. Thereafter, the Board will consider, at least annually, whether changes in facts and circumstances support any additional determinations under subparagraph (a)(1) or (a)(2). If so, the Board will make such additional determinations, as and when appropriate, to allow the Commission on a timely basis to identify covered issuers in accordance with the Commission's rules.

The Board is well positioned to assess the facts and circumstances surrounding its inspections and investigations and gauge whether and when a determination is appropriate under the proposed rule. The relevant circumstances in a jurisdiction can change quickly and unpredictably because foreign authorities can enact or amend laws, issue or modify rules or regulations, change their interpretation or application of those laws and rules, and otherwise take new positions with limited or no notice. The proposed rule allows the Board to make new determinations whenever appropriate, while

acknowledging that the Board's timing will be informed by the Commission's process for timely identifying covered issuers and also establishing that the Board will consider whether new determinations are warranted at least once each year.

When considering whether changed facts or circumstances provide a sufficient basis for a new Board determination, the Board may confront a number of different scenarios. It is not possible to identify with specificity all the developments that might lead to a new determination, but they could include the enactment of a new law or regulation, a change in the interpretation or the application of an existing law or regulation, the termination of or failure to perform under an existing cooperative arrangement, and the failure to take or renew an administrative action necessary to facilitate the Board's oversight. The Board's experience in a particular inspection or investigation also could supply the grounds for a new Board determination in accordance with the proposed rule.

The Board adopted subparagraph (a)(3) substantially as proposed.⁹⁰ The majority of commenters who addressed this issue expressed support for the Board's approach to the timing of determinations.

One commenter emphasized that the Board's approach should be sufficiently flexible so that Board determinations do not conflict with the language and intent of the HFCAA. The Board believes that subparagraph (a)(3) provides such flexibility, insofar as it provides that the Board will make any appropriate determinations promptly after the proposed rule becomes effective and thereafter will make additional determinations as

⁹⁰ For clarity, in the second sentence of the subparagraph, "changes in the facts and circumstances" has been changed to "changes in facts and circumstances."

and when appropriate to allow the Commission to identify covered issuers on a timely basis.

Another commenter suggested that the Board require firms to file special reports on Form 3 to apprise the Board of headquarters or office location changes. Such changes already are reported to the Board annually on Form 2. The Board does not believe that a new Form 3 reporting obligation should be imposed. If a firm opts to expose its issuer clients to the potential consequences of the HFCAA by moving the firm's headquarters to a jurisdiction that is subject to a jurisdiction-wide determination, such a change could be captured through the Board's current reporting procedures.⁹¹ Moreover, if a firm that is headquartered outside a noncooperative jurisdiction opens an office in a noncooperative jurisdiction, the Board would not anticipate making a determination as to that particular firm under subparagraph (a)(2) without evidence that the Board's ability to inspect and investigate the firm completely has become restricted as a result of the opening of the new office. Lastly, if a firm that is subject to a Board determination moves its headquarters out of or closes all of its offices in a noncooperative jurisdiction, the firm is required to notify the Board within five days of that development pursuant to subparagraph (e)(4) of the proposed rule, discussed below.

⁹¹ For instance, whenever the business mailing address of a firm's primary contact with the Board changes, the firm must file a special report on Form 3 that supplies the new address in Item 7.2. *See* PCAOB Rule 2203, *Special Reports*. Additionally, if a firm obtains a new license or certification to engage in the business of auditing or accounting from a governmental or regulatory authority, the firm must file a special report on Form 3 that identifies, in Item 6.2, the name of the state, agency, board, or other authority that issued the new license or certification. *See id.* And if a firm changes the jurisdiction under the law of which it is organized, the firm may file a Form 4 to succeed to the registration status of its predecessor. *See* PCAOB Rule 2109, *Procedure for Succeeding to the Registration Status of a Predecessor*.

Factors for Board Determinations

Paragraph (b) provides factors for Board determinations under the proposed rule.

When determining whether it can “inspect or investigate completely” under subparagraph (a)(1) as to a particular jurisdiction or subparagraph (a)(2) as to a particular firm, the Board will assess whether “the position taken by the authority (or authorities)” in the jurisdiction “impairs the Board’s ability to execute its statutory mandate with respect to inspections or investigations,” as detailed above.

To make this assessment, the Board will evaluate three factors, which correlate to the three principles that guide the Board’s approach to international cooperation. These factors embody the access the Board needs, and already experiences nearly worldwide, to fulfill its inspection and investigation mandates. Conceding on these factors in particular jurisdictions would dilute the Board’s oversight in a selective, unequal manner and would be detrimental to the PCAOB’s mission. In other words, this framework promotes a level playing field for U.S. and non-U.S. registered firms, in accordance with the Act’s directive that non-U.S. registered firms are subject to the Act and the Board’s rules in the same manner and to the same extent as U.S. registered firms.

No commenter suggested other benchmarks or factors that the Board should employ when making determinations, and one commenter stated that the factors set forth in paragraph (b) are appropriate and clear. The Board adopted paragraph (b) as proposed, except for one addition to subparagraph (b)(2)’s second factor, as discussed below.

The first factor is “the Board’s ability to select engagements, audit areas, and potential violations to be reviewed or investigated.” The ability to make such selections is

critical to the Board’s oversight activities and is embedded in its statutory mandate.⁹²

This factor would encompass situations in which a foreign authority takes the position that certain engagements, or certain parts of engagements, cannot be reviewed during an inspection, or that the Board cannot decide when (i.e., in which inspection year) certain engagements will be reviewed. It also would encompass situations in which a foreign authority takes the position that the Board cannot decide what potential violations it will investigate. No commenter expressed the view that this factor is unclear or inappropriate or sought further guidance about it.

The second factor is “the Board’s timely access, 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 Board considers relevant to an inspection or investigation.” The Board’s access to firm personnel, documents, and information is pivotal to its inspections and investigations, and is built into its mandate to oversee the audits of issuers that avail themselves of the U.S. capital markets.⁹³

One commenter suggested that the Board add “timely” to this factor so that it refers to “timely access,” and, after consideration, the Board has made that revision. The Board agrees with the commenter that the Board cannot inspect or investigate completely if its access to documents or information is not timely. Unreasonable delays in obtaining documents or information hinder the Board’s ability to execute its statutory mandate⁹⁴

⁹² See, e.g., Sections 104(d) and 105(b)(1) of the Act.

⁹³ See, e.g., Sections 104(d) and 105(b)(2) of the Act.

⁹⁴ See, e.g., Section 104(b) of the Act (specifying inspection frequency requirements); Section 105(b)(2)(B) of the Act (authorizing the Board to require

and therefore its ability to protect the interests of investors and further the public interest. No other commenter made any suggestions regarding this factor, and no commenter asserted that this factor is unclear or inappropriate or sought further guidance about it.

The third factor is “the Board’s ability to conduct inspections and investigations in a manner consistent with the provisions of the Act and the Rules of the Board, as interpreted and applied by the Board.” This provision captures all of the other aspects of the Board’s inspection and investigation mandates not already subsumed in the first and second factors. That includes the Board’s ability to satisfy inspection frequency requirements,⁹⁵ to identify potentially violative acts during inspections,⁹⁶ to impose sanctions for noncooperation with an investigation,⁹⁷ and to share information with the Commission and other regulators.⁹⁸ No commenter indicated that this factor is unclear or inappropriate or sought further guidance about it.

Importantly, these three factors do not function as separate prerequisites for a Board determination. Instead, impairment in any one respect may be sufficient under the circumstances to support a Board determination. To underscore the disjunctive nature of this three-factor analysis, the proposed rule provides that the Board will assess whether

production of audit work papers and other documents or information); PCAOB Rule 5103(b) (providing that requests for documents or information shall set forth “a reasonable time . . . for production”).

⁹⁵ See Section 104(b) of the Act.

⁹⁶ See Section 104(c)(1) of the Act.

⁹⁷ See Section 105(b)(3)(A) of the Act.

⁹⁸ See Sections 104(c)(2) and 105(b)(4)-(5) of the Act.

its ability to execute its mandate has been impaired in “one or more” of these three respects. No commenter objected to, or expressed concerns about, this approach.

Additionally, to make a determination under the proposed rule, the Board does not need to conclude that it has been impaired as to both its inspections and its investigations. The HFCAA authorizes the Board to make a determination if the Board is unable to inspect “or” investigate completely, and the proposed rule uses “or” in similar fashion: It is enough that the Board is impaired in its ability to execute its mandate with respect to either inspections or investigations. This approach is consistent with the HFCAA, and no commenter suggested otherwise.

Basis for Board Determinations

Paragraph (c) of the proposed rule addresses the basis for a Board determination. This provision establishes, first and foremost, that when assessing whether its ability to execute its mandate has been impaired, the Board may consider “any documents or information it deems relevant.” From there, the proposed rule specifies, for the avoidance of doubt, three non-exclusive categories of documents and information that the Board can rely upon when making a determination. No commenter objected to this approach or expressed concern about the three non-exclusive categories identified in the proposed rule, and one commenter stated that paragraph (c) provides adequate and substantive guidance. The Board adopted paragraph (c) as proposed.

Subparagraph (c)(1) states that the Board may consider a foreign jurisdiction’s laws, statutes, regulations, rules, and other legal authorities; in other words, the black-letter law of the foreign jurisdiction (and any political subdivisions thereof) in all of its varying forms. The Board also may consider relevant interpretations of those laws,

whether by the promulgating authority or others, as well as real-world applications of those laws.

Subparagraph (c)(2) provides that the Board may consider the entirety of its efforts to reach and secure compliance with agreements with foreign authorities in the jurisdiction. In so doing, the Board can take into account whether an agreement was reached, the terms of any such agreement, and the foreign authorities' interpretation of and performance under any such agreement.

Subparagraph (c)(3) recognizes that the Board may consider its experience with foreign authorities' other conduct and positions relative to Board inspections or investigations. This allows the Board to consider the totality of a foreign authority's prior conduct and positions in all contexts, including public and private statements made, positions asserted, and actions taken. This provision also may encompass circumstances where a foreign authority precipitously changes its position regarding PCAOB access without making any change to its laws or demanding any form of cooperative agreement.

Together, these provisions establish that the Board can consider any relevant information (including, but not limited to, the three categories of information discussed above) when making a determination. As a corollary, paragraph (d) of the proposed rule establishes that the Board's determination need not depend on the Board's "commencement of, but inability to complete, an inspection or investigation." The Board should not be expected to attempt to initiate inspections or investigations in a foreign jurisdiction that rejects the guiding principles for international cooperation, because such futile efforts would not advance the Board's mission of protecting investors and furthering the public interest in the preparation of informative, accurate, and independent

audit reports. No commenter challenged the Board’s reasoning or expressed the view that the Board must initiate an inspection or investigation as a prerequisite to making a determination under the HFCAA. Nor did any commenter indicate that the approach described in paragraph (d) is inappropriate. The Board adopted paragraph (d) as proposed.

Form and Publication of Board Determinations

Board Reports to the Commission

The HFCAA does not specify how the Board should communicate its determinations to the Commission. Subparagraph (e)(1) of the proposed rule establishes that process.

When the Board makes a determination, whether as to a particular jurisdiction under subparagraph (a)(1) or a particular firm under subparagraph (a)(2), the Board’s determination will be issued in the form of a report to the Commission.⁹⁹ Such a reporting process is authorized under Sections 101(c)(5), 101(g)(1), and 101(f)(6) of the Act.¹⁰⁰

The Board’s report will describe its assessment of whether the position taken by the foreign authority (or authorities) impairs the Board’s ability to execute its mandate with respect to inspections or investigations. The report will analyze the relevant factor(s)

⁹⁹ The Board will decide whether to conduct a public or non-public meeting to consider a potential determination under the HFCAA in accordance with the PCAOB bylaws. *See* Bylaw 5.1, *Governing Board Meetings*.

¹⁰⁰ *See* Section 101(c)(5) of the Act (the Board shall “perform such other duties or functions as the Board . . . determines are necessary or appropriate . . . to carry out this Act”); Section 101(g)(1) of the Act (the Board’s rules “shall . . . provide for . . . the performance of its responsibilities under this Act”); Section 101(f)(6) of the Act (the Board is authorized to “do any and all . . . acts and things necessary, appropriate, or incidental to . . . the exercise of its obligations . . . imposed” by the Act).

set forth in paragraph (b) and describe the basis for the Board's conclusions. The Board will identify the firm(s) subject to the Board's determination in two ways: by the name under which the firm is registered with the Board, and by the firm's identification number with the Board. No commenter identified any additional information that should be included in the Board's reports to the Commission.

The Board adopted subparagraph (e)(1) as proposed but with one modification: The Board will identify the firm(s) to which a determination applies in an appendix to the Board's report. Identifying such firms in a separate appendix will facilitate the Board's efforts to keep the list of firms subject to the determination current, as discussed below.

Publication of Board Reports

Promptly after the Board issues a report to the Commission, a copy of the report will be made publicly available on the PCAOB's website. The Board expects that a copy of the report ordinarily will be prominently featured on the Board's website on or about the same day the Board issues its report to the Commission.

Subparagraph (e)(2) of the proposed rule specifies, however, that the content of the Board's publicly available report will be subject to two limitations. First, the Board will be bound by Section 105 of the Act, which provides, in pertinent part, that "all documents and information prepared or received by or specifically for the Board . . . in connection with an inspection . . . or with an investigation . . . shall be confidential . . . , unless and until presented in connection with a public proceeding or released" in accordance with Section 105(c) of the Act.¹⁰¹ If the Board's report contains material encompassed by Section 105(b)(5)(A) of the Act, such material will be redacted from the

¹⁰¹ Section 105(b)(5)(A) of the Act.

publicly available version of the report posted on the PCAOB's website, in accordance with the Act.

Second, while the Board does not anticipate that such situations will frequently arise, the version of the Board's report posted on the PCAOB's website will be redacted if it contains proprietary, personal, or other information protected by applicable confidentiality laws. In this respect, the proposed rule aligns with the Act's treatment of registration applications and annual reports filed with the Board, which the Board may make publicly available subject to "applicable laws relating to the confidentiality of proprietary, personal, or other information."¹⁰²

Commenters generally supported redacting from the Board's publicly available reports any information that is subject to applicable confidentiality laws. One commenter suggested that redaction should not be limited to information covered by applicable confidentiality laws, but rather should be based on broader concepts of confidentiality. That commenter offered one example of such a concept, but that example—accountants' professional responsibilities of confidentiality—does not apply to the Board's performance of its oversight functions. Another commenter similarly suggested that redaction should extend to all confidential information whether explicitly covered by confidentiality laws or not, but that commenter did not suggest how to define this broader concept of confidential information or what categories of information it would encompass. Neither of these commenters identified any specific type of relevant information that is not subject to a confidentiality law but is nevertheless worthy of protection under a broader view of confidential information.

¹⁰²

Section 102(e) of the Act.

Besides one minor revision unrelated to redaction,¹⁰³ the Board adopted subparagraph (e)(2) as proposed. The Board believes that it is appropriate to limit redaction to confidential information protected by law. That approach comports with the Board's congressionally mandated treatment of registration applications and annual reports, which the Board also has extended to other reports filed with the Board. This approach also is more readily administrable than one that relies instead on broader, undefined concepts of confidentiality.

Transmittal of Board Reports to Subject Firms

The Board revised the proposed rule to add a new provision regarding the transmittal of reports to firms that are subject to a determination. While some commenters stated that posting Board reports on the Board's website would give sufficient notice of Board determinations to such firms, other commenters disagreed, and the Board has concluded that it would be prudent to transmit reports to those firms.

Subparagraph (e)(3) provides that promptly after the Board issues a report to the Commission under subparagraph (e)(1), a copy of the report will be sent by electronic mail to each registered public accounting firm that is listed in the appendix to that report (i.e., each firm as to which the determination applies). The Board expects that the report will be transmitted to the subject firm(s) by electronic mail after it has been posted on the Board's website, though both actions will take place promptly after the issuance of the report. Such reports will be redacted to the extent required by confidentiality laws, and

¹⁰³ For simplicity, the phrase "Board report containing a determination pursuant to subparagraph (a)(1) or (a)(2)" has been changed to "Board report pursuant to subparagraph (e)(1)."

the electronic mail will be directed to the electronic mail address of the firm's primary contact with the Board.¹⁰⁴

Two commenters suggested that the Board provide non-public advance notice of a forthcoming determination to firms that would be subject to that determination. One of those commenters indicated that firms could use this advance notice to initiate discussions with their issuer audit clients about the Board's forthcoming determination.

The Board does not believe that it is appropriate to provide non-public advance notice to firms. A firm headquartered in a noncooperative jurisdiction and performing audit work that subjects the firm to the PCAOB inspection requirement should know if it has not been inspected due to the PCAOB's inability to inspect such firm or firms in that jurisdiction.¹⁰⁵ Furthermore, as described above, the Board has long taken efforts to make known the access challenges it faces in certain jurisdictions. Although those disclosures are distinct from determinations under the proposed rule and predate the HFCAA's enactment, they underscore the Board's commitment to transparency about its oversight access. And if a firm-specific obstacle to Board inspections or investigations were to arise that might warrant a determination as to a particular registered firm pursuant to subparagraph (a)(2), the Board expects that it would have engaged with that firm about

¹⁰⁴ When applying to register with the Board, firms provide an electronic mail address for their primary contact with the Board in Item 1.3.7 of Form 1. Thereafter, firms confirm the electronic mail address for their primary contact with the Board annually in Item 1.3 of Form 2. If that electronic mail address changes, the firm must notify the Board within 30 days of the new electronic mail address for its primary contact with the Board in Item 7.2 of Form 3.

¹⁰⁵ *See also, e.g.,* SEC Exchange Act Release No. 91364, at 26 (noting "a highly similar type and pattern of disclosure regarding the PCAOB's inability to inspect those firms" in Item 3 of Form 20-F and in Item 1A of Form 10-K).

the Board's inability to inspect or investigate the firm completely before such a determination would be made.

In addition, providing non-public advance notice of a Board determination to firms would create information asymmetry in the marketplace: A forthcoming Board determination would be known to firms and to anyone with whom the firm elects to share that information (including not only the firm's issuer clients' management, but also potentially the issuers' directors, the issuers' outside counsel and other professional advisors, foreign government officials, and others), while the investing public would not be privy to the same information. The Board does not believe it would be in the public interest or the interests of investors to selectively preview its determinations in such a manner.

Several commenters also suggested that the Board establish a rule-based mechanism that would allow firms to submit information to the Board regarding a determination. Some of those commenters recommended that the Board provide by rule for such a submission process before a Board determination takes effect, while others expressed concern that such an approach could delay the timely implementation of the HFCAA. No commenter, however, identified any type of information that a firm might have that would be both relevant to a Board determination and previously unknown to the Board.

Because the Board believes that firms are unlikely to have new and relevant information regarding a determination, the Board is not establishing a rule-based process for firms to make such submissions. Board determinations turn on positions taken by authorities in foreign jurisdictions, and such positions, by virtue of having previously

been “taken” by a foreign authority, necessarily will be known to the Board already. Indeed, the Board has extensive experience in this area and, over more than a decade, has engaged significantly with foreign authorities and registered firms regarding inspections and investigations of non-U.S. firms. Therefore, the Board knows, and will timely learn, relevant information about its ability to conduct inspections and investigations abroad. The Board’s history of engagement and negotiations regarding such inspections and investigations is detailed above, and no commenter disputed the Board’s description of that history.

By the same token, any Board determination would be based on the Board’s judgment as to whether the extent of access available to it impairs its ability to conduct oversight in any of the three respects identified in paragraph (b). Consequently, the Board does not believe that firms will be able to contribute meaningfully to the mix of information available to the Board regarding foreign authorities’ positions or the Board’s experience-driven assessment of paragraph (b)’s three factors. Should a firm wish to communicate with the Board about its inspection or investigation experience, however, it can do so through existing channels for communicating with the Board’s inspection and enforcement staff.

Updating the Appendix to a Board Report

Subparagraph (e)(4) addresses the Board’s process for determining that the list of firms subject to a determination remains accurate. A few commenters expressed concern about potential developments that could render such a list inaccurate, and the Board believes that it is prudent to establish a process in the proposed rule to ensure the list is appropriately updated and accurate.

As provided in subparagraph (e)(1), the list of firms subject to a determination will be contained in an appendix to the Board's report. For a jurisdiction-wide determination under subparagraph (a)(1), the appendix will provide, for each firm, the name under which it is registered with the Board, its identification number with the Board, and the jurisdiction in which its headquarters is located. For a determination as to a particular firm under subparagraph (a)(2), the appendix will provide the name under which the firm is registered with the Board, its identification number with the Board, and the location of the office(s) the firm maintains in the foreign jurisdiction whose authorities have taken a position that results in the Board being unable to inspect or investigate the firm completely.

Subparagraph (e)(4) requires firms identified in an appendix to notify the PCAOB Secretary of any changes to the firm's information in the appendix within five days of such a change.¹⁰⁶ Firm names, identification numbers, headquarters locations, and office locations can change, and this requirement ensures that the Board will be alerted promptly to updated information.¹⁰⁷ Instructions regarding how to notify the Secretary of such a change will be provided in the appendix.

¹⁰⁶ In practice, this five-day period would span at least seven calendar days. See PCAOB Rule 1002, *Time Computation* (providing that Saturdays, Sundays, and federal legal holidays are excluded from the computation of time when a prescribed period of time in a Board rule is seven days or less).

¹⁰⁷ For example, if a firm changes its name while remaining the same legal entity, the firm has 30 days to notify the Board of its name change in Item 7.1 of Form 3. But if a firm changes its name while also changing its legal entity due to a change to its legal form of organization or as the result of a business combination, the firm may (but is not required to) file a Form 4 that, among other things, would notify the Board of the name change in Item 1.1, and that filing would be due 14 days after the change or business combination, unless the Board permits the firm to file its form out of time.

Subparagraph (e)(4) provides that the Board may issue an updated appendix at any time. This allows the Board to update its appendix to reflect changes reported by firms as required by subparagraph (e)(4). It also enables the Board to correct discrepancies or reflect changes identified by the Board or its staff through other means.¹⁰⁸ An updated appendix will bear the date on which it was issued by the Board.

The Board's issuance of an updated appendix would not constitute a reassessment of the Board's underlying determination. In other words, the Board can update an appendix without reanalyzing the three factors identified in paragraph (b). Whenever the Board issues an updated appendix, it will transmit that appendix to the Commission, make it publicly available in accordance with subparagraph (e)(2), and send it to firms that are identified in the appendix in accordance with subparagraph (e)(3).

Effective Date and Duration of Board Determinations

Paragraph (f) provides that a Board determination becomes effective on the date the Board issues its report to the Commission. Most commenters expressed support for this timing, though one commenter suggested that this timing would be appropriate only if firms received advance notice of a determination, and another commenter suggested that the Board delay the effectiveness of its determinations (e.g., for 120 days) so that issuers have time to understand and plan for them.

¹⁰⁸ For instance, the list of firms in the appendix could be reduced if a firm withdraws from registration or has its registration revoked, and could be expanded if a registered firm moves its headquarters to a jurisdiction that is the subject of a jurisdiction-wide determination.

The Board adopted paragraph (f) substantially as proposed.¹⁰⁹ For many of the same reasons that the Board does not believe that firms should receive advance notice of Board determinations (as discussed above), the Board does not believe that the effectiveness of its determinations should be delayed. Furthermore, delaying the effectiveness of a determination could frustrate the objectives of the HFCAA and, in the Board's view, impair the Commission's ability to identify covered issuers on a timely basis pursuant to its rules.

One commenter requested clarification regarding the date of issuance of a Board report. The date of issuance will be the date that appears on the report, which will correspond to the date upon which the Board's report is transmitted to the Commission.

Paragraph (g) addresses the duration of Board determinations. The Board adopted paragraph (g) substantially as proposed,¹¹⁰ save for one conforming change. As first proposed, the proposed rule provided that a Board determination would remain in effect "unless and until" it was modified or vacated. As discussed below, however, the Board has elected to reassess at least annually each determination that is in effect and to issue, at the conclusion of each reassessment, a report reaffirming, modifying, or vacating the determination. To conform to that approach, paragraph (g) has been revised to provide that a Board determination will remain in effect until it is reaffirmed, modified, or vacated by the Board.

¹⁰⁹ For simplicity, at the beginning of the paragraph, "When the Board makes a determination pursuant to subparagraph (a)(1) or (a)(2), the Board's determination becomes effective" has been replaced by "A determination pursuant to subparagraph (a)(1) or (a)(2) becomes effective."

¹¹⁰ For simplicity, at the beginning of the paragraph, "A determination made by the Board" has been changed to "A determination."

Reassessment of Board Determinations

As first proposed, paragraph (h) created a two-step process through which the Board would annually monitor the continued justification for a Board determination. First, the Board would consider whether changes in facts and circumstances warrant a reassessment of a determination that is in effect. Then, if the Board concludes that a reassessment is warranted, the Board would analyze the three factors identified in paragraph (b) and decide whether to leave its determination undisturbed or issue a new report modifying or vacating the determination. Apart from that annual process, the Board also could reassess a determination on its own initiative or at the Commission's request at any time.

Commenters generally supported that proposed two-step annual process. A few commenters suggested that the result of a reassessment should be made public in all circumstances, even when a determination is left undisturbed, and one commenter indicated that such public reporting could provide audit firms and issuers with more detailed guidance and transparent information. Some commenters suggested that firms should be able to request reevaluation of a determination outside of the annual cycle, with one commenter asking the Board to confirm that it would reassess a determination anytime there was a potentially material development in the facts and circumstances.

The Board has revised paragraph (h) to reduce the two-step process to a one-step process by eliminating the "annual consideration of changed facts and circumstances" contemplated in the proposed rule. Instead of requiring the Board to conduct a threshold inquiry each year to decide whether changes in facts and circumstances merit reassessment of a determination, the proposed rule requires the Board to annually

reassess each determination that is in effect. The Board believes that annual reassessment best aligns with the HFCAA's annual cycle, which includes the Commission's identification of covered issuers based on the filing of annual reports and its designation of non-inspection years.¹¹¹

Apart from its mandatory annual reassessments, the Board, on its own initiative or at the Commission's request, may reassess a determination at any time. It is not possible to specify every development that might prompt the Board to reassess a determination outside of the annual reassessment cycle. In certain circumstances, the withdrawal of a law or the execution of a cooperative agreement might suffice, if, for example, the law or the absence of an agreement were the sole reason why the Board's access was impaired in one or more of the respects identified in paragraph (b). However, as a general matter, when a determination derives from the Board's prolonged inability to complete inspections or investigations in a particular jurisdiction or of a particular firm, the Board does not anticipate modifying or vacating such a determination—even if a cooperative agreement is in place—until it has concluded that the foreign authority has taken, and the Board can reasonably conclude that the authority will maintain, new positions that respond satisfactorily to the Board's access needs with respect to each of the factors identified in paragraph (b). In such instances of prolonged lack of access, the Board would expect to conclude inspections or investigations in that jurisdiction or of that firm before modifying or vacating a determination. The conclusion of an inspection or investigation, however, is not necessarily conclusive evidence that the conditions

¹¹¹ HFCAA § 2(i)(1)-(2), 15 U.S.C. § 7214(i)(1)-(2).

preventing the Board from inspecting or investigating completely firms located in the foreign jurisdiction have been resolved.

Together, the proposed rule's framework of mandatory annual reassessment and discretionary off-cycle reassessment gives the Board the opportunity to reassess a determination whenever facts and circumstances warrant, and will help ensure that the Commission's actions under the HFCAA are based on Board determinations that reflect the current status of the Board's ability to inspect and investigate firms completely. When conducting a reassessment, whether annual or off-cycle, the Board will reanalyze the three factors identified in paragraph (b), and at the conclusion of that reassessment, the Board will reaffirm, modify, or vacate its determination.

Two commenters suggested that the Board allow firms to request reevaluation of a determination outside of the Board's annual reassessment process. One commenter further suggested that reevaluation requests could be based on a triggering event, but did not provide any examples of such an event or explain how a firm would have knowledge of such an event that the Board would lack. As explained above, the Board believes that firms are unlikely to have new, relevant information about positions taken by foreign authorities vis-à-vis the Board, and firms already have other channels through which they can communicate with the Board's staff about inspection- and investigation-related developments. Furthermore, even without a rule-based mechanism through which firms could request reevaluation, the Board will reassess determinations to which any firm is subject at least once a year.

One commenter suggested that the Board allow "jurisdictions" to request reevaluation of determinations at any time. That commenter was not a foreign authority;

indeed, no foreign authority submitted a comment asking for the ability to request reevaluation. Nor did the commenter explain why foreign authorities cannot communicate with the Board through existing channels. The Board believes that those customary channels for communication with foreign authorities, together with the Board's annual mandatory reassessments and discretionary off-cycle reassessments, suffice to provide the Board appropriate information to reexamine determinations as and when appropriate.

Reaffirmed, Modified, and Vacated Board Determinations

Paragraph (i) addresses reaffirmed, modified, and vacated Board determinations. The Board adopted paragraph (i) with several conforming changes that align paragraph (i) with other revisions to the proposed rule, including revisions regarding appendices to Board reports, the transmittal of Board reports by electronic mail, and annual reassessment of determinations that are in effect.

When the Board reaffirms, modifies, or vacates a determination, it will issue a report to the Commission describing its assessment and the basis for reaffirming, modifying, or vacating the determination. In the case of a reaffirmed or modified determination, the Board will update the appendix to the report that identifies the firm(s) to which the determination applies. A copy of the report will be posted on the PCAOB's website and sent by electronic mail to each firm's primary contact with the Board, subject to the confidentiality limitations described above in connection with subparagraphs (e)(2) and (e)(3).

A reaffirmed or modified determination, or the vacatur of a determination, will become effective on the date that the Board issues its report to the Commission. A

reaffirmed or modified determination will be subject to reassessment under paragraph (h): It must be reassessed at least annually; it may be reassessed at any time; and the Board's reassessment will consider the three factors identified in paragraph (b) and result in reaffirmation, modification, or vacatur. A reaffirmed or modified determination will remain in effect until it is reaffirmed, modified, or vacated.

D. Economic Considerations

The Board is mindful of the economic impacts of its rulemaking. This section discusses economic considerations related to the proposed rule, including the need for the rulemaking; a description of the baseline for evaluating the economic impacts of the proposed rule; consideration of the benefits, costs, and unintended consequences of the proposed rule; and alternatives considered by the Board.

The proposed rule does not require “mandatory audit firm rotation or a supplement to the auditor’s report in which the auditor would be required to provide additional information about the audit and the financial statements” of issuers, nor does it impose any “additional requirements” on auditors.¹¹² Accordingly, the Board has concluded that Section 103(a)(3)(C) of the Act does not apply to this rulemaking, and no commenter suggested otherwise.

Need for Rulemaking

As discussed in Section C above, the HFCAA does not expressly require the Board to adopt a rule governing the determinations it makes under the statute. Rather, the HFCAA gives the Board discretion regarding the procedure for making those determinations and the content and format of the Board’s reporting to the Commission.

¹¹² Section 103(a)(3)(C) of the Act.

The Board elected to pursue a rulemaking to bring transparency and consistency to its determinations. Specifically, the Board believes that a rule would inform investors, registered firms, issuers, audit committees, foreign authorities, and the public at large as to how the Board will perform its functions to satisfy its obligations under the statute. It also would promote consistency in the Board's process regarding determinations.

Baseline

The Board has evaluated the potential benefits, costs, and unintended consequences of the proposed rule relative to a baseline that consists of the current regulatory framework and current market practices. Although the HFCAA requires the Board to make a determination about which audit firms located in a foreign jurisdiction it is unable to inspect or investigate completely because of a position taken by one or more authorities in that jurisdiction, the HFCAA does not expressly require the Board to adopt a rule governing the determinations it makes under the statute. Moreover, the PCAOB website has long identified the jurisdictions in which the Board lacks inspection access, as well as the registered firms located in those jurisdictions.¹¹³ Measured against this baseline, the proposed rule builds on existing PCAOB practices and provides a framework for the Board's determinations under the HFCAA and, hence, should have limited economic impacts incremental to the impacts of the HFCAA and the Commission's actions to implement the HFCAA.

Under the HFCAA, issuers that retain firms that are subject to a Board determination to issue audit reports on their financial statements must make certain disclosures and submissions and, eventually, if certain conditions persist, the securities of

¹¹³ For an overview of this historical practice, see, for example, footnote 62.

those issuers may be subject to a prohibition on trading. The Commission has adopted interim final amendments to Forms 20-F, 40-F, 10-K, and N-CSR to implement the disclosure and submission requirements of the HFCAA.¹¹⁴ Other aspects of the HFCAA, including the trading prohibition, will be addressed in subsequent Commission actions.¹¹⁵ The economic impact of these aspects of the HFCAA, while tied to the Board's determinations about which audit firms it is unable to inspect or investigate completely, will depend on the implementation choices made by the Commission in carrying out its mandate under the HFCAA and thus are not considered as part of the economic analysis with respect to this rulemaking.

The baseline also takes into consideration the current international reach of the Board's oversight mandate. As of June 30, 2021, 851 non-U.S. firms, headquartered in 90 foreign jurisdictions, were registered with the Board.¹¹⁶ Out of those 851 non-U.S. registered firms, 202 issued at least one audit report on financial statements filed by an issuer with the Commission in the 12-month period ended June 30, 2021, and, altogether, they issued 1,260 audit reports during that 12-month period.¹¹⁷

Exhibit 1 reports the jurisdictions with the highest number of audit reports issued by non-U.S. registered firms on financial statements filed by issuers with the Commission

¹¹⁴ See SEC Exchange Act Release No. 91364. The interim final rule amendments became effective on May 5, 2021.

¹¹⁵ See *id.*

¹¹⁶ Source: PCAOB Registration, Annual, and Special Reporting ("RASR") System and Audit Analytics.

¹¹⁷ If a firm issued more than one audit report on financial statements filed by the same issuer during the 12-month period ended June 30, 2021, then only the most recent audit report is counted.

during the 12-month period ended June 30, 2021. The top 15 jurisdictions account for 84% of all audit reports issued by non-U.S. registered firms on financial statements filed by issuers during the 12-month period ended June 30, 2021.

Exhibit 1. Top Fifteen Non-U.S. Jurisdictions by Number of Audit Reports Issued by Non-U.S. Registered Firms on Financial Statements Filed by Issuers During the 12-Month Period Ended June 30, 2021¹¹⁸

Jurisdiction	Audit Reports Issued by Non-U.S. Registered Firms on Issuer Financial Statements				Market Capitalization		Number of Non-U.S. Registered Firms		Number of Non-U.S. Registered Firms Issuing Audit Reports on Issuer Financial Statements	
	#	%	\$ Billions	%	#	%	#	%		
Canada	358	28.4%	1,979	15.9%	36	4.2%	24	11.9%		
China (Excluding Hong Kong)	169	13.4%	1,709	13.7%	36	4.2%	9	4.5%		
Israel	155	12.3%	231	1.8%	21	2.5%	10	5.0%		
United Kingdom	76	6.0%	1,639	13.1%	47	5.5%	7	3.5%		
Hong Kong	50	4.0%	734	5.9%	28	3.3%	8	4.0%		
Brazil	41	3.3%	584	4.7%	18	2.1%	7	3.5%		
India	28	2.2%	362	2.9%	66	7.8%	11	5.4%		
Singapore	27	2.1%	155	1.2%	25	2.9%	8	4.0%		
Malaysia	25	2.0%	3	0.0%	18	2.1%	3	1.5%		
Argentina	24	1.9%	112	0.9%	16	1.9%	4	2.0%		
France	24	1.9%	296	2.4%	24	2.8%	5	2.5%		
Switzerland	23	1.8%	588	4.7%	6	0.7%	5	2.5%		
Greece	22	1.7%	10	0.1%	8	0.9%	3	1.5%		
Germany	19	1.5%	316	2.5%	31	3.6%	4	2.0%		
Mexico	17	1.3%	191	1.5%	20	2.4%	6	3.0%		
+ Other Non-US Jurisdictions	202	16.0%	3,563	28.6%	451	53.0%	88	43.6%		
Total of All Non-US Jurisdictions	1,260	100%	12,471	100%	851	100%	202	100%		

Source: RASR, Audit Analytics, and Standard & Poor's

As discussed in Section C above, over the years, the Board has been able to work effectively with authorities in foreign jurisdictions to fulfill its mandate to oversee

¹¹⁸ For purposes of Exhibit 1, a firm's jurisdiction is the jurisdiction where it is headquartered. The number of audit reports issued on the financial statements of issuers and the number of registered firms that issued those reports are based on issuer filings during the 12-month period ended June 30, 2021. The market capitalization of those issuers and the number of registered firms in each jurisdiction are as of June 30, 2021. Due to a lack of data on the number of shareholders, some audit reports included in Exhibit 1 may have been issued on the financial statements of entities with fewer than 300 shareholders. If a firm issued more than one audit report on financial statements filed by the same issuer during the 12-month period ended June 30, 2021, then only the most recent audit report is counted.

registered firms located outside the United States. With rare exceptions, foreign audit regulators have cooperated with the Board and allowed it to exercise its oversight authority as it relates to registered firms located within their respective jurisdictions. Authorities in a limited number of foreign jurisdictions, however, have taken positions that deny the Board access for oversight activities. The PCAOB's website identifies the jurisdictions that currently deny the Board such access.¹¹⁹

Considerations of the Benefits, Costs, and Unintended Consequences

Compared to the baseline of no PCAOB rulemaking, the proposed rule would have incremental benefits and costs. The proposed rule's scope is confined to establishing a framework for determinations that the Board is called upon by the HFCAA to make even absent a rulemaking. Additionally, neither the HFCAA nor the proposed rule gives the Board additional authority to take any action of legal consequence directly against a registered firm. Instead, the HFCAA contemplates that the Board would notify the Commission of its determinations, which may provide the predicate for other regulatory actions to be taken by the Commission if other conditions set forth in the HFCAA and the Commission's rules are met. This situation is in contrast to the direct impact of the Board's statutory mandate to register, set professional standards for, inspect, investigate, and discipline registered firms. One commenter stated that economic benefits and costs arise from the HFCAA, which the PCAOB cannot change and must implement.

¹¹⁹ See Audit Reports Issued by PCAOB-Registered Firms in Jurisdictions where Authorities Deny Access to Conduct Inspections, *available at* <https://pcaobus.org/oversight/international/denied-access-to-inspections>. The information contained on this webpage does not constitute a Board determination under the HFCAA. The Board has not yet made any determinations under the HFCAA.

The Board's analysis of the potential benefits, costs, and unintended consequences of the proposed rule does not presuppose any determination that the Board may make under the proposed rule, because the Board would determine whether to make any future determinations based on the facts and circumstances at that time. The Board's analysis discusses the economic impacts of four central features of the proposed rule: (1) the Board's ability to make determinations as to a particular foreign jurisdiction; (2) limiting those jurisdiction-wide determinations to firms headquartered in the jurisdiction; (3) the Board's complementary ability to make determinations as to a particular registered firm; and (4) the Board's publication of its determinations on its website. The analysis is qualitative in nature because of a lack of information and data necessary to provide reasonable quantitative estimates. Overall, the Board expects that the benefits of the proposed rule will justify any costs and unintended negative effects.

Benefits

The Board believes that the proposed rule would inform investors, registered firms, issuers, audit committees, foreign authorities, and the public at large as to how the Board will perform its functions under the HFCAA. The improved transparency and reduced regulatory uncertainty might help market participants make more efficient investment decisions and, hence, enhance capital formation. Furthermore, the proposed rule will promote consistency in the Board's processes regarding determinations. It will also assist the Commission in its consistent implementation of the HFCAA and achieving the statute's intended objectives. These are the primary benefits of the proposed rule. Several commenters agreed that a Board rule governing HFCAA determinations can improve regulatory transparency and consistency and reduce regulatory uncertainty.

The Board believes that the proposed rule's jurisdiction-wide determinations would yield additional benefits. In the Board's experience, when foreign authorities take a position that impairs the Board's oversight access, the position applies generally to all firms within the jurisdiction. Consequently, jurisdiction-wide determinations would provide an efficient, effective means of making Board determinations under the HFCAA.

Jurisdiction-wide determinations would be beneficial even when a foreign authority limits the Board's ability to inspect or investigate *certain types* of issuer audit engagements. Typically, the foreign authority's position applies to any firm in the jurisdiction that performs that type of engagement. If the Board were unable to make jurisdiction-wide determinations and instead were required to single out for determination only the specific audit firms handling those issuer engagements at a particular time, those issuers potentially could evade the consequences of the HFCAA by routinely changing audit firms in response to each successive firm-specific determination issued by the Board.¹²⁰ Beyond that, issuing a jurisdiction-wide determination in such a scenario would help ensure that foreign authorities cannot, in essence, choose which firms within their jurisdiction the Board may inspect or investigate.

¹²⁰ If the Board were to make only firm-by-firm determinations based on each firm's then-current client portfolio, the Board might need to establish a process requiring all registered firms to report auditor changes to the Board in real time so that the Board could monitor such changes and promptly make new determinations in response. Presently, the Board's rules require firms to report their issuer clients to the Board only after the firm's audit report on the issuer has been issued. *See* PCAOB Rule 3211(b), *Auditor Reporting of Certain Audit Participants* (Form AP must be filed within 35 days after the audit report is first included in a filing with the Commission, except that Form AP must be filed within 10 days if the audit report is included in a registration statement under the Securities Act). One commenter noted that jurisdiction-wide determinations would appear to be more efficient for the PCAOB's operations than determinations as to particular registered firms.

Limiting jurisdiction-wide determinations to firms headquartered in the jurisdiction would generate its own benefits. It would reduce the risk that a jurisdiction-wide determination sweeps too broadly by encompassing firms that merely have a physical presence or personnel in the jurisdiction but are headquartered elsewhere. Although a position taken by a foreign authority can naturally be understood to impact registered firms headquartered in the jurisdiction, its impact on firms that are headquartered elsewhere can turn on many factors, including the extent of the firm's presence in the jurisdiction and the nature and extent of the audit work it performs there. With that in mind, the proposed rule provides that the Board could choose to make individualized determinations with respect to firms that are headquartered elsewhere but have an office in such a jurisdiction.

Determinations as to a particular registered firm would complement the Board's jurisdiction-wide determinations by providing an additional option when the Board concludes that an across-the-board jurisdiction-wide determination is not appropriate. Such a provision recognizes that although the Board generally expects to make jurisdiction-wide determinations, it cannot anticipate every scenario it might encounter in the future. If a position taken by a foreign authority applies solely to one firm, which is expected to happen infrequently, the Board's ability to make a determination as to that firm would be a critical tool for fulfilling the HFCAA's objectives. Additionally, by providing an avenue for the Board to make determinations as to registered firms that are headquartered in a cooperating jurisdiction but have an office in a noncooperating jurisdiction, this provision would help ensure that the Board's flexibility under the proposed rule matches its mandate under the HFCAA.

The Board has also considered the potential benefits of making Board determinations public on its website. Such publication would inform investors, registered firms, issuers, audit committees, foreign authorities, and the public regarding Board determinations, thus promoting transparency and reducing regulatory uncertainty. Market participants may benefit from being informed of Board determinations promptly, rather than waiting for the Commission's identification of covered issuers.

Costs and Unintended Consequences

The Board has also considered the potential costs and unintended consequences of the proposed rule. The Board expects any such costs and consequences to be limited, as the proposed rule merely establishes a framework for the Board to perform the responsibilities imposed upon it by the HFCAA.

The Board has evaluated the potential costs and unintended consequences of making jurisdiction-wide determinations. As explained in Section C above, such determinations treat all registered firms headquartered in the jurisdiction alike when the positions taken by authorities in the jurisdiction apply equally to any firm performing the same audit work for issuers, whether or not a particular registered firm happens to be doing such work when the Board makes a determination. To mitigate any perceived overinclusiveness or underinclusiveness of a jurisdiction-wide determination, the proposed rule limits those determinations to registered firms headquartered in the jurisdiction, while also permitting the Board, when appropriate, to supplement a jurisdiction-wide determination with a determination as to a particular firm that has an

office in the jurisdiction but is not headquartered there.¹²¹ This approach, in the Board's view, would be unlikely to impose incremental additional costs or lead to unintended consequences relative to the baseline, which consists of, among other things, the historical practice of identifying publicly the jurisdictions where there are unresolved obstacles to Board inspections and investigations.

The Board does not expect that the second central feature of the proposed rule—limiting jurisdiction-wide determinations to firms headquartered in the jurisdiction—would lead to additional costs or unintended consequences.

Related to the third central feature of the proposed rule—the Board's ability to make determinations as to particular firms with an office in a foreign jurisdiction—one commenter encouraged the Board to consider the potential adverse impact on competition when assessing a potential future determination, and further encouraged the Board to provide equivalent treatment to similarly-situated firms. While any future determinations under the proposed rule as to particular registered firms may potentially have an impact on competition, such determinations, as noted in Section C above, are expected to be infrequent. Moreover, the magnitude of any impact would depend on many factors, such as the number of firms within the jurisdiction, the size of the firm as to which the determination is made, and how the foreign authority's obstruction of the Board's inspections or investigations has already affected competition in the jurisdiction.

Separately, the Board has evaluated the potential costs and unintended consequences of making its determinations public. The Board believes that the

¹²¹ Additionally, the Board has general residual exemption authority, subject to Commission approval, under Section 106(c) of the Act, and such authority could be used to address any potential overinclusiveness of a jurisdiction-wide determination.

incremental costs of such publication will likely be minimal because similar information has historically been available on the Board’s website for approximately a decade.¹²² Moreover, many issuers currently disclose in their annual reports the PCAOB’s inability to inspect their auditor, as the Commission recently observed.¹²³

Alternatives Considered

As an alternative to a rulemaking, the Board considered issuing guidance related to its process or establishing a non-public process for making its determinations. The Board has determined, however, that a rule would reduce regulatory uncertainty for market participants by providing transparency and promoting consistency as to how the Board would perform its functions under the statute. Commenters generally agreed that a rule governing the Board’s determination process would promote transparency and consistency and reduce regulatory uncertainty.

The Board also considered whether the proposed rule should be limited to determinations as to particular registered firms. Without jurisdiction-wide determinations, however, the Board would have to make determinations only as to particular firms under subparagraph (a)(2) of the proposed rule, potentially based on the present composition of each firm’s client portfolio. The Board believes that such an approach would incentivize an issuer whose audit engagement cannot be inspected or investigated by the Board to

¹²² See, e.g., Audit Reports Issued by PCAOB-Registered Firms in Jurisdictions where Authorities Deny Access to Conduct Inspections, *available at* <https://pcaobus.org/oversight/international/denied-access-to-inspections>.

¹²³ See SEC Exchange Act Release No. 91364, at 26 (noting “a highly similar type and pattern of disclosure regarding the PCAOB’s inability to inspect those firms included in the majority of the potential Commission-Identified Issuers’ Item 3 (for Form 20-F filers) and Item 1A (for Form 10-K filers) discussion of risk factors”).

switch audit firms frequently, possibly frustrating the intent of the HFCAA and potentially necessitating a new process for real-time reporting of auditor changes to the Board so that Board determinations could be made or reassessed on a timely basis.

The Board also considered whether to extend its jurisdiction-wide determinations to all firms that have an office in the jurisdiction, rather than only those headquartered there. The Board elected not to do so, based on its oversight experience, because the impact of a position taken by a foreign authority on a firm headquartered elsewhere can vary based on the particulars of the firm's presence, audit work, and issuer clients in the jurisdiction.

When prescribing the grounds upon which a determination may rest, the Board considered whether the Board's commencement and subsequent inability to finish an inspection or investigation should be a prerequisite to a determination. The Board has not adopted that approach because the position taken by a foreign authority can frustrate the initiation of, or the ability to complete, an inspection or investigation. Moreover, commencing inspections or investigations in the face of such obstacles would be costly and fruitless, not only for the Board, but also for registered firms.

Lastly, although it can exercise exemption authority under Section 106(c) of the Act with the Commission's approval,¹²⁴ the Board considered whether the proposed rule should include a procedure for the Board to grant exceptions from a jurisdiction-wide

¹²⁴ See Section 106(c) of the Act (“[T]he Board, subject to the approval of the Commission, may, by rule, regulation, or order, and as [the Board] determines necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions exempt any foreign public accounting firm, or any class of such firms, from any provision of this Act or the rules of the Board . . . issued under this Act.”).

determination. The Board did not include such a mechanism in the proposed rule for five principal reasons:

- An exception procedure would be inconsistent with the rationale for jurisdiction-wide determinations, namely, that the foreign authority has taken a position of such general scope and application that it obstructs the Board's ability to complete inspections or investigations in that jurisdiction.
- To the extent that exception arguments would be based on the composition of a firm's client portfolio at a moment in time, entertaining such arguments would require speculation as to whether the foreign authority would impede the Board's ability to inspect or investigate those audits and would create a moving target as the firm gains and loses clients over time.
- Exceptions might increase the risk of a "shell game." If a firm becomes subject to a Board determination because the Board cannot inspect certain types of issuer audit engagements it performed, those issuers might simply migrate to an excepted firm, triggering the need for the Board to monitor auditor changes constantly and then modify its determinations or revise its exceptions.
- An exception procedure might encourage foreign authorities to manipulate the determination process by cherry-picking certain firms that the PCAOB can inspect, thereby casting doubt on the justification for the Board's jurisdiction-wide determination.

- Allowing firms to seek exceptions could effectively transform the Board's jurisdiction-wide approach to a firm-by-firm approach that consumes substantial Board resources and fails to protect investors.

One commenter indicated that the Board's existing exemption authority is adequate and expressed concern that granting exceptions could transform the Board's jurisdiction-wide approach into a firm-by-firm approach that consumes substantial resources and fails to protect investors. The Board agrees with this commenter and has not created a procedure for granting exceptions from a jurisdiction-wide determination.

III. Date of Effectiveness of the Proposed Rule and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Board consents, the Commission will:

- (A) by order approve or disapprove such proposed rule; or
- (B) institute proceedings to determine whether the proposed rule should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule is consistent with the requirements of Title I of the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/pcaob.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. PCAOB-2021-01 on the subject line.

Paper comments:

- Send paper comments in triplicate to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, D.C. 20549-1090.

All submissions should refer to File No. PCAOB-2021-01. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's website


(<http://www.sec.gov/rules/pcaob.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule that are filed with the Commission, and all written communications relating to the proposed rule between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, D.C. 20549-1090, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings will also be available for inspection and copying at the principal office of the PCAOB. All comments received will be posted without charge; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to


File No. PCAOB-2021-01 and should be submitted on or before [21 days from publication in Federal Register].

By the Commission.

Vanessa Countryman
Secretary



 1666 K Street NW
Washington, DC 20006

 Office: 202-207-9100
Fax: 202-862-8430

 www.pcaobus.org

**PROPOSED RULE GOVERNING BOARD
DETERMINATIONS UNDER THE HOLDING
FOREIGN COMPANIES ACCOUNTABLE ACT**

PCAOB Release No. 2021-001
May 13, 2021

PCAOB Rulemaking
Docket Matter No. 048

Summary: The Public Company Accounting Oversight Board (the “PCAOB” or the “Board”) is proposing a new rule, PCAOB Rule 6100, *Board Determinations Under the Holding Foreign Companies Accountable Act*, to provide a framework for its determinations under the Holding Foreign Companies Accountable Act (the “HFCAA”) that the Board is unable to inspect or investigate completely registered public accounting firms located in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction. The proposed rule would establish the manner of the Board’s determinations; the factors the Board will evaluate and the documents and information the Board 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 Board can modify or vacate those determinations.

Public

Comment: Interested persons may submit written comments to the Board. Comments may be submitted by e-mail to comments@pcaobus.org or through the Board’s website at www.pcaobus.org. Comments also may be sent to the Office of the Secretary, PCAOB, 1666 K Street, NW, Washington, DC 20006-2803. All comments should refer to PCAOB Rulemaking Docket Matter No. 048 in the subject or reference line and should be received by the Board by July 12, 2021.

Board

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Risk Analysis (202/591-4725, henseln@pcaobus.org); Michael Gurbutt, Deputy Director, Economic Analysis (202/591-4739, gurbuttm@pcaobus.org); and Tian Liang, Assistant Director, Economic Analysis (202/591-4356, liangt@pcaobus.org)

I. EXECUTIVE SUMMARY

The Sarbanes-Oxley Act of 2002 (the “Act”) mandates that the Board inspect registered public accounting firms and investigate possible statutory, rule, and professional standards violations committed by those firms and their associated persons. That mandate applies with equal force to the Board’s oversight of registered firms in the United States and in foreign jurisdictions.

Over the course of more than a decade, the Board has worked effectively with authorities in foreign jurisdictions to fulfill its mandate to oversee registered firms located outside the United States. With rare exceptions, foreign audit regulators have cooperated with the Board and allowed it to exercise its oversight authority as it relates to registered firms located within their respective jurisdictions. The norms of international comity have guided those efforts and allowed the Board to work cooperatively across borders, to resolve conflicts of law, and to overcome other potential obstacles. The Board benefits greatly from cross-border cooperation with its international counterparts and has built constructive relationships that facilitate meaningful oversight. Authorities in a limited number of foreign jurisdictions, however, have taken positions that deny the Board the access it needs to conduct its mandated oversight activities.

Recognizing the ongoing obstacles to Board inspections and investigations in certain foreign jurisdictions, Congress enacted, and the President signed into law, the HFCAA.¹ The HFCAA requires that the Board determine whether it is unable to inspect or investigate completely registered public accounting firms located in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction. The HFCAA, among other things, also mandates that, after the Board makes such a determination, the U.S. Securities and Exchange Commission (the “Commission”) shall require covered issuers² who retain such firms to make certain disclosures in their annual reports and, eventually, if certain conditions persist, shall prohibit trading in those issuers’ securities.³

¹ Pub. L. No. 116-222, 134 Stat. 1063 (Dec. 18, 2020).

² See HFCAA § 2(i)(1)(A), 15 U.S.C. § 7214(i)(1)(A) (defining “covered issuer”). An “issuer,” as that term is used in this release, is distinct from a “covered issuer,” and is defined in Section 2(a)(7) of the Act.

³ See generally *Holding Foreign Companies Accountable Act Disclosure*, Exchange Act Release No. 91364 (Mar. 18, 2021).

The Board is proposing a new rule, PCAOB Rule 6100, *Board Determinations Under the Holding Foreign Companies Accountable Act*, to establish a framework for the Board to make its determinations under the HFCAA. The proposed rule would establish the manner of the Board's determinations; the factors the Board 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 Board can modify or vacate its determinations.

II. BACKGROUND AND REASON FOR THE PROPOSED RULE

A. The Board's Oversight of Non-U.S. Registered Public Accounting Firms Through Board Inspections and Investigations

Section 102 of the Act prohibits public accounting firms that are not registered with the Board from preparing or issuing, or from participating in the preparation or issuance of, audit reports with respect to issuers, brokers, or dealers.⁴ Implementing this prohibition, PCAOB Rule 2100 provides that each public accounting firm that prepares or issues an audit report with respect to an issuer, broker, or dealer, or plays a substantial role in the preparation or furnishing of such a report, must be registered with the Board.⁵

These provisions apply equally to U.S. and non-U.S. public accounting firms. Section 106 of the Act provides that any non-U.S. public accounting firm that prepares or furnishes an audit report with respect to an issuer, broker, or dealer is subject to the Act and to the Board's rules "in the same manner and to the same extent" as a U.S. public accounting firm.⁶ Therefore, non-U.S. firms issuing such reports must register with the Board. Section 106 of the Act further authorizes the Board to require non-U.S. firms that do not issue such reports but that play a substantial role in the preparation or furnishing of such reports to register with the Board,⁷ and the Board exercised that authority when it adopted Rule 2100.⁸

⁴ See Section 102(a) of the Act; see also Section 2(a)(7) of the Act & PCAOB Rule 1001(i)(iii) (defining "issuer"); Section 110(3) of the Act & PCAOB Rule 1001(b)(iii) (defining "broker"); Section 110(4) of the Act & PCAOB Rule 1001(d)(iii) (defining "dealer").

⁵ See PCAOB Rule 2100, *Registration Requirements for Public Accounting Firms*; see also PCAOB Rule 1001(p)(ii) (defining "play a substantial role in the preparation or furnishing of an audit report").

⁶ Section 106(a)(1) of the Act.

⁷ See Section 106(a)(2) of the Act.

⁸ See PCAOB Rule 2100. Section 106(c) of the Act allows the Board, subject to Commission approval, to exempt a non-U.S. firm or any class of such firms from any provision of the Act or the

Thus, by virtue of Section 106 of the Act and Rule 2100, non-U.S. firms are subject to the same registration requirements as U.S. firms, and, once registered, they are subject to the same oversight as U.S. firms. This oversight includes Board inspections at mandated regular intervals and Board investigations.

i. The Board's Inspection Mandate

The Act mandates that the Board administer a continuing program of inspections that assesses registered firms' and their associated persons' compliance with the Act, the rules of the Board, the rules of the Commission, and professional standards in connection with the performance of audits, the issuance of audit reports, and related matters involving issuers.⁹ Board inspections are the Board's "primary tool of oversight."¹⁰

In accordance with the Act, and as set forth in the Board's rules, the Board periodically inspects the audits of registered public accounting firms.¹¹ Board inspections must be performed annually with respect to each registered firm that regularly provides audit reports for more than 100 issuers, and at least triennially with respect to each registered firm that

Board's rules, upon a determination that doing so is necessary or appropriate in the public interest or for the protection of investors. In connection with the launch of its oversight system in 2003, the Board received numerous requests that non-U.S. firms be exempted from the Board's oversight requirements, but the Board declined to adopt any such exemptions, finding such exemptions to be inconsistent with its mandate to protect investors. *See, e.g., Registration System for Public Accounting Firms*, PCAOB Rel. No. 2003-007, at 13, 17-20 (May 6, 2003); *see also, e.g., Final Rule Concerning the Timing of Certain Inspections of Non-U.S. Firms, and Other Issues Relating to Inspections of Non-U.S. Firms*, PCAOB Rel. No. 2009-003, at 9 n.23 (June 25, 2009).

⁹ *See* Section 104(a)(1) of the Act; *see also* Section 101(c)(3) of the Act; PCAOB Rule 4000(a), *General*. The Act also permits the Board to establish, by rule, a program of inspection with respect to registered firms that provide one or more audit reports for a broker or dealer. *See* Section 104(a)(2) of the Act. The Board's rules provide for an interim inspection program related to audits of brokers and dealers. *See* PCAOB Rule 4020T, *Interim Inspection Program Related to Audits of Brokers and Dealers*.

¹⁰ PCAOB Rel. No. 2009-003, at 8-9; *see also Order Approving Proposed Amendment to Board Rules Relating to Inspections*, Exchange Act Release No. 61649, at 5 (Mar. 4, 2010) (observing that inspections are "the cornerstone of the Board's regulatory oversight of audit firms").

¹¹ *See* Section 104(a)(1) of the Act. Generally, a registered firm's issuance of an audit report triggers a PCAOB inspection, subject to certain limited exceptions. *See* Section 104(b)(1) of the Act; PCAOB Rules 4003(a)-(b), *Frequency of Inspections*; *see also* PCAOB Rules 4003(c) & (e) (identifying certain circumstances in which the Board has discretion to forgo an inspection of a firm). Additionally, the Board conducts inspections of firms that have not issued an audit report with respect to an issuer but have played a substantial role in the preparation or furnishing of such a report. *See* PCAOB Rule 4003(h).

regularly provides audit reports for 100 or fewer issuers.¹² The Board also may conduct special inspections on its own initiative or at the Commission's request.¹³

During an inspection, the Board reviews audit engagements "selected by the Board."¹⁴ The Board also evaluates the sufficiency of the firm's quality control system (and the documentation and communication of that system), and may perform other testing of the firm's audit, supervisory, and quality control procedures as deemed necessary or appropriate in light of the purpose of the inspection and the responsibilities of the Board.¹⁵

To conduct an inspection, the Board must obtain documents and information from the firm and its associated persons, and when the Board requests such documents or information, registered firms and their associated persons must comply. In this regard, the Act provides that a firm's cooperation in and compliance with document requests made in furtherance of the Board's authority and responsibilities under the Act are a condition to the continuing effectiveness of the firm's registration with the Board.¹⁶ Furthermore, PCAOB Rule 4006, *Duty to Cooperate With Inspectors*, imposes on registered firms and their associated persons a duty to cooperate with PCAOB inspectors, which includes complying with requests for access to, and the ability to copy, any record in their possession, custody, or control, and with requests for information by oral interviews, written responses, or otherwise.¹⁷

¹² See Section 104(b)(1) of the Act; see also PCAOB Rules 4003(a)-(b). The Act provides that the Board, by rule, may adjust the annual and triennial inspection schedules if the Board finds that different schedules are consistent with the purposes of the Act, the public interest, and the protection of investors. See Section 104(b)(2) of the Act; see also PCAOB Rules 4003(d)-(g) (adjusting the inspection schedule in certain circumstances).

¹³ See Section 104(b)(2) of the Act.

¹⁴ Section 104(d)(1) of the Act.

¹⁵ See Sections 104(d)(2) and 104(d)(3) of the Act.

¹⁶ See Section 102(b)(3) of the Act. Section 102(b)(3)(A) of the Act specifies that each registration application shall contain "a consent executed by the . . . firm to cooperation in and compliance with any request for . . . documents made by the Board in the furtherance of its authority and responsibilities" under the Act. Section 102(b)(3)(B) of the Act, in turn, provides that each registration application shall contain a statement that the firm "understands and agrees that [such] cooperation and compliance . . . shall be a condition to the continuing effectiveness of the registration of the firm with the Board."

¹⁷ See PCAOB Rule 4006; see also *Gately & Assocs., LLC*, Exchange Act Release No. 62656, at 9 (Aug. 5, 2010) ("The obligations under Rule 4006 are unequivocal, and apply to 'any request[] made in furtherance of the Board's authority and responsibilities.'" (quoting Rule 4006)). Documents and information prepared or received by or specifically for the Board in connection with an inspection are

ii. The Board's Investigation Mandate

The Act also authorizes the Board to conduct investigations (and, relatedly, disciplinary proceedings) with respect to registered firms and their associated persons.¹⁸ The Board may investigate any act, practice, or omission to act by a registered firm or associated person that may violate the Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards, regardless of how the act, practice, or omission came to the Board's attention.¹⁹

As with inspections, the Board's ability to conduct investigations depends on the Board's ability to obtain documents and information from registered firms and their associated persons. Pursuant to the Act,²⁰ the Board has adopted rules under which the Board may (1) require testimony of a registered firm or an associated person thereof with respect to any matter that the Board considers relevant or material to an investigation;²¹ (2) require production of audit work papers and any other document or information possessed by a registered firm or associated person, wherever domiciled, that the Board considers relevant or material to an investigation;²² (3) inspect the books or records of a registered firm or associated person to verify the accuracy of any documents or information supplied;²³ (4) request the testimony of, or any document in the possession of, any other person that the Board considers relevant or material to an investigation, subject to certain limitations;²⁴ and (5) seek issuance by the Commission, in a manner established by the Commission, of a subpoena requiring the

confidential and privileged as an evidentiary matter, but the Board may share them with the Commission and, under certain circumstances, with the Attorney General of the United States, certain federal regulators, state attorneys general, certain state regulators, and certain self-regulatory organizations. See Section 105(b)(5)(B) of the Act.

¹⁸ See Section 101(c)(4) of the Act; *see also* Section 105(a) of the Act.

¹⁹ See Section 105(b)(1) of the Act.

²⁰ See Section 105(b)(2) of the Act.

²¹ See PCAOB Rule 5102, *Testimony of Registered Public Accounting Firms and Associated Persons in Investigations*.

²² See PCAOB Rule 5103, *Demands for Production of Audit Workpapers and Other Documents from Registered Public Accounting Firms and Associated Persons*.

²³ See PCAOB Rule 5104, *Examination of Books and Records in Aid of Investigations*.

²⁴ See PCAOB Rule 5105, *Requests for Testimony or Production of Documents from Persons Not Associated with Registered Public Accounting Firms*.

testimony of, or the production of any document in the possession of, any person that the Board considers relevant or material to an investigation.²⁵

Pursuant to the Act, a firm's cooperation in and compliance with requests for testimony and for the production of documents made in furtherance of the Board's authority and responsibilities are a condition to the continuing effectiveness of the firm's registration with the Board.²⁶ Moreover, if a registered firm or associated person refuses to testify, produce documents, or otherwise cooperate with a Board investigation, the Board can impose sanctions, which may include suspending or revoking a firm's registration and suspending or barring an individual from associating with a registered firm.²⁷ As the Commission has observed, failure to cooperate in a Board investigation is "very serious misconduct."²⁸

The Act requires the Board to coordinate its investigations with the Commission. The Board must notify the Commission of any pending Board investigation that involves a potential violation of the securities laws, and must thereafter coordinate its work with the Commission's Division of Enforcement as necessary to protect any ongoing Commission investigation.²⁹ The Act also authorizes the Board to refer an investigation to the Commission, a self-regulatory organization, certain other federal regulators, and, at the Commission's direction, certain attorneys general and state regulators.³⁰

²⁵ See PCAOB Rule 5111, *Requests for Issuance of Commission Subpoenas in Aid of an Investigation*.

²⁶ See Section 102(b)(3) of the Act.

²⁷ See Section 105(b)(3) of the Act; PCAOB Rule 5110, *Noncooperation with an Investigation*.

²⁸ *R.E. Bassie & Co.*, SEC Accounting and Auditing Enforcement Release No. 3354, at 11 (Jan. 10, 2012).

²⁹ See Section 105(b)(4)(A) of the Act; see also PCAOB Rule 5112(a), *Commission Notification of Order of Formal Investigation*. Documents and information prepared or received by or specifically for the Board in connection with an investigation are confidential and privileged as an evidentiary matter, but the Board may share them with the Commission and, under certain circumstances, with the Attorney General of the United States, certain federal regulators, state attorneys general, certain state regulators, and certain self-regulatory organizations. See Section 105(b)(5)(B) of the Act.

³⁰ See Section 105(b)(4)(B) of the Act; see also PCAOB Rule 5112(b), *Board Referrals of Investigations*; PCAOB Rule 5112(c), *Commission-directed Referrals of Investigations*.

B. The Board's Cooperative Framework for International Oversight

The Board has long observed that certain aspects of its inspection and investigation mandates raise special concerns for non-U.S. firms, including potential conflicts with non-U.S. law.³¹ Acknowledging these challenges early on, the Board affirmed its commitment “to finding ways to accomplish the goals of the Act without subjecting non-U.S. firms to conflicting requirements.”³² The Board then worked with its international counterparts where necessary or appropriate, based on norms of international comity, to develop arrangements and working practices to enable the Board and other audit regulators to achieve their respective mandates in a manner responsive to the potential conflicts of law that non-U.S. firms might confront.³³ The Board's cooperative approach to oversight of PCAOB-registered firms located outside the United States did not, however, entail any abandonment of the Board's inspection or investigation mandates or any relinquishment of the Board's statutory authority to obtain the documents and information it needs from non-U.S. firms in order to execute those mandates.³⁴

When the Board adopted its cooperative framework for overseeing non-U.S. registered firms,³⁵ it rejected calls to afford non-U.S. firms that elected to register with the Board a legal-conflict accommodation during inspections and investigations.³⁶ In so doing, the Board reiterated that “[p]reserving the Board's ability to access audit work papers and other

³¹ See, e.g., *Proposed Rules Relating to the Oversight of Non-U.S. Public Accounting Firms*, PCAOB Rel. No. 2003-024, at 3 (Dec. 10, 2003).

³² *Inspection of Registered Public Accounting Firms*, PCAOB Rel. No. 2003-019, at 5, A2-15-A2-16 (Oct. 7, 2003).

³³ See, e.g., Briefing Paper, *Oversight of Non-U.S. Public Accounting Firms*, PCAOB Rel. No. 2003-020, at 1-2 (Oct. 28, 2003) (“[T]he PCAOB seeks to become partners with its international counterparts in the oversight of the audit firms that operate in the global capital markets. . . . [A]n arrangement based on mutual cooperation with other high quality regulatory systems respects the cultural and legal differences of the regulatory regimes that exist around the world.”); PCAOB Rel. No. 2003-024, at 8 (“The Board also believes its [cooperative] arrangements may reduce potential conflicts of law . . .”).

³⁴ PCAOB Rel. No. 2003-020, at 5 (“The Board believes that it is appropriate that a cooperative approach respect the laws of other jurisdictions, to the extent possible. At the same time, every jurisdiction must be able to protect the participants in, and the integrity of, its capital markets as it deems necessary and appropriate.”); *accord Final Rules Relating to Oversight of Non-U.S. Firms*, PCAOB Rel. No. 2004-005, at 3, A2-17 (June 9, 2004).

³⁵ See generally PCAOB Rel. No. 2004-005.

³⁶ See PCAOB Rel. No. 2004-005, at A2-15-A2-16.

documents or information maintained by registered public accounting firms, including non-U.S. registered public accounting firms, is critical to the Board carrying out its obligations under the Act.”³⁷ For that reason, the Board did not believe that it would be “in the interests of U.S. investors or the public for the Board to adopt a rule of general application that would limit its ability to access such documents or information regardless of the circumstances or need for those documents or information.”³⁸

The Commission approved the Board’s rules regarding oversight of non-U.S. firms, which embody the cooperative approach described above.³⁹ The Commission observed that the PCAOB was discussing potential conflicts of law with foreign audit oversight bodies and encouraged the PCAOB to continue those discussions and to consider ways to work cooperatively with its international counterparts.⁴⁰

Those discussions have continued, and nearly all have been fruitful. The Board’s oversight programs take into account the possibility that a non-U.S. firm’s obligations under the Act or the Board’s rules might conflict with non-U.S. law. The Board has established procedures that enable non-U.S. firms to assert legal conflicts during the registration and periodic reporting processes so that they are not prevented from completing a registration application or complying with periodic reporting requirements.⁴¹ The Board also seeks to coordinate and cooperate with its international counterparts when conducting inspections or investigations in other countries.⁴² Nevertheless, in all respects, the Board has made clear that its statutory

³⁷ PCAOB Rel. No. 2004-005, at A2-16.

³⁸ PCAOB Rel. No. 2004-005, at A2-16-A2-17.

³⁹ See *Order Approving Proposed Rules Relating to Oversight of Non-U.S. Registered Public Accounting Firms*, Exchange Act Release No. 34-50291, at 3 (Aug. 30, 2004).

⁴⁰ See Exchange Act Release No. 34-50291, at 3.

⁴¹ PCAOB Rule 2105, *Conflicting Non-U.S. Laws*, permits a non-U.S. firm to withhold required information from its registration application based on an asserted conflict with non-U.S. law. That rule allows the Board to treat a registration application as complete if the firm, among other things, submits a copy of the purportedly conflicting non-U.S. law and an accompanying legal opinion. But Rule 2105 does not provide a vehicle for resolving conflicts of law during registration, nor does it apply “to potential conflicts of law that may arise subsequent to registration.” PCAOB Rel. No. 2004-005, at A2-16-A2-18; see also PCAOB Rule 2207, *Assertions of Conflicts with Non-U.S. Laws* (establishing a similar process for registered firms’ annual and special reports to the Board).

⁴² See, e.g., *Rules on Periodic Reporting by Registered Public Accounting Firms*, PCAOB Rel. No. 2008-004, at 32 (June 10, 2008).

authority to obtain the documents and information it needs to conduct inspections and investigations has not been relinquished, surrendered, forfeited, or otherwise vitiating.⁴³

C. Resolution of Obstacles to Inspections and Investigations in Non-U.S. Jurisdictions

The practices and approaches the Board has successfully developed with foreign regulators to resolve conflicts and to complete inspections and investigations under the Act can differ from jurisdiction to jurisdiction, but they all implement three core principles:

- (1) The Board must be able to conduct inspections and investigations consistent with its mandate;⁴⁴
- (2) The Board must be able to select the audit work and potential violations to be examined;⁴⁵ and

⁴³ See, e.g., PCAOB Rel. No. 2008-004, at 41 (“The Board has consistently maintained that, although it will seek to work cooperatively with and through non-U.S. regulators, and although it is willing to accommodate a non-U.S. firm’s reluctance (rooted in an asserted conflict of law) to provide the required written consent to cooperate, each firm ultimately has an obligation to cooperate with the Board to the extent that the Board requires cooperation. The Board does not view this statutory obligation as limited or qualified by non-U.S. legal restrictions.”).

⁴⁴ See, e.g., Section 104(a)(1) of the Act (requiring a “continuing program of inspections”); Section 104(b)(1) of the Act (establishing inspection frequency requirements); Section 104(c) of the Act (requiring identification of non-compliant acts, practices, or omissions to act, and providing for reporting of such conduct to the Commission and appropriate state regulatory authorities, when appropriate); Section 105(b)(1) of the Act (authorizing Board investigations); Section 105(b)(3) of the Act (authorizing the imposition of sanctions for noncooperation with an investigation); Section 105(b)(4) of the Act (requiring coordination with the Commission’s Division of Enforcement and authorizing referrals of investigations in certain circumstances); Section 105(b)(5)(B)(i) of the Act (authorizing the Board to share with the Commission documents received in connection with an inspection or investigation).

⁴⁵ See, e.g., Section 104(d)(1) of the Act (directing the Board to inspect and review audit and review engagements “as selected by the Board”); Section 104(d)(3) of the Act (authorizing the Board to perform other testing of audit, supervisory, and quality control procedures as are necessary or appropriate in light of the purpose of the inspection and the responsibilities of the Board); Section 105(b)(1) of the Act (authorizing the Board to conduct an investigation of “any” act, practice, or omission to act by a registered firm or an associated person thereof that may violate “any” provision of the Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission under the Act, or professional standards).

- (3) The Board must have access to firm personnel, audit work papers, and other information and documents deemed relevant by Board staff.⁴⁶

The Board has been able to accommodate the legal requirements of most non-U.S. jurisdictions without compromising on these three core principles, which the Board considers to be fundamental to its ability to inspect and investigate non-U.S. firms completely.

Building collaborative working relationships with international counterparts based on these principles has taken considerable time and substantial effort, but the Board believes that “it is in the interests of the public and investors for the Board to develop efficient and effective cooperative arrangements with its non-U.S. counterparts.”⁴⁷ The Board now has extensive experience with cooperative arrangements that successfully resolve conflicts and allow the PCAOB and its international counterparts to satisfy their respective oversight mandates.

i. Board Inspections of Non-U.S. Firms

Inspections of non-U.S. firms began in 2005,⁴⁸ and the Board quickly identified obstacles that required negotiation with its international counterparts. When a registered firm issuing audit reports for an issuer is located in a non-U.S. jurisdiction that has an auditor oversight authority of its own, the Board seeks to engage with that local regulator. The PCAOB conducts many inspections of non-U.S. firms jointly with local authorities, using approaches that take into consideration the laws and practices of the local jurisdiction. The Board also developed a specific regulatory framework for assessing the degree, if any, to which the Board may rely on the inspection work of the local regulator in an effort to reduce redundancy.⁴⁹ Even where the

⁴⁶ See, e.g., Section 104(d)(1) of the Act (directing the Board to inspect and review audit and review engagements); Section 104(d)(2) of the Act (directing the Board to evaluate the sufficiency of a registered firm’s quality control system, including the manner of the documentation and communication of that system); Section 105(b)(2)(A)-(B) of the Act (authorizing the Board to require the testimony of, and the production of audit work papers and any other documents or information from, registered firms and their associated persons, and to inspect the books and records of such firm or associated person to verify the accuracy of any documents or information supplied).

⁴⁷ PCAOB Rel. No. 2009-003, at 4-5.

⁴⁸ See *Rule Amendments Concerning the Timing of Certain Inspections of Non-U.S. Firms, and Other Issues Relating to Inspections of Non-U.S. Firms*, PCAOB Rel. No. 2008-007, at 4 (Dec. 4, 2008).

⁴⁹ See PCAOB Rel. No. 2009-003, at 5-6. Non-U.S. firms may formally request that the Board rely on a non-U.S. inspection to the extent deemed appropriate by the Board, and the Board will examine certain factors to determine the degree to which, if any, the Board may rely on the non-U.S. inspection. See PCAOB Rule 4011, *Statement by Foreign Registered Public Accounting Firms*; PCAOB Rule 4012, *Inspections of Foreign Registered Public Accounting Firms*; PCAOB Rel. No. 2009-003, at 5. In contrast to

Board conducts its own inspection rather than a joint inspection with a local auditor oversight authority, the Board may communicate with its international counterpart regarding the Board's inspections in the jurisdiction.⁵⁰

By December 2008, the Board had inspected non-U.S. firms in 24 jurisdictions.⁵¹ But the Board also observed that home-country legal obstacles and sovereignty concerns were impeding the Board's ability to conduct inspections of some non-U.S. firms.⁵² Given these obstacles, the Board, in 2009, adjusted the schedule for its first inspections of non-U.S. firms in certain jurisdictions so that the Board could continue its efforts to reach cooperative arrangements with those firms' home-country regulators.⁵³

In so doing, however, the Board expressly rejected the suggestion that it should exempt from inspection non-U.S. firms "that cannot cooperate with PCAOB inspections due to legal conflicts or sovereignty-based opposition from their local governments," finding that exempting such firms from inspections is not in the interests of investors or the public.⁵⁴ Instead, the Board reaffirmed the ultimate obligation of all registered firms, including non-U.S. firms, to be subject to inspection and to comply with the Board's inspection-related requests.⁵⁵

an exemption, reliance on a non-U.S. inspection pursuant to Rule 4012 is a cooperative approach that can be used when efficient and appropriate.

⁵⁰ See PCAOB Rel. No. 2009-003, at 5.

⁵¹ See PCAOB Rel. No. 2008-007, at 4 & n.9 (inspections had been conducted in Argentina, Australia, Bermuda, Brazil, Canada, Chile, Colombia, Greece, Hong Kong, India, Indonesia, Ireland, Israel, Japan, Kazakhstan, Mexico, New Zealand, Panama, Peru, Singapore, South Africa, South Korea, Taiwan, and the United Kingdom).

⁵² PCAOB Rel. No. 2009-003, at 5.

⁵³ See PCAOB Rel. No. 2009-003, at 9.

⁵⁴ See PCAOB Rel. No. 2009-003, at 8-9.

⁵⁵ See PCAOB Rel. No. 2009-003, at 13-14 ("[F]irms must register with the Board in order to engage in certain professional activity directly related to, and affecting, U.S. financial markets, and all registered firms are subject to the Act and the rules of the Board irrespective of their location. A registered firm is subject to various requirements and conditions, including PCAOB Rule 4006's requirement to cooperate in an inspection. In addition, as reflected in Section 102(b)(3) of the Act, a firm's compliance with Board requests for information is a condition of the continuing effectiveness of the firm's registration with the Board."). The Board also reiterated that it "does not view non-U.S. legal restrictions or the sovereignty concerns of local authorities as a sufficient defense in a Board disciplinary proceeding . . . for failing or refusing to provide information requested in an inspection." PCAOB Rel. No. 2009-003, at 14; *accord* PCAOB Rel. No. 2008-007, at 16 n.35.

The Commission, in approving the Board's extension of the deadline for the first inspections of certain non-U.S. firms, recognized that "the adjustment would provide additional time [for the Board] to continue discussions on outstanding matters and work towards cooperation and coordination with authorities in all relevant jurisdictions."⁵⁶ And in connection with its approval of other adjustments to the inspection schedule of non-U.S. firms, the Commission stated that "the PCAOB should continue to work toward cooperative arrangements with the appropriate local auditor oversight authorities where it is reasonably likely that appropriate cooperative arrangements can be obtained."⁵⁷

By the end of 2009, the Board had conducted inspections of non-U.S. firms in an additional nine jurisdictions, bringing the cumulative total to 33 jurisdictions.⁵⁸ The Board, however, was still prevented from inspecting registered firms in China, Hong Kong (to the extent an audit encompassed a company's operations in China), Switzerland, and the European countries required to follow the European Union's Directive on Statutory Auditors.⁵⁹

The Board responded to these obstacles in several ways⁶⁰ and, since 2010, the Board has inspected non-U.S. firms in an additional 18 jurisdictions, bringing the total number of

⁵⁶ *Order Approving Proposed Amendment to Board Rules Relating to Inspections*, Exchange Act Release No. 34-59991, at 3 (May 28, 2009).

⁵⁷ Exchange Act Release No. 34-61649, at 5.

⁵⁸ *See Jurisdictions in Which the PCAOB Has Conducted Inspections (as of Dec. 31, 2009)* (Feb. 3, 2010), available at https://pcaob-assets.azureedge.net/pcaob-dev/docs/default-source/inspections/documents/12-31_jurisdictions.pdf?sfvrsn=2c09bd73_0 (adding Belize, Bolivia, Cayman Islands, Norway, Papua New Guinea, Philippines, Russia, Ukraine, and United Arab Emirates).

⁵⁹ *See PCAOB Publishes Updated Staff Guidance Related to Registration Process for Applicants from Certain Non-U.S. Jurisdictions* (June 1, 2010), available at https://pcaobus.org/news-events/news-releases/news-release-detail/pcaob-publishes-updated-staff-guidance-related-to-registration-process-for-applicants-from-certain-non-u-s-jurisdictions_289.

⁶⁰ In 2009, the Board began publishing a list of PCAOB-registered firms whose first inspections were overdue, which identified the jurisdiction in which each firm was located. *See* PCAOB Rel. No. 2009-003, at 10-11. In 2010, the Board expanded the publication to include a list of non-U.S. public companies with securities traded in U.S. markets that had retained a registered firm the Board could not inspect because of asserted restrictions based on non-U.S. law or objections on grounds of national sovereignty (the "Denied Access List"). *See PCAOB Publishes List of Issuer Audit Clients of Non-U.S. Registered Firms in Jurisdictions where the PCAOB is Denied Access To Conduct Inspections* (May 18, 2010), available at https://pcaobus.org/news-events/news-releases/news-release-detail/pcaob-publishes-list-of-issuer-audit-clients-of-non-u-s-registered-firms-in-jurisdictions-where-the-pcaob-is-denied-access-to-conduct-inspections_284 ("The auditors of the issuers appearing on this list are

non-U.S. jurisdictions in which the PCAOB has conducted inspections to 51.⁶¹ Where needed, the Board enters into formal bilateral cooperative agreements with non-U.S. regulators, and has done so with authorities in 25 jurisdictions.⁶² The Board continues to publish its Denied Access List, which identifies the jurisdictions where the PCAOB cannot conduct inspections because foreign authorities have denied access, the auditors from those jurisdictions that issued audit reports filed with the Commission, and those auditors' non-U.S. public company clients.⁶³ The Board also still adheres to the registration approach it adopted in 2010 and maintains a public list of the jurisdictions whose applicants are subject to it.⁶⁴

located in China, Hong Kong, Switzerland, and 18 European Union countries. The PCAOB continues to work to eliminate obstacles to inspections in these jurisdictions.”).

Also, in October 2010, the Board modified its approach to registration applications from firms in jurisdictions where there were unresolved obstacles to inspections, stating that “its consideration of new applications from firms in those jurisdictions will no longer be premised on an expectation that those obstacles will be resolved without undue delay to any necessary PCAOB inspection of the firm.” *Consideration of Registration Applications From Public Accounting Firms in Non-U.S. Jurisdictions Where There Are Unresolved Obstacles to PCAOB Inspections*, PCAOB Rel. No. 2010-007, at 2-3 (Oct. 7, 2010). A list of those jurisdictions is maintained on the PCAOB’s website. See *Frequently Asked Questions Regarding Issues Relating to Non-U.S. Accounting Firms* (Apr. 20, 2021), available at https://pcaobus.org/oversight/registration/non_us_registration_faq (FAQ 6).

⁶¹ See *Non-U.S. Jurisdictions Where the PCAOB has Conducted Oversight*, available at <https://pcaobus.org/oversight/international/international/pcaob-inspections-of-registered-non-u-s-firms> (adding Austria, Bahamas, Denmark, Finland, France, Germany, Hungary, Italy, Jamaica, Luxembourg, Malaysia, Netherlands, Nicaragua, Spain, Sweden, Switzerland, Thailand, and Turkey).

⁶² See *PCAOB Cooperative Arrangements with Non-U.S. Regulators*, available at <https://pcaobus.org/oversight/international/regulatorycooperation>. Although a formal bilateral agreement is not necessarily a prerequisite to a PCAOB inspection in a non-U.S. jurisdiction, the PCAOB often enters into such agreements with foreign audit regulators to minimize administrative burdens and potential legal or other conflicts that non-U.S. firms might face in their home countries.

⁶³ See *Audit Reports Issued by PCAOB-Registered Firms in Jurisdictions where Authorities Deny Access to Conduct Inspections*, available at <https://pcaobus.org/oversight/international/denied-access-to-inspections> (identifying jurisdictions where the Board has been denied access to conduct inspections).

⁶⁴ See *Frequently Asked Questions Regarding Issues Relating to Non-U.S. Accounting Firms* (Apr. 20, 2021), available at https://pcaobus.org/oversight/registration/non_us_registration_faq (FAQ 6, identifying jurisdictions where obstacles to inspection exist). This list of jurisdictions is broader than the Denied Access List, because this list includes certain European jurisdictions where the Board presently does not need to conduct inspections because no registered firms in the jurisdiction are issuing audit reports, but where an agreement regarding inspections would need to be reached before any future inspections could take place.

All told, more than 830 non-U.S. firms from more than 80 jurisdictions are registered with the Board. Over 200 of those firms, from more than 40 jurisdictions, are presently subject to PCAOB inspection on a triennial basis because they have chosen to audit issuers.⁶⁵ At this time, as reflected on the Board's website,⁶⁶ the Board can conduct inspections in all but two of those jurisdictions (China and Hong Kong).

ii. Board Investigations of Non-U.S. Firms

The Board has conducted numerous investigations in which it appeared that an act, practice, or omission to act by a non-U.S. firm or its associated persons might have violated a relevant law, rule, or standard. In the course of those investigations, the Board has used a variety of tools, provided for in the Act and the Board's rules, to access relevant documents and information. Using those tools, the Board has requested and obtained audit work papers and other documents and information from non-U.S. firms and associated persons, and has conducted interviews and testimony of non-U.S. firm personnel.

In many of those instances, the Board coordinated its investigation with a non-U.S. regulator with which it had entered a bilateral cooperative agreement. Those cooperative agreements have allowed the Board and its international counterpart to communicate and share information, facilitating the Board's access to the documents and information it needed to conduct the investigation. The Board has also conducted certain investigations in parallel with non-U.S. regulators. In those instances, bilateral cooperative arrangements have allowed the Board and its international counterpart to gather evidence while investigating the same firm or associated persons for possible violations under their respective laws and standards.

Many of the Board's investigations of non-U.S. firms or their associated persons remain confidential, because Board investigations are non-public and cannot be disclosed unless they have resulted in the imposition of disciplinary sanctions.⁶⁷ The Board does, however, disclose its settled and adjudicated disciplinary orders imposing sanctions.⁶⁸ To date, the Board has

⁶⁵ Currently, there are no non-U.S. firms that the PCAOB is required by the Act to inspect on an annual basis.

⁶⁶ See International, available at <https://pcaobus.org/oversight/international> (providing a map of jurisdictions showing where the Board currently is able to conduct oversight of registered firms and where the Board currently is denied the necessary access to conduct oversight activities).

⁶⁷ See Section 105(b)(5)(A) of the Act.

⁶⁸ When the Board imposes sanctions, the Board's disciplinary action is stayed if the respondent applies for Commission review of the Board's order or if the Commission initiates such review on its own. In either situation, the Board's sanctions remain stayed (and non-public) unless and until the

sanctioned over 50 non-U.S. registered firms and more than 60 associated persons of such firms, from 24 non-U.S. jurisdictions.⁶⁹ In addition to the investigations that resulted in the imposition of sanctions, the Board also has conducted investigations that did not result in sanctions in numerous other non-U.S. jurisdictions. Yet despite these results, the Board has been unable to complete some investigations of non-U.S. firms or their personnel because they refused to cooperate with an investigation based on a position taken by non-U.S. authorities in their jurisdiction.⁷⁰

D. The Holding Foreign Companies Accountable Act

Against this backdrop, Congress enacted the Holding Foreign Companies Accountable Act, and on December 18, 2020, the President signed it into law. The HFCAA, which amends Section 104 of the Act, calls for the Board to determine whether it is unable to inspect or investigate completely registered firms located in a foreign jurisdiction because of a position taken by an authority in that jurisdiction.⁷¹ The HFCAA, among other things, also mandates that after the Board makes such a determination, the Commission shall require covered issuers that retain firms subject to the Board's determination to make certain disclosures in their annual reports and, eventually, if certain conditions persist, shall prohibit trading in those issuers' securities.⁷²

The Board's determinations under the HFCAA supplement, rather than supplant, the Board's other authorities under the Act. A registered firm's cooperation in and compliance with Board requests during inspections and investigations continues to be a condition to the continuing effectiveness of its registration with the Board. Failure to cooperate with a Board inspection or investigation still can result in the imposition of disciplinary sanctions, including

Commission lifts the stay. See Section 105(e)(1) of the Act. After the stay is lifted, the Board's order may be made public. See Section 105(d)(1)(C) of the Act.

⁶⁹ See Enforcement Actions, available at <https://pcaobus.org/oversight/enforcement/enforcement-actions>.

⁷⁰ See, e.g., *Crowe Horwath (HK) CPA Limited*, PCAOB Rel. No. 105-2017-031 (July 25, 2017) (noncooperation with a Board investigation based on positions taken by Chinese authorities); *Kim Wilfred Ti*, PCAOB Rel. No. 105-2016-004 (Jan. 12, 2016) (same); *Derek Wan Tak Shing*, PCAOB Rel. No. 105-2016-003 (Jan. 12, 2016) (same); *Edith Lam Kar Bo*, PCAOB Rel. No. 105-2016-002 (Jan. 12, 2016) (same); *PKF [Hong Kong]*, PCAOB Rel. No. 105-2016-001 (Jan. 12, 2016) (same).

⁷¹ See HFCAA § 2(i)(2)(A), 15 U.S.C. § 7214(i)(2)(A) (requiring that the Commission identify certain issuers that "retain[] a registered public accounting firm that has a branch or office that . . . is located in a foreign jurisdiction . . . and . . . the Board is unable to inspect or investigate completely because of a position taken by an authority in [that] foreign jurisdiction . . . , as determined by the Board").

⁷² See HFCAA §§ 2(i)(2)(B), 2(i)(3), 3(b), 15 U.S.C. §§ 7214(i)(2)(B), 7214(i)(3), 7214a(b).

civil money penalties and revocation of the firm's registration. Therefore, firms must consider their obligations to comply with PCAOB inspection and investigation demands when they choose to become and remain registered with the Board and when they accept or continue client engagements.

III. DISCUSSION OF THE PROPOSED RULE

The HFCAA does not specify the procedure the Board should follow when making determinations. Nor does the HFCAA specify the content of the Board's determinations; the manner in which any such determination should be shared with the Commission; how, and in what format, any such determination should be made publicly available; the effective date or duration of any such determination; or the manner in which any such determination can be modified or vacated. The Board's proposed rule, PCAOB Rule 6100, *Board Determinations Under the Holding Foreign Companies Accountable Act*, would establish those facets of the Board's determination process.

Although the HFCAA does not expressly require the Board to adopt a rule governing the determinations it makes under the statute, the Board believes that such a rule will inform investors, registered firms, issuers, audit committees, foreign authorities, and the public at large as to how the Board will perform its functions under the statute. Furthermore, a Board rule will promote consistency in the Board's processes regarding determinations under the HFCAA.⁷³

A. Two Types of Board Determinations Under the HFCAA

The HFCAA requires that the Board determine whether it is unable to inspect or investigate completely registered public accounting firms that have a branch or office that is located in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction. The proposed rule would provide that the Board may make two types of determinations: determinations as to a particular foreign jurisdiction and determinations as to a particular registered firm. Those two types of determinations are addressed in subparagraphs (a)(1) and (a)(2) of proposed Rule 6100.

⁷³ The Act states that "[t]he rules of the Board shall, subject to the approval of the Commission[,] . . . provide for the operation and administration of the Board, the exercise of its authority, and the performance of its responsibilities under this Act." Section 101(g)(1) of the Act.

1. Determinations as to Registered Firms Headquartered in a Particular Foreign Jurisdiction

The Board believes that firms headquartered in a foreign jurisdiction necessarily have a branch or office that is located in that jurisdiction. Taking that into account, subparagraph (a)(1) of the proposed rule provides that the Board may determine that it is unable to inspect or investigate completely registered firms⁷⁴ headquartered in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction. In other words, a jurisdiction-wide determination under proposed subparagraph (a)(1) would apply to all firms *headquartered* in that jurisdiction.

The Board believes that a jurisdiction-wide approach to its determinations under the HFCAA is consistent with the structure of the statute. The statute requires the Board's determinations to be based on "a position taken by an authority in the foreign jurisdiction." It follows that if a foreign authority articulates or maintains a position that applies generally to PCAOB inspections or investigations in a foreign jurisdiction, that position could provide the basis for a jurisdiction-wide determination. Hence, the statute, in the Board's view, can reasonably be interpreted to allow the Board to make jurisdiction-wide determinations.⁷⁵

Having a jurisdiction-wide approach at the Board's disposal is important for consistency and efficiency. When the obstacles to completing inspections and investigations are not specific to individual registered firms, but instead reflect threshold or general positions taken by a foreign authority, the Board believes that it should be able to address those obstacles on a jurisdiction-wide basis in a consistent manner and in a single determination. Under those circumstances, separate determinations as to each registered firm in the jurisdiction should not be required.

The proposed rule provides that jurisdiction-wide determinations would be limited to registered firms that are "headquartered" in the jurisdiction. The Board believes that a position taken by a foreign authority will impact registered firms *headquartered* in the jurisdiction, but its impact on firms that are headquartered elsewhere can turn on multiple factors, including the extent of a firm's presence in the jurisdiction and the nature and extent of the audit work it

⁷⁴ The HFCAA refers to a firm's "branch or office" that the Board is unable to inspect or investigate completely. HFCAA § 2(i)(2)(A)(i), 15 U.S.C. § 7214(i)(2)(A)(i). The Board does not inspect or investigate branches or offices. Rather, the Board inspects registered firms and investigates potential violations by registered firms or their associated persons. Accordingly, the proposed rule refers to the Board's inability to inspect or investigate registered firms.

⁷⁵ See, e.g., 166 Cong. Rec. H6033 (daily ed. Dec. 2, 2020) (statement of Rep. Gonzalez) ("[T]he act should be read to apply to companies where the auditor that signs the audit report is located in a jurisdiction that does not permit PCAOB inspection access.").

performs in that jurisdiction. Limiting jurisdiction-wide determinations to firms that are headquartered in the jurisdiction is intended to ensure that these determinations are appropriately tailored and do not encompass firms that have a physical presence of any kind, or personnel of any number, in the jurisdiction. Consistent with the scope of the HFCAA, however, the proposed rule would provide that the Board may make individualized determinations as to firms that have an “office” in a noncooperative jurisdiction but are headquartered elsewhere, as discussed further in Section III.A.2 below.

A firm is “headquartered,” as that term is used in the proposed rule, at its principal place of business (i.e., where the firm’s management directs, controls, and coordinates the firm’s activities).⁷⁶ The Board would presume that a firm is headquartered at the physical address reported by the firm as its headquarters to the Board in its required filings.⁷⁷ Absent an indication that the headquarters address reported by a firm may not be its principal place of business, the Board would use that address to determine where the firm is “headquartered” for purposes of the proposed rule. If questions arise as to whether a firm’s reported headquarters address is the firm’s principal place of business, however, the Board may request additional information from the firm pursuant to the Board’s rules.⁷⁸

In some instances, a member firm of an international firm network might be headquartered in a jurisdiction that becomes subject to a jurisdiction-wide determination of the Board. In such a circumstance, if that member firm is a separate legal entity from the other member firms in the network and signs audit reports in its own name, the Board would not

⁷⁶ See, e.g., *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010) (defining “principal place of business” in the context of federal diversity jurisdiction, and further explaining that “in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, i.e., the ‘nerve center,’ and not simply an office where the corporation holds its board meetings”).

⁷⁷ When registering with the Board, an applicant must provide its “HEADQUARTERS PHYSICAL ADDRESS” in Item 1.2.1 of its application for registration on Form 1. Each year thereafter, in Item 1.2.a of its annual report on Form 2, a firm must provide the “Physical address of the Firm’s headquarters office.”

⁷⁸ See PCAOB Rule 4000(b) (“In furtherance of the Board’s inspection process, the Board may at any time request that a registered public accounting firm provide to the Board additional information or documents relating to information provided by the firm in any report filed pursuant to Section 2 of these Rules, or relating to information that has otherwise come to the Board’s attention.”). This approach would align with the Board’s decade-long practice when assessing registration applications from firms located in non-U.S. jurisdictions where there are obstacles to PCAOB inspections; that approach has been applied to applicants that are headquartered in such jurisdictions, and the Board has sought additional information from applicants when necessary to assess where they are headquartered.

treat other member firms in the network as being “located” or having an “office” in that jurisdiction merely because they are part of the same network as a member firm subject to the jurisdiction-wide determination.⁷⁹

Based on its experience with inspections and investigations in foreign jurisdictions, the Board anticipates that most determinations made under Rule 6100 would be jurisdiction-wide determinations under proposed subparagraph (a)(1). Historically, the positions taken by foreign authorities have impaired the Board’s ability to conduct inspections or investigations in the jurisdiction generally.

Some of the positions taken by foreign authorities have been based upon “gatekeeper” laws, which provide that a registered firm can transfer its audit work papers to the Board only via a local non-U.S. regulator. (By contrast, no audit oversight law in the U.S. requires foreign auditor oversight authorities to involve the PCAOB when seeking audit work papers from a U.S. firm.) As noted above, the Board has considerable experience resolving conflicts that arise from gatekeeper laws using bilateral arrangements, or statements of protocol, whereby the non-U.S. regulator facilitates the PCAOB’s access to audit work papers and associated information that registered firms are obligated to provide to the Board upon request. The Board’s ability to conduct inspections or investigations could become impaired in any of these jurisdictions, however, if such an arrangement were terminated; if non-performance under an arrangement were significant; or if, in the case of countries within the European Economic Area, an arrangement were rendered ineffective because the European Commission revoked or failed to renew its “adequacy decision” regarding the PCAOB.⁸⁰ The resulting impairment would have jurisdiction-wide impact, and thus could give rise to a jurisdiction-wide determination under subparagraph (a)(1) of the proposed rule.

Apart from gatekeeper laws, foreign authorities’ positions also may be based on other substantive laws (e.g., personal data protection laws, state secrecy laws, banking secrecy laws, or commercial secrecy laws) that impair the Board’s ability to conduct inspections or investigations by obstructing the Board’s access to firm personnel, audit work papers, or other documents or information relevant to an inspection or investigation. The Board also has

⁷⁹ See Exchange Act Release No. 91364, at 4 n.8.

⁸⁰ Article 47 of the Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts requires that the European Commission issue an adequacy decision regarding a third country audit regulator (such as the PCAOB) and that regulator’s ability to safeguard audit work papers and related confidential information before a European Union member state audit regulator can execute a working arrangement allowing firms to provide access to such information. See Directive 2014/56/EU, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0056>. The European Commission’s July 2016 adequacy decision with respect to the PCAOB is set to expire in July 2022.

considerable experience working collaboratively with non-U.S. regulators to employ working practices that enable compliance with such non-U.S. laws without impairing the Board's ability to complete inspections or investigations. The proposed rule contemplates circumstances in which a cooperative resolution to those legal conflicts might not be achieved.

In those circumstances, the Board believes that investors and the public interest would be best served by making a jurisdiction-wide determination under the HFCAA, even if the foreign jurisdiction's law (or interpretation or application of that law) affects the Board's ability to inspect or investigate only certain types of audit engagements. For instance, a foreign jurisdiction might impose a law that denies the PCAOB access to critical parts of the audit work papers for entities operating in a particular business sector (e.g., financial services) or for particular business models (e.g., state-owned enterprises ("SOEs")). In such a case, even if only a few registered firms in that jurisdiction presently are auditing issuers in that sector or with that business model, the Board would assess whether its access would be equally impaired should any registered firm in the jurisdiction perform the restricted engagements. If the foreign authority's position applies generally to firms within the jurisdiction, then it impairs the Board's ability to conduct inspections or investigations on a jurisdiction-wide basis, regardless of the differences among registered firms' client portfolios at the time of the Board's determination.

In the situation described above, the Board does not believe that firm-by-firm determinations would be appropriate. While the Board could make a determination as to particular firms under proposed subparagraph (a)(2) of the rule based, for instance, on the composition of each firm's client portfolio at a moment in time, the Board believes that such an approach may not effectively achieve the HFCAA's objectives. It might incentivize an issuer whose audit engagement cannot be inspected or investigated by the Board (a financial institution or SOE in the example) to switch audit firms frequently. Specifically, if the issuer's audit firm were made subject to a Board determination under the HFCAA, the issuer could switch to another audit firm in the jurisdiction that had not previously handled a restricted engagement and, when the Board subsequently issued a determination under the HFCAA as to the issuer's new audit firm, the issuer could switch yet again. Such purposeful migration by issuers could trigger a perpetual cycle of Board determinations as to particular audit firms, while the issuers potentially evade some or all of the consequences of the HFCAA. A jurisdiction-wide Board determination, by contrast, would eliminate these concerns.

The jurisdiction-wide determinations contemplated by subparagraph (a)(1) of the proposed rule also comport with the historical practice of identifying publicly the jurisdictions where there are unresolved obstacles to Board inspections or investigations. Since 2010, jurisdiction-wide determinations of this kind have been posted on the PCAOB's website, for two purposes: to notify investors and potential investors of the public companies whose audit reports were issued by firms from those jurisdictions, and to notify firms considering potential

registration with the Board of the consequences of obstacles to inspections in their jurisdiction.⁸¹

Jurisdiction-wide determinations would rest, as the HFCAA directs, on whether the Board is able “to inspect or investigate completely” firms in the jurisdiction. The HFCAA does not define what it means “to inspect or investigate completely,” however. The Board does not view that phrase as limited to instances where the Board started, but was unable to finish, an inspection or investigation of a registered firm, because foreign authorities’ positions also can make it impossible or infeasible, as a practical matter, for the Board to attempt to commence such inspections or investigations in the first place. In other words, the Board may make a determination under the HFCAA under a range of circumstances including when it is not able to commence an inspection or investigation or, based on historical knowledge and experience, when it is aware that commencing an inspection or investigation would be futile as a result of the position taken by a foreign authority.

With that in mind, the proposed rule ties the Board’s ability to “inspect or investigate completely” to the three core principles that guide the Board’s framework for international cooperation. Specifically, the Board will consider whether it (1) can select the audits and audit areas it will review during inspections and the potential violations it will investigate; (2) has access to firm personnel, audit work papers, and other documents and information relevant to its inspections and investigations, and the ability to retain and use such documents and information; and (3) can otherwise conduct its inspections and investigations in a manner consistent with the Act and the Board’s rules. For a further discussion of how these three principles would inform the Board’s assessment of whether it can “inspect or investigate completely,” see Section III.B below.

The Board’s jurisdiction-wide determinations under the proposed rule would be based on “a position taken by one or more authorities” in the foreign jurisdiction. While the proposed rule refers to a singular “position,” that term encompasses all of the various positions taken by authorities in the jurisdiction that, when aggregated together, collectively constitute the position of authorities in the jurisdiction. In a similar vein, the proposed rule’s reference to “one or more authorities” acknowledges that, in some jurisdictions, multiple authorities can take positions that impair the Board’s ability to conduct inspections or investigations. Those “authorities” are not limited to a “foreign auditor oversight authority,” as that phrase is defined

⁸¹ See Frequently Asked Questions Regarding Issues Relating to Non-U.S. Accounting Firms (Apr. 20, 2021), available at https://pcaobus.org/oversight/registration/non_us_registration_faq (FAQ 6); Audit Reports Issued by PCAOB-Registered Firms in Jurisdictions where Authorities Deny Access to Conduct Inspections, available at <https://pcaobus.org/oversight/international/denied-access-to-inspections>; see also International, available at <https://pcaobus.org/oversight/international/> (providing a map of jurisdictions where the Board currently can and cannot conduct oversight activities).

in the Act,⁸² but rather include any authority whose position can obstruct the Board’s oversight. Such authorities may include, for example, securities regulators, industry regulators, data protection authorities, national security bodies, foreign ministries, or authorities of political subdivisions (e.g., a provincial authority).

Questions:

- a. Is it appropriate to limit jurisdiction-wide determinations to registered firms headquartered in the jurisdiction? If not, what should be the scope of jurisdiction-wide determinations under the proposed rule?
- b. Is it appropriate for the Board to look, in the first instance, at registered firms’ required filings with the Board to determine where a firm is headquartered? If not, what information should the Board consider to determine where a firm is headquartered?

2. Determinations as to a Particular Registered Firm in a Foreign Jurisdiction

Although the Board anticipates that most determinations under the proposed rule would be jurisdiction-wide determinations, the Board cannot anticipate every scenario that it might encounter when conducting oversight of firms in foreign jurisdictions. In light of that practical limitation, proposed subparagraph (a)(2) of the rule provides another option: the Board may determine that it is unable to inspect or investigate completely a particular registered firm that has an office⁸³ located in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction. This provision would complement the Board’s ability to make jurisdiction-wide determinations in two important respects.

First, if a foreign authority obstructs a Board inspection or investigation of a particular firm headquartered in the jurisdiction—but does not obstruct inspections or investigations in a more general manner that might apply to all firms in the jurisdiction—proposed subparagraph (a)(2) provides the Board with an avenue for making a more tailored determination under the HFCAA when a jurisdiction-wide determination might be inappropriately broad.

⁸² See Section 2(a)(17) of the Act.

⁸³ The HFCAA authorizes the Board to make determinations as to firms having a “branch” or “office” in a foreign jurisdiction where the Board is unable to inspect or investigate completely because of a position taken by an authority in that jurisdiction. HFCAA § 2(i)(2)(A), 15 U.S.C. § 7214(i)(2)(A). Unlike in other contexts (such as banking), however, there is no commonly recognized distinction between a “branch” and an “office” with respect to accounting firms. Accordingly, the rule refers only to an “office,” which is a term commonly used by the Board in connection with its oversight programs.

Second, proposed subparagraph (a)(2) allows the Board to make determinations under the HFCAA as to firms that are not headquartered in the foreign authority's jurisdiction but have an office located there. In this respect, a determination under subparagraph (a)(2) can supplement a jurisdiction-wide determination under proposed subparagraph (a)(1) that applies to firms headquartered in the jurisdiction. Furthermore, the reach of proposed subparagraph (a)(2) ensures that the Board's determinations under the proposed rule can match the scope of its mandate under the HFCAA.

The Board's approach to determining where a firm's offices are located is similar to the Board's approach to determining where a firm is headquartered. The Board will look principally to the firm's filings with the Board,⁸⁴ but if there is any uncertainty as to whether a firm has an office in a jurisdiction, the Board may request additional information from the firm pursuant to Rule 4000(b).

Apart from those two distinguishing features (namely, that determinations are directed to a particular firm and can reach firms that have an office in the foreign jurisdiction but are not headquartered there), proposed subparagraph (a)(2) mirrors the operation of subparagraph (a)(1). The Board's inability "to inspect or investigate completely" is tied to the three principles that guide the Board's approach to international cooperation, as noted above and discussed further below. The phrase "position taken by one or more authorities" has the same meaning as in proposed subparagraph (a)(1). Finally, if a member firm of an international firm network becomes subject to a Board determination under subparagraph (a)(2), and is a separate legal entity from the other member firms in the network and signs audit reports in its own name, the Board would not treat it as an "office" of other member firms within the network, and accordingly the other member firms would not be subject to that Board determination under subparagraph (a)(2).

Questions:

- c. Is the proposed rule's framework of jurisdiction-wide and individualized determinations an appropriate approach to Board determinations under the HFCAA? Does the proposed rule make sufficiently clear the distinction between the jurisdiction-wide determinations contemplated by subparagraph (a)(1) and the individualized determinations contemplated by subparagraph (a)(2)? If not, what additional guidance or clarity would be useful?
- d. Is it appropriate for the Board to look, in the first instance, at a registered firm's required filings with the Board to determine where the firm's offices are

⁸⁴ Firms are required to identify all of their offices when they first register with the Board (in Item 1.5 of the application for registration on Form 1) and annually thereafter (in Item 5.1 of the annual report on Form 2).

located? If not, what information should the Board consider to determine where a firm's offices are located?

- e. As noted in footnote 83, although the HFCAA refers to a "branch or office" of a registered firm, subparagraph (a)(2) of the proposed rule refers only to an "office." Is it appropriate to refer only to an "office" in subparagraph (a)(2)? If not, what distinction should the Board recognize between a "branch" and an "office" in this context?

3. Timing of Board Determinations

Subparagraph (a)(3) of the proposed rule addresses the timing of the Board's determinations under the HFCAA. Promptly after the Board's rule becomes effective upon the Commission's approval, the Board will make any determinations under subparagraph (a)(1) or (a)(2) that are appropriate. Once those determinations, if any, are made, the Board would then consider, at least annually, whether changes in the facts and circumstances support any additional determinations under subparagraph (a)(1) or (a)(2). If they do, the Board would make such determinations, as and when appropriate, to allow the Commission on a timely basis to identify covered issuers in accordance with the Commission's rules.

The Board is well positioned to assess the facts and circumstances surrounding its inspections and investigations and gauge whether and when a determination is appropriate under the proposed rule. Committing this timing to the Board's discretion (while requiring the Board to consider at least annually whether changes in facts or circumstances support new determinations) accounts for the fact that the relevant circumstances in a jurisdiction can change quickly and unpredictably, because foreign authorities can enact or amend laws, issue or modify rules or regulations, change their interpretation or application of those laws and rules, and otherwise take new positions with limited or no notice.

When considering whether changed facts or circumstances provide a sufficient basis for a new Board determination, the Board may confront a number of different scenarios. It is not possible to identify with specificity all of the developments that might lead to a new determination, but they could include the enactment of a new law or regulation, a change in the interpretation or the application of an existing law or regulation, the termination of or failure to perform under an existing cooperative arrangement, and the failure to take or renew an administrative action necessary to facilitate the Board's oversight access. The Board's experience in a particular inspection or investigation also could supply the grounds for a new Board determination in accordance with the proposed rule.

Question:

- f. Is this approach to the timing of Board determinations appropriate? Should the Board take a different approach to the timing of its determinations? Should the Board consider changes in facts and circumstances more or less frequently than annually (e.g., semi-annually or biennially)?

B. Factors for Board Determinations

Paragraph (b) provides factors for Board determinations under the proposed rule. When determining whether it can “inspect or investigate completely” under either subparagraph (a)(1) as to a particular jurisdiction or subparagraph (a)(2) as to a particular firm, the Board would assess whether “the position taken by the authority (or authorities)” in the jurisdiction “impairs the Board’s ability to execute its statutory mandate with respect to inspections or investigations,” as detailed in Section II.A above.

To make this assessment, the Board would evaluate three factors, which correlate to the three principles that guide the Board’s approach to international cooperation. This framework promotes a level playing field for U.S. registered firms and non-U.S. registered firms, in accordance with the Act’s directive that non-U.S. registered firms are subject to the Act and the Board’s rules in the same manner and to the same extent as U.S. registered firms.

The first proposed factor is “the Board’s ability to select engagements, audit areas, and potential violations to be reviewed or investigated.” The ability to make such selections is critical to the Board’s oversight activities and is embedded in its statutory mandate.⁸⁵ This factor would encompass situations in which a foreign authority takes the position that certain engagements, or certain parts of engagements, cannot be reviewed during an inspection, or that the Board cannot decide when (i.e., in which inspection year) certain engagements will be reviewed. It also would encompass situations in which a foreign authority takes the position that the Board cannot decide what potential violations it will investigate.

The second proposed factor is “the Board’s access, 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 Board considers relevant to an inspection or investigation.” The Board’s access to firm personnel, documents, and information is pivotal to its inspections and investigations, and is built into its mandate to oversee the audits of issuers that avail themselves of the U.S. capital markets.⁸⁶

⁸⁵ See, e.g., Sections 104(d) and 105(b)(1) of the Act.

⁸⁶ See, e.g., Sections 104(d) and 105(b)(2) of the Act.

The third proposed factor is “the Board’s ability to conduct inspections and investigations in a manner consistent with the provisions of the Act and the Rules of the Board, as interpreted and applied by the Board.” This provision captures all of the other aspects of the Board’s inspection and investigation mandates not already subsumed in the first and second factors. That includes the Board’s ability to satisfy inspection frequency requirements,⁸⁷ to identify violative acts during inspections,⁸⁸ to impose sanctions for noncooperation with an investigation,⁸⁹ and to share information with the Commission and other regulators.⁹⁰

Importantly, these three proposed factors would not function as separate prerequisites for a Board determination. Instead, impairment in any one respect may be sufficient under the circumstances to support a Board determination under subparagraph (a)(1) or (a)(2). To underscore the disjunctive nature of this three-factor analysis, the proposed rule provides that the Board will assess whether its ability to execute its mandate has been impaired in “one or more” of those three respects.

Additionally, to make a determination under the proposed rule, the Board would not need to conclude that it has been impaired as to both its inspections and its investigations. The HFCAA authorizes the Board to make a determination if the Board is unable to inspect “or” investigate completely, and the proposed rule uses “or” in similar fashion: it is enough that the Board is impaired in its ability to execute its mandate with respect to either inspections or investigations.

Questions:

- g. The Board, when determining whether it can “inspect or investigate completely” under the HFCAA, would assess whether a position taken by a foreign authority impairs the Board’s ability to execute its statutory mandate with respect to inspections or investigations. Are there other benchmarks the Board should consider using to determine whether it can inspect or investigate completely?
- h. To determine whether the Board can “inspect or investigate completely” under the HFCAA, the proposed rule provides that the Board will look to three factors. Are the three factors identified in paragraph (b) of the proposed rule appropriate?

⁸⁷ See Section 104(b) of the Act.

⁸⁸ See Section 104(c)(1) of the Act.

⁸⁹ See Section 105(b)(3)(A) of the Act.

⁹⁰ See Sections 104(c)(2) and 105(b)(4)-(5) of the Act.

and sufficiently clear? Is there any additional guidance or clarity the Board should provide with respect to those factors? Are there other factors the Board should consider using to determine whether it can inspect or investigate completely?

C. Basis for Board Determinations

Paragraph (c) of the proposed rule addresses the basis for a Board determination. This provision establishes, first and foremost, that when assessing whether its ability to execute its mandate has been impaired, the Board may consider “any documents or information it deems relevant.” From there, the proposed rule specifies, for the avoidance of doubt, three non-exclusive categories of documents and information that the Board can rely upon when making a determination.

Proposed subparagraph (c)(1) states that the Board may consider a foreign jurisdiction’s laws, statutes, regulations, rules, and other legal authorities; in other words, the black-letter law of the foreign jurisdiction (and any political subdivisions thereof) in all of its varying forms. The Board also may consider relevant interpretations of those laws, whether by the promulgating authority or others, as well as real-world applications of those laws.

Proposed subparagraph (c)(2) provides that the Board may consider the entirety of its efforts to reach and secure compliance with agreements with foreign authorities in the jurisdiction. In so doing, the Board can take into account whether an agreement was reached, the terms of any such agreement, and the foreign authorities’ interpretation of and performance under any such agreement.

Proposed subparagraph (c)(3) recognizes that the Board may consider its experience with foreign authorities’ other conduct and positions relative to Board inspections or investigations. This allows the Board to consider the totality of a foreign authority’s prior conduct and positions in all contexts, including public and private statements made, positions asserted, and actions taken. This provision also may encompass circumstances where a foreign authority precipitously changes its position regarding PCAOB access without making any change to its laws or demanding any form of cooperative agreement.

Together, these provisions establish that the Board can consider any relevant information (including, but not limited to, the three categories of information discussed above) when making a determination. As a corollary, paragraph (d) of the proposed rule establishes that the Board’s determination need not depend on the Board’s “commencement of, but inability to complete, an inspection or investigation.” The Board should not be expected to attempt to initiate inspections or investigations in a foreign jurisdiction that rejects the guiding principles for international cooperation, because such futile efforts would not advance the

Board's mission of protecting investors and furthering the public interest in the preparation of informative, accurate, and independent audit reports.

Question:

- i. Is there any additional guidance or clarity that the Board should provide with respect to the basis for a Board determination?

D. Form and Publication of Board Determinations

1. Form of Board Determinations

The HFCAA does not specify how the Board should communicate its determinations to the Commission. Subparagraph (e)(1) of the proposed rule establishes that process.

When the Board makes a determination, whether as to a particular jurisdiction under subparagraph (a)(1) or a particular firm under subparagraph (a)(2), the Board's determination would be issued in the form of a report to the Commission.⁹¹ Such a reporting process is authorized under Sections 101(c)(5), 101(g)(1), and 101(f)(6) of the Act.⁹²

The Board's report would describe its assessment of whether the position taken by the foreign authority (or authorities) impairs the Board's ability to execute its mandate with respect to inspections or investigations. The report would analyze the relevant factor(s) set forth in paragraph (b) and describe the basis for the Board's conclusions. Furthermore, the Board's report to the Commission would identify the firm(s) subject to the Board's determination in two ways: by the name under which the firm is registered with the Board, and by the firm's identification number with the Board.

Question:

- j. Should the Board's reports to the Commission contain any other information in addition to the information specified in subparagraph (e)(1) of the proposed rule?

⁹¹ The Board will decide whether to conduct a public or non-public meeting to consider a potential determination under the HFCAA in accordance with the PCAOB bylaws. See Bylaw 5.1, *Governing Board Meetings*.

⁹² See Section 101(c)(5) of the Act (the Board shall "perform such other duties or functions as the Board . . . determines are necessary or appropriate . . . to carry out this Act"); Section 101(g)(1) of the Act (the Board's rules "shall . . . provide for . . . the performance of its responsibilities under this Act"); Section 101(f)(6) of the Act (the Board is authorized to "do any and all . . . acts and things necessary, appropriate, or incidental to . . . the exercise of its obligations . . . imposed" by the Act).

2. Publication of Board Determinations

Promptly after the Board issues a report to the Commission, a copy of the report would be made publicly available on the PCAOB's website. The Board expects that a copy of the report ordinarily would be prominently featured on the Board's website on or about the same day the Board issues its report to the Commission.

Subparagraph (e)(2) of the proposed rule specifies, however, that the content of the Board's publicly available report would be subject to two limitations. First, the Board would be bound by Section 105 of the Act, which provides, in pertinent part, that "all documents and information prepared or received by or specifically for the Board . . . in connection with an inspection . . . or with an investigation . . . shall be confidential . . . , unless and until presented in connection with a public proceeding or released" in accordance with Section 105(c) of the Act.⁹³ If the Board's report contains material encompassed by Section 105(b)(5)(A) of the Act, such material would be redacted from the publicly available version of the report posted on the PCAOB's website, in accordance with the Act.

Second, while the Board does not anticipate that such situations would frequently arise, the version of the Board's report posted on the PCAOB's website would be redacted if it contained proprietary, personal, or other information protected by applicable confidentiality laws. In this respect, the proposed rule would align with the Act's treatment of registration applications and annual reports filed with the Board, which the Board may make publicly available subject to "applicable laws relating to the confidentiality of proprietary, personal, or other information."⁹⁴

Questions:

- k. Are there any considerations the Board should take into account when determining where on the Board's website to post copies of the Board's reports to the Commission?
- l. Apart from posting the Board's reports to the Commission on the Board's website, should the Board also indicate on a registered firm's profile in the Board's Registration, Annual, and Special Reporting System that the firm is subject to a Board determination under the HFCAA?

⁹³ Section 105(b)(5)(A) of the Act.

⁹⁴ Section 102(e) of the Act.

- m. Is subparagraph (e)(2)'s approach to confidentiality considerations clear and appropriate? Are there any other grounds upon which the publicly available copy of a Board report to the Commission might need to be redacted?
- n. Besides posting a copy of the Board's report to the Commission on the Board's website, should the Board notify stakeholders about Board determinations under the HFCAA by other means? If so, which stakeholders should receive such notice, and when and how should it be provided? Specifically, should registered firms that are subject to a Board determination receive notice of such determination, and if so, when and how should it be provided?
- o. Should the Board continue its practice of publishing the Denied Access List on its website? If so, should any changes be made to the Denied Access List to avoid potential confusion with the Commission's identification of covered issuers under the HFCAA or with the disclosures provided by covered issuers under the HFCAA and the Commission's rules?

E. Effective Date, Duration, Modification, and Vacatur of Board Determinations

Paragraphs (f) and (g) of the proposed rule establish the effective date and duration of Board determinations. A Board determination becomes effective on the date the Board issues its report to the Commission, and it remains in effect unless and until the Board modifies or vacates it.

The process for modifying or vacating a prior Board determination is governed by paragraph (h) of the proposed rule. Under subparagraph (h)(1), the Board would consider, at least annually, whether changes in the facts and circumstances supporting a prior determination merit a reassessment of that determination. In other words, the Board, at least once per calendar year, would look at any developments with respect to the particular jurisdiction (for a determination under subparagraph (a)(1)) or the particular firm (for a determination under subparagraph (a)(2)) and consider whether those developments warrant a reassessment of the prior determination.

That reassessment process is established in subparagraph (h)(2) of the proposed rule. In addition to reassessing a determination as the result of its annual consideration of changed facts and circumstances described in subparagraph (h)(1), the Board may do so on its own initiative or at the Commission's request at any other time. This framework gives the Board the opportunity to reassess a determination whenever the facts and circumstances warrant, and would help ensure that the Commission's actions under the HFCAA are based on Board determinations that reflect recent developments.

When the Board reassesses a determination, it will assess, based on the new facts and circumstances, whether the position taken by the authority in the foreign jurisdiction still impairs its ability to execute its inspection or investigation mandate in one or more of the respects identified in paragraph (b). Based on that reassessment, the Board can modify its prior determination, vacate it, or leave it undisturbed.

It is not possible to specify every development that might prompt the Board to reassess a prior determination. In certain circumstances, for example, the withdrawal of a law or the execution of a cooperative agreement might suffice. However, as a general matter, when a prior Board determination derives from the Board's prolonged inability to complete inspections or investigations in a particular jurisdiction or of a particular firm, the Board does not anticipate modifying or vacating such a determination until it has successfully concluded inspections or investigations in that jurisdiction or of that firm.

If the Board modifies or vacates a determination, it would issue a report to the Commission describing its new assessment and the basis for modifying or vacating its prior determination. That report would be posted on the PCAOB's website, subject to the same confidentiality limitations described above. When a Board determination is modified, the Board's report would identify, by Board-registered name and Board-issued identification number, the registered firms that are subject to the modified Board determination and, if applicable, the registered firms that by virtue of the modification are no longer subject to a Board determination. When a Board determination is vacated, the Board's report would identify, by Board-registered name and Board-issued identification number, the registered firms that are no longer subject to a Board determination. The Board's modified or vacated determination would become effective on the date that the Board issues its report to the Commission.

Questions:

- p. Is it appropriate to have Board determinations become effective on the date the Board issues its report to the Commission? If not, when should Board determinations take effect?
- q. Should the proposed rule provide registered firms with a mechanism to provide relevant information to, or to seek reconsideration or reevaluation by, the Board with respect to a Board determination? If so, when should such a process be available, what procedures should it entail, and how could it be administered so as not to interfere with the ability of the Board and the Commission to discharge their responsibilities under the HFCAA on a timely basis?
- r. Is subparagraph (h)(1)'s annual consideration of changed facts and circumstances clear and appropriate? Should the Board consider changes in facts

and circumstances more or less frequently than annually (e.g., semi-annually or biennially)? Should the Board publicly report the outcome of this process whenever the Board decides that reassessment of a prior determination is not warranted or that a prior determination should not be modified or vacated?

- s. Should the Board provide any additional guidance or clarity regarding the Board's process for modifying or vacating a prior determination? Should the Board's report regarding a modified or vacated determination contain any information not already specified in the proposed rule?
- t. Is the process described in paragraph (h) of the proposed rule sufficient to monitor the continued justification for a prior determination? Should the Board instead specify a termination date (e.g., three years, five years, ten years) prior to which the Board must formally renew or reissue a prior determination for that determination to remain in effect?

IV. ECONOMIC CONSIDERATIONS

The Board is mindful of the economic impacts of its rulemaking. This section discusses economic considerations related to the proposed rule, including a description of the baseline for evaluating the economic impacts of the proposed rule; the need for the rulemaking; consideration of the benefits, costs, and unintended consequences of the proposed rule; and alternatives considered by the Board.⁹⁵

A. The Baseline for Measuring Economic Impacts

The Board has evaluated the potential benefits, costs, and unintended consequences of the proposed rule relative to a baseline that consists of the current regulatory framework and current market practices. Although the HFCAA requires the Board to make a determination about which audit firms located in a foreign jurisdiction it is unable to inspect or investigate completely because of a position taken by one or more authorities in that jurisdiction, the HFCAA does not expressly require the Board to adopt a rule governing the determinations it makes under the statute. Moreover, the PCAOB website has long identified the jurisdictions in which the Board lacks inspection access, as well as the registered firms located in those jurisdictions.⁹⁶ Measured against this baseline, the proposed rule builds on existing PCAOB

⁹⁵ The proposed rule does not require "mandatory audit firm rotation or a supplement to the auditor's report in which the auditor would be required to provide additional information about the audit and the financial statements" of issuers, nor does it impose any "additional requirements" on auditors. Section 103(a)(3)(C) of the Act. Accordingly, the Board has preliminarily concluded that Section 103(a)(3)(C) of the Act does not apply to this proposed rulemaking.

⁹⁶ For an overview of this historical practice, see, for example, footnote 60.

practices and provides a framework for the Board's determinations under the HFCAA and, hence, should have limited economic impacts incremental to the impacts of the HFCAA and the Commission's actions to implement the HFCAA.

Under the HFCAA, issuers that retain firms that are subject to a Board determination to issue audit reports on their financial statements must make certain disclosures and submissions and, eventually, if certain conditions persist, the securities of those issuers may be subject to a prohibition on trading. The Commission has adopted interim final amendments to Forms 20-F, 40-F, 10-K, and N-CSR to implement the disclosure and submission requirements of the HFCAA.⁹⁷ Other aspects of the HFCAA, including the trading prohibition, will be addressed in subsequent Commission actions.⁹⁸ The economic impact of these aspects of the HFCAA, while tied to the Board's determinations about which audit firms it is unable to inspect or investigate completely, will depend on the implementation choices made by the Commission in carrying out its mandate under the HFCAA and thus are not considered as part of the economic analysis with respect to this rulemaking.

The baseline also takes into consideration the current international reach of the Board's oversight mandate. As of March 31, 2021, there were 852 non-U.S. firms registered with the Board, 200 of which issued at least one audit report on financial statements filed by an issuer with the Commission in the 12-month period ended March 31, 2021.⁹⁹ Those 200 non-U.S. registered firms were headquartered in 90 foreign jurisdictions and, altogether, issued 1,166 audit reports on financial statements filed by issuers during that 12-month period.¹⁰⁰

Exhibit 1 reports the jurisdictions with the highest number of audit reports issued by non-U.S. registered firms on financial statements filed by issuers with the Commission during the 12-month period ended March 31, 2021. The top 15 jurisdictions account for 84% of all audit reports issued by non-U.S. registered firms on financial statements filed by issuers during the 12-month period ended March 31, 2021.

⁹⁷ See Exchange Act Release No. 91364. The interim final rule amendments became effective on May 5, 2021.

⁹⁸ See Exchange Act Release No. 91364.

⁹⁹ Source: PCAOB Registration, Annual, and Special Reporting (RASR) System and Audit Analytics.

¹⁰⁰ If a firm issued more than one audit report on financial statements filed by the same issuer during the 12-month period ended March 31, 2021, then only the most recent audit report is counted.

Exhibit 1. Top Fifteen Non-U.S. Jurisdictions by Number of Audit Reports Issued by Non-U.S. Registered Firms on Financial Statements Filed by Issuers During the 12-Month Period Ended March 31, 2021¹⁰¹

Jurisdiction	Audit Reports Issued by Non-U.S. Registered Firms on Issuer Financial Statements		Market Capitalization		Number of Non-U.S. Registered Firms		Number of Non-U.S. Registered Firms Issuing Audit Reports on Issuer Financial Statements	
	#	%	\$ Billions	%	#	%	#	%
Canada	334	29%	1,791	16%	37	4%	25	13%
China (excluding Hong Kong)	165	14%	1,472	13%	36	4%	9	5%
Israel	133	11%	184	2%	20	2%	10	5%
United Kingdom	76	7%	1,559	14%	46	5%	7	4%
Hong Kong	48	4%	654	6%	28	3%	9	5%
Brazil	39	3%	450	4%	16	2%	6	3%
India	27	2%	333	3%	67	8%	10	5%
Argentina	24	2%	103	1%	17	2%	4	2%
France	21	2%	292	3%	24	3%	5	3%
Malaysia	23	2%	4	0%	18	2%	3	2%
Germany	18	2%	247	2%	33	4%	4	2%
Singapore	19	2%	121	1%	25	3%	8	4%
Greece	19	2%	7	0%	8	1%	3	2%
Switzerland	18	2%	552	5%	6	1%	5	3%
Mexico	17	1%	175	2%	20	2%	6	3%
+ Other Non-U.S. Jurisdictions	185	16%	3,314	29%	451	53%	86	43%
Total of All Non-U.S. Jurisdictions	1,166	100%	11,256	100%	852	100%	200	100%

Source: RASR, Audit Analytics, and Standard & Poor's

As discussed in Section II above, over the years, the Board has been able to work effectively with authorities in foreign jurisdictions to fulfill its mandate to oversee registered firms located outside the United States. With rare exceptions, foreign audit regulators have cooperated with the Board and allowed it to exercise its oversight authority as it relates to registered firms located within their respective jurisdictions. Authorities in a limited number of foreign jurisdictions, however, have taken positions that deny the Board access for oversight

¹⁰¹ For purposes of Exhibit 1, a firm's jurisdiction is the jurisdiction where it is headquartered. The number of audit reports issued on the financial statements of issuers and the number of registered firms that issued those reports are based on issuer filings during the 12-month period ended March 31, 2021. The market capitalization of those issuers and the number of registered firms in each jurisdiction are as of March 31, 2021. Due to a lack of data on the number of shareholders, some audit reports included in Exhibit 1 may have been issued on the financial statements of entities with fewer than 300 shareholders. If a firm issued more than one audit report on financial statements filed by the same issuer during the 12-month period ended March 31, 2021, then only the most recent audit report is counted.

activities. The PCAOB's website identifies the jurisdictions that currently deny the Board such access.¹⁰²

B. Need for the Proposed Rule

As discussed in Section III above, the HFCAA does not expressly require the Board to adopt a rule governing the determinations it makes under the statute. Rather, the HFCAA gives the Board discretion regarding the procedure for making those determinations and the content and format of the Board's reporting to the Commission. The Board has elected to pursue a rulemaking to bring transparency and consistency to its determinations. Specifically, the Board believes that a rule would inform investors, registered firms, issuers, audit committees, foreign authorities, and the public at large as to how the Board will perform its functions to satisfy its obligations under the statute. It would also promote consistency in the Board's process regarding determinations.

C. Economic Impacts

Compared to the baseline of no PCAOB rulemaking, the proposed rule would have incremental benefits and costs. The proposed rule's scope is confined to establishing a framework for determinations that the Board is called upon by the HFCAA to make even absent a rulemaking. Additionally, neither the HFCAA nor the proposed rule gives the Board additional authority to take any action of legal consequence directly against a registered firm. Instead, the HFCAA contemplates that the Board would notify the Commission of its determinations, which may provide the predicate for other regulatory actions to be taken by the Commission if other conditions set forth in the HFCAA and the Commission's rules are met. This situation is in contrast to the direct impact of the Board's statutory mandate to register, set professional standards for, inspect, investigate, and discipline registered firms.

This section discusses the potential benefits, costs, and unintended consequences of the proposed rule. It does not presuppose any determination that the Board may make under the proposed rule, because the Board would determine whether to make any future determinations based on the facts and circumstances at that time.

This section also discusses the economic impacts of four central features of the proposed rule: (1) the Board's ability to make determinations as to a particular foreign jurisdiction; (2) limiting those jurisdiction-wide determinations to firms headquartered in the jurisdiction; (3) the Board's complementary ability to make determinations as to a particular

¹⁰² See Audit Reports Issued by PCAOB-Registered Firms in Jurisdictions where Authorities Deny Access to Conduct Inspections, available at <https://pcaobus.org/oversight/international/denied-access-to-inspections>. The information contained on this webpage does not constitute a Board determination under the HFCAA. The Board has not yet made any determinations under the HFCAA.

registered firm; and (4) the Board's publication of its determinations on its website. The analysis is qualitative in nature because of a lack of information and data necessary to provide reasonable quantitative estimates. Overall, the Board expects that the benefits of the proposed rule will justify any costs and unintended negative effects.

i. Benefits

As previously noted, the Board believes that the proposed rule would inform investors, registered firms, issuers, audit committees, foreign authorities, and the public at large as to how the Board will perform its functions under the HFCAA. The improved transparency and reduced regulatory uncertainty might help market participants make more efficient investment decisions and, hence, enhance capital formation. Furthermore, the proposed rule will promote consistency in the Board's processes regarding determinations. It will also assist the Commission in its consistent implementation of the HFCAA and achieving the statute's intended objectives. These are the primary benefits of the proposed rule.

The Board believes that the proposed rule's jurisdiction-wide determinations would yield additional benefits. In the Board's experience, when foreign authorities take a position that impairs the Board's oversight access, the position applies generally to all firms within the jurisdiction. Consequently, jurisdiction-wide determinations would provide an efficient, effective means of making Board determinations under the HFCAA.

Jurisdiction-wide determinations would be beneficial even when a foreign authority limits the Board's ability to inspect or investigate *certain types* of issuer audit engagements. Typically, the foreign authority's position applies to any firm in the jurisdiction that performs that type of engagement. If the Board were unable to make jurisdiction-wide determinations and instead were required to single out for determination only the specific audit firms handling those issuer engagements at a particular time, those issuers potentially could evade the consequences of the HFCAA by routinely changing audit firms in response to each successive firm-specific determination issued by the Board.¹⁰³ Beyond that, issuing a jurisdiction-wide determination in such a scenario would help ensure that foreign authorities cannot, in essence, choose which firms within their jurisdiction the Board may inspect or investigate.

¹⁰³ If the Board were to make only firm-by-firm determinations based on each firm's then-current client portfolio, the Board might need to establish a process requiring all registered firms to report auditor changes to the Board in real time so that the Board could monitor such changes and promptly make new determinations in response. Presently, the Board's rules require firms to report their issuer clients to the Board only after the firm's audit report on the issuer has been issued. See PCAOB Rule 3211(b), *Auditor Reporting of Certain Audit Participants* (Form AP must be filed within 35 days after the audit report is first included in a filing with the Commission, except that Form AP must be filed within 10 days if the audit report is included in a registration statement under the Securities Act).

Limiting jurisdiction-wide determinations to firms headquartered in the jurisdiction would generate its own benefits. It would reduce the risk that a jurisdiction-wide determination sweeps too broadly by encompassing firms that merely have a physical presence or personnel in the jurisdiction but are headquartered elsewhere. Although a position taken by a foreign authority can naturally be understood to impact registered firms headquartered in the jurisdiction, its impact on firms that are headquartered elsewhere can turn on many factors, including the extent of the firm's presence in the jurisdiction and the nature and extent of the audit work it performs there. With that in mind, the proposed rule provides that the Board could choose to make individualized determinations with respect to firms that are headquartered elsewhere but have an office in such a jurisdiction.

Determinations as to a particular registered firm would complement the Board's jurisdiction-wide determinations by providing an additional option when the Board concludes that an across-the-board jurisdiction-wide determination is not appropriate. Such a provision recognizes that although the Board generally expects to make jurisdiction-wide determinations, it cannot anticipate every scenario it might encounter in the future. If a position taken by a foreign authority applies solely to one firm, which is expected to happen rarely, the Board's ability to make a determination as to that firm would be a critical tool for fulfilling the HFCAA's objectives. Additionally, by providing an avenue for the Board to make determinations as to registered firms that are headquartered in a cooperating jurisdiction but have an office in a non-cooperating jurisdiction, this provision would help ensure that the Board's flexibility under the proposed rule matches its mandate under the HFCAA.

The Board has also considered the potential benefits of making Board determinations public on its website. Such publication would inform investors, registered firms, issuers, audit committees, foreign authorities, and the public regarding Board determinations, thus promoting transparency and reducing regulatory uncertainty. Market participants may benefit from being informed of Board determinations promptly, rather than waiting for the Commission's identification of covered issuers.

ii. Costs and Unintended Consequences

The Board has also considered the potential costs and unintended consequences of the proposed rule. The Board expects any such costs and consequences to be limited, as the proposed rule merely establishes a framework for the Board to perform the responsibilities imposed upon it by the HFCAA.

The Board has evaluated the potential costs and unintended consequences of making jurisdiction-wide determinations. As explained above, such determinations treat all registered firms headquartered in the jurisdiction alike when the positions taken by authorities in the jurisdiction apply equally to any firm performing the same audit work for issuers, whether or not a particular registered firm happens to be doing such work when the Board makes a determination. To mitigate any perceived overinclusiveness or underinclusiveness of a

jurisdiction-wide determination, the proposed rule limits those determinations to registered firms headquartered in the jurisdiction, while also permitting the Board, when appropriate, to supplement a jurisdiction-wide determination with a determination as to a particular firm that has an office in the jurisdiction but is not headquartered there.¹⁰⁴ This approach, in the Board's view, would be unlikely to impose incremental additional costs or lead to unintended consequences relative to the baseline, which consists of, among other things, the historical practice of identifying publicly the jurisdictions where there are unresolved obstacles to Board inspections and investigations.

The Board does not expect that the second and third central features of the proposed rule, limiting jurisdiction-wide determinations to firms headquartered in the jurisdiction and the Board's complementary ability to make determinations as to particular registered firms, would lead to additional costs or unintended consequences.

Separately, the Board has evaluated the potential costs and unintended consequences of making its determinations public. The Board believes that the incremental costs of such publication will likely be minimal because similar information has historically been available on the Board's website for approximately a decade.¹⁰⁵ Moreover, many issuers currently disclose in their annual reports the PCAOB's inability to inspect their auditor, as the Commission recently observed.¹⁰⁶

Question:

- u. Does the Board's analysis of the potential economic impacts of the proposed rule adequately address the benefits and costs of the proposed rule?

D. Alternatives Considered

As an alternative to a rulemaking, the Board considered issuing guidance related to its process or establishing a non-public process for making its determinations. The Board has

¹⁰⁴ Additionally, as noted in Section IV.D, the Board has general residual exemption authority, subject to Commission approval, under Section 106(c) of the Act, and such authority could be used to address any potential overinclusiveness of a jurisdiction-wide determination.

¹⁰⁵ See, e.g., Audit Reports Issued by PCAOB-Registered Firms in Jurisdictions where Authorities Deny Access to Conduct Inspections, available at <https://pcaobus.org/oversight/international/denied-access-to-inspections>.

¹⁰⁶ See Exchange Act Release No. 91364, at 26 (noting "a highly similar type and pattern of disclosure regarding the PCAOB's inability to inspect those firms included in the majority of the potential Commission-Identified Issuers' Item 3 (for Form 20-F filers) and Item 1A (for Form 10-K filers) discussion of risk factors").

determined, however, that a rule would reduce regulatory uncertainty for market participants by providing transparency and promoting consistency as to how the Board would perform its functions under the statute.

As discussed in Section III.A, the Board also considered whether the proposed rule should be limited to determinations as to particular registered firms. Without jurisdiction-wide determinations, however, the Board would have to make determinations only as to particular firms under subparagraph (a)(2) of the rule, potentially based on the present composition of each firm's client portfolio. The Board believes that such an approach would incentivize an issuer whose audit engagement cannot be inspected or investigated by the Board to switch audit firms frequently, possibly frustrating the intent of the HFCAA and potentially necessitating a new process for real-time reporting of auditor changes to the Board so that Board determinations could be made or reassessed on a timely basis.

Also as discussed in Section III.A, the Board considered whether to extend its jurisdiction-wide determinations to all firms that have an office in the jurisdiction, rather than only those headquartered there. The Board elected not to do so, based on its oversight experience, because the impact of a position taken by a foreign authority on a firm headquartered elsewhere can vary based on the particulars of the firm's presence, audit work, and issuer clients in the jurisdiction.

When prescribing the proposed grounds upon which a determination may rest, the Board considered whether the Board's commencement and subsequent inability to finish an inspection or investigation should be a prerequisite to a determination. As explained in Sections III.A.1 and III.C, the Board is not proposing that approach because the position taken by a foreign authority can frustrate the initiation of, or the ability to complete, an inspection or investigation. Moreover, commencing inspections or investigations in the face of such obstacles would be costly and fruitless, not only for the Board, but also for registered firms.

Lastly, although it can exercise exemption authority under Section 106(c) of the Act with the Commission's approval,¹⁰⁷ the Board considered whether the proposed rule should include a procedure for the Board to grant exceptions from a jurisdiction-wide determination. The Board did not include such a mechanism in the proposed rule for five principal reasons:

- An exception procedure would be inconsistent with the rationale for jurisdiction-wide determinations, namely, that the foreign authority has taken a

¹⁰⁷ See Section 106(c) of the Act ("[T]he Board, subject to the approval of the Commission, may, by rule, regulation, or order, and as [the Board] determines necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions exempt any foreign public accounting firm, or any class of such firms, from any provision of this Act or the rules of the Board . . . issued under this Act.").

position of such general scope and application that it obstructs the Board's ability to complete inspections or investigations in that jurisdiction.

- To the extent that exception arguments would be based on the composition of a firm's client portfolio at a moment in time, entertaining such arguments would require speculation as to whether the foreign authority would impede the Board's ability to inspect or investigate those audits and would create a moving target as the firm gains and loses clients over time.
- Exceptions might increase the risk of a "shell game." If a firm becomes subject to a Board determination because the Board cannot inspect certain types of issuer audit engagements it performed, those issuers might simply migrate to an excepted firm, triggering the need for the Board to monitor auditor changes constantly and then modify its determinations or revise its exceptions.
- An exception procedure might encourage foreign authorities to manipulate the determination process by cherry-picking certain firms that the PCAOB can inspect, thereby casting doubt on the justification for the Board's jurisdiction-wide determination.
- Allowing firms to seek exceptions could effectively transform the Board's jurisdiction-wide approach to a firm-by-firm approach that consumes substantial Board resources and fails to protect investors.

Question:

- v. Is the Board's existing exemption authority adequate, or should the proposed rule include a process that would enable the Board to grant exceptions from a jurisdiction-wide determination? If the latter, what factors should the Board take into account when considering exceptions, and how could an exception process be structured and implemented to address the concerns identified above?

V. EFFECTIVE DATE

As discussed above in Section III.A.3, if a rule is adopted by the Board and approved by the Commission, the Board envisions that the rule would then become immediately effective and the Board would promptly assess whether any determinations under the HFCAA are warranted, employing the framework established in the rule.

VI. TEXT OF PROPOSED RULE

RULES

SECTION 6. International

* * * * *

Rule 6100. Board Determinations Under the Holding Foreign Companies Accountable Act

(a) Determinations as to Inability to Inspect or Investigate Registered Firms Completely

(1) Determinations as to Registered Firms Headquartered in a Particular Foreign Jurisdiction

The Board may determine that it is unable to inspect or investigate completely registered public accounting firms headquartered in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction.

(2) Determinations as to a Particular Registered Firm in a Foreign Jurisdiction

The Board may determine that it is unable to inspect or investigate completely a registered public accounting firm that has an office that is located in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction.

(3) Timing of Board Determinations

Promptly after the effective date of this rule, the Board will make determinations under subparagraph (a)(1) or (a)(2) to the extent such determinations are appropriate. Thereafter, the Board will consider, at least annually, whether changes in the facts and circumstances support any additional determinations pursuant to subparagraph (a)(1) or (a)(2). The Board will make additional determinations under subparagraph (a)(1) or (a)(2), as and when appropriate, to allow the Commission on a timely basis to identify covered issuers pursuant to the Commission's rules.

(b) Factors for Board Determinations

When making a determination described in subparagraph (a)(1) or (a)(2), the Board will assess whether the position taken by the authority (or authorities) impairs the Board's ability to execute its statutory mandate with respect to inspections or investigations of such firm(s) in one or more of the following respects:

- (1) the Board's ability to select engagements, audit areas, and potential violations to be reviewed or investigated;
- (2) the Board's 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 Board considers relevant to an inspection or investigation; and
- (3) the Board's ability to conduct inspections and investigations in a manner consistent with the provisions of the Act and the Rules of the Board, as interpreted and applied by the Board.

(c) Basis for Board Determinations

The Board may consider any documents or information it deems relevant when making the assessment described in paragraph (b), including, but not limited to:

- (1) laws, statutes, regulations, rules, ordinances, and other legal authorities purporting to have or treated as having the force of law in the foreign jurisdiction or any political subdivision thereof, and interpretations and applications thereof;
- (2) the existence or absence of any agreement (and, if applicable, the terms thereof) between the Board and any relevant authority in the foreign jurisdiction regarding the conduct of inspections and investigations, as well as the authority's (or authorities') interpretations of and performance under any such agreement; and
- (3) the Board's experience with respect to the foreign authority's (or authorities') other conduct and positions taken relative to Board inspections or investigations.

(d) Commencement of Inspection or Investigation Not Required

A Board determination pursuant to subparagraph (a)(1) or (a)(2) need not depend on the Board's commencement of, but inability to complete, an inspection or investigation of a registered public accounting firm located in the foreign jurisdiction.

(e) Form and Publication of Board Determinations**(1) Reports to the Commission**

When the Board makes a determination pursuant to subparagraph (a)(1) or (a)(2), its determination will be issued in the form of a report to the Commission. The report will describe the Board's assessment under paragraph (b) and the basis for the Board's determination. The report will identify the registered public accounting firm(s) to which the Board's determination applies by (i) the name under which the firm is registered with the Board and (ii) the firm's identification number with the Board.

(2) Publication of Board Reports to the Commission

Promptly after the issuance of a Board report containing a determination pursuant to subparagraph (a)(1) or (a)(2), a copy of the report will be made publicly available on the Board's website; provided, however, that the report's contents will be redacted to the extent required by Section 105 of the Act and applicable laws relating to the confidentiality of proprietary, personal, or other information.

(f) Effective Date of Board Determinations

When the Board makes a determination pursuant to subparagraph (a)(1) or (a)(2), the Board's determination becomes effective on the date the Board issues its report to the Commission referenced in subparagraph (e)(1).

(g) Duration of Board Determinations

A determination made by the Board pursuant to subparagraph (a)(1) or (a)(2) remains in effect unless and until it is modified or vacated by the Board.

(h) Modification or Vacatur of Board Determinations**(1) Annual Consideration of Changed Facts and Circumstances**

The Board will consider, at least annually, whether changes in the facts and circumstances supporting a prior determination made pursuant to subparagraph (a)(1) or (a)(2) merit a reassessment of such determination.

(2) Reassessment of Prior Board Determination

Pursuant to subparagraph (h)(1), or on its own initiative or at the Commission's request at any time, the Board may reassess a prior determination made pursuant to subparagraph

(a)(1) or (a)(2). When reassessing a prior determination, the Board will conduct the same assessment set forth in paragraph (b). Based on such reassessment, the Board may modify or vacate its prior determination. If the Board modifies or vacates a prior determination, it will issue a report to the Commission in accordance with the requirements of subparagraph (e)(1) and will make that report publicly available in accordance with subparagraph (e)(2), and the Board's modified or vacated determination will become effective on the date the Board issues its report to the Commission.

VII. OPPORTUNITY FOR PUBLIC COMMENT

The Board is seeking comment on all aspects of its proposed rule. Among other things, the Board seeks comment on the specific questions presented above in Sections III and IV.

Comments may be submitted by email to comments@pcaobus.org or through the Board's website at www.pcaobus.org. Written comments also may be sent to the Office of the Secretary, PCAOB, 1666 K Street, NW, Washington, DC 20006-2803. All comments should refer to PCAOB Rulemaking Document Matter No. 048 in the subject or reference line and should be received by the Board no later than July 12, 2021.

The Board will consider all comments received. After the close of the comment period, the Board will determine whether to adopt final rules, with or without changes from the proposal. Any final rules adopted will be submitted to the Commission for approval. Pursuant to Section 107 of the Sarbanes-Oxley Act of 2002, proposed rules of the Board do not take effect unless approved by the Commission.

* * * *

On the 13th day of May, in the year 2021, the foregoing was, in accordance with the bylaws of the Public Company Accounting Oversight Board,

ADOPTED BY THE BOARD.

/s/ Phoebe W. Brown

Phoebe W. Brown
Secretary

May 13, 2021



Exhibit 2(a)(B)

Alphabetical List of Commenters on the Proposal in PCAOB Release No. 2021-001	
1	Chris Barnard
2	California State Teachers' Retirement System
3	Center for Audit Quality
4	Council of Institutional Investors
5	Ernst & Young LLP
6	Miguel Minutti-Meza, Emmanuel T. De George, and Yini Wang
7	Thomas H. Spitters, CPA
8	Roman L. Weil

Please note that the comments expressed herein are solely my personal views

Public Company Accounting Oversight Board
1666 K Street, N.W.
Washington, D.C. 20006-2803
United States
www.pcaobus.org

Chris Barnard
Actuary

12 July 2021

- **Release No. 2021-001**
- **PCAOB Rulemaking Docket Matter No. 048**
- **Proposed Rule Governing Board Determinations under the Holding Foreign Companies Accountable Act**

Dear Sir,

Thank you for giving us the opportunity to comment on your Proposed Rule Governing Board Determinations under the Holding Foreign Companies Accountable Act (HFCAA). You are proposing a new rule to provide a framework for your determinations under the 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 one or more authorities in that jurisdiction. The proposed rule would establish the manner of the PCAOB's determinations; the factors the PCAOB will evaluate and the documents and information the PCAOB 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 can modify or vacate those determinations.

I support this proposed rule, which will facilitate meaningful audit oversight, strengthen investor protection, and improve regulatory consistency and transparency.

Answers to specific questions raised by the PCAOB

a. Is it appropriate to limit jurisdiction-wide determinations to registered firms headquartered in the jurisdiction? If not, what should be the scope of jurisdiction-wide determinations under the proposed rule?

Yes. This would be consistent with the HFCAA.

Please note that the comments expressed herein are solely my personal views

b. Is it appropriate for the Board to look, in the first instance, at registered firms' required filings with the Board to determine where a firm is headquartered? If not, what information should the Board consider to determine where a firm is headquartered?

Yes, it is appropriate to look at registered firms' required filings with the Board to determine where a firm is headquartered.

c. Is the proposed rule's framework of jurisdiction-wide and individualized determinations an appropriate approach to Board determinations under the HFCAA? Does the proposed rule make sufficiently clear the distinction between the jurisdiction-wide determinations contemplated by subparagraph (a)(1) and the individualized determinations contemplated by subparagraph (a)(2)? If not, what additional guidance or clarity would be useful?

I agree with the proposed rule's framework. The distinction is sufficiently clear between the jurisdiction-wide determinations contemplated by subparagraph (a)(1) and the individualized determinations contemplated by subparagraph (a)(2).

d. Is it appropriate for the Board to look, in the first instance, at a registered firm's required filings with the Board to determine where the firm's offices are located? If not, what information should the Board consider to determine where a firm's offices are located?

Yes, it is appropriate to look, in the first instance, at a registered firm's required filings with the PCAOB to determine where the firm's offices are located.

e. As noted in footnote 83, although the HFCAA refers to a "branch or office" of a registered firm, subparagraph (a)(2) of the proposed rule refers only to an "office." Is it appropriate to refer only to an "office" in subparagraph (a)(2)? If not, what distinction should the Board recognize between a "branch" and an "office" in this context?

It is appropriate to refer only to an "office" in subparagraph (a)(2) there is no commonly recognized distinction between a "branch" and an "office" with respect to accounting firms.

f. Is this approach to the timing of Board determinations appropriate? Should the Board take a different approach to the timing of its determinations? Should the Board consider changes in facts and circumstances more or less frequently than annually (e.g., semi-annually or biennially)?

This depends on the context and significance of a particular case. In general, annual should be sufficient.

m. Is subparagraph (e)(2)'s approach to confidentiality considerations clear and appropriate? Are there any other grounds upon which the publicly available copy of a Board report to the Commission might need to be redacted?

This should be the minimum requirement. Again, this depends on the context and significance of a particular case.

n. Besides posting a copy of the Board's report to the Commission on the Board's website, should the Board notify stakeholders about Board determinations under the HFCAA by other

Please note that the comments expressed herein are solely my personal views

means? If so, which stakeholders should receive such notice, and when and how should it be provided? Specifically, should registered firms that are subject to a Board determination receive notice of such determination, and if so, when and how should it be provided?

No, the PCAOB should not notify stakeholders about PCAOB determinations under the HFCAA by other means.

o. Should the Board continue its practice of publishing the Denied Access List on its website? If so, should any changes be made to the Denied Access List to avoid potential confusion with the Commission's identification of covered issuers under the HFCAA or with the disclosures provided by covered issuers under the HFCAA and the Commission's rules?

The PCAOB should continue its practice of publishing the Denied Access List on its website without modification.

Yours faithfully

C.R.B.

Chris Barnard



California State Teachers'
Retirement System
Sustainable Investment & Stewardship Strategies
100 Waterfront Place, MS 4
West Sacramento, CA 95605

July 12, 2021

Office of the Secretary
Public Company Accounting Oversight Board
1666 K Street, NW
Washington, DC 20006-2803

RE: [PCAOB Rulemaking Docket Matter No. 048](#)

Dear Madam Secretary:

We write on behalf of the California State Teachers' Retirement System (CalSTRS). Established in 1913, CalSTRS is the largest educator-only pension fund in the world with a global investment portfolio valued at approximately \$306 billion as of May 31, 2021.¹ As administrators of both a defined benefit plan and a defined contribution plan, our mission is to secure the financial future and sustain the trust of more than 975,000 Californian educators.

Trustworthy audited financial statements are essential to us for investment risk diligence. We value the PCAOB's work to protect investors by ensuring audit integrity. We support the PCAOB's proposed rule to establish a framework for assessing and disclosing its decisions when, in the minority of cases, access to accounting firm oversight is not granted to PCAOB. For specific recommendations, we respectfully refer the PCAOB to the enclosed letter from the Council of Institutional Investors (CII), of which CalSTRS is an active member.

We thank the PCAOB for its work to strengthen transparency and accountability in our markets for the benefit of long-term investors like California's teachers.

Sincerely,

A handwritten signature in blue ink that reads "Aisha Mastagni".

Aeisha Mastagni
Portfolio Manager

¹ [California State Teachers' Retirement System current investment portfolio](#)

Via E-Mail

June 24, 2021

Office of the Secretary
PCAOB
1666 K Street, NW
Washington, DC 20006-2803

Re: PCAOB Rulemaking Docket Matter No. 048

Dear Madam Secretary:

I am writing of behalf of the Council of Institutional Investors (CII) in response to The Public Company Accounting Oversight Board (PCAOB or Board) proposed “new rule, PCAOB Rule 6100, *Board Determinations Under the Holding Foreign Companies Accountable Act*” (HFCAA) (Proposed Rule).¹

CII is a nonprofit, nonpartisan association of United States (U.S.) public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true “Main Street” investors through their pension funds. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$40 trillion in assets under management.²

As the leading voice for effective corporate governance and strong shareholder rights, CII believes that accurate and reliable audited financial statements are critical to investors in making informed decisions, and vital to the overall well-being of our capital markets.³ For far too long, more than 13 years, there has been a gap in the PCAOB’s ability to inspect and investigate

¹ PCAOB Rule 6100, Board Determinations Under the Holding Foreign Companies Accountable Act, PCAOB Rulemaking Docket Matter No. 048, PCAOB Rel. No. 2021-001 at 1 (May 13, 2021), https://pcaob-assets.azureedge.net/pcaob-dev/docs/default-source/rulemaking/docket048/2021-001-hfcaa-proposing-release.pdf?sfvrsn=dad8edcf_6.

² For more information about the Council of Institutional Investors (“CII”), including its board and members, please visit CII’s website at <http://www.cii.org>.

³ CII, Policies on Other Issues, Independence of Accounting and Auditing Standard Setters (updated Mar. 1, 2017), http://www.cii.org/policies_other_issues#indep_acct_audit_standards.

Page 2 of 5
June 24, 2021

completely auditing firms located in China.⁴ We believe the PCAOB's inability to inspect those firms has been to the detriment of long-term investors.⁵

More specifically, CII has long believed that for the protection of investors, all firms performing audits of issuers listed on U.S. exchanges should be subject to PCAOB inspections and investigations, without impediments from foreign authorities such as exist in China.⁶ Investors should be able to rely on the financial statements of issuers traded in the United States, regardless of where the issuers' audits take place.⁷ We generally supported the HFCAA because it will finally close the gap by requiring the PCAOB and the U.S. Securities and Exchange Commission (Commission) to take actions consistent with their responsibilities under the federal securities laws to protect investors.⁸

⁴ See, e.g., Soyoung Ho, Trump Administration Seeks to Delist U.S.-Listed Chinese Companies for Blocking Audit Inspections, Thomson Reuters Tax & Acct. (Aug. 10, 2020), <https://tax.thomsonreuters.com/news/trump-administration-seeks-to-delist-u-s-listed-chinese-companies-for-blocking-audit-inspections/> (“the PCAOB has not been able to get Chinese authorities to agree to a joint inspection program despite over 13 years of off-and-on negotiations”).

⁵ See, e.g., Final Rule Concerning the Timing of Certain Inspections of Non-U.S. Firms, and Other Issues Relating to Inspection of Non-U.S. Firms, PCAOB Rulemaking Docket Matter No. 027, PCAOB Rel. No. 2009-003 at 8-9 (June 25, 2009), https://pcaob-assets.azureedge.net/pcaob-dev/docs/default-source/rulemaking/docket_027/2009-06-25_release_no_2009-003.pdf?sfvrsn=61e7cb9b_0 (“The Board believes that it is not in the interests of investors or the public to exempt non-U.S. firms from the Act's inspection requirement given that the Board has previously determined not to exempt non-U.S. firms from the Act's registration requirements and given that an inspection is the Board's primary tool of oversight.”).

⁶ See, e.g., Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Office of the Secretary, PCAOB at 6 (Sept. 6, 2018), https://www.cii.org/files/issues_and_advocacy/correspondence/2018/September%206.%202018%20PCAOB%20Strategic%20Plan.pdf (“We are particularly concerned about PCAOB-registered firms located in China for at least four reasons: (1) since 2010 the PCAOB has actively sought without success inspections of China-based audit firms and the mainland affiliates of the Big Four accountancies - Deloitte, KPMG, PricewaterhouseCoopers and EY; (2) many of the China-based audit firms do significant work on audits of major U.S. companies doing business in China; (3) the recent surge in the number of Chinese companies listed on U.S. stock exchanges; and (4) most of the Chinese companies listed on U.S. stock exchanges in recent years have a variable interest entity structure that is highly complex and might include risks that some investors and auditors may not fully understand or appreciate.”); see also CII, Buyer Beware: Chinese Companies and the VIE Structure (Dec. 2017), https://www.cii.org/files/publications/misc/12_07_17%20Chinese%20Companies%20and%20the%20VIE%20Structure.pdf (describing the frequency and risks of Chinese companies with variable interest entity structures).

⁷ See, e.g., Rebekah Goshorn Jurata, Board Member, PCAOB, Statement on the PCAOB's Proposing Release for Rule 6100, Board Determinations Under the Holding Foreign Companies Accountable Act (May 13, 2021), <https://pcaobus.org/news-events/speeches/speech-detail/statement-on-the-pcaob-s-proposing-release-for-rule-6100-board-determinations-under-the-holding-foreign-companies-accountable-act> (“Investors should be able to rely on the financial statements of issuers traded in the United States, regardless of where the issuers' audits take place.”).

⁸ See, e.g., Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to The Honorable Carolyn B. Maloney, Chair, Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets Committee on Financial Services, United States House of Representatives et al. 6 (June 18, 2019), [https://www.cii.org/files/issues_and_advocacy/correspondence/2019/June%2018%202019%20Letter%20to%20Subcommittee%20on%20Investor%20Protection%20Entrepreneurship%20and%20Capital%20Markets%20\(finalF\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2019/June%2018%202019%20Letter%20to%20Subcommittee%20on%20Investor%20Protection%20Entrepreneurship%20and%20Capital%20Markets%20(finalF).pdf) (“We acknowledge that there are a number of possible alternative actions the SEC, the PCAOB, the stock exchanges, or Congress could potentially take to address, at least in part, the investor protection and general oversight issues that exist for U.S. Chinese listed companies [and] [i]n our view, the provisions of the . . . Act are not an unreasonable response, particularly in light of the apparent increasing size, scope, and significance of those issues.”).

CII generally supports the Proposed Rule. We agree that the Proposed Rule is not expressly required because the HFCAA is largely self-executing.⁹ However, we also agree that the Proposed Rule is appropriate because it can promote transparency and consistency regarding the PCAOB determination of whether it is unable to inspect or investigate completely registered public accounting firms located in foreign jurisdictions because of a position taken by one or more authorities in that jurisdiction.¹⁰ And we offer the following comments in response to select questions identified in the Proposed Rule:

- a. Is it appropriate to limit jurisdiction-wide determinations to registered firms headquartered in the jurisdiction? If not, what should be the scope of jurisdiction-wide determinations under the proposed rule?¹¹

CII generally agrees with the Board that “a jurisdiction-wide approach to its determinations under the HFCAA is consistent with the structure of the statute.”¹² We also agree that “[w]hen the obstacles to completing inspections and investigations are not specific to individual registered firms, but instead reflect threshold or general positions taken by a foreign authority, the Board . . . should be able to address those obstacles on a jurisdiction-wide basis in a consistent manner and in a single determination.”¹³ We also agree that “investors and the public interest would be best served by making a jurisdiction-wide determination under the HFCAA, even if the foreign jurisdiction’s law (or interpretation or application of that law) affects the Board’s ability to inspect or investigate only certain types of audit engagements.”¹⁴

- f. Is this approach to the timing of Board determinations appropriate? Should the Board take a different approach to the timing of its determinations? Should the Board consider changes in facts and circumstances more or less frequently than annually (e.g., semi-annually or biennially)?¹⁵

CII generally believes the approach to the timing of Board determinations is appropriate. We, however, also believe the approach should be sufficiently flexible to ensure that the Board determinations do not conflict with the language and intent of the HFCAA which we believe

⁹ See PCAOB Rule 6100, Board Determinations Under the Holding Foreign Companies Accountable Act, PCAOB Rulemaking Docket Matter No. 048, PCAOB Rel. No. 2021-001 at 17 (“the HFCAA does not expressly require the Board to adopt a rule governing the determinations it makes under the statute”); Holding Foreign Companies Accountable Act, Pub. L. No. 116-222, § 104(i)(3)(A) (Dec. 18, 2020), *available at* <https://www.congress.gov/116/plaws/publ222/PLAW-116publ222.pdf> (“if the Commission determines that a covered issuer has 3 consecutive non-inspection years, the Commission shall prohibit the securities of the covered issuer from being traded”).

¹⁰ See PCAOB Rule 6100, Board Determinations Under the Holding Foreign Companies Accountable Act, PCAOB Rulemaking Docket Matter No. 048, PCAOB Rel. No. 2021-001 at 17 (“Although the HFCAA does not expressly require the Board to adopt a rule governing the determinations it makes under the statute, the Board believes that such a rule will inform investors, registered firms, issuers, audit committees, foreign authorities, and the public at large as to how the Board will perform its functions under the statute [and] . . . a Board rule will promote consistency in the Board’s processes regarding determinations under the HFCAA.”).

¹¹ *Id.* at 23.

¹² *Id.* at 18.

¹³ *Id.*

¹⁴ *Id.* at 21.

¹⁵ *Id.* at 26.

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requires the prohibition of company securities from being traded on a U.S. national securities exchange or an ‘over-the-counter’ market by 2024 if the company has had three consecutive non-inspection years.¹⁶

- h. To determine whether the Board can “inspect or investigate completely” under the HFCAA, the proposed rule provides that the Board will look to three factors. Are the three factors identified in paragraph (b) of the proposed rule appropriate, and sufficiently clear? Is there any additional guidance or clarity the Board should provide with respect to those factors? Are there other factors the Board should consider using to determine whether it can inspect or investigate completely?¹⁷

CII generally believes that the Board should consider clarifying the second factor by inserting the word “timely” before the word “access.”¹⁸ In our view, the Board cannot inspect or investigate completely if its access to documents or information is not timely.¹⁹

- p. Is it appropriate to have Board determinations become effective on the date the Board issues its report to the Commission? If not, when should Board determinations take effect?

CII generally believes that it is appropriate to have the Board determinations become effective on the date the Board issues its report to the Commission. See our response to question f.

- q. Should the proposed rule provide registered firms with a mechanism to provide relevant information to, or to seek reconsideration or reevaluation by, the Board with respect to a Board determination? If so, when should such a process be available, what procedures should it entail, and how could it be administered so as not to interfere with the ability of the Board and the Commission to discharge their responsibilities under the HFCAA on a timely basis?

¹⁶ See Richard Vernon Smith & Jinsong Zhang, Orrick, Herrington & Sutcliffe LLP, *The Holding Foreign Companies Accountable Act Is Signed Into Law*, JDSUPRA (Jan. 22, 2021), <https://www.jdsupra.com/legalnews/the-holding-foreign-companies-5211670/> (“If the SEC determines that a public company has three consecutive ‘noninspection years,’ beginning in 2021, the SEC would prohibit the company’s securities from being traded on a U.S. national securities exchange or an ‘over-the-counter’ market subject to SEC regulations.”); Holding Foreign Companies Accountable Act, Pub. L. No. 116-222, § 104(i)(3)(A) (“if the Commission determines that a covered issuer has 3 consecutive non-inspection years, the Commission shall prohibit the securities of the covered issuer from being traded”); *cf.* President’s Working Group on Financial Markets: Report on Protecting United States Investors from Significant Risks from Chinese Companies (July 24, 2020), <https://home.treasury.gov/system/files/136/PWG-Report-on-Protecting-United-States-Investors-from-Significant-Risks-from-Chinese-Companies.pdf> (recommending “the new listing standards could provide for a transition period until January 1, 2022 for currently listed companies from NCJs to come into compliance [and] [t]he new listing standards would apply immediately to new company listings once the necessary rulemakings and/or standard-setting are effective”).

¹⁷ PCAOB Rule 6100, Board Determinations Under the Holding Foreign Companies Accountable Act, PCAOB Rulemaking Docket Matter No. 048, PCAOB Rel. No. 2021-001 at 27-28.

¹⁸ *Id.* at 43.

¹⁹ See, e.g., Corrected Order on the Basis of Offers of Settlement of Certain Respondents Implementing Settlement, Exchange Act Rel. No. 74,217, Accounting and Auditing Enforcement No. 3,627 at 22 (Feb. 6, 2015), <https://www.sec.gov/litigation/admin/2015/34-74217.pdf> (public accounting firms based in the People’s Republic of China agreeing to specific required time periods for production of information to the United States Securities and Exchange Commission).

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June 24, 2021

CII generally believes that the proposed rule should provide a mechanism for the registered firm to provide relevant information. But we think any mechanism should not be permitted to delay the ability of the Board or Commission to discharge their responsibilities under the HFCAA on a timely basis. See our response to question f.

- u. Does the Board’s analysis of the potential economic impacts of the proposed rule adequately address the benefits and costs of the proposed rule?

We agree with the Board that the potential economic impact of the Proposed Rule includes that it would benefit investors because it “would inform investors . . . as to how the Board will perform its functions under the HFCAA [and] [t]he improved transparency and reduced regulatory uncertainty might help market participants make more efficient investment decisions and, hence, enhance capital formation [and] . . . [i]t will also assist the Commission in its consistent implementation of the HFCAA and achieving the statute’s intended objectives.”²⁰ In addition, we note that “achieving the statute’s intended objective” includes, as discussed in our response to question f., the prohibition of company securities from being traded on a U.S. national securities exchange or an ‘over-the-counter’ market by 2024 if the company has had three consecutive non-inspection years.

- v. Is the Board’s existing exemption authority adequate, or should the proposed rule include a process that would enable the Board to grant exceptions from a jurisdiction-wide determination? If the latter, what factors should the Board take into account when considering exceptions, and how could an exception process be structured and implemented to address the concerns identified above?

CII generally believes the Board’s existing exemption authority is adequate. We agree with the Board that “[a]llowing firms to seek exceptions could effectively transform the Board’s jurisdiction-wide approach to a firm-by-firm approach that consumes substantial Board resources and fails to protect investors.”²¹

Thank you for consideration of our views. If we can answer any questions or provide additional information, please do not hesitate to contact me.

Sincerely,



Jeffrey P. Mahoney
General Counsel

²⁰ PCAOB Rule 6100, Board Determinations Under the Holding Foreign Companies Accountable Act, PCAOB Rulemaking Docket Matter No. 048, PCAOB Rel. No. 2021-001 at 37.

²¹ *Id.* at 41.

CHIEF EXECUTIVE OFFICER

Julie Bell Lindsay

GOVERNING BOARD*Governing Board Chairman***Kelly Grier**US Chairman and Managing
Partner, Americas Managing
Partner
EY*Governing Board Vice Chairman***Wayne Berson**US CEO and Global Chairman
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and Special Advisor to the
Founder and Chairman
Bloomberg LP**Joseph B. Uczoglu**Chief Executive Officer
Deloitte US

July 12, 2021

PCAOB Office of the Secretary
1666 K Street, NW
Washington, DC 20006-2803

Re: PCAOB Rulemaking Docket Matter No. 048

Dear Office of the Secretary:

The Center for Audit Quality (CAQ) is an autonomous public policy organization dedicated to enhancing investor confidence and public trust in the global capital markets. The CAQ fosters high-quality performance by public company auditors; convenes and collaborates with other stakeholders to advance the discussion of important issues requiring action and intervention; and advocates policies and standards that promote public company auditors' objectivity, effectiveness, and responsiveness to dynamic market conditions. Based in Washington, DC, the CAQ is affiliated with the American Institute of CPAs. This letter represents the observations of the CAQ based upon feedback and discussions with certain of our member firms, but not necessarily the views of any specific firm, individual, or CAQ Governing Board member.

The CAQ appreciates the opportunity to share our views in response to the Public Company Accounting Oversight Board's (PCAOB or Board) [Proposed Rule 6100, Board Determinations Under the Holding Foreign Companies Accountable Act](#) (Proposed Rule or Proposal).

The CAQ believes that high quality, reliable financial statements are the bedrock of our disclosure-based regulatory ecosystem, and audit quality is an important driver of high-quality financial disclosure. PCAOB inspections are a key component of the U.S. regulatory efforts to enhance the quality of financial reporting and ensure audit quality. The CAQ understands that the Holding Foreign Companies Accountable Act (HFCAA) has created a mandate for the PCAOB to determine when it is unable to "inspect or investigate completely" a registered public accounting firm located in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction.¹

¹ See HFCAA § 2(i)(2)(A), 15 U.S.C. § 7214(i)(2)(A) (requiring that the Commission identify certain issuers that "retain[] a registered public accounting firm that has a branch or office that . . . is located in a foreign jurisdiction . . . and . . . the Board is unable to inspect or investigate completely because of a position taken by an authority in [that] foreign jurisdiction . . . as determined by the Board.)"



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We welcome the PCAOB's transparency in establishing the framework to make those determinations and to seek input on the process. We agree that adopting a rule governing how the PCAOB makes such determinations will be informative to investors, registered firms, issuers, audit committees, foreign authorities, and the public at large.

We support the approach of limiting jurisdiction-wide determinations to firms "headquartered" in the jurisdiction as well as the recognition that member firms within a network should not be subject to jurisdiction-wide determinations based merely on their network relationship status. We acknowledge the success the PCAOB has had in negotiating with other jurisdictions and strongly encourage the PCAOB to continue such negotiations, this Proposed Rule notwithstanding. As the factors in the Board's determinations can be broad, we believe that the PCAOB should continue the current approach of working with jurisdictions to address concerns such as data privacy and state secrecy laws.

We recognize that the PCAOB anticipates that most determinations under the Proposed Rule would be jurisdiction-wide determinations and that the PCAOB cannot anticipate every scenario it may encounter when conducting oversight of firms in foreign jurisdictions. When assessing a potential firm-based determination, we encourage the PCAOB to consider the potential adverse impact on competition within that jurisdiction that could result from such a determination and provide equivalent treatment to similarly-situated firms.

We are responding to select questions included in the Board's Proposed Rule for your consideration.

Question m. Is subparagraph (e)(2)'s approach to confidentiality considerations clear and appropriate? Are there any other grounds upon which the publicly available copy of a Board report to the Commission might need to be redacted?

We acknowledge and support that the Proposal indicates that the PCAOB will not publish information protected by confidentiality laws. For purposes of these determinations we believe that this treatment can be extended to all confidential information, whether explicitly covered by laws if that can be done without impeding the PCAOB's overall goal. We recommend the Board clarify that it will redact confidential information except to the extent necessary to explain the basis of a determination made under the rule.

Question n. Besides posting a copy of the Board's report to the Commission on the Board's website, should the Board notify stakeholders about Board determinations under the HFCAA by other means? If so, which stakeholders should receive such notice, and when and how should it be provided? Specifically, should registered firms that are subject to a Board determination receive notice of such determination, and if so, when and how should it be provided?

Yes. When the Board determines it cannot inspect or investigate completely a particular jurisdiction or firm, we believe any registered firm subject to a Board determination should be notified prior to a report being sent to the Commission or posted on the Board's website publicly. Such notification should be made using the Board's normal protocol for communication with



registered firms, using information provided in Form 2. See our responses below regarding the timing of notification and our views regarding providing a mechanism for re-evaluation. We do not believe that there are other stakeholders that should be required to receive notice outside of the registered firms.

Question p. Is it appropriate to have Board determinations become effective on the date the Board issues its report to the Commission? If not, when should Board determinations take effect?

It is appropriate to have Board determinations become effective on the date the Board issues its report to the Commission if there is sufficient notice to registered firms in advance and if a mechanism is in place to allow for re-evaluation. We encourage the Board to clarify what is intended by the date of report “issuance.” For example, is report issuance the date of the report or the date a report is made publicly available? If the latter, is the issuance date the date the report is publicly posted to the SEC or the PCAOB’s website and how will registered firms be made aware of such date?

Question q. Should the proposed rule provide registered firms with a mechanism to provide relevant information to, or to seek reconsideration or reevaluation by, the Board with respect to a Board determination? If so, when should such a process be available, what procedures should it entail, and how could it be administered so as not to interfere with the ability of the Board and the Commission to discharge their responsibilities under the HFCAA on a timely basis?

We believe there should be a mechanism to provide relevant information to, or to seek reconsideration or re-evaluation by the Board with respect to a Board determination. Such a process may involve a similar protocol to how some registered firms now respond to the Board’s inspection report with a formal response from the registered firm.

Question r. Is subparagraph (h)(1)’s annual consideration of changed facts and circumstances clear and appropriate? Should the Board consider changes in facts and circumstances more or less frequently than annually (e.g., semi-annually or biennially)? Should the Board publicly report the outcome of this process whenever the Board decides that reassessment of a prior determination is not warranted or that a prior determination should not be modified or vacated?

We believe annual consideration of changed facts and circumstances is appropriate. Firms and jurisdictions should also have the right to request a re-evaluation at any time if there is a valid triggering event such that facts and circumstances have changed. In other words, a registered firm should not have to wait until the next annual assessment if there are changes to relevant facts and circumstances. The outcome of any assessment (whether annual or otherwise) should be made public.



We appreciate the opportunity to comment on the Proposed Rule. We would be pleased to discuss our comments or answer any questions regarding the views expressed in this letter. Please address questions to Vanessa Teitelbaum (vteitelbaum@thecaq.org) or Matt Sickmiller (msickmiller@thecaq.org).

Sincerely,

A handwritten signature in black ink that reads 'Vanessa J'.

Vanessa Teitelbaum, CPA
Senior Director, Professional Practice
Center for Audit Quality

cc:

PCAOB

Duane M. DesParte, Acting Chairperson
Rebekah Goshorn Jurata, Board Member
Megan Zietsman, Board Member

SEC

The Honorable Gary Gensler, Chair
Caroline A. Crenshaw, Commissioner
Allison Herren Lee, Commissioner
Hester M. Peirce, Commissioner
Elad L. Roisman, Commissioner
Paul Munter, Acting Chief Accountant
Diana Stoltzfus, Deputy Chief Accountant

Via E-Mail

June 24, 2021

Office of the Secretary
PCAOB
1666 K Street, NW
Washington, DC 20006-2803

Re: PCAOB Rulemaking Docket Matter No. 048

Dear Madam Secretary:

I am writing of behalf of the Council of Institutional Investors (CII) in response to The Public Company Accounting Oversight Board (PCAOB or Board) proposed “new rule, PCAOB Rule 6100, *Board Determinations Under the Holding Foreign Companies Accountable Act*” (HFCAA) (Proposed Rule).¹

CII is a nonprofit, nonpartisan association of United States (U.S.) public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true “Main Street” investors through their pension funds. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$40 trillion in assets under management.²

As the leading voice for effective corporate governance and strong shareholder rights, CII believes that accurate and reliable audited financial statements are critical to investors in making informed decisions, and vital to the overall well-being of our capital markets.³ For far too long, more than 13 years, there has been a gap in the PCAOB’s ability to inspect and investigate

¹ PCAOB Rule 6100, Board Determinations Under the Holding Foreign Companies Accountable Act, PCAOB Rulemaking Docket Matter No. 048, PCAOB Rel. No. 2021-001 at 1 (May 13, 2021), https://pcaob-assets.azureedge.net/pcaob-dev/docs/default-source/rulemaking/docket048/2021-001-hfcaa-proposing-release.pdf?sfvrsn=dad8edcf_6.

² For more information about the Council of Institutional Investors (“CII”), including its board and members, please visit CII’s website at <http://www.cii.org>.

³ CII, Policies on Other Issues, Independence of Accounting and Auditing Standard Setters (updated Mar. 1, 2017), http://www.cii.org/policies_other_issues#indep_acct_audit_standards.

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June 24, 2021

completely auditing firms located in China.⁴ We believe the PCAOB's inability to inspect those firms has been to the detriment of long-term investors.⁵

More specifically, CII has long believed that for the protection of investors, all firms performing audits of issuers listed on U.S. exchanges should be subject to PCAOB inspections and investigations, without impediments from foreign authorities such as exist in China.⁶ Investors should be able to rely on the financial statements of issuers traded in the United States, regardless of where the issuers' audits take place.⁷ We generally supported the HFCAA because it will finally close the gap by requiring the PCAOB and the U.S. Securities and Exchange Commission (Commission) to take actions consistent with their responsibilities under the federal securities laws to protect investors.⁸

⁴ See, e.g., Soyoung Ho, Trump Administration Seeks to Delist U.S.-Listed Chinese Companies for Blocking Audit Inspections, Thomson Reuters Tax & Acct. (Aug. 10, 2020), <https://tax.thomsonreuters.com/news/trump-administration-seeks-to-delist-u-s-listed-chinese-companies-for-blocking-audit-inspections/> (“the PCAOB has not been able to get Chinese authorities to agree to a joint inspection program despite over 13 years of off-and-on negotiations”).

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⁶ See, e.g., Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Office of the Secretary, PCAOB at 6 (Sept. 6, 2018), https://www.cii.org/files/issues_and_advocacy/correspondence/2018/September%206.%202018%20PCAOB%20Strategic%20Plan.pdf (“We are particularly concerned about PCAOB-registered firms located in China for at least four reasons: (1) since 2010 the PCAOB has actively sought without success inspections of China-based audit firms and the mainland affiliates of the Big Four accountancies - Deloitte, KPMG, PricewaterhouseCoopers and EY; (2) many of the China-based audit firms do significant work on audits of major U.S. companies doing business in China; (3) the recent surge in the number of Chinese companies listed on U.S. stock exchanges; and (4) most of the Chinese companies listed on U.S. stock exchanges in recent years have a variable interest entity structure that is highly complex and might include risks that some investors and auditors may not fully understand or appreciate.”); see also CII, Buyer Beware: Chinese Companies and the VIE Structure (Dec. 2017), https://www.cii.org/files/publications/misc/12_07_17%20Chinese%20Companies%20and%20the%20VIE%20Structure.pdf (describing the frequency and risks of Chinese companies with variable interest entity structures).

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⁸ See, e.g., Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to The Honorable Carolyn B. Maloney, Chair, Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets Committee on Financial Services, United States House of Representatives et al. 6 (June 18, 2019), [https://www.cii.org/files/issues_and_advocacy/correspondence/2019/June%2018%202019%20Letter%20to%20Subcommittee%20on%20Investor%20Protection%20Entrepreneurship%20and%20Capital%20Markets%20\(finalF\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2019/June%2018%202019%20Letter%20to%20Subcommittee%20on%20Investor%20Protection%20Entrepreneurship%20and%20Capital%20Markets%20(finalF).pdf) (“We acknowledge that there are a number of possible alternative actions the SEC, the PCAOB, the stock exchanges, or Congress could potentially take to address, at least in part, the investor protection and general oversight issues that exist for U.S. Chinese listed companies [and] [i]n our view, the provisions of the . . . Act are not an unreasonable response, particularly in light of the apparent increasing size, scope, and significance of those issues.”).

CII generally supports the Proposed Rule. We agree that the Proposed Rule is not expressly required because the HFCAA is largely self-executing.⁹ However, we also agree that the Proposed Rule is appropriate because it can promote transparency and consistency regarding the PCAOB determination of whether it is unable to inspect or investigate completely registered public accounting firms located in foreign jurisdictions because of a position taken by one or more authorities in that jurisdiction.¹⁰ And we offer the following comments in response to select questions identified in the Proposed Rule:

- a. Is it appropriate to limit jurisdiction-wide determinations to registered firms headquartered in the jurisdiction? If not, what should be the scope of jurisdiction-wide determinations under the proposed rule?¹¹

CII generally agrees with the Board that “a jurisdiction-wide approach to its determinations under the HFCAA is consistent with the structure of the statute.”¹² We also agree that “[w]hen the obstacles to completing inspections and investigations are not specific to individual registered firms, but instead reflect threshold or general positions taken by a foreign authority, the Board . . . should be able to address those obstacles on a jurisdiction-wide basis in a consistent manner and in a single determination.”¹³ We also agree that “investors and the public interest would be best served by making a jurisdiction-wide determination under the HFCAA, even if the foreign jurisdiction’s law (or interpretation or application of that law) affects the Board’s ability to inspect or investigate only certain types of audit engagements.”¹⁴

- f. Is this approach to the timing of Board determinations appropriate? Should the Board take a different approach to the timing of its determinations? Should the Board consider changes in facts and circumstances more or less frequently than annually (e.g., semi-annually or biennially)?¹⁵

CII generally believes the approach to the timing of Board determinations is appropriate. We, however, also believe the approach should be sufficiently flexible to ensure that the Board determinations do not conflict with the language and intent of the HFCAA which we believe

⁹ See PCAOB Rule 6100, Board Determinations Under the Holding Foreign Companies Accountable Act, PCAOB Rulemaking Docket Matter No. 048, PCAOB Rel. No. 2021-001 at 17 (“the HFCAA does not expressly require the Board to adopt a rule governing the determinations it makes under the statute”); Holding Foreign Companies Accountable Act, Pub. L. No. 116-222, § 104(i)(3)(A) (Dec. 18, 2020), *available at* <https://www.congress.gov/116/plaws/publ222/PLAW-116publ222.pdf> (“if the Commission determines that a covered issuer has 3 consecutive non-inspection years, the Commission shall prohibit the securities of the covered issuer from being traded”).

¹⁰ See PCAOB Rule 6100, Board Determinations Under the Holding Foreign Companies Accountable Act, PCAOB Rulemaking Docket Matter No. 048, PCAOB Rel. No. 2021-001 at 17 (“Although the HFCAA does not expressly require the Board to adopt a rule governing the determinations it makes under the statute, the Board believes that such a rule will inform investors, registered firms, issuers, audit committees, foreign authorities, and the public at large as to how the Board will perform its functions under the statute [and] . . . a Board rule will promote consistency in the Board’s processes regarding determinations under the HFCAA.”).

¹¹ *Id.* at 23.

¹² *Id.* at 18.

¹³ *Id.*

¹⁴ *Id.* at 21.

¹⁵ *Id.* at 26.

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requires the prohibition of company securities from being traded on a U.S. national securities exchange or an ‘over-the-counter’ market by 2024 if the company has had three consecutive non-inspection years.¹⁶

- h. To determine whether the Board can “inspect or investigate completely” under the HFCAA, the proposed rule provides that the Board will look to three factors. Are the three factors identified in paragraph (b) of the proposed rule appropriate, and sufficiently clear? Is there any additional guidance or clarity the Board should provide with respect to those factors? Are there other factors the Board should consider using to determine whether it can inspect or investigate completely?¹⁷

CII generally believes that the Board should consider clarifying the second factor by inserting the word “timely” before the word “access.”¹⁸ In our view, the Board cannot inspect or investigate completely if its access to documents or information is not timely.¹⁹

- p. Is it appropriate to have Board determinations become effective on the date the Board issues its report to the Commission? If not, when should Board determinations take effect?

CII generally believes that it is appropriate to have the Board determinations become effective on the date the Board issues its report to the Commission. See our response to question f.

- q. Should the proposed rule provide registered firms with a mechanism to provide relevant information to, or to seek reconsideration or reevaluation by, the Board with respect to a Board determination? If so, when should such a process be available, what procedures should it entail, and how could it be administered so as not to interfere with the ability of the Board and the Commission to discharge their responsibilities under the HFCAA on a timely basis?

¹⁶ See Richard Vernon Smith & Jinsong Zhang, Orrick, Herrington & Sutcliffe LLP, *The Holding Foreign Companies Accountable Act Is Signed Into Law*, JDSUPRA (Jan. 22, 2021), <https://www.jdsupra.com/legalnews/the-holding-foreign-companies-5211670/> (“If the SEC determines that a public company has three consecutive ‘noninspection years,’ beginning in 2021, the SEC would prohibit the company’s securities from being traded on a U.S. national securities exchange or an ‘over-the-counter’ market subject to SEC regulations.”); Holding Foreign Companies Accountable Act, Pub. L. No. 116-222, § 104(i)(3)(A) (“if the Commission determines that a covered issuer has 3 consecutive non-inspection years, the Commission shall prohibit the securities of the covered issuer from being traded”); *cf.* President’s Working Group on Financial Markets: Report on Protecting United States Investors from Significant Risks from Chinese Companies (July 24, 2020), <https://home.treasury.gov/system/files/136/PWG-Report-on-Protecting-United-States-Investors-from-Significant-Risks-from-Chinese-Companies.pdf> (recommending “the new listing standards could provide for a transition period until January 1, 2022 for currently listed companies from NCJs to come into compliance [and] [t]he new listing standards would apply immediately to new company listings once the necessary rulemakings and/or standard-setting are effective”).

¹⁷ PCAOB Rule 6100, Board Determinations Under the Holding Foreign Companies Accountable Act, PCAOB Rulemaking Docket Matter No. 048, PCAOB Rel. No. 2021-001 at 27-28.

¹⁸ *Id.* at 43.

¹⁹ See, e.g., Corrected Order on the Basis of Offers of Settlement of Certain Respondents Implementing Settlement, Exchange Act Rel. No. 74,217, Accounting and Auditing Enforcement No. 3,627 at 22 (Feb. 6, 2015), <https://www.sec.gov/litigation/admin/2015/34-74217.pdf> (public accounting firms based in the People’s Republic of China agreeing to specific required time periods for production of information to the United States Securities and Exchange Commission).

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CII generally believes that the proposed rule should provide a mechanism for the registered firm to provide relevant information. But we think any mechanism should not be permitted to delay the ability of the Board or Commission to discharge their responsibilities under the HFCAA on a timely basis. See our response to question f.

- u. Does the Board’s analysis of the potential economic impacts of the proposed rule adequately address the benefits and costs of the proposed rule?

We agree with the Board that the potential economic impact of the Proposed Rule includes that it would benefit investors because it “would inform investors . . . as to how the Board will perform its functions under the HFCAA [and] [t]he improved transparency and reduced regulatory uncertainty might help market participants make more efficient investment decisions and, hence, enhance capital formation [and] . . . [i]t will also assist the Commission in its consistent implementation of the HFCAA and achieving the statute’s intended objectives.”²⁰ In addition, we note that “achieving the statute’s intended objective” includes, as discussed in our response to question f., the prohibition of company securities from being traded on a U.S. national securities exchange or an ‘over-the-counter’ market by 2024 if the company has had three consecutive non-inspection years.

- v. Is the Board’s existing exemption authority adequate, or should the proposed rule include a process that would enable the Board to grant exceptions from a jurisdiction-wide determination? If the latter, what factors should the Board take into account when considering exceptions, and how could an exception process be structured and implemented to address the concerns identified above?

CII generally believes the Board’s existing exemption authority is adequate. We agree with the Board that “[a]llowing firms to seek exceptions could effectively transform the Board’s jurisdiction-wide approach to a firm-by-firm approach that consumes substantial Board resources and fails to protect investors.”²¹

Thank you for consideration of our views. If we can answer any questions or provide additional information, please do not hesitate to contact me.

Sincerely,



Jeffrey P. Mahoney
General Counsel

²⁰ PCAOB Rule 6100, Board Determinations Under the Holding Foreign Companies Accountable Act, PCAOB Rulemaking Docket Matter No. 048, PCAOB Rel. No. 2021-001 at 37.

²¹ *Id.* at 41.



**Building a better
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1 July 2021

PCAOB Rule 6100, Board Determinations Under the Holding Foreign Companies Accountable Act (PCAOB Rel. No. 2021-001; Rulemaking Docket No. 048)

Dear Office of the Secretary:

Ernst & Young LLP (EY US) is pleased to submit these comments to the Public Company Accounting Oversight Board (PCAOB or Board) on proposed Rule 6100. The proposed rule provides a framework for the Board to make determinations as required to implement the Holding Foreign Companies Accountable Act (HFCAA).

We recognize the important role of the PCAOB in strengthening audit quality, including through fulfilling its statutory mandate to inspect registered firms. We also recognize the value of the Board and other regulators reaching agreements to facilitate inspections, and the significant progress the Board has made in reaching such agreements. Because we believe increased economic integration and cross-border trade drives global growth and prosperity, we are hopeful that the Board and other regulators will continue to seek agreements that respect each regulator's mandate while avoiding the delisting of issuers in the US.

Our responses to selected questions in the proposal are set out below.

Q.a: Is it appropriate to limit jurisdiction-wide determinations to registered firms headquartered in the jurisdiction? If not, what should be the scope of jurisdiction-wide determinations under the proposed rule?

We believe it is appropriate for the Board to look to the location of a firm's headquarters for purposes of such a determination.

Q.b: Is it appropriate for the Board to look, in the first instance, at registered firms' required filings with the Board to determine where a firm is headquartered? If not, what information should the Board consider to determine where a firm is headquartered?

We believe it is appropriate for the Board to look to registered firms' required filings for this information.



Q.c: Is the proposed rule’s framework of jurisdiction-wide and individualized determinations an appropriate approach to Board determinations under the HFCAA? Does the proposed rule make sufficiently clear the distinction between the jurisdiction-wide determinations contemplated by subparagraph (a)(1) and the individualized determinations contemplated by subparagraph (a)(2)? If not, what additional guidance or clarity would be useful?

We believe the proposal makes sufficiently clear the distinction between jurisdiction-wide determinations and individualized determinations.

Q.d: Is it appropriate for the Board to look, in the first instance, at a registered firm’s required filings with the Board to determine where the firm’s offices are located? If not, what information should the Board consider to determine where a firm’s offices are located?

We believe it is appropriate for the Board to look to registered firms’ required filings for this information.

Q.e: As noted in footnote 83, although the HFCAA refers to a “branch or office” of a registered firm, subparagraph (a)(2) of the proposed rule refers only to an “office.” Is it appropriate to refer only to an “office” in subparagraph (a)(2)? If not, what distinction should the Board recognize between a “branch” and an “office” in this context?

We believe it is appropriate to refer only to an “office” in subparagraph (a)(2). As noted in the Board’s Proposal (p. 23, n. 83), there is no recognized distinction between the terms “branch” and “office” in the context of accounting firms. The Board’s standards and forms use the term “office.” For instance, AS 1215, *Audit Documentation*, sets out requirements in paragraphs .18 and .19 for offices issuing an auditor’s report regarding the preparation, review, and retention of required documentation. Similarly, Form AP, Item 3.1, requires the disclosure of the office of the firm issuing the audit report in question. In contrast, the Board’s standards and forms do not distinguish between “branches” and “offices” of a registered firm. We agree that introducing such a distinction for purposes of the HFCAA would not further the implementation of the legislation, and believe that the use of a superfluous term could introduce confusion. Accordingly, we believe the proposed focus on “office” is appropriate.

Q.m: Is subparagraph (e)(2)’s approach to confidentiality considerations clear and appropriate? Are there any other grounds upon which the publicly available copy of a Board report to the Commission might need to be redacted?

Subparagraph (e)(2) provides that, apart from redacting information as required the Sarbanes-Oxley Act, the Board also would redact contents to the extent required by “applicable laws relating to the confidentiality of



proprietary, personal, or other information.” We believe the Board should broaden this language, including by removing the reference to “laws” governing confidentiality and instead relying on broader concepts of confidentiality.

The focus of any public report should be on giving notice of a determination under the HFCAA, and providing such general supporting information as would be appropriate to substantiate the basis for the determination. This can be accomplished without including confidential information regarding an accounting firm, the identities of its clients, its clients’ confidential financial and other information, or the personnel of either the firm or the client – without regard to whether such information is expressly covered by a confidentiality law. The Board can expand this definition to appropriately safeguard information covered by accountants’ professional responsibilities of confidentiality, for example, without sacrificing its ability to publish relevant information regarding its determinations.

Q.n: Besides posting a copy of the Board’s report to the Commission on the Board’s website, should the Board notify stakeholders about Board determinations under the HFCAA by other means? If so, which stakeholders should receive such notice, and when and how should it be provided? Specifically, should registered firms that are subject to a Board determination receive notice of such determination, and if so, when and how should it be provided?

We believe the Board should provide a registered firm with non-public advance notice of the Board’s preliminary determination that the firm is subject to a determination under subparagraphs (a)(1) or (a)(2), and identify a period of time in which the firm can submit information for the Board’s consideration in reaching a final determination. This would promote due process for the firms impacted by such determinations. It also would enable such firms to initiate discussions with their clients to help those clients understand and plan for the impact of such a determination.

Q.p: Is it appropriate to have Board determinations become effective on the date the Board issues its report to the Commission? If not, when should Board determinations take effect?

We believe the Board should delay effectiveness of its determinations – for example, for 120 days. As noted above in response to question N, we believe firms’ clients will benefit from an additional opportunity to understand and plan for the impact of such a determination.

Q.q: Should the proposed rule provide registered firms with a mechanism to provide relevant information to, or to seek reconsideration or reevaluation by, the Board with respect to a Board determination? If so, when should such a process be available, what procedures should it entail, and how could it be administered so as not to interfere with the ability of the Board and the Commission to discharge their responsibilities under the HFCAA on a timely basis?



As noted above in response to question N, we believe the Board should provide a registered firm with advance notice of a preliminary determination and an opportunity to submit relevant information for the Board's consideration. Additionally, we believe it is appropriate for the Board to provide firms with the ability to request reevaluation by the Board of a prior determination under subparagraphs (a)(1) or (a)(2) outside of the normal annual reevaluation. The Board should clarify that information submitted by firms through either of these processes will be kept confidential.

Q.r: Is subparagraph (h)(1)'s annual consideration of changed facts and circumstances clear and appropriate? Should the Board consider changes in facts and circumstances more or less frequently than annually (e.g., semi-annually or biennially)? Should the Board publicly report the outcome of this process whenever the Board decides that reassessment of a prior determination is not warranted or that a prior determination should not be modified or vacated?

We believe the proposed annual reconsideration of changed facts and circumstances is an appropriate timeframe. Additionally, as noted above in response to question Q, we also believe it is appropriate for the Board to provide firms with the ability to request reevaluation by the Board of a prior determination under subparagraphs (a)(1) or (a)(2) outside of the normal annual reconsideration.

Q.s: Should the Board provide any additional guidance or clarity regarding the Board's process for modifying or vacating a prior determination? Should the Board's report regarding a modified or vacated determination contain any information not already specified in the proposed rule?

We believe it is appropriate for the Board to confirm in its rule that any potentially material development in the facts and circumstances as to a determination will result in a reconsideration of the determination. We do not believe that a report regarding a modified or vacated determination needs to contain any information not already specified in the proposal.

Q.t: Is the process described in paragraph (h) of the proposed rule sufficient to monitor the continued justification for a prior determination? Should the Board instead specify a termination date (e.g., three years, five years, ten years) prior to which the Board must formally renew or reissue a prior determination for that determination to remain in effect?

We believe that reconsideration at least annually of changed facts and circumstances is appropriate. Because the Board would be required under the proposal to consider any changed facts and circumstances regarding each determination at least annually, we do not believe it is necessary to specify a termination date for a determination.



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* * * * *

We would be pleased to discuss our comments with the Board or its staff at your convenience.

Ernst & Young LLP



Via Email: comments@pcaobus.org

Office of the Secretary
 Public Company Oversight Board
 1666 K street, NW
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July 12, 2021

Re: PCAOB Rulemaking Docket Matter No. 048

Ladies and Gentlemen:

We appreciate the opportunity to comment on the proposed new PCAOB Rule 6100 “*Board Determinations Under the Holding Foreign Companies Accountable Act*”. The purpose of this new rule is to establish a framework for the PCAOB to make its determinations under the SEC’s HFCAA. The proposed rule would establish the manner of the PCAOB’s (“Board’s”) determinations; the factors the Board 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 Board can modify or vacate its determinations.

In this letter we provide responses to several of the PCAOBs specific questions. Further, we draw the Board’s attention to our related comment letter in response to the SEC’s request for comment re. “*File Number S7-03-21, Holding Foreign Companies Accountable Act Disclosure, Interim final rule.*” which also provides pertinent information to these issues.

Below we reproduce specific questions from the PCAOB request, Release No. 2021-001, in bold italics, followed by our responses. In our responses, we aim to provide details that emerged during our own analysis of data from registered audit firms (and their clients) that could be subject to the HFCAA requirements.

A.1 Determinations as to Registered Firms Headquartered in a Particular Foreign Jurisdiction

Question a) Is it appropriate to limit jurisdiction-wide determination to registered firms headquartered in the jurisdiction? If not, what should be the scope of jurisdiction-wide determinations under the proposed rule?

We believe that jurisdiction-wide determination, based on the location of signing audit firms’ headquarters is an appropriate starting point. However, the Board might need to provide more guidance in cases where an audit firm, with headquarters in a cooperative jurisdiction, signs the audit report of a client located in a non-cooperative jurisdiction, including cases where local



personal at the non-cooperative jurisdiction is substantially involved in audit tasks. For instance, an audit firm with headquarters in the U.S. signs an audit report of a client located in Mainland China and uses local resources from a Chinese affiliate (e.g., the Shanghai office).

Our review of issuers' risk factor disclosures in annual filings raises questions about the jurisdiction-wide determination approach. For example, Alibaba Group's [CIK: 0001577552] Form 20-F for fiscal year ended March 31, 2019 states:

In addition, auditors based outside of China are subject to similar restrictions under PRC law and CSRC directives in respect of audit work that is carried out in China that supports the audit opinions issued on financial statements of entities with substantial China operations. (*see Item 3*)

Therefore, if Alibaba retains KPMG U.S., it is unclear if the auditor could be legally able to allow the PCAOB to inspect the audit, if selected. This could result in U.S. audit firms (or other audit firms in cooperative jurisdictions) becoming non-compliant, so the jurisdiction-wide determination needs additional consideration and guidance.

Question b) Is it appropriate for the Board to look, in the first instance, at registered firms' required filings with the Board to determine where a firm is headquartered? If not, what information should the Board consider to determine where a firm is headquartered?

Registered firms' required filings (PCAOB Forms AP and 2/A) typically convey the most detailed, precise, and up to date information regarding the jurisdiction where signing audit firms' headquarters are located. However, we highlight two issues that could arise if the Board uses these filings as the sole basis for identifying the location of firm' headquarters.

- 1) We have identified several cases of omission or delay in the filing of Form AP.¹
- 2) We believe that an average investor, without access to database providers such as Audit Analytics, is likely to infer an auditor's jurisdiction based on the location printed under the signature of the audit report, filed along with issuers' 20-Fs and 10-Ks. While the auditor's signature in Form 20-F/10-K is identified with the signing branch's office city and country, the Form AP's information is directly provided by the audit firm.² However, there are cases where these locations differ (e.g., when audit firms in one country have branch offices in

¹ See for example Shanghai Perfect C.P.A Partnership (ID 3027), headquartered in China, has never appeared in the Form AP database (as of 2021/06/24), however lists MERCURY FINTECH HOLDING INC. [CIK: 0001527762] on the Item 4.1 of its Form 2 filed on 2021/5/12.

² See for example the PCAOB's inspection report of MBP dated on Jan. 16th, 2020. The Form 2 of MBP shows the headquarter of the auditor is in New York, US., however the firm has branch offices in Beijing, Hangzhou, Shenzhen, Shanghai, Guangzhou, and Tianjin in China. It is these branches that appear on the MBP signatures on audit reports (e.g. SINOVAC BIOTECH LTD.'s 20-F for Dec. 31st, 2019 states "Marcum Bernstein & Pinchuck LLP, we have served as the Company's auditor since 2019, Beijing China, April 30, 2020".)



another country that do not operate as a separate legal entity). Our review of annual filings for fiscal years 2019 and 2020 revealed that 12 issuers had at least one of their audit reports signed by the auditor Marcum Bernstein & Pinchuk LLP [MBP, ID 5395].) MBP's signatures reveal the jurisdiction of MBP as China, but Form AP and Form 2 reveal the jurisdiction of MBP as the United States.³

We recommend the Board to: (1) ensure that information on Form 2 (e.g., audit firms' headquarters, and ITEM 4 "*Audit Reports Issued by the Firm for Issuers*") is completely incorporated into Form AP in a timely fashion. This measure would prevent situations where audit reports are already signed, and Form 2 is updated but not reflected in Form AP (see footnote #1); and, (2) provide additional guidance for investors to avoid confusion about a given audit firm's headquarters, for example, the Board could explicitly communicate to investors that the location disclosed under the auditor's signature may not be the location of the auditor's headquarters, and instead direct them to the "Auditor Search" function on PCAOB's official website.⁴

Moreover, we refer to our earlier comment letter to the SEC (S7-03-21), where we recommend the introduction of a structured XBRL tagging requirement pertaining to the auditor's name, branch office, and jurisdiction. This approach could alleviate several concerns and sources of discrepancies that one may observe across public data sources. We also recommended the SEC to include specific guidance to tag the auditor's name and location as listed on Form AP.

A2. Determinations as to a Particular Registered Firm in a Foreign Jurisdiction

Question d) Is it appropriate for the Board to look, in the first instance, at a registered firm's required filings with the Board to determine where the firm's offices are located? If not, what information should the Board consider to determine where a firm's offices are located?

We agree that it is appropriate to look at the registered firms' PCAOB filings to determine where their offices are located, but we recommend the Board to consider additional sources to validate this information, such as 20-Fs/10-Ks.

Question e) As noted in footnote 83, although the HFCAA refers to a "branch or office" of a registered firm, subparagraph (a)(2) of the proposed rule refers only to an "office". Is it appropriate to refer only to an "office" in subparagraph (a)(2)? If not, what distinction should the Board recognize between a "branch" and an "office" in this context?

Instead of "*branch or office*" we recommend that the Board refers to "*Issuing City*". Given that the Form AP database includes a field called "*Issuing City*" to refer to the branch or office that

³ This explicitly indicates a US auditor taking responsibility for the audit of Chinese companies. E.g., Deloitte Touché Tohmatsu's Form AP and Form 2 indicates jurisdiction in China, not the US.

⁴ Auditor Search webpage: <https://pcaobus.org/resources/auditorsearch>



issued or signed the specific audit report. Employing this common terminology would allow the Board to avoid confusion between “branch” and “office” and ensure consistency.

A3. Timing of Board Determinations

Question f) Is this approach to the timing of Board determinations appropriate? Should the Board take a different approach to the timing of its determinations? Should the Board consider changes in facts and circumstances more or less frequently than annually (e.g., semi-annually or biennially)?

We believe that it is reasonable to rely on annual assessments, given the timing of audit reports. However, we raise several questions relating to events that may trigger jurisdictional changes that the Board should consider:

- 1) Are registered audit firms allowed to simply change their headquarters? If so, are there limitations on the frequency of these changes?
- 2) Are registered audit firms required to report to the Board any changes in their branch offices on a timely basis (e.g., additions or closures)?
- 3) Are audit firms required to report to the Board any mergers/acquisitions that may impact their office locations on a timely basis?

While we generally agree that the Board stipulate an annual approach, it seems prudent to require timely updates on the special report (Form 3) for any ongoing event(s) that could affect its jurisdiction determination.

D.2. Publication of Board Determinations

Question k) Are there any considerations the Board should take into account when determining where on the Board’s website to post copies of the Board’s reports to the Commission?

We recommend the Board to post copies of these reports on the PCAOB’s website, specifically in the section “*Audit Reports Issued by PCAOB-Registered Firms in Jurisdictions where Authorities Deny Access to Conduct Inspections*”.⁵

In addition, it may be useful to post both: (1) the report to the Commission, and (2) guidelines to investors, as per our recommendation in our response to *Question b)* above, together.

⁵ <https://pcaobus.org/oversight/international/denied-access-to-inspections>



Question l) Apart from posting the Board’s reports to the Commission on the Board’s website, should the Board also indicate on a registered firm’s profile in the Board’s Registration, Annual, and Special Reporting System that the firm is subject to a Board determination under the HFCAA?

We believe the registered firm’s profile in the PCAOB’s website “*Auditor Search*” page is likely the most reliable (and direct) source for an average investor to look up detailed information for audit firms outside of issuers’ annual filings. Therefore, an indication in this system that the firm is subject to a Board determination, under the HFCAA, will likely be the most effective way to inform the public and can help reduce investors’ information processing costs.

Question n) Besides posting a copy of the Board’s report to the Commission on the Board’s website, should the Board notify stakeholders about Board determinations under the HFCAA by other means? If so, which stakeholders should receive such notice, and when and how should it be provided? Specifically, should registered firms that are subject to a Board determination receive notice of such determination, and if so, when and how should it be provided?

We believe that registered firms that are subject to a Board determination should receive notice of such determination at the same time as the Board submits the report to the Commission. However, this action depends on whether the Board will allow registered firms to appeal cases. If appeals are allowed, then the Board may want to consider granting a grace period between notifying the registered firms, and the submission to the Commission.

Question o) Should the Board continue its practice of publishing the Denied Access List on its website? If so, should any changes be made to the Denied Access List to avoid potential confusion with the Commission’s identification of covered issuers under the HFCAA or with the disclosures provided by covered issuers under the HFCAA and the Commission’s rules.

The current *Denied Access List* seems to be solely based on Form AP. However, as mentioned previously, there can be omission/delay cases in Form AP filings. The Board might want to assess the cost of frequently updating this list and litigation risks related to untimely updates.

In addition, if the Commission adopted the tagging suggestion (See our response to *Question b*) above) then an average investor can identify the jurisdiction of an audit firm using the tag, which would be consistent with the Board’s determination report. Therefore, there may be no longer be a need for the *Denied Access List*.

E. Effective Date, Duration, Modification and Vacatur of Board Determinations



Question p) Is it appropriate to have Board determinations become effective on the date the Board issues its report to the Commission? If not, when should Board determinations take effect?

We believe it reasonable for the Board's determinations to be effective on the date the Board issues its report to the Commission. However, as mentioned above, a grace period might need to be granted if the Board would like to open for appeals from registered audit firms.

Question q) Should the proposed rule provide registered firms with a mechanism to provide relevant information to, or to seek reconsideration or reevaluation by, the Board with respect to a Board determination? If so, when should such a process be available, what procedures should it entail, and how could it be administered so as not to interfere with the ability of the Board and Commission to discharge their responsibilities under the HFCAA on a timely basis?

In providing comment to this question, we refer to our comments in earlier sections. In particular:

- a) In our responses to *Questions a) and b)*, regarding the timing of Board determinations, we recommend the Board to consider requiring timely updates on the special report (Form 3) from audit firms for any ongoing event(s) that could affect its jurisdiction determination. Therefore, the registered firms could file appeal cases/seek reconsideration/revaluation by the Board with respect to a Board determination at the same time. Effectively, this means that each year the Board reviews the determination status for audit firms based on the jurisdiction of their headquarters. For example, if a firm's status changes in a year, it can (and should) apply for reconsideration immediately if conditions triggering changes in its jurisdiction take place.
- b) In our response to *Question n)* above, we recommend the Board to consider granting a grace period between notifying the registered firms and submission to the Commission if they decided to provide registered firms with a mechanism to seek reconsideration/reassessment. For example, if the submission to Commission is Dec. 31st every year, the Board could publish a preliminary determination list (based on the most updated headquarter information on file) on its official website around Sept 30th, allowing a 90-day grace period for registered firms to explicitly seek for reassessment/reconsideration with reliable supporting documents.

Question r) Is subparagraph (h)(1)'s annual consideration of changed facts and circumstances clear and appropriate? Should the Board consider changes in facts and circumstances more or less frequently than annually (e.g., semi-annually or biennially)? Should the Board publicly report the outcome of this process whenever the Board decides that reassessment of a prior determination is not warranted or that a prior determination should not be modified or vacated?

If the Board decides on an annual evaluation, but requires timely reporting of special events, then the frequency seems appropriate.



Further, we believe that the Board should publicly report the outcome of this process whenever it decides that reassessment of a prior determination is warranted, should not be modified, or is vacated. This could provide audit firms and issuers with more detailed guidance and transparent information on when one firm is deemed or not deemed to be “black” so that they could make informed decisions.

We hope you find our comments helpful. Please feel free to contact Professor Miguel Minutti-Meza (mminutti@bus.miami.edu) if you have any questions about this letter or our associated analysis.

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DRAFT. PCAOB Release No. 2021-001, PCAOB Rulemaking Document Matter No. 048

Office of the Secretary

Public Company Accounting Oversight Board

1666 "K" Street, NW

Washington, D.C. 20006 - 2803

To the Secretary :

This commenter has reviewed PCAOB Release No. 2021 – 001. While it is a privilege to be able to comment and give feedback on these matters, please note the following question stems and responses on the subject of the proposed Rulemaking Document Matter No. 048. Responses to questions are as follows :

a. Is it appropriate to limit jurisdiction-wide determinations to registered firms headquartered in the jurisdiction? If not, what should be the scope of jurisdiction-wide determinations under the proposed rule? Limiting jurisdiction – wide determinations to registered firms headquartered in a particular sovereign jurisdiction should not be construed as creating cross – border legal compliance requirements, statutory in nature, that are legislated and enforced from outside the jurisdiction. By this, jurisdictional agreements on Rule 6100 should include language that non – U.S. rules parallel U.S. rules under the circumstances and that enforcement of HFCAA rules in cross – border situations, given the parallel legal provisions, should be at least at first initiated by authorities in the non – U.S. jurisdictions given the non – U.S. statutory parallels.

b. Is it appropriate for the Board to look, in the first instance, at registered firms' required filings with the Board to determine where a firm is headquartered? If not, what information should the Board consider to determine where a firm is headquartered? The Board should look not only at the registered firms' required filings with the Board and with home – rule regulators to determine where a firm is headquartered, but the economic substance and materiality with respect to the economic size of the reporting entity within a jurisdiction should also play a role in determining where the firm has its headquarters.

c. Is the proposed rule's framework of jurisdiction-wide and individualized determinations an appropriate approach to Board determinations under the HFCAA? Does the proposed rule make sufficiently clear the distinction between the jurisdiction-wide determinations contemplated by subparagraph (a)(1) and the individualized determinations contemplated by subparagraph (a)(2)? If not, what additional guidance or clarity would be useful? The proposed rule's framework of jurisdiction – wide and individualized determinations is an appropriate, constructive approach to Board investigations and determinations under the HFCAA while the Board should include language in the rules, for instance, in the event of agency considerations or if the investigation examines a firm contractor or sub – contractor auditor. It also appears the Board went to considerable lengths to distinguish between the auditor as headquartered in a specific jurisdiction or as having an office in a specific jurisdiction. In this one finds the distinction between a headquartered firm and an office such as a regional or cross – border office is easily distinguishable.

d. Is it appropriate for the Board to look, in the first instance, at a registered firm's required filings with the Board to determine where the firm's offices are (firms are required to identify all of their offices when they first register with the Board ...) located? If not, what information should the Board consider to determine where a firm's offices are located? In determining where the firm's offices are located, the Board should first look at the firm's required filings with the Board and then any related documentation such as charters and the auditor's other certified documents to confirm cross – border or non – U.S. office locations.

e. As noted in footnote 83, although the HFCAA refers to a "branch or office" of a registered firm, subparagraph (a)(2) of the proposed rule refers only to an "office." Is it appropriate to refer only to an "office" in subparagraph (a)(2)? If not, what distinction should the Board recognize between a "branch" and an "office" in this context? Under the circumstances where a branch has its own books and records and an office might not, a distinction between "branch" and "office" should be made in subparagraph (a)(2) between these two distinct types of entities simply based upon the financial reporting status of the "branch" as with its own accounting system separate from but connected to headquarters and whereas an "office" is by this a different entity if not just given its implied smaller economic size and substance compared with the "branch".

f. Is this approach to the timing of Board determinations appropriate? Should the Board take a different approach to the timing of its determinations? Should the Board consider changes in facts and circumstances more or less frequently than annually (e.g., semi-annually or biennially)? Given the consideration that the board examine facts and circumstances as to changes in filings and their timing, annual consideration of firm headquarters, "branch", and "office" locations seems appropriate at this time. It is important that the Board also consider the overall importance of "branch" and "office" locations to the headquarters in examining the

economic substance and materiality of these to headquarters activities and locations within a jurisdiction.

g. The Board, when determining whether it can “inspect or investigate completely” under the HFCAA, would assess whether a position taken by a foreign authority impairs the Board’s ability to execute its statutory mandate with respect to inspections or investigations. Are there other benchmarks the Board should consider using to determine whether it can inspect or investigate completely? Factors that include benchmarks to consider in whether an inspection or investigation can be completed or is complete have to do with the nature, timing and extent of examination and then investigation functions and the overall value of these to any Board findings. The background of this can be determined in the inspection planning process and using risk assessment in combination with PCAOB inspection and investigation abilities and capabilities as assessed for the statutory mandate with respect to firms with more than a hundred issuers and those with a hundred or less.

h. To determine whether the Board can “inspect or investigate completely” under the HFCAA, the proposed rule provides that the Board will look to three factors. Are the three factors identified in paragraph (b) of the proposed rule appropriate and sufficiently clear? Is there any additional guidance or clarity the Board should provide with respect to those factors? Are there other factors the Board should consider using to determine whether it can inspect or investigate completely? The three factors considered for the proper and appropriate completion of inspections and investigations as illustrated in paragraph (b) of the proposed rules are appropriate and clear insofar as compliance with the rules of the HFCAA and in the inspections and investigations selection process that is called for given the provisions of Rule 6100. Certainly, however, the Board cannot be expected to investigate audit matters while carrying on an examination as these are distinct activities and functions and investigations are to follow examinations in time, usually. Any refusal by non – U.S. authorities to comply with a Board inspection or investigation should be minimized by efforts at jurisdictional and statutory parallels and resolutions in cross – border facts and circumstances.

i. Is there any additional guidance or clarity that the Board should provide with respect to the basis for a Board determination? Paragraph (c) of Rule 6100 seems to provide adequate and substantive guidance on responses to situations, facts and relevant circumstances having to do with possible impairment(s) in the execution of the Board’s mandate with respect to inspections and investigations.

j. Should the Board’s reports to the Commission contain any other information in addition to the information specified in subparagraph (e)(1) of the proposed rule? The inspection and

examination reports to the Board should be according to an analysis of the three factors in paragraph (b) and the Board's ability to conduct and complete inspections and investigations. These reports should contain relevant information as to determinations under Section 101 of the Sarbanes – Oxley Act and any descriptions and reasons why the Board cannot execute its inspections and investigations mandate : While the reports by the Board will contain analyses of the relevant inspection and investigation matters and factors set forth in paragraph (b) as well as the basis for the Board's conclusions, the subject mater firm in the investigation should be identified in said reports by its registered firm name and identification number.

k. Are there any considerations the Board should take into account when determining where on the Board's website to post copies of the Board's reports to the Commission? Provided the Board's reports comply with paragraph (b) provisions and related provisions such as paragraph (e) and Sarbanes – Oxley Act Section 105 as well as related confidentiality and secrecy rules, Rule 6100 provides adequately for the posting of paragraph (b) reports, perhaps in a section of the Board's website dedicated to these reports.

l. Apart from posting the Board's reports to the Commission on the Board's website, should the Board also indicate on a registered firm's profile in the Board's Registration, Annual, and Special Reporting System that the firm is subject to a Board determination under the HFCAA? The Board should also disclose on a registered firm's profile any information having to do with a Board determination under the HFCAA. This meets with the necessity to make such information and related details readily, and publicly available and accessible.

m. Is subparagraph (e)(2)'s approach to confidentiality considerations clear and appropriate? Are there any other grounds upon which the publicly available copy of a Board report to the Commission might need to be redacted? The subparagraph (e)(2)'s approach to confidentiality considerations is clear and succinct, and appropriate and in the event of legal protection, a report would "be redacted if it contained proprietary, personal, or other information protected by applicable confidentiality laws." The availability of such content while subject to legal protection could also be made available publicly if legal provisions allow in the event of legal matters subsequent to the report are found to be bearing upon the report and requirements call for public disclosure of the relevant records.

n. Besides posting a copy of the Board's report to the Commission on the Board's website, should the Board notify stakeholders about Board determinations under the HFCAA by other means? If so, which stakeholders should receive such notice, and when and how should it be provided? Specifically, should registered firms that are subject to a Board determination receive notice of such determination, and if so, when and how should it be provided? Stakeholders, given the duty of the Board to them, given determinations under the HFCAA and other related rules should be

informed of the Board determinations by way of press release, or the auditing entity should send a relevant and illustrative memorandum to stakeholders notifying them of Board scrutiny within a reasonable time (to be determined) after the completion and posting of the paragraph (b) report. Registered firms are a stakeholder in the inspection and investigations process and should be thus informed in the same way as other stakeholders in the jurisdiction examined.

o. Should the Board continue its practice of publishing the Denied Access List on its website? If so, should any changes be made to the Denied Access List to avoid potential confusion with the Commission's identification of covered issuers under the HFCAA or with the disclosures provided by covered issuers under the HFCAA and the Commission's rules? The Public Company Accounting Oversight Board should continue to publish its Denied Access List on its website with references to identification of those subject to inspections and investigations and related results and findings.

p. Is it appropriate to have Board determinations become effective on the date the Board issues its report to the Commission? If not, when should Board determinations take effect? Unless otherwise declared or stated in an inspection or investigation report, Board determinations should become effective on the date of issue to the Commission.

q. Should the proposed rule provide registered firms with a mechanism to provide relevant information to, or to seek reconsideration or reevaluation by, the Board with respect to a Board determination? If so, when should such a process be available, what procedures should it entail, and how could it be administered so as not to interfere with the ability of the Board and the Commission to discharge their responsibilities under the HFCAA on a timely basis? The proposed rule provides an overall outline with relevant information on seeking reconsideration or reevaluation by the Board with respect to a Board determination. The timing as reasonable in the reconsideration or reevaluation process should be the subject of further individualized determinations by the Board given the availability of resources including human resources, if not then subject to Commission rules and guidelines and the rules and guidelines of applicable administrative law.

r. Is subparagraph (h)(1)'s annual consideration of changed facts and circumstances clear and appropriate? Should the Board consider changes in facts and circumstances more or less frequently than annually (e.g., semi-annually or biennially)? Should the Board publicly report the outcome of this process whenever the Board decides that reassessment of a prior determination is not warranted or that a prior determination should not be modified or vacated? The guidance on annual consideration of changed facts and circumstances is clear and appropriate. This annual consideration should prevail apart from possible ad hoc considerations concerning the reconsideration and reevaluation processes for firms with a

hundred or more issuers, and the economic importance or weight of the Board determination and the resolve of the firm to redress any findings.

s. Should the Board provide any additional guidance or clarity regarding the Board's process for modifying or vacating a prior determination? Should the Board's report regarding a modified or vacated determination contain any information not already specified in the proposed rule? The Board does not need to provide any additional guidance nor clarity considering the process for modifying or vacating a prior determination as completed and submitted to the Commission. Given the possible economic magnitude and legal importance, especially jurisdictional importance of the modification of, or vacatur of a report, the Board might elect to issue a press release indicating relevant details as to the vacatur of, or modifications to its previous determination(s).

t. Is the process described in paragraph (h) of the proposed rule sufficient to monitor the continued justification for a prior determination? Should the Board instead specify a termination date (e.g., three years, five years, ten years) prior to which the Board must formally renew or reissue a prior determination for that determination to remain in effect? The process described in paragraph (h) of the proposed rule is sufficient to monitor the continued justification for a previous Board determination, and this commenter believes overall the Board determination and findings should stand until the report is vacated or modified given the vacatur and modification process described in Rule 6100.

u. Does the Board's analysis of the potential economic impacts of the proposed rule adequately address the benefits and costs of the proposed rule? Some regulators have the long – held reputation of caring little for their stakeholders and caring even less about the economic consequences of their rulemakings. This commenter believes the well – reasoned Board analysis of the proposed rule addresses the benefits and costs of the proposed rule and this has to do with the jurisdictional approach and range of Rule 6100 as enhancing capital formation, possibly reducing overall audit risk for firms; and in jurisdictions where the bigger audit firms allow for larger and larger entities, allowing for greater effectiveness and efficiencies of audit work. This guidance also leaves some oversight issues un – resolved whereas issuers are not infrequently in the mood to find new accountants anyway, these rules might have only a marginal effect. Overall, this guidance reduces one's sense of regulatory uncertainty and related contingencies on the subject of financial - legal jurisdictions and rules first, and audits second.

v. Is the Board's existing exemption authority adequate, or should the proposed rule include a process that would enable the Board to grant exceptions from a

jurisdiction-wide determination? If the latter, what factors should the Board take into account when considering exceptions, and how could an exception process be structured and implemented to address the concerns identified above? While the Board is not in the business of legislating statutes and rules to control international finance and related reporting, the proposed rule should include a mechanism for having determinations removed through process and due diligence, instead of allowing for facts and circumstances that are in determinations, even very adverse ones, influence removal of the determination(s) themselves through exemptions. This commenter suggests the Board, in its enlightened view of things, has chosen a very wise petitioning process for the resolution of the results of any determination instead of (again) allowing for exemptions. One factor that should be examined given any consideration by the Board for an exemption policy is the status and various initiatives of the firm entities in any particular jurisdiction that are before the U.S. Internal Revenue Service. Tax considerations often do not completely, nor do they always parallel financial ones, though at times finance is heavily influenced by tax attributes and tax status. The way transactions are treated for tax vis – a – vis their financial accounting treatment is a case in point in these matters. Also, any consideration of exemptions should not whatsoever evoke the idea that as soon as the Board issues a determination that it will hold itself out then of availing firms in particular jurisdictions of exemptions given findings in the Board inspection and investigation reports.

By,

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Date : July 12, 2021



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19-May-2021

Office of the Secretary
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PCAOB Rulemaking Docket Matter No. 048

**Comments on Proposed Rule Governing Board Determinations Under
The Holding Foreign Companies Accountable Act**

PCAOB Rulemaking Docket Matter No. 048

Roman L. Weil, PhD, CPA¹

You will better understand my answers to your questions if you know that I think HFCAA, enforced as written, likely will do US investors more harm than good. Given the recalcitrance of Chinese accounting and other financial market authorities, we will see the gradual delisting from US markets of Chinese companies, make investing in these companies more onerous for US investors, not necessarily safer. My contrarian view would be for the SEC to figure out a way for those poorly audited companies to continue to be available to US investors but with large warning signs about the risks involved. No one at the SEC, or in the US Congress for that matter, will likely follow my advice in this regard.

Given the law, the HFCAA, you have to implement it. Even if you disagree with its purpose, as I do, you have to put politics aside and do what it says. My answers to your questions proceed from this beginning. I don't like HFCAA. PCAOB has limited resources and a large remit. I want PCAOB to use its limited resources to carry out its duties cost-effectively. My judgment, based on first principles without empirical evidence, I state in my penultimate answer (question [u]): jurisdiction-wide determinations will be the cost-effective way to implement HFCAA, not "particular registered firm" determinations.

In the following, I do not repeat your question unless I think it necessary for you [I have in mind the Staff likely reading this] to put the answer in context.

- a. Is it appropriate to limit jurisdiction-wide determinations to registered firms head-quartered in the jurisdiction? If not, what should be the scope of jurisdiction-wide determinations under the proposed rule?

No. Substance over form. The idea is to get to the files and work papers of any audit of an entity of a registrant. Don't let corporate structure or governance of the audit firm interfere with efficient administration of resource-strapped PCAOB. If you think that the regulations of the jurisdiction will impede access to the data you need to do your work, then don't worry about where the firm has its headquarters.

- b. If you follow the advice in [a.] above, this is moot. If you don't, I have nothing useful to say on this question.

¹ V. Duane Rath Professor of Accounting Emeritus; Chicago Booth School Business; University of Chicago; 5807 S. Woodlawn Ave; Chicago IL 60637; roman.weil@chicagobooth.edu

- c. Is the proposed rule's framework of jurisdiction-wide and individualized determinations an appropriate approach to Board determinations under the HFCAA? Does the proposed rule make sufficiently clear the distinction between the jurisdiction-wide determinations contemplated by subparagraph (a)(1) and the individualized determinations contemplated by subparagraph (a)(2)? If not, what additional guidance or clarity would be useful?

I think it clear, but I've insufficient imagination to think of a tough case, at the border-line, where the guidance would be insufficient. You might give some examples where Staff thinks deciding is hard.

- d. Don't focus on where the firm is located. Look at whether the firm has files or work papers that need examining and if the jurisdiction has rules/regulations making such examinations difficult/impossible. Don't worry about the formality of locale of home office.
- e. If you attend to form over substance, this issue goes away, no?
- f. Is this approach to the timing of Board determinations appropriate? Should the Board take a different approach to the timing of its determinations? Should the Board consider changes in facts and circumstances more or less frequently than annually (e.g., semi-annually or biennially)?

Consider what the US Supreme Court does. If four (of nine) Justices think a case important, then a case gets on the docket. Let PCAOB Staff consider a process whereby someone out there appeals for a hearing more quickly than a year and, say, two Board Members think the appeal has sufficient merit for a fast hearing, then have a procedure to allow a faster hearing.

- g. This would be easier to respond to if the Staff has given us some examples. Such as I can't think of any, but that's my lack of imagination. If you can't give us any, then I'm more confident that there aren't any. The fact that I can't think of any proves little.
- h. I can think of none.
- i. Is there any additional guidance or clarity that the Board should provide with respect to the basis for a Board determination?

Perhaps. The Board could make clear that the burden of proof falls to the auditor to provide documentation sufficient to satisfy the Board's two decades of examples, not on the Board to prove that the auditor has failed. PCAOB might say that if it judges "We haven't enough to do our sort of inspection," then that decision is not challengeable by regulators in the auditor's home base.

- j. Should the Board's reports to the Commission contain any other information in addition to the information specified in subparagraph (e)(1) of the proposed rule?

PCAOB has no obligation to provide more, but should feel free to provide more with a description that this "more" is not required but is given for the reasons that are explained along with the "more".

- k. I have nothing useful to say.
- l. Apart from posting the Board's reports to the Commission on the Board's website, should the Board also indicate on a registered firm's profile in the Board's Registration, Annual, and Special Reporting System that the firm is subject to a Board determination under the HFCAA?

Unless I misunderstand, all auditors who audit registrants or parts of registrants will be subject to Board's determination under HFCAA. If I am correct, you might indicate at the head of the listings that all firms "shown below" are subject to Board determination except the ones marked with **. Or something else to indicate the exceptions. I've assumed in this answer that the exceptions are few.

- m. I have insufficient experience to think of other cases needing redacting.
- n. I think the Board should not obligate itself to notify auditors to Board postings. Auditors unaware of the Board's existence and actions can suffer the consequences of being asleep at the switch.
- o. Likely, users will find the Denied Access List helpful because of the three-year lag between PCAOB's flagging derelict audits and de-listing. There needs to be, however, a user-friendly tutorial referred to in both places explaining the difference between the Denied Access on the one hand and a(1) or a(2) determinations on the other. The user needs to know about both forms of disapprobation and how they differ.
- p. Is it appropriate to have Board determinations become effective on the date the Board issues its report to the Commission? If not, when should Board determinations take effect?

Given the three-lag until de-listing, I can't think why we need further delays.

- q. The audit firm should be allowed to know that PCAOB is reviewing its case and be allowed to provide information. Given the three-year lag period before delisting, there is adequate time for appeal of any decision. Do not slow down the process further.
- r. Annually is adequate, particularly if you adopt the appeals procedure I mentioned in [f].

- s. If the Board modifies or vacates a determination, I think it should explain what it did and why, but it should have no obligation to do so. It needs to have sufficient self-confidence to admit it made a mistake.
- t. The Board has data, see its Exhibit 1, on the number of registrants in various jurisdictions. It could publish a schedule that says something like if we have a jurisdiction-wide determination for a place with, say, more than twenty companies, then we'll look again in, say, five years. And so on. The more the companies, the more frequent the re-look.
- u. Does the Board's analysis of the potential economic impacts of the proposed rule adequately address the benefits and costs of the proposed rule?

As I said in my introduction, the benefits and costs at issue arise from the HFCAA itself. Given that PCAOB cannot change HFCAA nor the SEC's implementation of it, PCAOB should focus on efficient determinations. Jurisdiction-wide determinations appear efficient. The more PCAOB can avoid "particular registered firm" determinations, the more cost effective will be its operations.

- v. Absent specific examples, I cannot say.

NOTICE: This is an unofficial transcript of the Public Company Accounting Oversight Board's *Webinar for Investors on International Issues* held on June 10, 2021, that relates to the Board's proposed PCAOB Rule 6100 on Board determinations under the Holding Foreign Companies Accountable Act. The Public Company Accounting Oversight Board does not certify the accuracy of this unofficial transcript, which may contain typographical or other errors.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

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WEBINAR FOR INVESTORS ON INTERNATIONAL ISSUES

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PROPOSED RULE 6100: BOARD DETERMINATIONS
UNDER THE HOLDING FOREIGN COMPANIES
ACCOUNTABLE ACT (HFCAA)

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JUNE 10, 2021

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This transcript was produced from
audio provided by the Public Company Accounting
Oversight Board.

SPEAKERS:

DUANE DESPARTE, Acting Chairperson

REBEKAH GOSHORN JURATA, Board Member

MEGAN ZIETSMAN, Board Member

**LIZA MCANDREW MOBERG, Director, Office of
International Affairs**

**ERIN DWYER, Deputy Director, Office of External
Affairs**

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P-R-O-C-E-E-D-I-N-G-S

3:00 p.m.

MS. DWYER: Thank you for joining us today. I'm Erin Dwyer, the stakeholder liaison at the PCAOB and we are very happy to have all of you with us today, even though we're still virtual as we've been for the last 15 months.

But despite the remote work that all of us have been doing, at the PCAOB we've continued to emphasize and prioritize our engagement with key stakeholders including investors, audit committees, and financial preparers. Our webinar today is a part of that engagement and we're really pleased that you've taken time out of your busy schedules to be with us.

Before we jump into this, I do want to give the disclaimer for myself and fellow speakers who are presenting today, and that is that the views expressed are those of each speaker and do not necessarily reflect the view of the Board, other Board members, or the PCAOB

1 staff.

2 With me today I'm really pleased to
3 have as our speakers Acting Chairperson Duane
4 DesParte, and Board members Rebekah Goshorn
5 Jurata and Megan Zietsman, as well as our
6 Director of the Office of International Affairs
7 Liza McAndrew Moberg. If you do not see Liza, it
8 is not your connection. She was having a little
9 technical difficulty so she is joining us by
10 audio today. We apologize for that but she's
11 there on the phone and we are delighted she can
12 join us.

13 So, with that, I would like to turn it
14 over now to Duane. Duane, I was hoping you could
15 kick us off with some opening remarks.

16 MR. DESPARTE: Sure. Thank you, Erin.
17 On behalf of myself and Rebekah and Megan,
18 welcome. Really thank you for being here. As
19 Erin mentioned, stakeholder outreach is really a
20 key focus for us, remains a key focus for us, and
21 we're looking forward to our engagement today.

22 One of the things that you might know

1 is we had some developments last Friday that I
2 thought I would just cover very briefly. Last
3 Friday the SEC announced Bill Dunhnke's departure
4 from the PCAOB and I was designated as Acting
5 Chair effective at that time.

6 On Tuesday you may have seen that the
7 SEC also commenced a process to solicit and
8 consider nominations for all five of our Board
9 positions. I expect that some of you may have
10 questions about these changes. We would, though,
11 appreciate if we could devote out time together
12 today to address our agenda which, of course, is
13 on international audit-related issues.

14 That said, I do want to emphasize that
15 during this time of leadership transition
16 Rebekah, Megan, and I, and all of our dedicated
17 and talented staff, remain fully committed to our
18 responsibilities and to our mission of investor
19 protection through what we do day in and day out
20 in our audit oversight activities.

21 Our core standard setting,
22 inspections, and enforcement activities will

1 proceed normally through the transition period,
2 and we will continue to work in coordination with
3 the SEC to assess and respond to evolving
4 priorities as we always do.

5 With that, Erin, I'll turn it back to
6 you.

7 MS. DWYER: Great. Thank, Duane.
8 Appreciate those remarks.

9 I do now want to jump into our topic
10 at hand. We are going to address international
11 work. I know that some of what's going on on the
12 international stage has been top of mind for many
13 investors, including the PCAOB's role and
14 responsibilities related to the Holding Foreign
15 Companies Accountable Act.

16 Before we get into the details, Duane,
17 I was thinking maybe we could take a step back
18 and I thought it might be helpful if you could
19 give us a sense of the scope of our international
20 oversight responsibilities and its relationship
21 to HFCAA.

22 MR. DESPARTE: Sure. Thanks, Erin.

1 You know, robust inspections and investigations
2 of audit firms that audit U.S. public companies
3 are really what we're all about. It's our core
4 mandate under the Sarbanes-Oxley Act.

5 That mandate applies whether firms or
6 the public companies that the firms audit are
7 located inside or outside the U.S. All firms
8 auditing U.S. public companies are required to
9 register with us and they are subject to our
10 oversight activity.

11 To illustrate the scope of our
12 oversight program from an international
13 perspective, we have approximately 1,700 audit
14 firms that are registered with us, and of those
15 about 49 percent are located outside of the
16 United States.

17 Of those approximately 800 firms, 300
18 of them are located in 62 foreign jurisdictions
19 and those 300 firms perform activities that make
20 them subject to our inspection and our
21 investigation activity including the obligation
22 to be inspected by the PCAOB at least once every

1 three years.

2 For the 12 months ended March 31,
3 2021, this year, PCAOB-registered firms located
4 outside the U.S. issued approximately 1,200 audit
5 reports on U.S. issuer financial statements.

6 Those issuers had a combined market
7 capitalization at that time of more than \$11
8 trillion.

9 So all of that is to highlight for you
10 that while we are a U.S. regulator, our mandate
11 extends to firms, wherever they may be, that
12 audit U.S. issuers and, thus, international focus
13 and engagement is very important to our success
14 and to what we do.

15 I will offer that in order for us to
16 effectively fulfill our inspection and our
17 investigation activities, firms -- you know, we
18 need firms to cooperate and provide our
19 inspection teams, our investigators, our
20 enforcement teams, with complete and timely
21 access to personnel and to documentation. In
22 most cases, that is exactly what happens but not

1 always.

2 In some situations, we are not able to
3 fully inspect or investigate registered firms
4 completely and, partly in response to those types
5 of situations, Congress did pass the Holding
6 Foreign Companies Accountable Act. I think we're
7 going to talk a little bit more about that now.

8 Erin.

9 MS. DWYER: Yep. Thanks, Duane. I'm
10 unmuting myself. I think that's a really helpful
11 overview in setting our stage to now turn to the
12 proposed rule. Since we are in an open comment
13 period for that proposed rule, I just want to
14 outline logistically where we are in that process
15 and provide some disclosures or disclaimers, if
16 you will.

17 As many of you know, on May 13 of this
18 year the Board issued a release regarding a
19 proposed PCAOB rule that would govern Board
20 determinations under the Holding Foreign
21 Companies Accountable Act. That release contains
22 the views of the Board with respect to the

1 proposed rule and invites public comment on it.

2 We welcome input from all stakeholders
3 on all aspects of that proposed rule including
4 the questions posed in the Board's proposing
5 release. We encourage you to submit a written
6 comment if you wish to do so.

7 The comment period does close on July
8 12th. Instructions for submitting comments are
9 on our website as well as in the proposing
10 release, so I encourage you to take a look at
11 that. I will just now, before we jump into this
12 discussion, reiterate my earlier disclaimer that
13 the views each speaker expresses on this topic
14 are specifically their own and not necessarily
15 the views of the rest of the Board or PCAOB
16 staff.

17 With those disclaimers out of the way,
18 Duane, can I turn back to you to share with the
19 audience sort of a high-level overview? I think
20 I've satisfied the lawyers so maybe you can give
21 us --

22 MR. DESPARTE: All the fine print that

1 we put at the top. Yes, sure. Under -- we're
2 referring to it as HFCAA, Holding Foreign
3 Companies Accountable Act, but that's also a
4 mouthful. The PCAOB is required under that Act
5 to determine whether we are unable to inspect or
6 investigate completely registered public
7 accounting firms that are located in a foreign
8 jurisdiction because of a position that is taken
9 by one or more authorities in that jurisdiction.

10 In addition, the SEC is required to
11 take various actions with respect to public
12 companies that use registered audit firms that
13 the PCAOB has determined fit that criteria.
14 Under HFCAA such companies are referred to as
15 "covered issuers."

16 The SEC's website has a lot more
17 information about the actions that the SEC is
18 required to take under HFCAA including a release
19 that they issued in March that addresses
20 reporting requirements for public companies that
21 are, in fact, being covered issuers under the
22 Act.

1 With respect to our determination, we
2 issued a proposed rule on May 13th that provides
3 a framework for the Board in making this
4 determination as is required under the Act.

5 Along with the text of the proposed rule, the
6 Board had an open Board meeting and we discussed
7 the background of our proposed rule, the need for
8 the proposed rule, and the intended operation of
9 the proposed rule.

10 I encourage you to take a look at the
11 release that we issued for further detail.

12 Nothing we say today is intended to modify or
13 supersede the discussion of the proposed rule as
14 set forth in that release.

15 I also encourage you to provide us any
16 comments or feedback that you may have on the
17 proposed rule through our comment period which,
18 as Erin just mentioned, runs through July 12th.
19 We're making it as simple as possible. You can
20 just email us at comments@PCAOBUS.org.

21 I will now turn to Liza McAndrew
22 Moberg who heads up our Office of International

1 Affairs to share some additional details on the
2 proposed rule.

3 Liza.

4 MS. MCANDREW MOBERG: Thank you,
5 Duane. If it isn't a sign of the times, of
6 course, my technology issues started 15 minutes
7 before this was starting so I apologize for not
8 being on camera but hopefully you can hear me
9 fine.

10 As Duane said, and you'll hear us say
11 a couple more times as we go along in this
12 description, the HFCAA calls for the Board to
13 determine whether it's unable to inspect or
14 investigate completely registered public
15 accounting firms in a foreign jurisdiction
16 because of a position taken by authorities in
17 that jurisdiction.

18 I want to cover three aspects of the
19 rule that the Board recently proposed and, as was
20 already said, is open for public comment.
21 Specifically what I'll cover is, first, how the
22 Board proposes to allow two types of

1 determinations. Second, how the Board proposes
2 to make those determinations. And, third, how
3 the Board proposes to communicate its
4 determination.

5 First, on the type of determinations,
6 the Board is proposing to take a two-pronged
7 approach to determining which firms cannot be
8 inspected or investigated completely. The first
9 proposed approach is for the Board to make its
10 determination as to a jurisdiction.

11 In that scenario the Board can
12 determine that all firms headquartered in a
13 particular jurisdiction cannot be inspected or
14 investigated completely. The Board expects to
15 employ this approach in most cases and has
16 indicated that in its proposing release.

17 Second, the proposed rule allows for
18 firm-specific determinations, so we have
19 jurisdiction-wide or firm-specific
20 determinations. For example, because the
21 jurisdiction-wide determination would apply to
22 all firms headquartered in the jurisdiction, the

1 Board's proposed rule provides the Board the
2 ability to identify specific firms that are not
3 headquartered in the jurisdiction but that have
4 an office there and that the Board cannot inspect
5 or investigate completely because of the foreign
6 authority in that jurisdiction. So those, in
7 summary, are the types of determinations the
8 Board proposes to make.

9 I'll move on now to the second issue
10 which is how the Board proposes to make the
11 determinations. The proposed rule would tie the
12 Board's ability to inspect or investigate
13 completely to the mandate in the Sarbanes-Oxley
14 Act with respect to inspections and
15 investigations.

16 The Board would assess whether the
17 position taken by the foreign authority impairs
18 the Board's ability to execute its statutory
19 mandate with respect to inspections or
20 investigations. That assessment is driven under
21 the proposed rule by three factors:

22 First, the Board's ability to select

1 engagements in audit areas to be reviewed during
2 an inspection, and to select potential violations
3 to be investigated.

4 Second, the Board's access to, and its
5 ability to retain and use, any documents or
6 information that the Board considers relevant to
7 the inspection or the investigation.

8 Third, the Board's ability to conduct
9 inspections and investigations in a manner
10 consistent with the statutory mandate and the
11 rules of the Board. Really, this third factor is
12 capturing any other aspect of the Board's
13 requirements, statutory mandate, that aren't
14 already covered in the first two factors I just
15 went over.

16 An example of this is the Board's
17 ability to satisfy its inspection frequency
18 requirements -- for some firms it's annually and
19 for some firms it's every three years -- and the
20 Board's ability to share information with the SEC
21 as required under the Act.

22 These three factors are not separate

1 prerequisites for a Board determination. Rather,
2 if a position taken by a foreign authority
3 impairs the Board's ability to execute its
4 mandate in any of these three respects, a Board
5 determination could be warranted under the
6 proposed rule.

7 Also, the Board may not be impaired as
8 to both inspections and investigations. The
9 Board may make a determination under the proposed
10 rule if it's unable to either inspect or
11 investigate completely.

12 In addition to the three factors that
13 the Board would evaluate, the proposed rule
14 provides that the Board may consider any
15 documents or information it deems relevant. The
16 proposed rule, however, identifies for the
17 avoidance of doubt and clarity certain categories
18 of documents or information that the Board may
19 consider.

20 The proposed rule indicates that
21 determinations would remain in effect
22 indefinitely until modified or vacated by the

1 Board. However, as proposed, the Board would
2 reassess at least annually whether its prior
3 determinations merit reassessment.

4 Now I'll move on to the third aspect
5 that I wanted to cover which is communicating
6 about the determinations. Under the proposed
7 rule when the Board makes a determination, it
8 would issue the determination in the form of a
9 report to the Commission, the SEC. The Board's
10 report would describe the Board's assessment and
11 the basis for the Board's determination and
12 identify the firms subject to the determination.

13 Promptly after the Board's report is
14 issued, a copy of the report would be made
15 publicly available on the Board's website.

16 As Duane and Erin both said, the Board
17 has requested comments from the public on its
18 proposed rule and the Board welcomes comments or
19 feedback submitted in writing.

20 Erin, with that, I'll turn it back to
21 you.

22 MS. DWYER: Great. Thank you, Liza.

1 To reiterate I guess now for a third time, please
2 do think about submitting a comment or any
3 feedback to our docket. As Duane mentioned the
4 email is comments@PCAOBUS.org.

5 Someone is asking about if there are
6 specific countries that pose challenges so I know
7 we'll get into that a little later. So since
8 we're going to go into the country-specific topic
9 shortly here, maybe Rebekah, I'll turn to you
10 and, you know, sort of sticking with the same
11 HFCAA theme. That legislation was born out of
12 Congress' concerns about the implication of the
13 PCAOB's inability to access information from
14 auditors in certain circumstances.

15 While the HFCAA has increased
16 attention to this issue, we have at the PCAOB for
17 many years sought to be transparent with
18 investors and the public about these access
19 challenges, so can you describe our initiatives
20 and what that has looked like over the past
21 several years?

22 MS. JURATA: Absolutely. First of

1 all, I just want to say thank you to Duane and to
2 you, Erin, as our Stakeholder Liaison. I think
3 this demonstrates how critically important it is
4 that we can demonstrate to our stakeholders that
5 we're still showing up and doing our day job and
6 fulfilling our mission.

7 But, more importantly is that the
8 mission of the PCAOB, as Duane indicated in his
9 opening remarks, is not limited to the boundaries
10 of the United States but, in fact, our mission
11 and mandate is abroad and international. Our
12 international inspections program is crucial to
13 ensure that we can monitor and enforce for
14 compliance with the standards of the PCAOB.

15 It's also critically important that we
16 are able to facilitate our international
17 inspections program to ensure that everybody is
18 playing by the same rules of the road. I think
19 over the course of time the PCAOB has established
20 incredible cooperative relationships with our
21 counterparts and foreign regulators, but we do
22 still have some access issues. With that little

1 bit in the beginning, I'll go ahead and dive into
2 a little bit more.

3 The international cooperation is
4 obviously crucially important and how we
5 facilitate that here at the PCAOB is through a
6 number of facets including significant engagement
7 between the PCAOB with an international
8 regulatory information-sharing body called IFIAR,
9 which Duane is currently the chair of IFIAR,
10 where all the regulators -- all the other audit
11 regulators get around the table and, you know,
12 facilitate really critically important
13 information sharing in recognition that our
14 borders and our financial services markets are
15 global in nature, and that we want to advance
16 audit quality internationally. It's because we
17 have to facilitate those international
18 cooperations.

19 Now, also throughout the history of
20 the PCAOB as we have continued to apply our
21 standards compliance regime inspections program
22 internationally, we need to do that through

1 engagement with our counterparts abroad. In
2 certain jurisdictions, you know, you might come
3 across a conflict of law issue, but we've been
4 able to mitigate a lot of these access issues
5 through cooperative agreements.

6 I think it's a success that we can
7 demonstrate that just this past April the PCAOB
8 entered into such a cooperative agreement with
9 the country of Belgium, and I just have to
10 applaud Liza and her team for everybody to get to
11 that success. Right now there are no obstacles
12 for the PCAOB to facilitate our international
13 inspections program in Europe, which is
14 significant so that we can ensure that those
15 investors who are availing themselves of the U.S.
16 capital markets can do so in comfort knowing that
17 PCAOB's inspection program is applying itself
18 both domestically and abroad.

19 We have at the PCAOB, as you noted,
20 Erin, in your kickoff over to me, tried to
21 enhance the disclosure and what we are making
22 publicly available to investors of what we're

1 doing abroad including those international
2 cooperative agreements and where we are still
3 struggling with access.

4 (Laughter). Sorry. It was like
5 abracadabra.

6 MS. DWYER: I was trying to get my
7 slides up. I didn't mean to scare you with it.

8 MS. JURATA: Like what did I do? What
9 did I say? No, but I appreciate that t-off.
10 This will show, as Erin is pointing out, what
11 we're trying to make readily available for all of
12 our stakeholders, and investors in particular, to
13 know where we are able to show up and do our job
14 and where we are still having problems.

15 I have to give credit that making
16 everything transparent happened before I joined
17 the Board starting in 2009 and really kind of
18 geared up in 2018 where we wanted to flag as much
19 information as possible for those investors of
20 issuers who were using auditors that may be
21 located abroad who have not been inspected by the
22 PCAOB.

1 In particular, starting in 2018, we
2 starting making quarterly data available which
3 included the aggregate market capitalization of
4 issuers whose audits we have been unable to
5 inspect, and data about auditors doing referred
6 work, as well as about the auditors that sign
7 issuer audit opinions.

8 I think to just sort of, you know,
9 circle back to what I began in talking about was
10 that we want to ensure that auditors who are
11 registered with the PCAOB are subject to the same
12 rules and requirements and that we are able to go
13 in and do inspections to ensure compliance with
14 our standards.

15 What is really important and relates
16 to our international inspections program is that
17 we're applying the same standards and principles
18 of our program both domestically and abroad
19 consistently. There has been a certain
20 jurisdiction, which comes as no surprise, where
21 we have not had that same experience.

22 Now, other jurisdictions have raised

1 their own concerns and issues. As I kind of
2 referenced earlier, we've been able to work
3 through those through cooperative agreements. I
4 think that Congress has highlighted the fact that
5 we want to ensure that investors who are availing
6 themselves of the U.S. capital markets recognize
7 that issuers who use an auditor registered with
8 the PCAOB should be subject to the same
9 requirements and the same inspections program.

10 That is why, I believe, that Congress
11 required the SEC and the PCAOB to take action
12 under the Holding Foreign Companies Accountable
13 Act. I think, you know, as we work through that
14 as a critical rulemaking, hopefully it will fill
15 that gap but, obviously, it's in the early
16 stages. The lawyer in me, Erin, will circle that
17 also and say we welcome comments as we move
18 forward with the proposal. But I do just want to
19 emphasize that the work that we do, both domestic
20 and, importantly, abroad, we're trying to
21 increase our transparency.

22 As Erin popped up, and startled me

1 (laughter), on our website we really are trying
2 to make it clear to the investing public where we
3 are having issues but also where we are
4 successfully facilitating our international
5 inspections program.

6 MS. DWYER: I apologize, Rebekah, for
7 the pop-up but I did want to share and show
8 investors where you can look on our website under
9 the Oversight tab and there's a whole section on
10 the international that has some really good
11 information, as Rebekah noted, that we've been
12 updating quarterly.

13 When you click through on the audit
14 reports issued by PCAOB-registered firms in
15 jurisdictions where denied access to conduct
16 inspections, you can search by a number of
17 parameters, including country, firm name, among a
18 number of items. I'm going to turn that up but
19 warn my speakers that they will pop back up
20 again, different slides. Apologies again for
21 that.

22 I did want to before we move on, you

1 know, kind of turn to our audience again because
2 I think a lot of people are surprised, at least
3 when I speak with investors and others, when they
4 hear that there's about \$2.3 trillion, Rebekah,
5 as you mentioned, in market cap that's audited by
6 PCAOB registered firms in jurisdictions where we
7 face access challenges.

8 I'm going to try to ask a poll
9 question here and hopefully no one is frightened
10 by this pop-up poll like I did with my slide.
11 The poll question is for investors: When
12 thinking about investment risks, do you consider
13 PCAOB access challenges often, occasionally,
14 rarely, or never? I'll give everyone a minute to
15 answer that before I share the results with the
16 group.

17 All right. I'm going to end the poll
18 so hopefully everyone has voted and share the
19 results with everybody. So hopefully my fellow
20 speakers can see this. What we're getting is
21 that almost half of folks who answered this
22 question occasionally consider PCAOB access

1 challenges, where another almost 40 percent think
2 of us often, and about 22 percent rarely or
3 never.

4 I have to say that makes me happy that
5 over about -- oh, gosh, my math is bad, but 68
6 percent about are thinking about the PCAOB's
7 access either often or occasionally. I don't
8 know if others want to provide comments as they
9 go about their results but I think I've now ended
10 that poll.

11 You know, I'll move on a bit, I think.
12 We've covered a lot about, Rebekah, where we have
13 challenges.

14 Megan, as Rebekah mentioned, access
15 challenges are the exception, not the norm for us
16 at the PCAOB when it comes to our international
17 oversight program. Can you speak maybe a little
18 bit to the scope of our oversight internationally
19 as well as our enforcement activities?

20 MS. ZIETSMAN: Yeah, sure, Erin.
21 Hello everybody and thank you for joining and for
22 having the opportunity for us to engage with you

1 today.

2 I think maybe what I'm doing is
3 recapping some of the points that others have
4 already made. Maybe this puts some of the other
5 conversation in context again. I think as Duane
6 mentioned at the beginning, the PCAOB's
7 responsibilities are mandated by Congress and
8 they apply equally to all registered firms
9 irrespective of where those firms are located.

10 Our registration processes, our
11 inspection processes, and our enforcement
12 activities are intended to operate in the same
13 way for all firms. Of course, audits of issuers
14 need to be done in accordance with the PCAOB
15 standards and rules. In accordance with the
16 Sarbanes-Oxley Act, the Board is expected to
17 periodically inspect firms that issue audit
18 reports for U.S. issuers.

19 During those inspections our staff are
20 required to go and obtain the documents and the
21 information that they need so that they can
22 perform those reviews of both selected audit

1 engagements, as well as firms' quality control
2 systems and perform any other procedures that
3 they think are appropriate in the context of
4 those inspections.

5 Of course, I think it goes without
6 saying that inspections and investigations are
7 really crucial aspects of the Board's oversight
8 and critical to the accomplishment of the mission
9 of the Board.

10 To give a sense of the scope of our
11 international oversight activities, I think you
12 heard some of the stats and data through the
13 presentation already, but the slide that's up now
14 shows that actually nearly half of the firms that
15 are registered with the PCAOB are actually
16 located outside of the United States. You can
17 see on the slide where since 2004 the PCAOB has
18 actually conducted inspections of one or more
19 registered firms.

20 The Board, of course, is strongly
21 committed to enforcing compliance with our
22 standards, rules, and the related federal

1 securities laws. Obviously, that's core to the
2 achievement of our mission.

3 As the Board and as the members of our
4 organization we are all strongly committed to
5 that goal. When registered firms and their
6 associated persons engage in improper conduct, we
7 also will take prompt action to hold them
8 accountable. That's to not only hold people
9 accountable for things that we think they haven't
10 done properly, but it's also intended to deter
11 others from similarly engaging in that same kind
12 of improper conduct.

13 So we continue to allocate substantial
14 resources to our enforcement activities and our
15 enforcement priorities with an emphasis on cases
16 that involve significant audit failures. That's
17 really where we tend to try to focus our efforts
18 and our resources.

19 Maybe just to give a little bit of a
20 sense for our enforcement activities related to
21 non-U.S. firms and their associated persons, over
22 the five years ending December 31, 2020 one-third

1 of our cases related to non-U.S. firms or their
2 associated persons. That's a term that's defined
3 in our rules. Those cases were located in 17
4 jurisdictions. Currently when we look at our
5 current case load we kind of continue roughly at
6 that one-third level as well.

7 I think you've heard a little bit
8 about agreements that we have in place with
9 foreign regulators. Those agreements address
10 both inspections as well as investigations which
11 fall under our enforcement function.

12 While non-U.S. oversight might involve
13 some additional coordination considerations with
14 non-U.S. regulators, fundamentally an inspection
15 or an investigation should be the same whether or
16 not the firm is located within or outside of the
17 U.S.

18 I think at that point I'm going to
19 turn over to Liza and she'll give us a little
20 more information about what does an inspection
21 entail and really how that might look in the
22 context of a non-U.S. inspection.

1 Liza, I'll turn it over to you.

2 MS. DWYER: Yeah. And I'll jump in
3 really quickly I think before Liza starts because
4 we did have an audience question that I'm now
5 seeing, so apologies guys, about in the COVID
6 environment how the access challenges to
7 documents are handled. Liza, I think you're
8 going to walk us through sort of how the
9 inspections work.

10 As you're thinking of your comments on
11 that, if you can speak to how we've been handling
12 our international inspections during COVID and
13 what, if any, additional challenges have arisen,
14 I think that would be helpful to the group.

15 MS. MCANDREW MOBERG: Great, Erin.
16 Yes, happy to do that and I will cover that.

17 Erin, since I can't see what's on the
18 screen, we're going to go back to the
19 presentation. If you can let me know when we
20 have up on the screen our slide on home regulator
21 involvement.

22 I'll get started with reinforcing

1 something that Megan just said which is all our
2 inspections are the same fundamentally whether it
3 is of a U.S. firm or a non-U.S. firm, and that
4 includes also whether we do the work on our own
5 or if we do it cooperatively with the home
6 country regulator in the jurisdiction.

7 I'm going to provide you an overview
8 of the inspection process in a minute, but first
9 let's talk a little bit about how other
10 regulators are involved in our inspections in
11 some cases.

12 Erin, do we have our slide up?

13 MS. DWYER: We do and I will -- I'm on
14 the home regulator slide. When you tell me to
15 move on, I will.

16 MS. MCANDREW MOBERG: Perfect. Thank
17 you. You guys are having a real-time
18 demonstration of PCAOB agility and flexibility in
19 unforeseen circumstances.

20 On the home regulator involvement,
21 during our inspections if we start with the two
22 poles of this slide, in many cases a non-U.S.

1 firm inspection is PCAOB only. Quite a lot of
2 our inspections are done where perhaps there's
3 not a regulator in that country, or perhaps there
4 is a regulator but for a number of reasons the
5 regulator chooses to not work with us on the
6 inspection.

7 Not in any negative way. It's just
8 for whatever reason the choice that they make.
9 In those cases we notify the firm, we coordinate
10 our inspection, we go and do our inspection just
11 as we would any U.S. firm, no difference. If we
12 go on to the opposite side of the slide, a joint
13 inspection.

14 In many cases we truly do all aspects
15 of our inspection jointly with the home country
16 regulator. That would be before we even contact
17 the firm we might plan with the regulator. We
18 are out on the field together. We talk with each
19 other about what we find and we'll see some of
20 that when I get to the inspection process in a
21 minute. So those are joint inspections and those
22 can be done also for a number of reasons.

1 In the earliest days in some
2 jurisdictions the law required that the
3 inspection be done jointly with the foreign
4 regulator. Today there are many places where
5 that is the law and it's just become normal for
6 us and those regulators to have a relationship
7 where we plan and conduct inspections together.

8 In other jurisdictions there is no
9 requirement under law that we do the inspections
10 jointly, but we choose to. The foreign regulator
11 wants to and we are always open to having a
12 conversation with them about doing that.

13 We find it, the staff finds it, very
14 beneficial for us to be communicating with the
15 audit regulators in the home country. We learn a
16 lot about what it is that they are seeing in
17 their domestic environment that that firm is
18 operating in, so we find those joint inspections
19 and those communications very useful.

20 In the middle of the slide here we
21 have coordination or observation. This can take
22 a variety of forms. We have some regulators who

1 like to be the ones to contact the firm and say,
2 "hey, the PCAOB is coming" and set up the dates.
3 We have some regulators who say "go ahead and set
4 up with the firm, but I'm going to ask the firm
5 if I can come and observe what you do."

6 Again, we are open to all of those
7 sorts of arrangements. Of course, we do all of
8 this in compliance with the Sarbanes-Oxley Act
9 which requires us to keep information
10 confidential, but certainly there are provisions
11 in place and ways that we can work with the
12 foreign regulator nonetheless.

13 So if we move on, Erin, to the next
14 slide on the cycle, I want to give an overview
15 here really quickly of what the planning cycle
16 looks like and then we'll go through a timeline
17 in a little bit more detail.

18 The key point that I want you to take
19 away from this slide is that the inspection
20 process really doesn't stop once we issue a
21 report. We plan our inspection, we go out and do
22 it, the Board reaches its conclusion.

1 Importantly, it's the Board that decides what to
2 issue in the final report. It's a Board report
3 on the inspection.

4 Then after the report is finalized, we
5 take a look at whether or not any quality control
6 issues have been remediated by the firm to the
7 satisfaction of Board within 12 months. At the
8 end of all of that, again we're still not done.
9 We've learned a lot through that whole process.

10 Before we start planning the next
11 inspection -- at this moment every non-U.S. firm,
12 the number of audit reports that they issue
13 subjects them to inspections once every three
14 years. We do not have any non-U.S. firms at this
15 moment whose activity level on audit subjects
16 them to an annual inspection.

17 But if we're coming back to the firm
18 three years later -- we might decide to pull it
19 forward depending on the facts that we know --
20 we think about what we learned in that report in
21 that past inspection, and we think about what
22 have we learned in other inspections. That cycle

1 is really meant to reinforce that idea. We're
2 always building off of prior knowledge to see how
3 that informs the risks and the approaches for
4 future inspections.

5 I want to reinforce at this point,
6 this is a reminder I'm sure to many of you, that
7 we inspect quality control overall for the firm,
8 the firm-wide quality control system. Then we
9 also select certain engagements and inspect those
10 engagements. We don't do 100 percent of the
11 engagements that we select. We select focus
12 areas with an engagement. Again, it's based on
13 our risk assessments.

14 So, Erin, if we can move on now to the
15 next slide on the timeline. Perfect. Thank you.

16 So this has a lot of the features I
17 just went through on the last slide but a couple
18 of more details. This is where I'm going to get
19 to some of the challenges that we've had and some
20 of the different ways we've adapted to the COVID
21 environment.

22 I want to reinforce before I start

1 that, in fact, with very few exceptions, in fact
2 one exception, this is the timeline and these are
3 the processes for every one of our inspections.
4 The only exception is for a non-U.S. firm, if
5 those work papers are not documented in English,
6 you'll see the very first item on the timeline is
7 our planning and our risk assessment, we think
8 about whether we need a translator or an
9 interpreter to help us make sure we get through
10 the work papers and, importantly, to help us make
11 sure we have the means to communicate effectively
12 with the inspected firm so that their firm
13 personnel can really communicate to us what they
14 need to about the work that they did.

15 You'll see in the timeline that we
16 don't just show up and surprise the firm and say,
17 "We're here. We're starting to inspect." We
18 notify the firm in advance of the inspection.
19 The firm then provides us some preliminary
20 information. We've already done our risk
21 assessment. We've done some planning based on
22 information we have, what we know. Some of it

1 from the prior inspection, some of it from the
2 annual reports that the firms have to file, and
3 other documents that we received. We ask them to
4 provide us a little bit more information so that
5 we can further refine our plan. Then you'll see
6 the second item at the top. We notify the firm
7 of the specific engagements that we've selected
8 and the focus areas for our review so that they
9 have everything ready for us when we get out
10 there to inspect.

11 We also ask them to give us even a
12 little bit more information so, again, we further
13 refine. It's not unlike an audit, in fact, where
14 the auditor is required to continually re-
15 evaluate the information and reassess as they go
16 along in the process.

17 One thing that is a little bit
18 different this year, this is one of our COVID
19 challenges and how we've responded, is the early
20 access in the test of technology. In many cases
21 for the U.S. firms, in particular, we might have
22 gotten advanced access and we might have utilized

1 technology in order to see some of the firms'
2 documents.

3 In the non-U.S. setting, we had never
4 done that prior to COVID. We didn't ask for work
5 papers in advance. We would fly to the
6 jurisdiction, we would show up at the firm's
7 offices, and we would start our work from there,
8 so there was no technology to deal with. We
9 would get there and there would be firm laptops
10 ready for us.

11 Now what we have done to pivot in the
12 COVID environment, all of our inspections since
13 we closed mid-March of last year, closed our
14 offices and started working from home, all of our
15 inspections had been remote whether they are
16 domestic or foreign. Some of those still are
17 laptops. Some firms choose to send us laptops
18 with all of their data on it for the inspection.
19 We return it at the end.

20 But in many cases it's technology
21 enabled and we didn't have all of this set up
22 with every single one of the firms around the

1 world that we'd need to inspect, so we've spent a
2 lot of time working with their IT and with our IT
3 to ensure that we've established effective and
4 safe ways for us to access the data.

5 Then we conduct our field work.

6 Again, we have "remote" signaled here because
7 this year, and in most of last year, those were
8 remote inspections. We do our field work and at
9 the end of it, we request and the firm provides
10 supporting documentation for what we have found.
11 Again, we don't keep all of the firm's audit work
12 papers, all of their files. We don't have a need
13 for all of them, but we do have a need for the
14 documentation that supports what we have found
15 that we think might be a finding, we call it.

16 After the field work we issue comment
17 forms to the firm. It describes what it is that
18 we found and it gives the firm an opportunity to
19 respond. It may be that there's something that
20 they feel that we didn't see and they want to
21 provide it to us. It may be that there are other
22 factors they want us to consider, so that comment

1 form really makes sure that we've had a thorough
2 process and a thorough understanding between our
3 teams and the firm.

4 Based on those comment forms, we draft
5 a report. We have an internal process to ensure
6 that across all of our many inspections that we
7 conduct, we have consistency in how we've
8 evaluated what we found and decided what belongs
9 in an inspection report.

10 Again, the firm has a chance to review
11 that report and respond. Not to negotiate with
12 us about what's in it, but rather that they see
13 it, they can see if they've provided us
14 everything that we needed that is relevant and,
15 importantly, the firm has an option to provide a
16 letter that we will attach to the final report
17 that the Board ultimately publishes.

18 As I said before, all of our reports
19 are, in fact, reports of the Board. Our Board
20 votes on them and once they are voted on, they
21 are published.

22 Finally, as I mentioned before, if we

1 have quality control findings, the firm has one
2 year in order to demonstrate to the Board's
3 satisfaction that it has remediated those quality
4 control findings. But we don't just wait 12
5 months until we talk to them. It is a process of
6 communication with the firm and the staff between
7 the time we issue it and the time that ultimately
8 the Board reaches its determination.

9 So that, in some detail, is what
10 happens in an inspection. Again, I want to go
11 back to the only things that are different are
12 translators are needed. We have been using
13 technology a lot more on the remote inspections
14 this year. And, as I said before, there would be
15 coordination of varying degrees with the
16 regulators along the way.

17 I want to make one thing very clear
18 also. When we coordinate with regulators, we
19 still independently, the Board, draws its own
20 conclusions at the end of the inspection. All of
21 the procedures that we needed to have done have
22 been done and the Board has evaluated what it

1 found to arrive at its own conclusions.

2 We speak with the foreign regulator
3 about what we found and we find that two-way
4 dialogue very helpful to understand how they are
5 concluding and them understanding how we are
6 concluding but, at the end of the day, it is an
7 independent report of our Board at the end of the
8 joint inspection.

9 I'm going to turn back to Erin in just
10 one minute, but I wanted to touch on something
11 that Megan said earlier to emphasize what we've
12 gone through with you in detail, what happens in
13 an inspection, in our investigations it's the
14 same concept. When our investigators are looking
15 at a suspected matter of a non-U.S. firm, they
16 are conducting all of the procedures, they are
17 going through the processes, the same as they
18 would in a U.S. firm.

19 In some cases when we get access to
20 that information, we request it through a home
21 country regulator but that doesn't change in
22 essence what it is that are investigators are

1 doing in order to form recommendations to put
2 before the Board.

3 With that, Erin, I will turn it back
4 to you and see if we have any questions.

5 MS. DWYER: We do, Liza. I actually
6 think one that we just got is a good one for you,
7 which is how do you determine which international
8 firms to inspect. I guess we got ahead of
9 ourselves a little. Maybe you can just take a
10 step back and share with the group how we choose
11 which international firms we are going to
12 inspect.

13 MS. MCANDREW MOBERG: Sure. No
14 problem. So this is driven by the statute, by
15 our mandate. If a firm is conducting audit work
16 that subjects it to our inspection, which really
17 if they are issuing audit reports for any U.S.
18 issuer, they are subject to being inspected every
19 three years. Sometimes for risk reasons, or for
20 other reasons, we might do it more frequently
21 than every three years. We are able to do that.
22 The Board is able to do that.

1 We know pretty well -- we have about
2 300 firms right now, non-U.S. firms, that are
3 subject to inspection and we know when they are
4 coming up due for their three years. If there's
5 a foreign regulator involved, some foreign
6 regulators don't inspect every single firm every
7 single year so we might have conversations with
8 them about we are going to need to come in the
9 next three years. When will you be there? We
10 try to align our schedule so that joint
11 inspection works very effectively for us, for
12 them and, frankly, I think it's probably better
13 for the firm as well.

14 MS. DWYER: Great. Thanks, Liza.
15 While you were talking, I popped up another slide
16 just to show folks where on our website you can
17 find our inspection reports. I think sometimes
18 I've heard from stakeholders that they didn't
19 know they could access our inspection reports but
20 if you do go, again, to PCAOBUS.org under
21 oversight, you will see a link to firm
22 inspections reports.

1 Again, once you get there, you will
2 have a lot of different ways you can search for a
3 report. Right now this is just what the most
4 recent reports that we've issued are. They are
5 coming up alphabetically so you'll see some of
6 the Deloitte firm reports there, but you can also
7 do a country look-up, as well as whether it
8 includes a public quality control criticism. I
9 really do encourage investors to look at those
10 reports. I think it's really useful information.

11 We are coming to the end of our time
12 and we will open the floor to question and
13 answer.

14 Before we do that, I wanted to get one
15 more polling question in from our attendees to
16 ask sort of about your confidence in the audited
17 financials of companies based in jurisdictions
18 where the PCAOB cannot inspect audits is.

19 Please fill in the blank with much
20 less, less, the same, more, or much more compared
21 to jurisdictions where the PCAOB can inspect.
22 I'm going to give that a minute. Please as we're

1 taking our poll questions, if you have questions
2 for us, the Q&A box is where you can ask them.

3 All right. So I will end the polling
4 and share the results. Pretty interesting.

5 Almost 90 percent of you have less or much less
6 confidence in the audited financials of companies
7 where we cannot inspect. About 13 percent of you
8 have the same amount. Interesting results.

9 Like I said, I will now turn to our
10 Q&A. We have a question here that asks sort of
11 with the extent of remote auditing happening by
12 firms in the last year -- I imagine this is
13 related to COVID -- the person is asking what is
14 the PCAOB been doing to assess the impact in
15 2020, as well as in this current year, and are we
16 able to do that sort of assessment
17 internationally.

18 Maybe, Duane, I'll kick it to you if
19 you'd like to start.

20 MR. DESPARTE: Sure. Yeah, I can
21 start. Erin, I do have the polling question
22 still up just by the way, on my screen at least.

1 In any case, with respect to remote auditing,
2 certainly last year not only were auditors doing
3 their audits remotely, but a lot of the financial
4 close activities for issuers were being performed
5 remotely as well.

6 That certainly can -- that certainly
7 got our attention, as you would expect. Last
8 year right out of the gate we engaged with the
9 firms to get a better understanding of what they
10 were doing to ensure that they had quality
11 controls around their inspections -- around their
12 audits.

13 We also in our inspections we
14 increased our scope to include some calendar
15 non-calendar year-end audits; for instance, June
16 30th audit, just to start to get a feel of what
17 some of the risks were going to be. We have a
18 general feel kind of what complexities were out
19 there last year. We had a lot of discussions
20 with the firms in terms of what activities and
21 controls they were putting in place to address
22 those complexities. That's kind of overall from

1 an international perspective.

2 It was mentioned earlier that PCAOB is
3 a very active member of the International Forum
4 of Independent Audit Regulators, IFIAR. IFIAR
5 spent a lot of time with the global firms, the
6 largest network firms, to engage with them to
7 understand what they were doing and how they were
8 managing the remote environment.

9 I think as the PCAOB we have a lot of
10 information about what the firms have told us
11 they were doing. We are just starting our
12 inspections of 2020 audits for the most part so
13 we are now going to be finding out -- you know,
14 we kind of understand what the firm intended to
15 do. We are now going to inspect to see how that
16 worked out.

17 But the feedback that we've gotten
18 from most of our stakeholders is that it seems to
19 have run more smoothly than anybody would have
20 initially expected. I think that really relates
21 to some significant investments in technology at
22 preparers and at firms that help facilitate a

1 very unique, obviously, and challenging,
2 situation.

3 Erin, I don't know if anyone else
4 would want to comment.

5 MS. JURATA: Erin, I might jump in and
6 just say, you know, I don't have much to add
7 because Duane answered the question but I do just
8 want to flag that we did as an organization try
9 to signal and make public a lot of areas of
10 concern and high risk given the remote audit
11 environment.

12 As Duane said, you know, we did a
13 significant amount of ongoing outreach, not only
14 with audit firms, but also with audit committees
15 seeing how they were addressing the risk. We
16 were trying to make public and signaling to the
17 firms registered with us and subject to our
18 requirements that we expected the audit
19 procedures, in particular over ICFR, should
20 change in light of the fact that if the auditor
21 is doing a remote audit, then they can't rely on
22 procedures that were previously used in a non-

1 remote environment.

2 I think highlighting that and then, as
3 well, as focusing on the quality control systems
4 of firms and how they've adjusted in a remote
5 environment is going to feed into our 2021
6 inspections. Just to emphasize what Duane
7 pointed out was that I want to applaud the work
8 that the Staff did in responding to 2020. We did
9 change our inspections program in response to the
10 COVID environment.

11 I think it bears mentioning again what
12 Duane just said, we changed the issuers whose
13 audits were selected for inspection and review to
14 include some with calendar year ends of June
15 2020, as well as the interim reviews. The PCAOB
16 did get some real-time updates of how firms are
17 handling it, and then again calling out the high-
18 risk areas through a lot of publications.

19 MS. DWYER: Great. Thank, Rebekah.

20 I think we just have another question
21 that maybe I'll wrap us up with because we at
22 almost the time mark. This is a really good

1 question. Maybe, Liza, I'll give this one to you
2 to start, at least, which is in a joint
3 inspection does the PCAOB ever wish to inspect
4 areas or items that foreign inspectors -- foreign
5 regulators they mean -- don't wish to inspect?
6 If so, what happens?

7 MS. MCANDREW MOBERG: It happens all
8 the time, Erin. We're very used to this
9 discussion. You know, at its heart a joint
10 inspection and the work that we do
11 collaboratively really is about the foreign
12 regulator respects that firms are doing work,
13 registered with us and did work that subjects
14 them to our oversight. That firm needs to meet
15 its requirements under its registration
16 obligations.

17 That foreign regulator has its own
18 work that it has to do under its mandate. From
19 one jurisdiction to another, the scope, the
20 frequency, the type of work that the foreign
21 regulator needs to do to satisfy their own
22 mandate, could be quite different from ours.

1 They and we agree to work together so that each
2 side can get done what they need to do in an
3 effective way. It is quite often that we talk to
4 the regulator. We say -- they want to do some
5 things, we want to do some things. Part of the
6 time we might be out in the field together doing
7 the same things and part of the time we might be
8 in the field together doing totally different
9 things.

10 They obviously being in the
11 jurisdiction will spend, you know, different
12 amounts of time at that firm and have the luxury
13 to come and go. We go out and try to get
14 everything done effectively while we are there.
15 In some jurisdictions it could be in one year
16 they will look at a firm with us together and
17 then the next year they won't look at the firm at
18 all. It might not be part of their inspection
19 cycle.

20 We really see a lot of variations of
21 the extent of coordination in an individual joint
22 inspection but, in most cases, our program has

1 been very successful at managing those to achieve
2 the outcomes -- the objectives of the Act.

3 MS. DWYER: Great. Thanks, Liza. You
4 have brought us to almost exactly 4:00 so I just
5 on behalf of the attendees would like to thank
6 Acting Chair DesParte, as well as Board Members
7 Zietzman and Goshorn Jurata, as well as Liza for,
8 I think, what hopefully was really useful
9 information today. Thanks to you all for bearing
10 with us on the technology. Still after all these
11 months I'm not sure we quite nailed it but I
12 think we did okay.

13 Then, Duane, did you have any
14 concluding remarks?

15 MR. DESPARTE: Yes. I hope this gives
16 you an increased appreciation for the rigor with
17 which we approach our work internationally and
18 gives you an understanding of why we do that.
19 You know, I was really encouraged by the poll
20 question results because I think it demonstrates
21 that at least folks here today understand the
22 protection that what we do at PCAOB provides to

1 investors.

2 It's so important that protection
3 apply equally to any issuer whether it's a U.S.
4 issuer or not. I think that's what Congress is
5 getting at in the act that we discussed. But it
6 really is fulfilling to know that you view what
7 we do really matters. Of course, we do as well.

8 The international component is just so
9 important given the materiality that we talked
10 about earlier.


11 Thank you for being here. We
12 appreciate your interest. If you have further
13 questions, please reach out to us informally as
14 well. The best to everybody.


15 MS. DWYER: Thanks, Duane.


16 Thank everyone for joining us. Please
17 do reach out if you have any questions for us.
18 We hope to see your comments in the HFCAA
19 proposed rule docket. Thanks again. Bye-bye
20 everybody.

21 (Whereupon, the above-entitled matter
22 went off the record at 4:00 p.m.)



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**RULE GOVERNING
BOARD DETERMINATIONS UNDER THE
HOLDING FOREIGN COMPANIES
ACCOUNTABLE ACT**

PCAOB Release No. 2021-004
September 22, 2021

PCAOB Rulemaking
Docket Matter No. 048

Summary: The Public Company Accounting Oversight Board (the “PCAOB” or the “Board”) is adopting a new rule, PCAOB Rule 6100, *Board Determinations Under the Holding Foreign Companies Accountable Act*, to provide a framework for its determinations under the Holding Foreign Companies Accountable Act (the “HFCAA”) that the Board is unable to inspect or investigate completely registered public accounting firms located in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction. The rule establishes the manner of the Board’s determinations; the factors the Board will evaluate and the documents and information the Board 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 Board will reaffirm, modify, or vacate any such determinations.

Board

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I. EXECUTIVE SUMMARY

The Sarbanes-Oxley Act of 2002 (the “Act”) mandates that the Board inspect registered public accounting firms and investigate possible statutory, rule, and professional standards violations committed by those firms and their associated persons. That mandate applies with equal force to the Board’s oversight of registered firms in the United States and in foreign jurisdictions.

Over the course of more than a decade, the Board has worked effectively with authorities in foreign jurisdictions to fulfill its mandate to oversee registered firms located outside the United States. With rare exceptions, foreign audit regulators have cooperated with the Board and allowed it to exercise its oversight authority as it relates to registered firms located within their respective jurisdictions. The norms of international comity have guided those efforts and allowed the Board to work cooperatively across borders, to resolve conflicts of law, and to overcome other potential obstacles. The Board benefits greatly from cross-border cooperation with its international counterparts and has built constructive relationships that facilitate meaningful oversight. Authorities in a limited number of foreign jurisdictions, however, have taken positions that deny the Board the access it needs to conduct its mandated oversight activities.

Recognizing the ongoing obstacles to Board inspections and investigations in certain foreign jurisdictions, Congress enacted the HFCAA.¹ The HFCAA requires that the Board determine whether it is unable to inspect or investigate completely registered public accounting firms located in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction. The HFCAA, among other things, also mandates that, after the Board makes such a determination, the U.S. Securities and Exchange Commission (the “Commission”) shall require covered issuers² who retain such firms to make certain disclosures in their annual reports and, eventually, if certain conditions persist, shall prohibit trading in those issuers’ securities.³

Following public comment, the Board is adopting a new rule, PCAOB Rule 6100, *Board Determinations Under the Holding Foreign Companies Accountable Act*, as proposed with some modifications after consideration of comments, to establish a framework for the Board to make its determinations under the HFCAA. The final rule establishes the manner of the Board’s

¹ Pub. L. No. 116-222, 134 Stat. 1063 (Dec. 18, 2020).

² See HFCAA § 2(i)(1)(A), 15 U.S.C. § 7214(i)(1)(A) (defining “covered issuer”). An “issuer,” as that term is used in this release, is distinct from a “covered issuer,” and is defined in Section 2(a)(7) of the Act.

³ See generally *Holding Foreign Companies Accountable Act Disclosure*, SEC Exchange Act Release No. 91364 (Mar. 18, 2021).

determinations; the factors the Board 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 Board will reaffirm, modify, or vacate any such determinations.

II. RULEMAKING HISTORY

On May 13, 2021, the Board proposed a new rule that would establish a framework for the Board's determinations under the HFCAA.⁴ The Board received eight comments on the proposal from commenters across a range of affiliations.⁵ Commenters generally noted that the Board's statutorily mandated oversight activities—including the Board inspections and investigations referenced in the HFCAA—promote audit quality and enhance the quality of financial reporting, which serve to protect investors and further the public interest. The final rule is informed by the comments received on the proposal, which are discussed throughout this release. As did the proposed rule, the final rule also takes into account observations based on PCAOB oversight activities.

III. BACKGROUND AND REASON FOR THE RULE

A. The Board's Oversight of Non-U.S. Registered Public Accounting Firms Through Board Inspections and Investigations

Section 102 of the Act prohibits public accounting firms that are not registered with the Board from preparing or issuing, or from participating in the preparation or issuance of, audit reports with respect to issuers, brokers, or dealers.⁶ Implementing this prohibition, PCAOB Rule 2100, *Registration Requirements for Public Accounting Firms*, provides that each public accounting firm that prepares or issues an audit report with respect to an issuer, broker, or

⁴ See PCAOB Rel. No. 2021-001, *Proposed Rule Governing Board Determinations Under the Holding Foreign Companies Accountable Act* (May 13, 2021).

⁵ The comment letters on the proposal are available on the Board's website in Rulemaking Docket No. 048, available at <https://pcaobus.org/about/rules-rulemaking/rulemaking-dockets/docket-048-proposed-rule-governing-board-determinations-under-holding-foreign-companies-accountable-act>. During the comment period, Board members and staff discussed the proposal during a webinar for investors on international issues, a transcript of which also is available in Rulemaking Docket No. 048.

⁶ See Section 102(a) of the Act; see also Section 2(a)(7) of the Act & PCAOB Rule 1001(i)(iii) (defining "issuer"); Section 110(3) of the Act & PCAOB Rule 1001(b)(iii) (defining "broker"); Section 110(4) of the Act & PCAOB Rule 1001(d)(iii) (defining "dealer").

dealer, or plays a substantial role in the preparation or furnishing of such a report, must be registered with the Board.⁷

These provisions apply equally to U.S. and non-U.S. public accounting firms. Section 106 of the Act provides that any non-U.S. public accounting firm that prepares or furnishes an audit report with respect to an issuer, broker, or dealer is subject to the Act and to the Board's rules "in the same manner and to the same extent" as a U.S. public accounting firm.⁸ Therefore, non-U.S. firms issuing such reports must register with the Board. Section 106 of the Act further authorizes the Board to require non-U.S. firms that do not issue such reports but that play a substantial role in the preparation or furnishing of such reports to register with the Board,⁹ and the Board exercised that authority when it adopted Rule 2100.¹⁰

Thus, by virtue of Section 106 of the Act and Rule 2100, non-U.S. firms are subject to the same registration requirements as U.S. firms, and, once registered, they are subject to the same oversight as U.S. firms. This oversight includes Board inspections at mandated regular intervals and Board investigations.

i. The Board's Inspection Mandate

The Act mandates that the Board administer a continuing program of inspections that assesses registered firms' and their associated persons' compliance with the Act, the rules of the Board, the rules of the Commission, and professional standards in connection with the

⁷ See PCAOB Rule 2100; see also PCAOB Rule 1001(p)(ii) (defining "play a substantial role in the preparation or furnishing of an audit report").

⁸ Section 106(a)(1) of the Act.

⁹ See Section 106(a)(2) of the Act.

¹⁰ See PCAOB Rule 2100. Section 106(c) of the Act allows the Board, subject to Commission approval, to exempt a non-U.S. firm or any class of such firms from any provision of the Act or the Board's rules, upon a determination that doing so is necessary or appropriate in the public interest or for the protection of investors. In connection with the launch of its oversight system in 2003, the Board received numerous requests that non-U.S. firms be exempted from the Board's oversight requirements, but the Board declined to adopt any such exemptions, finding such exemptions to be inconsistent with its mandate to protect investors. See, e.g., *Registration System for Public Accounting Firms*, PCAOB Rel. No. 2003-007, at 13, 17-20 (May 6, 2003); see also, e.g., *Final Rule Concerning the Timing of Certain Inspections of Non-U.S. Firms, and Other Issues Relating to Inspections of Non-U.S. Firms*, PCAOB Rel. No. 2009-003, at 9 n.23 (June 25, 2009).

performance of audits, the issuance of audit reports, and related matters involving issuers.¹¹ Board inspections are the Board's "primary tool of oversight."¹²

In accordance with the Act, and as set forth in the Board's rules, the Board periodically inspects the audits of registered public accounting firms.¹³ Board inspections must be performed annually with respect to each registered firm that regularly provides audit reports for more than 100 issuers, and at least triennially with respect to each registered firm that regularly provides audit reports for 100 or fewer issuers.¹⁴ The Board also may conduct special inspections on its own initiative or at the Commission's request.¹⁵

During an inspection, the Board reviews audit engagements "selected by the Board."¹⁶ The Board also evaluates the sufficiency of the firm's quality control system (and the documentation and communication of that system), and may perform other testing of the firm's audit, supervisory, and quality control procedures as deemed necessary or appropriate in light of the purpose of the inspection and the responsibilities of the Board.¹⁷

¹¹ See Section 104(a)(1) of the Act; see also Section 101(c)(3) of the Act; PCAOB Rule 4000(a), *General*. The Act also permits the Board to establish, by rule, a program of inspection with respect to registered firms that provide one or more audit reports for a broker or dealer. See Section 104(a)(2) of the Act. The Board's rules provide for an interim inspection program related to audits of brokers and dealers. See PCAOB Rule 4020T, *Interim Inspection Program Related to Audits of Brokers and Dealers*.

¹² PCAOB Rel. No. 2009-003, at 8-9; see also *Order Approving Proposed Amendment to Board Rules Relating to Inspections*, SEC Exchange Act Release No. 61649, at 5 (Mar. 4, 2010) (observing that inspections are "the cornerstone of the Board's regulatory oversight of audit firms").

¹³ See Section 104(a)(1) of the Act. Generally, a registered firm's issuance of an audit report triggers a PCAOB inspection, subject to certain limited exceptions. See Section 104(b)(1) of the Act; PCAOB Rules 4003(a)-(b), *Frequency of Inspections*; see also PCAOB Rules 4003(c) & (e) (identifying certain circumstances in which the Board has discretion to forgo an inspection of a firm). Additionally, the Board conducts inspections of firms that have not issued an audit report with respect to an issuer but have played a substantial role in the preparation or furnishing of such a report. See PCAOB Rule 4003(h).

¹⁴ See Section 104(b)(1) of the Act; see also PCAOB Rules 4003(a)-(b). The Act provides that the Board, by rule, may adjust the annual and triennial inspection schedules if the Board finds that different schedules are consistent with the purposes of the Act, the public interest, and the protection of investors. See Section 104(b)(2) of the Act; see also PCAOB Rules 4003(d)-(g) (adjusting the inspection schedule in certain circumstances).

¹⁵ See Section 104(b)(2) of the Act.

¹⁶ Section 104(d)(1) of the Act.

¹⁷ See Sections 104(d)(2) and 104(d)(3) of the Act.

To conduct an inspection, the Board must obtain documents and information from the firm and its associated persons, and when the Board requests such documents or information, registered firms and their associated persons must comply. In this regard, the Act provides that a firm's cooperation in and compliance with document requests made in furtherance of the Board's authority and responsibilities under the Act are a condition to the continuing effectiveness of the firm's registration with the Board.¹⁸ Furthermore, PCAOB Rule 4006, *Duty to Cooperate With Inspectors*, imposes on registered firms and their associated persons a duty to cooperate with PCAOB inspectors, which includes complying with requests for access to, and the ability to copy, any record in their possession, custody, or control, and with requests for information by oral interviews, written responses, or otherwise.¹⁹

ii. The Board's Investigation Mandate

The Act also authorizes the Board to conduct investigations (and, relatedly, disciplinary proceedings) with respect to registered firms and their associated persons.²⁰ The Board may investigate any act, practice, or omission to act by a registered firm or associated person that may violate the Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission issued under the Act, or professional standards, regardless of how the act, practice, or omission came to the Board's attention.²¹

As with inspections, the Board's ability to conduct investigations depends on the Board's ability to obtain documents and information from registered firms and their associated persons.

¹⁸ See Section 102(b)(3) of the Act. Section 102(b)(3)(A) of the Act specifies that each registration application shall contain "a consent executed by the . . . firm to cooperation in and compliance with any request for . . . documents made by the Board in the furtherance of its authority and responsibilities" under the Act. Section 102(b)(3)(B) of the Act, in turn, provides that each registration application shall contain a statement that the firm "understands and agrees that [such] cooperation and compliance . . . shall be a condition to the continuing effectiveness of the registration of the firm with the Board."

¹⁹ See PCAOB Rule 4006; see also *Gately & Assocs., LLC*, SEC Exchange Act Release No. 62656, at 9 (Aug. 5, 2010) ("The obligations under Rule 4006 are unequivocal, and apply to 'any request[] made in furtherance of the Board's authority and responsibilities.'" (quoting Rule 4006)). Documents and information prepared or received by or specifically for the Board in connection with an inspection are confidential and privileged as an evidentiary matter, but the Board may share them with the Commission and, under certain circumstances, with the Attorney General of the United States, certain federal regulators, state attorneys general, certain state regulators, and certain self-regulatory organizations. See Section 105(b)(5)(B) of the Act.

²⁰ See Section 101(c)(4) of the Act; see also Section 105(a) of the Act.

²¹ See Section 105(b)(1) of the Act.

Pursuant to the Act,²² the Board has adopted rules under which the Board may (1) require testimony of a registered firm or an associated person thereof with respect to any matter that the Board considers relevant or material to an investigation;²³ (2) require production of audit work papers and any other document or information possessed by a registered firm or associated person, wherever domiciled, that the Board considers relevant or material to an investigation;²⁴ (3) inspect the books or records of a registered firm or associated person to verify the accuracy of any documents or information supplied;²⁵ (4) request the testimony of, or any document in the possession of, any other person that the Board considers relevant or material to an investigation, subject to certain limitations;²⁶ and (5) seek issuance by the Commission, in a manner established by the Commission, of a subpoena requiring the testimony of, or the production of any document in the possession of, any person that the Board considers relevant or material to an investigation.²⁷

Pursuant to the Act, a firm's cooperation in and compliance with requests for testimony and for the production of documents made in furtherance of the Board's authority and responsibilities are a condition to the continuing effectiveness of the firm's registration with the Board.²⁸ Moreover, if a registered firm or associated person refuses to testify, produce documents, or otherwise cooperate with a Board investigation, the Board can impose sanctions, which may include suspending or revoking a firm's registration and suspending or barring an individual from associating with a registered firm.²⁹ As the Commission has observed, failing to cooperate in a Board investigation is "very serious misconduct."³⁰

The Act requires the Board to coordinate its investigations with the Commission. The Board must notify the Commission of any pending Board investigation that involves a potential

²² See Section 105(b)(2) of the Act.

²³ See PCAOB Rule 5102, *Testimony of Registered Public Accounting Firms and Associated Persons in Investigations*.

²⁴ See PCAOB Rule 5103, *Demands for Production of Audit Workpapers and Other Documents from Registered Public Accounting Firms and Associated Persons*.

²⁵ See PCAOB Rule 5104, *Examination of Books and Records in Aid of Investigations*.

²⁶ See PCAOB Rule 5105, *Requests for Testimony or Production of Documents from Persons Not Associated with Registered Public Accounting Firms*.

²⁷ See PCAOB Rule 5111, *Requests for Issuance of Commission Subpoenas in Aid of an Investigation*.

²⁸ See Section 102(b)(3) of the Act.

²⁹ See Section 105(b)(3) of the Act; PCAOB Rule 5110, *Noncooperation with an Investigation*.

³⁰ *R.E. Bassie & Co.*, SEC Accounting and Auditing Enforcement Release No. 3354, at 11 (Jan. 10, 2012).

violation of the securities laws, and must thereafter coordinate its work with the Commission's Division of Enforcement as necessary to protect any ongoing Commission investigation.³¹ The Act also authorizes the Board to refer an investigation to the Commission, a self-regulatory organization, certain other federal regulators, and, at the Commission's direction, certain attorneys general and state regulators.³²

B. The Board's Cooperative Framework for International Oversight

The Board has long observed that certain aspects of its inspection and investigation mandates raise special concerns for non-U.S. firms, including potential conflicts with non-U.S. law.³³ Acknowledging these challenges early on, the Board affirmed its commitment "to finding ways to accomplish the goals of the Act without subjecting non-U.S. firms to conflicting requirements."³⁴ The Board then worked with its international counterparts where necessary or appropriate, based on norms of international comity, to develop arrangements and working practices to enable the Board and other audit regulators to achieve their respective mandates in a manner responsive to the potential conflicts of law that non-U.S. firms might confront.³⁵ The Board's cooperative approach to oversight of registered firms located outside the United States did not, however, entail any abandonment of the Board's inspection or investigation

³¹ See Section 105(b)(4)(A) of the Act; see also PCAOB Rule 5112(a), *Commission Notification of Order of Formal Investigation*. Documents and information prepared or received by or specifically for the Board in connection with an investigation are confidential and privileged as an evidentiary matter, but the Board may share them with the Commission and, under certain circumstances, with the Attorney General of the United States, certain federal regulators, state attorneys general, certain state regulators, and certain self-regulatory organizations. See Section 105(b)(5)(B) of the Act.

³² See Section 105(b)(4)(B) of the Act; see also PCAOB Rule 5112(b), *Board Referrals of Investigations*; PCAOB Rule 5112(c), *Commission-directed Referrals of Investigations*.

³³ See, e.g., *Proposed Rules Relating to the Oversight of Non-U.S. Public Accounting Firms*, PCAOB Rel. No. 2003-024, at 3 (Dec. 10, 2003).

³⁴ *Inspection of Registered Public Accounting Firms*, PCAOB Rel. No. 2003-019, at 5, A2-15-A2-16 (Oct. 7, 2003).

³⁵ See, e.g., Briefing Paper, *Oversight of Non-U.S. Public Accounting Firms*, PCAOB Rel. No. 2003-020, at 1-2 (Oct. 28, 2003) ("[T]he PCAOB seeks to become partners with its international counterparts in the oversight of the audit firms that operate in the global capital markets. . . . [A]n arrangement based on mutual cooperation with other high quality regulatory systems respects the cultural and legal differences of the regulatory regimes that exist around the world."); PCAOB Rel. No. 2003-024, at 8 ("The Board also believes its [cooperative] arrangements may reduce potential conflicts of law . . .").

mandates or any relinquishment of the Board's statutory authority to obtain the documents and information it needs from non-U.S. firms in order to execute those mandates.³⁶

When the Board adopted its cooperative framework for overseeing non-U.S. registered firms,³⁷ it rejected calls to afford non-U.S. firms that elected to register with the Board a legal-conflict accommodation during inspections and investigations.³⁸ In so doing, the Board reiterated that “[p]reserving the Board’s ability to access audit work papers and other documents or information maintained by registered public accounting firms, including non-U.S. registered public accounting firms, is critical to the Board carrying out its obligations under the Act.”³⁹ For that reason, the Board did not believe that it would be “in the interests of U.S. investors or the public for the Board to adopt a rule of general application that would limit its ability to access such documents or information regardless of the circumstances or need for those documents or information.”⁴⁰

The Commission approved the Board’s rules regarding oversight of non-U.S. firms, which embody the cooperative approach described above.⁴¹ The Commission observed that the PCAOB was discussing potential conflicts of law with foreign audit oversight bodies and encouraged the PCAOB to continue those discussions and to consider ways to work cooperatively with its international counterparts.⁴²

Those discussions have continued, and nearly all have been fruitful. The Board’s oversight programs take into account the possibility that a non-U.S. firm’s obligations under the Act or the Board’s rules might conflict with non-U.S. law. The Board has established procedures that enable non-U.S. firms to assert legal conflicts during the registration and periodic reporting processes so that such firms are not prevented from completing a registration application or

³⁶ PCAOB Rel. No. 2003-020, at 5 (“The Board believes that it is appropriate that a cooperative approach respect the laws of other jurisdictions, to the extent possible. At the same time, every jurisdiction must be able to protect the participants in, and the integrity of, its capital markets as it deems necessary and appropriate.”); *accord Final Rules Relating to Oversight of Non-U.S. Firms*, PCAOB Rel. No. 2004-005, at 3, A2-17 (June 9, 2004).

³⁷ *See generally* PCAOB Rel. No. 2004-005.

³⁸ *See id.* at A2-15-A2-16.

³⁹ *Id.* at A2-16.

⁴⁰ *Id.* at A2-16-A2-17.

⁴¹ *See Order Approving Proposed Rules Relating to Oversight of Non-U.S. Registered Public Accounting Firms*, SEC Exchange Act Release No. 34-50291, at 3 (Aug. 30, 2004).

⁴² *See id.* at 3.

complying with periodic reporting requirements.⁴³ The Board also seeks to coordinate and cooperate with its international counterparts when conducting inspections or investigations in other countries.⁴⁴ Nevertheless, in all respects, the Board has made clear that its statutory authority to obtain the documents and information it needs to conduct inspections and investigations has not been relinquished, surrendered, forfeited, or otherwise vitiated.⁴⁵

C. Resolution of Obstacles to Inspections and Investigations in Non-U.S. Jurisdictions

The practices and approaches the Board has successfully developed with foreign regulators to resolve conflicts and to complete inspections and investigations under the Act can differ from jurisdiction to jurisdiction, but they all implement three core principles:

- (1) The Board must be able to conduct inspections and investigations consistent with its mandate;⁴⁶

⁴³ PCAOB Rule 2105, *Conflicting Non-U.S. Laws*, permits a non-U.S. firm to withhold required information from its registration application based on an asserted conflict with non-U.S. law. That rule allows the Board to treat a registration application as complete if the firm, among other things, submits a copy of the purportedly conflicting non-U.S. law and an accompanying legal opinion. But Rule 2105 does not provide a vehicle for resolving conflicts of law during registration, nor does it apply “to potential conflicts of law that may arise subsequent to registration.” PCAOB Rel. No. 2004-005, at A2-16-A2-18; *see also* PCAOB Rule 2207, *Assertions of Conflicts with Non-U.S. Laws* (establishing a similar process for registered firms’ annual and special reports to the Board).

⁴⁴ *See, e.g., Rules on Periodic Reporting by Registered Public Accounting Firms*, PCAOB Rel. No. 2008-004, at 32 (June 10, 2008).

⁴⁵ *See, e.g., id.* at 41 (“The Board has consistently maintained that, although it will seek to work cooperatively with and through non-U.S. regulators, and although it is willing to accommodate a non-U.S. firm’s reluctance (rooted in an asserted conflict of law) to provide the required written consent to cooperate, each firm ultimately has an obligation to cooperate with the Board to the extent that the Board requires cooperation. The Board does not view this statutory obligation as limited or qualified by non-U.S. legal restrictions.”).

⁴⁶ *See, e.g.,* Section 104(a)(1) of the Act (requiring a “continuing program of inspections”); Section 104(b)(1) of the Act (establishing inspection frequency requirements); Section 104(c) of the Act (requiring identification of non-compliant acts, practices, or omissions to act, and providing for reporting of such conduct to the Commission and appropriate state regulatory authorities, when appropriate); Section 105(b)(1) of the Act (authorizing Board investigations); Section 105(b)(3) of the Act (authorizing the imposition of sanctions for noncooperation with an investigation); Section 105(b)(4) of the Act (requiring coordination with the Commission’s Division of Enforcement and authorizing referrals of investigations in certain circumstances); Section 105(b)(5)(B)(i) of the Act (authorizing the Board to share with the Commission documents received in connection with an inspection or investigation).

- (2) The Board must be able to select the audit work and potential violations to be examined;⁴⁷ and
- (3) The Board must have access to firm personnel, audit work papers, and other information and documents deemed relevant by Board staff.⁴⁸

The Board has been able to accommodate the legal requirements of most non-U.S. jurisdictions without compromising on these three core principles, which the Board considers to be fundamental to its ability to inspect and investigate non-U.S. firms completely.

Building collaborative working relationships with international counterparts based on these principles has taken considerable time and substantial effort, but the Board believes that “it is in the interests of the public and investors for the Board to develop efficient and effective cooperative arrangements with its non-U.S. counterparts.”⁴⁹ The Board now has extensive experience with cooperative arrangements that successfully resolve conflicts and allow the PCAOB and its international counterparts to satisfy their respective oversight mandates.

i. Board Inspections of Non-U.S. Firms

Inspections of non-U.S. firms began in 2005,⁵⁰ and the Board quickly identified obstacles that required negotiation with its international counterparts. When a registered firm issuing audit reports for an issuer is located in a non-U.S. jurisdiction that has an auditor oversight

⁴⁷ See, e.g., Section 104(d)(1) of the Act (directing the Board to inspect and review audit and review engagements “as selected by the Board”); Section 104(d)(3) of the Act (authorizing the Board to perform other testing of audit, supervisory, and quality control procedures as are necessary or appropriate in light of the purpose of the inspection and the responsibilities of the Board); Section 105(b)(1) of the Act (authorizing the Board to conduct an investigation of “any” act, practice, or omission to act by a registered firm or an associated person thereof that may violate “any” provision of the Act, the rules of the Board, the provisions of the securities laws relating to the preparation and issuance of audit reports and the obligations and liabilities of accountants with respect thereto, including the rules of the Commission under the Act, or professional standards).

⁴⁸ See, e.g., Section 104(d)(1) of the Act (directing the Board to inspect and review audit and review engagements); Section 104(d)(2) of the Act (directing the Board to evaluate the sufficiency of a registered firm’s quality control system, including the manner of the documentation and communication of that system); Section 105(b)(2)(A)-(B) of the Act (authorizing the Board to require the testimony of, and the production of audit work papers and any other documents or information from, registered firms and their associated persons, wherever domiciled, and to inspect the books and records of such firm or associated person to verify the accuracy of any documents or information supplied).

⁴⁹ PCAOB Rel. No. 2009-003, at 4-5.

⁵⁰ See *Rule Amendments Concerning the Timing of Certain Inspections of Non-U.S. Firms, and Other Issues Relating to Inspections of Non-U.S. Firms*, PCAOB Rel. No. 2008-007, at 4 (Dec. 4, 2008).

authority of its own, the Board seeks to engage with that local regulator. The PCAOB conducts many inspections of non-U.S. firms jointly with local authorities, using approaches that take into consideration the laws and practices of the local jurisdiction. The Board also developed a specific regulatory framework for assessing the degree, if any, to which the Board may rely on the inspection work of the local regulator in an effort to reduce redundancy.⁵¹ Even where the Board conducts its own inspection rather than a joint inspection with a local auditor oversight authority, the Board may communicate with its international counterpart regarding the Board's inspections in the jurisdiction.⁵²

By December 2008, the Board had inspected non-U.S. firms in 24 jurisdictions.⁵³ But the Board also observed that home-country legal obstacles and sovereignty concerns were impeding the Board's ability to conduct inspections of some non-U.S. firms.⁵⁴ Given these obstacles, the Board, in 2009, adjusted the schedule for its first inspections of non-U.S. firms in certain jurisdictions so that the Board could continue its efforts to reach cooperative arrangements with those firms' home-country regulators.⁵⁵

In so doing, however, the Board expressly rejected the suggestion that it should exempt from inspection non-U.S. firms "that cannot cooperate with PCAOB inspections due to legal conflicts or sovereignty-based opposition from their local governments," finding that exempting such firms from inspections is not in the interests of investors or the public.⁵⁶ Instead, the Board reaffirmed the ultimate obligation of all registered firms, including non-U.S. firms, to be subject to inspection and to comply with the Board's inspection-related requests.⁵⁷

⁵¹ See PCAOB Rel. No. 2009-003, at 5-6. Non-U.S. firms may formally request that the Board rely on a non-U.S. inspection to the extent deemed appropriate by the Board, and the Board will examine certain factors to determine the degree, if any, to which the Board may rely on the non-U.S. inspection. See PCAOB Rule 4011, *Statement by Foreign Registered Public Accounting Firms*; PCAOB Rule 4012, *Inspections of Foreign Registered Public Accounting Firms*; PCAOB Rel. No. 2009-003, at 5. In contrast to an exemption, reliance on a non-U.S. inspection pursuant to Rule 4012 is a cooperative approach that can be used when efficient and appropriate.

⁵² See PCAOB Rel. No. 2009-003, at 5.

⁵³ See PCAOB Rel. No. 2008-007, at 4 & n.9 (inspections had been conducted in Argentina, Australia, Bermuda, Brazil, Canada, Chile, Colombia, Greece, Hong Kong, India, Indonesia, Ireland, Israel, Japan, Kazakhstan, Mexico, New Zealand, Panama, Peru, Singapore, South Africa, South Korea, Taiwan, and the United Kingdom).

⁵⁴ PCAOB Rel. No. 2009-003, at 5.

⁵⁵ See *id.* at 9.

⁵⁶ See *id.* at 8-9.

⁵⁷ See *id.* at 13-14 ("[F]irms must register with the Board in order to engage in certain professional activity directly related to, and affecting, U.S. financial markets, and all registered firms are subject to

The Commission, in approving the Board's extension of the deadline for the first inspections of certain non-U.S. firms, recognized that "the adjustment would provide additional time [for the Board] to continue discussions on outstanding matters and work towards cooperation and coordination with authorities in all relevant jurisdictions."⁵⁸ And in connection with its approval of other adjustments to the inspection schedule of non-U.S. firms, the Commission stated that "the PCAOB should continue to work toward cooperative arrangements with the appropriate local auditor oversight authorities where it is reasonably likely that appropriate cooperative arrangements can be obtained."⁵⁹

By the end of 2009, the Board had conducted inspections of non-U.S. firms in an additional nine jurisdictions, bringing the cumulative total to 33 jurisdictions.⁶⁰ The Board, however, was still prevented from inspecting registered firms in mainland China, Hong Kong (to the extent an audit encompassed a company's operations in mainland China), Switzerland, and the European countries required to follow the European Union's Directive on Statutory Auditors.⁶¹

The Board responded to these obstacles in several ways⁶² and, since 2010, the Board has inspected non-U.S. firms in an additional 20 jurisdictions, bringing the total number of

the Act and the rules of the Board irrespective of their location. A registered firm is subject to various requirements and conditions, including PCAOB Rule 4006's requirement to cooperate in an inspection. In addition, as reflected in Section 102(b)(3) of the Act, a firm's compliance with Board requests for information is a condition of the continuing effectiveness of the firm's registration with the Board."). The Board also reiterated that it "does not view non-U.S. legal restrictions or the sovereignty concerns of local authorities as a sufficient defense in a Board disciplinary proceeding . . . for failing or refusing to provide information requested in an inspection." PCAOB Rel. No. 2009-003, at 14; *accord* PCAOB Rel. No. 2008-007, at 16 n.35.

⁵⁸ *Order Approving Proposed Amendment to Board Rules Relating to Inspections*, SEC Exchange Act Release No. 34-59991, at 3 (May 28, 2009).

⁵⁹ *Id.* at 5.

⁶⁰ *See Jurisdictions in Which the PCAOB Has Conducted Inspections (as of Dec. 31, 2009)* (Feb. 3, 2010), available at https://pcaob-assets.azureedge.net/pcaob-dev/docs/default-source/inspections/documents/12-31_jurisdictions.pdf?sfvrsn=2c09bd73_0 (adding Belize, Bolivia, Cayman Islands, Norway, Papua New Guinea, Philippines, Russia, Ukraine, and United Arab Emirates).

⁶¹ *See PCAOB Publishes Updated Staff Guidance Related to Registration Process for Applicants from Certain Non-U.S. Jurisdictions* (June 1, 2010), available at <https://pcaobus.org/news-events/news-releases/news-release-detail/pcaob-publishes-updated-staff-guidance-related-to-registration-process-for-applicants-from-certain-non-u-s-jurisdictions> 289.

⁶² In 2009, the Board began publishing a list of registered firms whose first inspections were overdue, which identified the jurisdiction in which each firm was located. *See* PCAOB Rel. No. 2009-003, at 10-11. In 2010, the Board expanded the publication to include a list of non-U.S. public companies with securities traded in U.S. markets that had retained a registered firm the Board could not inspect because

non-U.S. jurisdictions in which the PCAOB has conducted inspections to 53.⁶³ Where needed, the Board enters into formal bilateral cooperative agreements with non-U.S. regulators, and has done so with authorities in 25 jurisdictions.⁶⁴ The Board continues to publish its Denied Access List, which identifies the jurisdictions where the PCAOB cannot conduct inspections because foreign authorities have denied access, the auditors from those jurisdictions that issued audit reports filed with the Commission, and those auditors' non-U.S. public company clients.⁶⁵ The Board also still adheres to the registration approach it adopted in 2010 and maintains a public list of the jurisdictions whose applicants are subject to that approach.⁶⁶

of asserted restrictions based on non-U.S. law or objections on grounds of national sovereignty (the "Denied Access List"). See *PCAOB Publishes List of Issuer Audit Clients of Non-U.S. Registered Firms in Jurisdictions where the PCAOB is Denied Access To Conduct Inspections* (May 18, 2010), available at <https://pcaobus.org/news-events/news-releases/news-release-detail/pcaob-publishes-list-of-issuer-audit-clients-of-non-u-s-registered-firms-in-jurisdictions-where-the-pcaob-is-denied-access-to-conduct-inspections> 284 ("The auditors of the issuers appearing on this list are located in [mainland] China, Hong Kong, Switzerland, and 18 European Union countries. The PCAOB continues to work to eliminate obstacles to inspections in these jurisdictions.").

Also, in October 2010, the Board modified its approach to registration applications from firms in jurisdictions where there were unresolved obstacles to inspections, stating that "its consideration of new applications from firms in those jurisdictions will no longer be premised on an expectation that those obstacles will be resolved without undue delay to any necessary PCAOB inspection of the firm." *Consideration of Registration Applications From Public Accounting Firms in Non-U.S. Jurisdictions Where There Are Unresolved Obstacles to PCAOB Inspections*, PCAOB Rel. No. 2010-007, at 2-3 (Oct. 7, 2010). A list of those jurisdictions is maintained on the PCAOB's website. See *Frequently Asked Questions Regarding Issues Relating to Non-U.S. Accounting Firms* (Apr. 20, 2021), available at https://pcaobus.org/oversight/registration/non_us_registration_faq (FAQ 6).

⁶³ See *Non-U.S. Jurisdictions Where the PCAOB has Conducted Oversight*, available at <https://pcaobus.org/oversight/international/international/pcaob-inspections-of-registered-non-u-s-firms> (adding Austria, Bahamas, Denmark, Finland, France, Germany, Hungary, Italy, Jamaica, Luxembourg, Malaysia, Netherlands, Nicaragua, Nigeria, Pakistan, Spain, Sweden, Switzerland, Thailand, and Turkey).

⁶⁴ See *PCAOB Cooperative Arrangements with Non-U.S. Regulators*, available at <https://pcaobus.org/oversight/international/regulatorycooperation>. Although a formal bilateral agreement is not necessarily a prerequisite to a PCAOB inspection in a non-U.S. jurisdiction, the PCAOB often enters into such agreements with foreign audit regulators to minimize administrative burdens and potential legal or other conflicts that non-U.S. firms might face in their home countries.

⁶⁵ See *Audit Reports Issued by PCAOB-Registered Firms in Jurisdictions where Authorities Deny Access to Conduct Inspections*, available at <https://pcaobus.org/oversight/international/denied-access-to-inspections> (identifying jurisdictions where the Board has been denied access to conduct inspections).

⁶⁶ See *Frequently Asked Questions Regarding Issues Relating to Non-U.S. Accounting Firms* (Apr. 20, 2021), available at https://pcaobus.org/oversight/registration/non_us_registration_faq (FAQ 6, identifying jurisdictions where obstacles to inspection exist). This list of jurisdictions is broader than the

All told, more than 840 non-U.S. firms from more than 80 jurisdictions are registered with the Board. Over 200 of those firms, from more than 40 jurisdictions, are presently subject to PCAOB inspection on a triennial basis because they have chosen to audit issuers.⁶⁷ As of the date of this release, as reflected on the Board's website,⁶⁸ the Board can conduct inspections everywhere it needs to do so except in mainland China and Hong Kong.

ii. Board Investigations of Non-U.S. Firms

The Board has conducted numerous investigations in which it appeared that an act, practice, or omission to act by a non-U.S. firm or its associated persons might have violated an applicable law, rule, or standard. In the course of those investigations, the Board has used a variety of tools, provided for in the Act and the Board's rules, to access relevant documents and information. Using those tools, the Board has requested and obtained audit work papers and other documents and information from non-U.S. firms and associated persons, and has conducted interviews and testimony of non-U.S. firm personnel.

In many of those instances, the Board coordinated its investigation with a non-U.S. regulator with which it had entered a bilateral cooperative arrangement. Those cooperative arrangements have allowed the Board and its international counterpart to communicate and share information, facilitating the Board's access to the documents and information it needed to conduct the investigation. In some but not all circumstances, in parallel with the Board's investigation, a non-U.S. regulator may conduct its own investigation of the same firm or associated persons for possible violations under the regulator's laws and standards.

Many of the Board's investigations of non-U.S. firms or their associated persons remain confidential, because Board investigations are non-public and cannot be disclosed unless they have resulted in the imposition of disciplinary sanctions.⁶⁹ The Board does, however, disclose its settled and adjudicated disciplinary orders imposing sanctions.⁷⁰ To date, the Board has

Denied Access List, because this list includes certain European jurisdictions where the Board presently does not need to conduct inspections because no registered firms in the jurisdiction are issuing audit reports, but where an agreement regarding inspections would need to be reached before any future inspections could take place.

⁶⁷ Currently, there are no non-U.S. firms that the PCAOB is required by the Act to inspect on an annual basis.

⁶⁸ See International, available at <https://pcaobus.org/oversight/international> (providing a map showing where the Board currently is able to conduct oversight of registered firms and where the Board currently is denied the necessary access to conduct oversight activities).

⁶⁹ See Section 105(b)(5)(A) of the Act.

⁷⁰ When the Board imposes sanctions, the Board's disciplinary action is stayed if the respondent applies for Commission review of the Board's order or if the Commission initiates such review on its

sanctioned more than 50 non-U.S. registered firms and more than 60 associated persons of such firms, from 24 non-U.S. jurisdictions.⁷¹ In addition to the investigations that resulted in the imposition of sanctions, the Board also has conducted investigations that did not result in sanctions in numerous other non-U.S. jurisdictions. Yet despite these results, the Board has been unable to complete some investigations of non-U.S. firms or their personnel because they refused to cooperate with an investigation based on a position taken by non-U.S. authorities in their jurisdiction.⁷²

D. The Holding Foreign Companies Accountable Act

Against this backdrop, Congress enacted the Holding Foreign Companies Accountable Act. The HFCAA, which amends Section 104 of the Act, calls for the Board to determine whether it is unable to inspect or investigate completely registered firms located in a foreign jurisdiction because of a position taken by an authority in that jurisdiction.⁷³ The HFCAA, among other things, also mandates that after the Board makes such a determination, the Commission shall require covered issuers that retain firms subject to the Board's determination to make certain disclosures in their annual reports and, eventually, if certain conditions persist, shall prohibit trading in those issuers' securities.⁷⁴

The Board's determinations under the HFCAA supplement, rather than supplant, the Board's other authorities under the Act. A registered firm's cooperation in and compliance with Board requests during inspections and investigations continues to be a condition to the continuing effectiveness of its registration with the Board. Failure to cooperate with a Board inspection or investigation still can result in the imposition of disciplinary sanctions, including civil money penalties and revocation of the firm's registration. Therefore, firms must consider their obligations to comply with PCAOB inspection and investigation demands when they

own. In either situation, the Board's sanctions remain stayed (and non-public) unless and until the Commission lifts the stay. *See* Section 105(e)(1) of the Act. After the stay is lifted, the Board's order may be made public. *See* Section 105(d)(1)(C) of the Act.

⁷¹ *See* Enforcement Actions, available at <https://pcaobus.org/oversight/enforcement/enforcement-actions>.

⁷² *See, e.g., Crowe Horwath (HK) CPA Limited*, PCAOB Rel. No. 105-2017-031 (July 25, 2017) (noncooperation with a Board investigation based on positions taken by Chinese authorities); *Kim Wilfred Ti*, PCAOB Rel. No. 105-2016-004 (Jan. 12, 2016) (same); *Derek Wan Tak Shing*, PCAOB Rel. No. 105-2016-003 (Jan. 12, 2016) (same); *Edith Lam Kar Bo*, PCAOB Rel. No. 105-2016-002 (Jan. 12, 2016) (same); *PKF [Hong Kong]*, PCAOB Rel. No. 105-2016-001 (Jan. 12, 2016) (same).

⁷³ *See* HFCAA § 2(i)(2)(A), 15 U.S.C. § 7214(i)(2)(A) (requiring that the Commission identify certain issuers that "retain[] a registered public accounting firm that has a branch or office that . . . is located in a foreign jurisdiction . . . and . . . the Board is unable to inspect or investigate completely because of a position taken by an authority in [that] foreign jurisdiction . . . , as determined by the Board").

⁷⁴ *See* HFCAA §§ 2(i)(2)(B), 2(i)(3), 3(b), 15 U.S.C. §§ 7214(i)(2)(B), 7214(i)(3), 7214a(b).

choose to become and remain registered with the Board and when they accept or continue client engagements.

IV. DISCUSSION OF THE RULE

The HFCAA does not specify the procedure the Board should follow when making determinations. Nor does the HFCAA specify the content of the Board's determinations; the manner in which any such determination should be shared with the Commission; how, and in what format, any such determination should be made publicly available; the effective date or duration of any such determination; or the manner in which any such determination can be reaffirmed, modified, or vacated. The rule establishes those facets of the Board's determination process.

Although the HFCAA does not expressly require the Board to adopt a rule governing the determinations it makes under the statute, the Board believes that a rule will inform investors, registered firms, issuers, audit committees, foreign authorities, and the public at large as to how the Board will perform its functions under the statute. Furthermore, a Board rule will promote consistency in the Board's processes regarding determinations under the HFCAA.⁷⁵ Commenters generally agreed that a rule governing the Board's determination process would promote transparency and consistency and reduce regulatory uncertainty.

A. Two Types of Board Determinations Under the HFCAA

The HFCAA requires that the Board determine whether it is unable to inspect or investigate completely registered public accounting firms that have a branch or office that is located in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction. The rule provides that the Board may make two types of determinations: determinations as to a particular foreign jurisdiction and determinations as to a particular registered firm. Those two types of determinations are addressed in subparagraphs (a)(1) and (a)(2) of Rule 6100.

1. Determinations as to Registered Firms Headquartered in a Particular Foreign Jurisdiction

The Board believes that firms headquartered in a foreign jurisdiction necessarily have a branch or office that is located in that jurisdiction. Taking that into account, subparagraph (a)(1) of the rule provides that the Board may determine that it is unable to inspect or investigate

⁷⁵ The Act states that "[t]he rules of the Board shall, subject to the approval of the Commission[,] . . . provide for the operation and administration of the Board, the exercise of its authority, and the performance of its responsibilities under this Act." Section 101(g)(1) of the Act.

completely registered firms⁷⁶ headquartered in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction. In other words, a jurisdiction-wide determination under subparagraph (a)(1) would apply to all firms *headquartered* in that jurisdiction.

The Board is adopting subparagraph (a)(1) as proposed. Commenters generally supported the Board's proposed approach to jurisdiction-wide determinations. Several commenters noted that jurisdiction-wide determinations would be consistent with the HFCAA or otherwise appropriate, and several other commenters stated that having such determinations apply to firms that are headquartered in the jurisdiction would likewise be appropriate. No commenter asserted that jurisdiction-wide determinations would be inconsistent with the HFCAA or otherwise inappropriate.

The Board believes that a jurisdiction-wide approach to its determinations under the HFCAA is consistent with the structure of the statute. The statute requires the Board's determinations to be based on "a position taken by an authority in the foreign jurisdiction." It follows that if a foreign authority articulates or maintains a position that applies generally to PCAOB inspections or investigations in a foreign jurisdiction, that position could provide the basis for a jurisdiction-wide determination. Hence, the statute, in the Board's view, can reasonably be interpreted to allow the Board to make jurisdiction-wide determinations.⁷⁷

Having a jurisdiction-wide approach at the Board's disposal is important for consistency and efficiency. When the obstacles to completing inspections and investigations are not specific to individual registered firms, but instead reflect threshold or general positions taken by a foreign authority, the Board believes that it should be able to address those obstacles on a jurisdiction-wide basis in a consistent manner and in a single determination. Under those circumstances, separate determinations as to each registered firm in the jurisdiction should not be required.

The rule provides that jurisdiction-wide determinations would be limited to registered firms that are "headquartered" in the jurisdiction. The Board believes that a position taken by a foreign authority will impact registered firms headquartered in the jurisdiction, but its impact on firms that are headquartered elsewhere can turn on multiple factors, including the extent of

⁷⁶ The HFCAA refers to a firm's "branch or office" that the Board is unable to inspect or investigate completely. HFCAA § 2(i)(2)(A)(i), 15 U.S.C. § 7214(i)(2)(A)(i). The Board does not inspect or investigate branches or offices. Rather, the Board inspects registered firms and investigates potential violations by registered firms or their associated persons. Accordingly, the rule refers to the Board's inability to inspect or investigate registered firms.

⁷⁷ See, e.g., 166 Cong. Rec. H6033 (daily ed. Dec. 2, 2020) (statement of Rep. Gonzalez) ("[T]he act should be read to apply to companies where the auditor that signs the audit report is located in a jurisdiction that does not permit PCAOB inspection access.").

a firm's presence in the jurisdiction and the nature and extent of the audit work it performs in that jurisdiction. Limiting jurisdiction-wide determinations to firms that are headquartered in the jurisdiction is intended to ensure that these determinations are appropriately tailored and do not encompass firms that have a physical presence of any kind, or personnel of any number, in the jurisdiction. Consistent with the scope of the HFCAA, however, the rule provides that the Board may make individualized determinations as to firms that have an "office" in a noncooperative jurisdiction but are headquartered elsewhere, as discussed in Section IV.A.2 below.

A firm is "headquartered," as that term is used in the rule, at its principal place of business (i.e., where the firm's management directs, controls, and coordinates the firm's activities).⁷⁸ The Board would presume that a firm is headquartered at the physical address reported by the firm as its headquarters to the Board in the firm's required filings.⁷⁹ Absent an indication that the headquarters address reported by a firm may not be its principal place of business, the Board would use that address to determine where the firm is "headquartered" for purposes of the rule. If questions arise as to whether a firm's reported headquarters address is the firm's principal place of business, however, the Board may consider other relevant and reliable information regarding the firm and may request additional information from the firm pursuant to the Board's rules when determining where a firm is headquartered.⁸⁰

Several commenters stated that it was appropriate for the Board to look at a firm's required filings with the Board in the first instance for information as to where the firm is headquartered. One commenter suggested that the Board look beyond such filings and also consider a firm's filings with its home-country regulator as well as other facts and

⁷⁸ See, e.g., *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010) (defining "principal place of business" in the context of federal diversity jurisdiction, and further explaining that "in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, i.e., the 'nerve center,' and not simply an office where the corporation holds its board meetings").

⁷⁹ When registering with the Board, an applicant must provide its "HEADQUARTERS PHYSICAL ADDRESS" in Item 1.2.1 of its application for registration on Form 1. Each year thereafter, in Item 1.2.a of its annual report on Form 2, a firm must provide the "Physical address of the Firm's headquarters office."

⁸⁰ See PCAOB Rule 4000(b) ("In furtherance of the Board's inspection process, the Board may at any time request that a registered public accounting firm provide to the Board additional information or documents relating to information provided by the firm in any report filed pursuant to Section 2 of these Rules, or relating to information that has otherwise come to the Board's attention."). This approach aligns with the Board's decade-long practice when assessing registration applications from firms located in non-U.S. jurisdictions where there are obstacles to PCAOB inspections. This approach has been applied to applicants that are headquartered in such jurisdictions, and the Board has sought additional information from applicants when necessary to assess where they are headquartered.

circumstances regarding the firm. As noted in the preceding paragraph, the Board retains the ability to request and consider additional information—including the information identified by the commenter—if any questions arise regarding the location of a firm’s headquarters. Another commenter, contemplating that the Board might look to filings of Form AP for information as to where a firm is headquartered, cautioned that such forms may not be timely filed.⁸¹ The Board intends to rely on annual reports on Form 2 rather than Form APs for such information, though the Board is not precluded from considering information on Form APs or any other relevant and reliable information.⁸²

In some instances, a member firm of an international firm network might be headquartered in a jurisdiction that becomes subject to a jurisdiction-wide determination of the Board. In such a circumstance, if that member firm is a separate legal entity from the other member firms in the network and signs audit reports in its own name, the Board would not treat other member firms in the network as being “located” or having an “office” in that jurisdiction merely because they are part of the same network as a member firm subject to the jurisdiction-wide determination.⁸³ One commenter addressed this topic and agreed with this approach.

Based on its experience with inspections and investigations in foreign jurisdictions, the Board anticipates that most determinations made under Rule 6100 would be jurisdiction-wide determinations under subparagraph (a)(1). Historically, the positions taken by foreign authorities have impaired the Board’s ability to conduct inspections or investigations in the jurisdiction generally.

Some of the positions taken by foreign authorities have been based upon “gatekeeper” laws, which provide that a registered firm can transfer its audit work papers to the Board only via a local non-U.S. regulator. (By contrast, no audit oversight law in the U.S. requires foreign auditor oversight authorities to involve the PCAOB when seeking audit work papers from a U.S. firm.) As noted above, the Board has considerable experience resolving conflicts that arise from gatekeeper laws using bilateral arrangements, or statements of protocol, whereby the non-U.S. regulator facilitates the PCAOB’s access to audit work papers and associated information that registered firms are obligated to provide to the Board upon request. The Board’s ability to conduct inspections or investigations could become impaired in any of these jurisdictions,

⁸¹ Item 3.1.7 of Form AP identifies the office (not the headquarters) of the firm that issued the audit report for the referenced audit engagement, but Item 4.1 of Form AP identifies the headquarters’ office location of the other accounting firms that contributed 5% or more of the total audit hours.

⁸² In any event, PCAOB Rule 3211, *Auditor Reporting of Certain Audit Participants*, already requires timely filing of accurate Form APs, and the failure to comply with that rule can provide the basis for inspection findings or disciplinary sanctions.

⁸³ See SEC Exchange Act Release No. 91364, at 4 n.8.

however, if such an arrangement were terminated; if non-performance under an arrangement were significant; or if, in the case of countries within the European Economic Area, an arrangement were rendered ineffective because the European Commission revoked or failed to renew its “adequacy decision” regarding the PCAOB.⁸⁴ The resulting impairment would have jurisdiction-wide impact, and thus could give rise to a jurisdiction-wide determination under subparagraph (a)(1) of the rule. The Board believes that a jurisdiction-wide determination would be an efficient, appropriate response to such an impairment.

Apart from gatekeeper laws, foreign authorities’ positions also may be based on other substantive laws (e.g., personal data protection laws, state secrecy laws, banking secrecy laws, or commercial secrecy laws) that impair the Board’s ability to conduct inspections or investigations by obstructing the Board’s access to firm personnel, audit work papers, or other documents or information relevant to an inspection or investigation. The Board also has considerable experience working collaboratively with non-U.S. regulators to employ working practices that enable compliance with such non-U.S. laws without impairing the Board’s ability to complete inspections or investigations. The rule contemplates circumstances in which a cooperative resolution to those legal conflicts might not be achieved.

In those circumstances, the Board believes that investors and the public interest would be best served by making a jurisdiction-wide determination under the HFCAA, even if the foreign jurisdiction’s law (or interpretation or application of that law) affects the Board’s ability to inspect or investigate only certain types of audit engagements. For instance, a foreign jurisdiction might deny to the PCAOB access to critical parts of the audit work papers for entities operating in a particular business sector (e.g., financial services) or with particular business models (e.g., state-owned enterprises). In such a case, even if only a few registered firms in that jurisdiction presently are auditing issuers in that sector or with that business model, the Board would assess whether its access would be equally impaired should any registered firm in the jurisdiction perform the restricted engagements. If the foreign authority’s position applies generally to firms within the jurisdiction, then it impairs the Board’s ability to conduct inspections or investigations completely on a jurisdiction-wide basis, regardless of the differences among registered firms’ client portfolios at the time of the Board’s determination. No commenter challenged this reasoning, nor did any commenter suggest that investors or the public interest would be better served if the Board were to make determinations as to particular firms, rather than jurisdiction-wide determinations, in such circumstances.

⁸⁴ Article 47 of the Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts requires that the European Commission issue an adequacy decision regarding a third country audit regulator (such as the PCAOB) and that regulator’s ability to safeguard audit work papers and related confidential information before a European Union member state audit regulator can execute a working arrangement allowing firms to provide access to such information. See Directive 2014/56/EU, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0056>. The European Commission’s July 2016 adequacy decision with respect to the PCAOB is set to expire in July 2022.

In the situation described above, the Board does not believe that firm-by-firm determinations would be appropriate. While the Board could make a determination as to particular firms under subparagraph (a)(2) of the rule based, for instance, on the composition of each firm's client portfolio at a moment in time, the Board believes that such an approach may not effectively accomplish the HFCAA's objectives. For instance, it might incentivize an issuer whose audit engagement cannot be inspected or investigated by the Board (a financial institution or state-owned enterprise in the example) to switch audit firms frequently. Specifically, if the issuer's audit firm were made subject to a Board determination under the HFCAA, the issuer could switch to another audit firm in the jurisdiction that had not previously handled a restricted engagement and, when the Board subsequently issued a determination under the HFCAA as to the issuer's new audit firm, the issuer could switch yet again. Such purposeful migration by issuers could trigger a perpetual cycle of Board determinations as to particular audit firms, while the issuers potentially evade some or all of the intended consequences of the HFCAA. A jurisdiction-wide determination, by contrast, would eliminate these concerns. No commenter disagreed with this analysis or the Board's rationale.

The jurisdiction-wide determinations contemplated by subparagraph (a)(1) of the rule also comport with the historical practice of identifying publicly the jurisdictions where there are unresolved obstacles to Board inspections or investigations. Since 2010, information of this kind has been posted on the PCAOB's website, for two purposes: to notify investors and potential investors of the public companies whose audit reports were issued by firms from those jurisdictions, and to notify firms considering potential registration with the Board of the consequences of obstacles to inspections in their jurisdictions.⁸⁵

Jurisdiction-wide determinations would rest, as the HFCAA directs, on whether the Board is able "to inspect or investigate completely" firms in the jurisdiction. The HFCAA, however, does not define what it means "to inspect or investigate completely." The Board does not view that phrase as limited to instances where the Board started, but was unable to finish, an inspection or investigation of a registered firm, because foreign authorities' positions also can make it impossible or infeasible, as a practical matter, for the Board to attempt to commence such inspections or investigations in the first place. In other words, the Board may make a determination under the HFCAA under a range of circumstances, including when it is not able to commence an inspection or investigation or when, based on the Board's knowledge and experience, it has concluded that commencing an inspection or investigation would be futile as a result of the position taken by a foreign authority.

⁸⁵ See Audit Reports Issued by PCAOB-Registered Firms in Jurisdictions where Authorities Deny Access to Conduct Inspections, available at <https://pcaobus.org/oversight/international/denied-access-to-inspections>; Frequently Asked Questions Regarding Issues Relating to Non-U.S. Accounting Firms (Apr. 20, 2021), available at https://pcaobus.org/oversight/registration/non_us_registration_faq (FAQ 6); see also International, available at <https://pcaobus.org/oversight/international/> (providing map showing where the Board currently can and cannot conduct oversight activities).

With that in mind, the rule ties the Board’s ability to “inspect or investigate completely” to the three core principles that guide the Board’s framework for international cooperation. Specifically, the Board will consider whether it (1) can select the audits and audit areas it will review during inspections and the potential violations it will investigate; (2) has timely access to firm personnel, audit work papers, and other documents and information relevant to its inspections and investigations, and the ability to retain and use such documents and information; and (3) can otherwise conduct its inspections and investigations in a manner consistent with the Act and the Board’s rules. For a further discussion of how these three principles would inform the Board’s assessment of whether it can “inspect or investigate completely,” see Section IV.B below.

The Board’s jurisdiction-wide determinations under the rule would be based on “a position taken by one or more authorities” in the foreign jurisdiction. While the rule refers to a singular “position,” that term encompasses all of the various positions taken by authorities in the jurisdiction that, when aggregated together, collectively constitute the position of authorities in the jurisdiction. In a similar vein, the rule’s reference to “one or more authorities” acknowledges that, in some jurisdictions, multiple authorities can take positions that impair the Board’s ability to conduct inspections or investigations. Those “authorities” are not limited to a “foreign auditor oversight authority,” as that phrase is defined in the Act,⁸⁶ but rather include any authority whose position can obstruct the Board’s oversight. Such authorities may include, for example, securities regulators, industry regulators, data protection authorities, national security bodies, foreign ministries, or authorities of political subdivisions (e.g., a provincial authority).

2. Determinations as to a Particular Registered Firm With an Office in a Foreign Jurisdiction

Although the Board anticipates that most determinations under the rule would be jurisdiction-wide determinations, the Board cannot anticipate every scenario that it might encounter when conducting oversight of firms in foreign jurisdictions. In light of that practical limitation, subparagraph (a)(2) of the rule provides that the Board may determine that it is unable to inspect or investigate completely a particular registered firm that has an office⁸⁷ located in a foreign jurisdiction because of a position taken by one or more authorities in that

⁸⁶ See Section 2(a)(17) of the Act.

⁸⁷ The HFCAA authorizes the Board to make determinations as to firms having a “branch” or “office” in a foreign jurisdiction where the Board is unable to inspect or investigate completely because of a position taken by an authority in that jurisdiction. HFCAA § 2(i)(2)(A), 15 U.S.C. § 7214(i)(2)(A). Unlike in other contexts (such as banking), however, there is no commonly recognized distinction between a “branch” and an “office” with respect to accounting firms. Accordingly, the rule refers only to an “office,” which is a term commonly used by the Board in connection with its oversight programs. A majority of the commenters who addressed this rationale agreed with it.

jurisdiction. This provision would complement the Board's ability to make jurisdiction-wide determinations in two important respects.

First, if a foreign authority obstructs a Board inspection or investigation of a particular firm headquartered in the jurisdiction—but does not obstruct inspections or investigations in a more general manner that might apply to all firms in the jurisdiction—subparagraph (a)(2) provides the Board with an avenue for making a more tailored determination under the HFCAA when a jurisdiction-wide determination might be inappropriately broad.

Second, subparagraph (a)(2) allows the Board to make determinations under the HFCAA as to firms that are not headquartered in the foreign authority's jurisdiction but have an office located there. In this respect, a determination under subparagraph (a)(2) can supplement a jurisdiction-wide determination under subparagraph (a)(1) that applies to firms headquartered in the jurisdiction. Furthermore, the reach of subparagraph (a)(2) ensures that the Board's determinations under the rule can match the scope of its mandate under the HFCAA.

The Board's approach to determining where a firm's offices are located is similar to the Board's approach to determining where a firm is headquartered. The Board will look principally to the firm's filings with the Board,⁸⁸ but if there is any uncertainty as to whether a firm has an office in a jurisdiction, the Board may consider other information regarding the firm and may request additional information from the firm pursuant to Rule 4000(b).

Apart from those two distinguishing features (namely, that determinations are directed to a particular firm and can reach firms that have an office in the foreign jurisdiction but are not headquartered there), subparagraph (a)(2) mirrors the operation of subparagraph (a)(1). The Board's inability "to inspect or investigate completely" is tied to the three principles that guide the Board's approach to international cooperation, as noted above and discussed further below. The phrase "position taken by one or more authorities" has the same meaning as in subparagraph (a)(1). Finally, if a member firm of an international firm network becomes subject to a Board determination under subparagraph (a)(2), and is a separate legal entity from the other member firms in the network and signs audit reports in its own name, the Board would not treat it as an "office" of other member firms within the network, and accordingly the other member firms would not be subject to that Board determination under subparagraph (a)(2).

⁸⁸ Firms are required to identify all of their offices when they first register with the Board (in Item 1.5 of the application for registration on Form 1) and annually thereafter (in Item 5.1 of the annual report on Form 2).

The Board is adopting subparagraph (a)(2) as proposed, except for one addition to the subparagraph's title.⁸⁹ Commenters generally supported the Board's proposed approach to determinations as to a particular registered firm and stated that the distinction between those determinations and the jurisdiction-wide determinations contemplated in subparagraph (a)(1) is clear. Several commenters also stated that it is appropriate for the Board to look at a firm's required filings with the Board in the first instance for information as to where the firm's offices are located, though two commenters suggested that the Board look beyond such filings to ascertain or validate the location of a firm's offices. As previously noted, the Board retains the ability to consider other relevant and reliable information, including the information identified by the commenters, when determining where a firm's offices are located.

One commenter requested guidance about the application of the rule when a firm that is headquartered in a cooperative jurisdiction uses local personnel in a noncooperative jurisdiction to perform an audit for an issuer located in the noncooperative jurisdiction. In such a circumstance, the firm could not be subject to a jurisdiction-wide determination under subparagraph (a)(1) because it is not headquartered in a noncooperative jurisdiction, but it could be subject to a determination under subparagraph (a)(2) if it has an office in the noncooperative jurisdiction.

3. Timing of Board Determinations

Subparagraph (a)(3) of the rule addresses the timing of the Board's determinations under the HFCAA. Promptly after the Board's rule becomes effective upon the Commission's approval, the Board will make any determinations under subparagraph (a)(1) or (a)(2) that are appropriate. Thereafter, the Board will consider, at least annually, whether changes in facts and circumstances support any additional determinations under subparagraph (a)(1) or (a)(2). If so, the Board will make such additional determinations, as and when appropriate, to allow the Commission on a timely basis to identify covered issuers in accordance with the Commission's rules.

The Board is well positioned to assess the facts and circumstances surrounding its inspections and investigations and gauge whether and when a determination is appropriate under the rule. The relevant circumstances in a jurisdiction can change quickly and unpredictably because foreign authorities can enact or amend laws, issue or modify rules or regulations, change their interpretation or application of those laws and rules, and otherwise take new positions with limited or no notice. The rule allows the Board to make new determinations whenever appropriate, while acknowledging that the Board's timing will be

⁸⁹ The phrase "Particular Registered Firm in a Foreign Jurisdiction" has been revised to "Particular Registered Firm With an Office in a Foreign Jurisdiction" to mirror more closely the text of subparagraph (a)(2), create a parallel structure between the titles of subparagraphs (a)(1) and (a)(2), and provide a clearer contrast between the scope of those two subparagraphs.

informed by the Commission's process for timely identifying covered issuers and also establishing that the Board will consider whether new determinations are warranted at least once each year.

When considering whether changed facts or circumstances provide a sufficient basis for a new Board determination, the Board may confront a number of different scenarios. It is not possible to identify with specificity all the developments that might lead to a new determination, but they could include the enactment of a new law or regulation, a change in the interpretation or the application of an existing law or regulation, the termination of or failure to perform under an existing cooperative arrangement, and the failure to take or renew an administrative action necessary to facilitate the Board's oversight. The Board's experience in a particular inspection or investigation also could supply the grounds for a new Board determination in accordance with the rule.

The Board is adopting subparagraph (a)(3) substantially as proposed.⁹⁰ The majority of commenters who addressed this issue expressed support for the Board's approach to the timing of determinations.

One commenter emphasized that the Board's approach should be sufficiently flexible so that Board determinations do not conflict with the language and intent of the HFCAA. The Board believes that subparagraph (a)(3) provides such flexibility, insofar as it provides that the Board will make any appropriate determinations promptly after the rule becomes effective and thereafter will make additional determinations as and when appropriate to allow the Commission to identify covered issuers on a timely basis.

Another commenter suggested that the Board require firms to file special reports on Form 3 to apprise the Board of headquarters or office location changes. Such changes already are reported to the Board annually on Form 2. The Board does not believe that a new Form 3 reporting obligation should be imposed. If a firm opts to expose its issuer clients to the potential consequences of the HFCAA by moving the firm's headquarters to a jurisdiction that is subject to a jurisdiction-wide determination, such a change could be captured through the Board's current reporting procedures.⁹¹ Moreover, if a firm that is headquartered outside a

⁹⁰ For clarity, in the second sentence of the subparagraph, "changes in the facts and circumstances" has been changed to "changes in facts and circumstances."

⁹¹ For instance, whenever the business mailing address of a firm's primary contact with the Board changes, the firm must file a special report on Form 3 that supplies the new address in Item 7.2. See PCAOB Rule 2203, *Special Reports*. Additionally, if a firm obtains a new license or certification to engage in the business of auditing or accounting from a governmental or regulatory authority, the firm must file a special report on Form 3 that identifies, in Item 6.2, the name of the state, agency, board, or other authority that issued the new license or certification. See *id.* And if a firm changes the jurisdiction under the law of which it is organized, the firm may file a Form 4 to succeed to the registration status of its

noncooperative jurisdiction opens an office in a noncooperative jurisdiction, the Board would not anticipate making a determination as to that particular firm under subparagraph (a)(2) without evidence that the Board's ability to inspect and investigate the firm completely has become restricted as a result of the opening of the new office. Lastly, if a firm that is subject to a Board determination moves its headquarters out of or closes all of its offices in a noncooperative jurisdiction, the firm is required to notify the Board within five days of that development pursuant to subparagraph (e)(4) of the rule, discussed in Section IV.D.4 below.

B. Factors for Board Determinations

Paragraph (b) provides factors for Board determinations under the rule. When determining whether it can "inspect or investigate completely" under subparagraph (a)(1) as to a particular jurisdiction or subparagraph (a)(2) as to a particular firm, the Board will assess whether "the position taken by the authority (or authorities)" in the jurisdiction "impairs the Board's ability to execute its statutory mandate with respect to inspections or investigations," as detailed in Section III.A above.

To make this assessment, the Board will evaluate three factors, which correlate to the three principles that guide the Board's approach to international cooperation. These factors embody the access the Board needs, and already experiences nearly worldwide, to fulfill its inspection and investigation mandates. Conceding on these factors in particular jurisdictions would dilute the Board's oversight in a selective, unequal manner and would be detrimental to the PCAOB's mission. In other words, this framework promotes a level playing field for U.S. and non-U.S. registered firms, in accordance with the Act's directive that non-U.S. registered firms are subject to the Act and the Board's rules in the same manner and to the same extent as U.S. registered firms.

No commenter suggested other benchmarks or factors that the Board should employ when making determinations, and one commenter stated that the factors set forth in paragraph (b) are appropriate and clear. The Board is adopting paragraph (b) as proposed, except for one addition to subparagraph (b)(2)'s second factor, as discussed below.

The first factor is "the Board's ability to select engagements, audit areas, and potential violations to be reviewed or investigated." The ability to make such selections is critical to the Board's oversight activities and is embedded in its statutory mandate.⁹² This factor would encompass situations in which a foreign authority takes the position that certain engagements, or certain parts of engagements, cannot be reviewed during an inspection, or that the Board cannot decide when (i.e., in which inspection year) certain engagements will be reviewed. It

predecessor. See PCAOB Rule 2109, *Procedure for Succeeding to the Registration Status of a Predecessor*.

⁹² See, e.g., Sections 104(d) and 105(b)(1) of the Act.

also would encompass situations in which a foreign authority takes the position that the Board cannot decide what potential violations it will investigate. No commenter expressed the view that this factor is unclear or inappropriate or sought further guidance about it.

The second factor is “the Board’s timely access, 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 Board considers relevant to an inspection or investigation.” The Board’s access to firm personnel, documents, and information is pivotal to its inspections and investigations, and is built into its mandate to oversee the audits of issuers that avail themselves of the U.S. capital markets.⁹³

One commenter suggested that the Board add “timely” to this factor so that it refers to “timely access,” and, after consideration, the Board has made that revision. The Board agrees with the commenter that the Board cannot inspect or investigate completely if its access to documents or information is not timely. Unreasonable delays in obtaining documents or information hinder the Board’s ability to execute its statutory mandate⁹⁴ and therefore its ability to protect the interests of investors and further the public interest. No other commenter made any suggestions regarding this factor, and no commenter asserted that this factor is unclear or inappropriate or sought further guidance about it.

The third factor is “the Board’s ability to conduct inspections and investigations in a manner consistent with the provisions of the Act and the Rules of the Board, as interpreted and applied by the Board.” This provision captures all of the other aspects of the Board’s inspection and investigation mandates not already subsumed in the first and second factors. That includes the Board’s ability to satisfy inspection frequency requirements,⁹⁵ to identify potentially violative acts during inspections,⁹⁶ to impose sanctions for noncooperation with an investigation,⁹⁷ and to share information with the Commission and other regulators.⁹⁸ No commenter indicated that this factor is unclear or inappropriate or sought further guidance about it.

⁹³ See, e.g., Sections 104(d) and 105(b)(2) of the Act.

⁹⁴ See, e.g., Section 104(b) of the Act (specifying inspection frequency requirements); Section 105(b)(2)(B) of the Act (authorizing the Board to require production of audit work papers and other documents or information); PCAOB Rule 5103(b) (providing that requests for documents or information shall set forth “a reasonable time . . . for production”).

⁹⁵ See Section 104(b) of the Act.

⁹⁶ See Section 104(c)(1) of the Act.

⁹⁷ See Section 105(b)(3)(A) of the Act.

⁹⁸ See Sections 104(c)(2) and 105(b)(4)-(5) of the Act.

Importantly, these three factors do not function as separate prerequisites for a Board determination. Instead, impairment in any one respect may be sufficient under the circumstances to support a Board determination. To underscore the disjunctive nature of this three-factor analysis, the rule provides that the Board will assess whether its ability to execute its mandate has been impaired in “one or more” of these three respects. No commenter objected to, or expressed concerns about, this approach.

Additionally, to make a determination under the rule, the Board does not need to conclude that it has been impaired as to both its inspections and its investigations. The HFCAA authorizes the Board to make a determination if the Board is unable to inspect “or” investigate completely, and the rule uses “or” in similar fashion: It is enough that the Board is impaired in its ability to execute its mandate with respect to either inspections or investigations. This approach is consistent with the HFCAA, and no commenter suggested otherwise.

C. Basis for Board Determinations

Paragraph (c) of the rule addresses the basis for a Board determination. This provision establishes, first and foremost, that when assessing whether its ability to execute its mandate has been impaired, the Board may consider “any documents or information it deems relevant.” From there, the rule specifies, for the avoidance of doubt, three non-exclusive categories of documents and information that the Board can rely upon when making a determination. No commenter objected to this approach or expressed concern about the three non-exclusive categories identified in the rule, and one commenter stated that paragraph (c) provides adequate and substantive guidance. The Board is adopting paragraph (c) as proposed.

Subparagraph (c)(1) states that the Board may consider a foreign jurisdiction’s laws, statutes, regulations, rules, and other legal authorities; in other words, the black-letter law of the foreign jurisdiction (and any political subdivisions thereof) in all of its varying forms. The Board also may consider relevant interpretations of those laws, whether by the promulgating authority or others, as well as real-world applications of those laws.

Subparagraph (c)(2) provides that the Board may consider the entirety of its efforts to reach and secure compliance with agreements with foreign authorities in the jurisdiction. In so doing, the Board can take into account whether an agreement was reached, the terms of any such agreement, and the foreign authorities’ interpretation of and performance under any such agreement.

Subparagraph (c)(3) recognizes that the Board may consider its experience with foreign authorities’ other conduct and positions relative to Board inspections or investigations. This allows the Board to consider the totality of a foreign authority’s prior conduct and positions in all contexts, including public and private statements made, positions asserted, and actions taken. This provision also may encompass circumstances where a foreign authority

precipitously changes its position regarding PCAOB access without making any change to its laws or demanding any form of cooperative agreement.

Together, these provisions establish that the Board can consider any relevant information (including, but not limited to, the three categories of information discussed above) when making a determination. As a corollary, paragraph (d) of the rule establishes that the Board's determination need not depend on the Board's "commencement of, but inability to complete, an inspection or investigation." The Board should not be expected to attempt to initiate inspections or investigations in a foreign jurisdiction that rejects the guiding principles for international cooperation, because such futile efforts would not advance the Board's mission of protecting investors and furthering the public interest in the preparation of informative, accurate, and independent audit reports. No commenter challenged the Board's reasoning or expressed the view that the Board must initiate an inspection or investigation as a prerequisite to making a determination under the HFCAA. Nor did any commenter indicate that the approach described in paragraph (d) is inappropriate. The Board is adopting paragraph (d) as proposed.

D. Form and Publication of Board Determinations

1. Board Reports to the Commission

The HFCAA does not specify how the Board should communicate its determinations to the Commission. Subparagraph (e)(1) of the rule establishes that process.

When the Board makes a determination, whether as to a particular jurisdiction under subparagraph (a)(1) or a particular firm under subparagraph (a)(2), the Board's determination will be issued in the form of a report to the Commission.⁹⁹ Such a reporting process is authorized under Sections 101(c)(5), 101(g)(1), and 101(f)(6) of the Act.¹⁰⁰

The Board's report will describe its assessment of whether the position taken by the foreign authority (or authorities) impairs the Board's ability to execute its mandate with respect to inspections or investigations. The report will analyze the relevant factor(s) set forth in paragraph (b) and describe the basis for the Board's conclusions. The Board will identify the

⁹⁹ The Board will decide whether to conduct a public or non-public meeting to consider a potential determination under the HFCAA in accordance with the PCAOB bylaws. See Bylaw 5.1, *Governing Board Meetings*.

¹⁰⁰ See Section 101(c)(5) of the Act (the Board shall "perform such other duties or functions as the Board . . . determines are necessary or appropriate . . . to carry out this Act"); Section 101(g)(1) of the Act (the Board's rules "shall . . . provide for . . . the performance of its responsibilities under this Act"); Section 101(f)(6) of the Act (the Board is authorized to "do any and all . . . acts and things necessary, appropriate, or incidental to . . . the exercise of its obligations . . . imposed" by the Act).

firm(s) subject to the Board's determination in two ways: by the name under which the firm is registered with the Board, and by the firm's identification number with the Board. No commenter identified any additional information that should be included in the Board's reports to the Commission.

The Board is adopting subparagraph (e)(1) as proposed but with one modification: The Board will identify the firm(s) to which a determination applies in an appendix to the Board's report. Identifying such firms in a separate appendix will facilitate the Board's efforts to keep the list of firms subject to the determination current, as discussed below.

2. Publication of Board Reports

Promptly after the Board issues a report to the Commission, a copy of the report will be made publicly available on the PCAOB's website. The Board expects that a copy of the report ordinarily will be prominently featured on the Board's website on or about the same day the Board issues its report to the Commission.

Subparagraph (e)(2) of the rule specifies, however, that the content of the Board's publicly available report will be subject to two limitations. First, the Board will be bound by Section 105 of the Act, which provides, in pertinent part, that "all documents and information prepared or received by or specifically for the Board . . . in connection with an inspection . . . or with an investigation . . . shall be confidential . . . , unless and until presented in connection with a public proceeding or released" in accordance with Section 105(c) of the Act.¹⁰¹ If the Board's report contains material encompassed by Section 105(b)(5)(A) of the Act, such material will be redacted from the publicly available version of the report posted on the PCAOB's website, in accordance with the Act.

Second, while the Board does not anticipate that such situations will frequently arise, the version of the Board's report posted on the PCAOB's website will be redacted if it contains proprietary, personal, or other information protected by applicable confidentiality laws. In this respect, the rule aligns with the Act's treatment of registration applications and annual reports filed with the Board, which the Board may make publicly available subject to "applicable laws relating to the confidentiality of proprietary, personal, or other information."¹⁰²

Commenters generally supported redacting from the Board's publicly available reports any information that is subject to applicable confidentiality laws. One commenter suggested that redaction should not be limited to information covered by applicable confidentiality laws, but rather should be based on broader concepts of confidentiality. That commenter offered one example of such a concept, but that example—accountants' professional responsibilities of

¹⁰¹ Section 105(b)(5)(A) of the Act.

¹⁰² Section 102(e) of the Act.

confidentiality—does not apply to the Board’s performance of its oversight functions. Another commenter similarly suggested that redaction should extend to all confidential information whether explicitly covered by confidentiality laws or not, but that commenter did not suggest how to define this broader concept of confidential information or what categories of information it would encompass. Neither of these commenters identified any specific type of relevant information that is not subject to a confidentiality law but is nevertheless worthy of protection under a broader view of confidential information.

Besides one minor revision unrelated to redaction,¹⁰³ the Board is adopting subparagraph (e)(2) as proposed. The Board believes that it is appropriate to limit redaction to confidential information protected by law. That approach comports with the Board’s congressionally mandated treatment of registration applications and annual reports, which the Board also has extended to other reports filed with the Board. This approach also is more readily administrable than one that relies instead on broader, undefined concepts of confidentiality.

3. Transmittal of Board Reports to Subject Firms

The Board has revised the rule to add a new provision regarding the transmittal of reports to firms that are subject to a determination. While some commenters stated that posting Board reports on the Board’s website would give sufficient notice of Board determinations to such firms, other commenters disagreed, and the Board has concluded that it would be prudent to transmit reports to those firms.

Subparagraph (e)(3) provides that promptly after the Board issues a report to the Commission under subparagraph (e)(1), a copy of the report will be sent by electronic mail to each registered public accounting firm that is listed in the appendix to that report (i.e., each firm as to which the determination applies). The Board expects that the report will be transmitted to the subject firm(s) by electronic mail after it has been posted on the Board’s website, though both actions will take place promptly after the issuance of the report. Such reports will be redacted to the extent required by confidentiality laws, and the electronic mail will be directed to the electronic mail address of the firm’s primary contact with the Board.¹⁰⁴

¹⁰³ For simplicity, the phrase “Board report containing a determination pursuant to subparagraph (a)(1) or (a)(2)” has been changed to “Board report pursuant to subparagraph (e)(1).”

¹⁰⁴ When applying to register with the Board, firms provide an electronic mail address for their primary contact with the Board in Item 1.3.7 of Form 1. Thereafter, firms confirm the electronic mail address for their primary contact with the Board annually in Item 1.3 of Form 2. If that electronic mail address changes, the firm must notify the Board within 30 days of the new electronic mail address for its primary contact with the Board in Item 7.2 of Form 3.

Two commenters suggested that the Board provide non-public advance notice of a forthcoming determination to firms that would be subject to that determination. One of those commenters indicated that firms could use this advance notice to initiate discussions with their issuer audit clients about the Board's forthcoming determination.

The Board does not believe that it is appropriate to provide non-public advance notice to firms. A firm headquartered in a noncooperative jurisdiction and performing audit work that subjects the firm to the PCAOB inspection requirement should know if it has not been inspected due to the PCAOB's inability to inspect such firm or firms in that jurisdiction.¹⁰⁵ Furthermore, as described in Section III.C above, the Board has long taken efforts to make known the access challenges it faces in certain jurisdictions. Although those disclosures are distinct from determinations under the rule and predate the HFCAA's enactment, they underscore the Board's commitment to transparency about its oversight access. And if a firm-specific obstacle to Board inspections or investigations were to arise that might warrant a determination as to a particular registered firm pursuant to subparagraph (a)(2), the Board expects that it would have engaged with that firm about the Board's inability to inspect or investigate the firm completely before such a determination would be made.

In addition, providing non-public advance notice of a Board determination to firms would create information asymmetry in the marketplace: A forthcoming Board determination would be known to firms and to anyone with whom the firm elects to share that information (including not only the firm's issuer clients' management, but also potentially the issuers' directors, the issuers' outside counsel and other professional advisors, foreign government officials, and others), while the investing public would not be privy to the same information. The Board does not believe it would be in the public interest or the interests of investors to selectively preview its determinations in such a manner.

Several commenters also suggested that the Board establish a rule-based mechanism that would allow firms to submit information to the Board regarding a determination. Some of those commenters recommended that the Board provide by rule for such a submission process before a Board determination takes effect, while others expressed concern that such an approach could delay the timely implementation of the HFCAA. No commenter, however, identified any type of information that a firm might have that would be both relevant to a Board determination and previously unknown to the Board.

Because the Board believes that firms are unlikely to have new and relevant information regarding a determination, the Board is not establishing a rule-based process for firms to make such submissions. Board determinations turn on positions taken by authorities in foreign

¹⁰⁵ See also, e.g., SEC Exchange Act Release No. 91364, at 26 (noting "a highly similar type and pattern of disclosure regarding the PCAOB's inability to inspect those firms" in Item 3 of Form 20-F and in Item 1A of Form 10-K).

jurisdictions, and such positions, by virtue of having previously been “taken” by a foreign authority, necessarily will be known to the Board already. Indeed, the Board has extensive experience in this area and, over more than a decade, has engaged significantly with foreign authorities and registered firms regarding inspections and investigations of non-U.S. firms. Therefore, the Board knows, and will timely learn, relevant information about its ability to conduct inspections and investigations abroad. The Board’s history of engagement and negotiations regarding such inspections and investigations is detailed above in Sections III.B and III.C, and no commenter disputed the Board’s description of that history.

By the same token, any Board determination would be based on the Board’s judgment as to whether the extent of access available to it impairs its ability to conduct oversight in any of the three respects identified in paragraph (b). Consequently, the Board does not believe that firms will be able to contribute meaningfully to the mix of information available to the Board regarding foreign authorities’ positions or the Board’s experience-driven assessment of paragraph (b)’s three factors. Should a firm wish to communicate with the Board about its inspection or investigation experience, however, it can do so through existing channels for communicating with the Board’s inspection and enforcement staff.

4. Updating the Appendix to a Board Report

Subparagraph (e)(4) addresses the Board’s process for determining that the list of firms subject to a determination remains accurate. A few commenters expressed concern about potential developments that could render such a list inaccurate, and the Board believes that it is prudent to establish a process in the rule to ensure the list is appropriately updated and accurate.

As provided in subparagraph (e)(1), the list of firms subject to a determination will be contained in an appendix to the Board’s report. For a jurisdiction-wide determination under subparagraph (a)(1), the appendix will provide, for each firm, the name under which it is registered with the Board, its identification number with the Board, and the jurisdiction in which its headquarters is located. For a determination as to a particular firm under subparagraph (a)(2), the appendix will provide the name under which the firm is registered with the Board, its identification number with the Board, and the location of the office(s) the firm maintains in the foreign jurisdiction whose authorities have taken a position that results in the Board being unable to inspect or investigate the firm completely.

Subparagraph (e)(4) requires firms identified in an appendix to notify the PCAOB Secretary of any changes to the firm’s information in the appendix within five days of such a

change.¹⁰⁶ Firm names, identification numbers, headquarters locations, and office locations can change, and this requirement ensures that the Board will be alerted promptly to updated information.¹⁰⁷ Instructions regarding how to notify the Secretary of such a change will be provided in the appendix.

Subparagraph (e)(4) provides that the Board may issue an updated appendix at any time. This allows the Board to update its appendix to reflect changes reported by firms as required by subparagraph (e)(4). It also enables the Board to correct discrepancies or reflect changes identified by the Board or its staff through other means.¹⁰⁸ An updated appendix will bear the date on which it was issued by the Board.

The Board's issuance of an updated appendix would not constitute a reassessment of the Board's underlying determination. In other words, the Board can update an appendix without reanalyzing the three factors identified in paragraph (b). Whenever the Board issues an updated appendix, it will transmit that appendix to the Commission, make it publicly available in accordance with subparagraph (e)(2), and send it to firms that are identified in the appendix in accordance with subparagraph (e)(3).

E. Effective Date and Duration of Board Determinations

Paragraph (f) provides that a Board determination becomes effective on the date the Board issues its report to the Commission. Most commenters expressed support for this timing, though one commenter suggested that this timing would be appropriate only if firms received advance notice of a determination, and another commenter suggested that the Board delay the effectiveness of its determinations (e.g., for 120 days) so that issuers have time to understand and plan for them.

¹⁰⁶ In practice, this five-day period would span at least seven calendar days. See PCAOB Rule 1002, *Time Computation* (providing that Saturdays, Sundays, and federal legal holidays are excluded from the computation of time when a prescribed period of time in a Board rule is seven days or less).

¹⁰⁷ For example, if a firm changes its name while remaining the same legal entity, the firm has 30 days to notify the Board of its name change in Item 7.1 of Form 3. But if a firm changes its name while also changing its legal entity due to a change to its legal form of organization or as the result of a business combination, the firm may (but is not required to) file a Form 4 that, among other things, would notify the Board of the name change in Item 1.1, and that filing would be due 14 days after the change or business combination, unless the Board permits the firm to file its form out of time.

¹⁰⁸ For instance, the list of firms in the appendix could be reduced if a firm withdraws from registration or has its registration revoked, and could be expanded if a registered firm moves its headquarters to a jurisdiction that is the subject of a jurisdiction-wide determination.

The Board is adopting paragraph (f) substantially as proposed.¹⁰⁹ For many of the same reasons that the Board does not believe that firms should receive advance notice of Board determinations (see Section IV.D.3 above), the Board does not believe that the effectiveness of its determinations should be delayed. Furthermore, delaying the effectiveness of a determination could frustrate the objectives of the HFCAA and, in the Board's view, impair the Commission's ability to identify covered issuers on a timely basis pursuant to its rules.

One commenter requested clarification regarding the date of issuance of a Board report. The date of issuance will be the date that appears on the report, which will correspond to the date upon which the Board's report is transmitted to the Commission.

Paragraph (g) addresses the duration of Board determinations. The Board is adopting paragraph (g) substantially as proposed,¹¹⁰ save for one conforming change. As proposed, the rule provided that a Board determination would remain in effect "unless and until" it was modified or vacated. As discussed in Section IV.F below, however, the Board has elected to reassess at least annually each determination that is in effect and to issue, at the conclusion of each reassessment, a report reaffirming, modifying, or vacating the determination. To conform to that approach, paragraph (g) has been revised to provide that a Board determination will remain in effect until it is reaffirmed, modified, or vacated by the Board.

F. Reassessment of Board Determinations

As proposed, paragraph (h) created a two-step process through which the Board would annually monitor the continued justification for a Board determination. First, the Board would consider whether changes in facts and circumstances warrant a reassessment of a determination that is in effect. Then, if the Board concludes that a reassessment is warranted, the Board would analyze the three factors identified in paragraph (b) and decide whether to leave its determination undisturbed or issue a new report modifying or vacating the determination. Apart from that annual process, the Board also could reassess a determination on its own initiative or at the Commission's request at any time.

Commenters generally supported that proposed two-step annual process. A few commenters suggested that the result of a reassessment should be made public in all circumstances, even when a determination is left undisturbed, and one commenter indicated that such public reporting could provide audit firms and issuers with more detailed guidance and transparent information. Some commenters suggested that firms should be able to request

¹⁰⁹ For simplicity, at the beginning of the paragraph, "When the Board makes a determination pursuant to subparagraph (a)(1) or (a)(2), the Board's determination becomes effective" has been replaced by "A determination pursuant to subparagraph (a)(1) or (a)(2) becomes effective."

¹¹⁰ For simplicity, at the beginning of the paragraph, "A determination made by the Board" has been changed to "A determination."

reevaluation of a determination outside of the annual cycle, with one commenter asking the Board to confirm that it would reassess a determination anytime there was a potentially material development in the facts and circumstances.

The Board has revised paragraph (h) to reduce the two-step process to a one-step process by eliminating the “annual consideration of changed facts and circumstances” contemplated in the proposed rule. Instead of requiring the Board to conduct a threshold inquiry each year to decide whether changes in facts and circumstances merit reassessment of a determination, the rule requires the Board to annually reassess each determination that is in effect. The Board believes that annual reassessment best aligns with the HFCAA’s annual cycle, which includes the Commission’s identification of covered issuers based on the filing of annual reports and its designation of non-inspection years.¹¹¹

Apart from its mandatory annual reassessments, the Board, on its own initiative or at the Commission’s request, may reassess a determination at any time. It is not possible to specify every development that might prompt the Board to reassess a determination outside of the annual reassessment cycle. In certain circumstances, the withdrawal of a law or the execution of a cooperative agreement might suffice, if, for example, the law or the absence of an agreement were the sole reason why the Board’s access was impaired in one or more of the respects identified in paragraph (b). However, as a general matter, when a determination derives from the Board’s prolonged inability to complete inspections or investigations in a particular jurisdiction or of a particular firm, the Board does not anticipate modifying or vacating such a determination—even if a cooperative agreement is in place—until it has concluded that the foreign authority has taken, and the Board can reasonably conclude that the authority will maintain, new positions that respond satisfactorily to the Board’s access needs with respect to each of the factors identified in paragraph (b). In such instances of prolonged lack of access, the Board would expect to conclude inspections or investigations in that jurisdiction or of that firm before modifying or vacating a determination. The conclusion of an inspection or investigation, however, is not necessarily conclusive evidence that the conditions preventing the Board from inspecting or investigating completely firms located in the foreign jurisdiction have been resolved.

Together, the rule’s framework of mandatory annual reassessment and discretionary off-cycle reassessment gives the Board the opportunity to reassess a determination whenever facts and circumstances warrant, and will help ensure that the Commission’s actions under the HFCAA are based on Board determinations that reflect the current status of the Board’s ability to inspect and investigate firms completely. When conducting a reassessment, whether annual or off-cycle, the Board will reanalyze the three factors identified in paragraph (b), and at the conclusion of that reassessment, the Board will reaffirm, modify, or vacate its determination.

¹¹¹ HFCAA § 2(i)(1)-(2), 15 U.S.C. § 7214(i)(1)-(2).

Two commenters suggested that the Board allow firms to request reevaluation of a determination outside of the Board's annual reassessment process. One commenter further suggested that reevaluation requests could be based on a triggering event, but did not provide any examples of such an event or explain how a firm would have knowledge of such an event that the Board would lack. As explained in Section IV.D.3 above, the Board believes that firms are unlikely to have new, relevant information about positions taken by foreign authorities vis-à-vis the Board, and firms already have other channels through which they can communicate with the Board's staff about inspection- and investigation-related developments. Furthermore, even without a rule-based mechanism through which firms could request reevaluation, the Board will reassess determinations to which any firm is subject at least once a year.

One commenter suggested that the Board allow "jurisdictions" to request reevaluation of determinations at any time. That commenter was not a foreign authority; indeed, no foreign authority submitted a comment asking for the ability to request reevaluation. Nor did the commenter explain why foreign authorities cannot communicate with the Board through existing channels. The Board believes that those customary channels for communication with foreign authorities, together with the Board's annual mandatory reassessments and discretionary off-cycle reassessments, suffice to provide the Board appropriate information to reexamine determinations as and when appropriate.

G. Reaffirmed, Modified, and Vacated Board Determinations

Paragraph (i) addresses reaffirmed, modified, and vacated Board determinations. The Board is adopting paragraph (i) with several conforming changes that align paragraph (i) with other revisions to the rule, including revisions regarding appendices to Board reports, the transmittal of Board reports by electronic mail, and annual reassessment of determinations that are in effect.

When the Board reaffirms, modifies, or vacates a determination, it will issue a report to the Commission describing its assessment and the basis for reaffirming, modifying, or vacating the determination. In the case of a reaffirmed or modified determination, the Board will update the appendix to the report that identifies the firm(s) to which the determination applies. A copy of the report will be posted on the PCAOB's website and sent by electronic mail to each firm's primary contact with the Board, subject to the confidentiality limitations described above in connection with subparagraphs (e)(2) and (e)(3).

A reaffirmed or modified determination, or the vacatur of a determination, will become effective on the date that the Board issues its report to the Commission. A reaffirmed or modified determination will be subject to reassessment under paragraph (h): It must be reassessed at least annually; it may be reassessed at any time; and the Board's reassessment will consider the three factors identified in paragraph (b) and result in reaffirmation,

modification, or vacatur. A reaffirmed or modified determination will remain in effect until it is reaffirmed, modified, or vacated.

V. ECONOMIC CONSIDERATIONS

The Board is mindful of the economic impacts of its rulemaking. This section discusses economic considerations related to the rule, including a description of the baseline for evaluating the economic impacts of the rule; the need for the rulemaking; consideration of the benefits, costs, and unintended consequences of the rule; and alternatives considered by the Board.¹¹²

A. The Baseline for Measuring Economic Impacts

The Board has evaluated the potential benefits, costs, and unintended consequences of the rule relative to a baseline that consists of the current regulatory framework and current market practices. Although the HFCAA requires the Board to make a determination about which audit firms located in a foreign jurisdiction it is unable to inspect or investigate completely because of a position taken by one or more authorities in that jurisdiction, the HFCAA does not expressly require the Board to adopt a rule governing the determinations it makes under the statute. Moreover, the PCAOB website has long identified the jurisdictions in which the Board lacks inspection access, as well as the registered firms located in those jurisdictions.¹¹³ Measured against this baseline, the rule builds on existing PCAOB practices and provides a framework for the Board's determinations under the HFCAA and, hence, should have limited economic impacts incremental to the impacts of the HFCAA and the Commission's actions to implement the HFCAA.

Under the HFCAA, issuers that retain firms that are subject to a Board determination to issue audit reports on their financial statements must make certain disclosures and submissions and, eventually, if certain conditions persist, the securities of those issuers may be subject to a prohibition on trading. The Commission has adopted interim final amendments to Forms 20-F, 40-F, 10-K, and N-CSR to implement the disclosure and submission requirements of the HFCAA.¹¹⁴ Other aspects of the HFCAA, including the trading prohibition, will be addressed in

¹¹² The rule does not require "mandatory audit firm rotation or a supplement to the auditor's report in which the auditor would be required to provide additional information about the audit and the financial statements" of issuers, nor does it impose any "additional requirements" on auditors. Section 103(a)(3)(C) of the Act. Accordingly, the Board has concluded that Section 103(a)(3)(C) of the Act does not apply to this rulemaking, and no commenter suggested otherwise.

¹¹³ For an overview of this historical practice, see, for example, footnote 62.

¹¹⁴ See SEC Exchange Act Release No. 91364. The interim final rule amendments became effective on May 5, 2021.

subsequent Commission actions.¹¹⁵ The economic impact of these aspects of the HFCAA, while tied to the Board's determinations about which audit firms it is unable to inspect or investigate completely, will depend on the implementation choices made by the Commission in carrying out its mandate under the HFCAA and thus are not considered as part of the economic analysis with respect to this rulemaking.

The baseline also takes into consideration the current international reach of the Board's oversight mandate. As of June 30, 2021, 851 non-U.S. firms, headquartered in 90 foreign jurisdictions, were registered with the Board.¹¹⁶ Out of those 851 non-U.S. registered firms, 202 issued at least one audit report on financial statements filed by an issuer with the Commission in the 12-month period ended June 30, 2021, and, altogether, they issued 1,260 audit reports during that 12-month period.¹¹⁷

Exhibit 1 reports the jurisdictions with the highest number of audit reports issued by non-U.S. registered firms on financial statements filed by issuers with the Commission during the 12-month period ended June 30, 2021. The top 15 jurisdictions account for 84% of all audit reports issued by non-U.S. registered firms on financial statements filed by issuers during the 12-month period ended June 30, 2021.

¹¹⁵ *See id.*

¹¹⁶ Source: PCAOB Registration, Annual, and Special Reporting ("RASR") System and Audit Analytics.

¹¹⁷ If a firm issued more than one audit report on financial statements filed by the same issuer during the 12-month period ended June 30, 2021, then only the most recent audit report is counted.

Exhibit 1. Top Fifteen Non-U.S. Jurisdictions by Number of Audit Reports Issued by Non-U.S. Registered Firms on Financial Statements Filed by Issuers During the 12-Month Period Ended June 30, 2021¹¹⁸

Jurisdiction	Audit Reports Issued by Non-U.S. Registered Firms on Issuer Financial Statements		Market Capitalization		Number of Non-U.S. Registered Firms		Number of Non-U.S. Registered Firms Issuing Audit Reports on Issuer Financial Statements	
	#	%	\$ Billions	%	#	%	#	%
Canada	358	28.4%	1,979	15.9%	36	4.2%	24	11.9%
China (Excluding Hong Kong)	169	13.4%	1,709	13.7%	36	4.2%	9	4.5%
Israel	155	12.3%	231	1.8%	21	2.5%	10	5.0%
United Kingdom	76	6.0%	1,639	13.1%	47	5.5%	7	3.5%
Hong Kong	50	4.0%	734	5.9%	28	3.3%	8	4.0%
Brazil	41	3.3%	584	4.7%	18	2.1%	7	3.5%
India	28	2.2%	362	2.9%	66	7.8%	11	5.4%
Singapore	27	2.1%	155	1.2%	25	2.9%	8	4.0%
Malaysia	25	2.0%	3	0.0%	18	2.1%	3	1.5%
Argentina	24	1.9%	112	0.9%	16	1.9%	4	2.0%
France	24	1.9%	296	2.4%	24	2.8%	5	2.5%
Switzerland	23	1.8%	588	4.7%	6	0.7%	5	2.5%
Greece	22	1.7%	10	0.1%	8	0.9%	3	1.5%
Germany	19	1.5%	316	2.5%	31	3.6%	4	2.0%
Mexico	17	1.3%	191	1.5%	20	2.4%	6	3.0%
+ Other Non-US Jurisdictions	202	16.0%	3,563	28.6%	451	53.0%	88	43.6%
Total of All Non-US Jurisdictions	1,260	100%	12,471	100%	851	100%	202	100%

Source: RASR, Audit Analytics, and Standard & Poor's

As discussed in Section III above, over the years, the Board has been able to work effectively with authorities in foreign jurisdictions to fulfill its mandate to oversee registered firms located outside the United States. With rare exceptions, foreign audit regulators have cooperated with the Board and allowed it to exercise its oversight authority as it relates to registered firms located within their respective jurisdictions. Authorities in a limited number of foreign jurisdictions, however, have taken positions that deny the Board access for oversight

¹¹⁸ For purposes of Exhibit 1, a firm's jurisdiction is the jurisdiction where it is headquartered. The number of audit reports issued on the financial statements of issuers and the number of registered firms that issued those reports are based on issuer filings during the 12-month period ended June 30, 2021. The market capitalization of those issuers and the number of registered firms in each jurisdiction are as of June 30, 2021. Due to a lack of data on the number of shareholders, some audit reports included in Exhibit 1 may have been issued on the financial statements of entities with fewer than 300 shareholders. If a firm issued more than one audit report on financial statements filed by the same issuer during the 12-month period ended June 30, 2021, then only the most recent audit report is counted.

activities. The PCAOB's website identifies the jurisdictions that currently deny the Board such access.¹¹⁹

B. Need for the Rule

As discussed in Section IV above, the HFCAA does not expressly require the Board to adopt a rule governing the determinations it makes under the statute. Rather, the HFCAA gives the Board discretion regarding the procedure for making those determinations and the content and format of the Board's reporting to the Commission. The Board has elected to pursue a rulemaking to bring transparency and consistency to its determinations. Specifically, the Board believes that a rule would inform investors, registered firms, issuers, audit committees, foreign authorities, and the public at large as to how the Board will perform its functions to satisfy its obligations under the statute. It would also promote consistency in the Board's process regarding determinations.

C. Economic Impacts

Compared to the baseline of no PCAOB rulemaking, the rule would have incremental benefits and costs. The rule's scope is confined to establishing a framework for determinations that the Board is called upon by the HFCAA to make even absent a rulemaking. Additionally, neither the HFCAA nor the rule gives the Board additional authority to take any action of legal consequence directly against a registered firm. Instead, the HFCAA contemplates that the Board would notify the Commission of its determinations, which may provide the predicate for other regulatory actions to be taken by the Commission if other conditions set forth in the HFCAA and the Commission's rules are met. This situation is in contrast to the direct impact of the Board's statutory mandate to register, set professional standards for, inspect, investigate, and discipline registered firms. One commenter stated that economic benefits and costs arise from the HFCAA, which the PCAOB cannot change and must implement.

This section discusses the potential benefits, costs, and unintended consequences of the rule. It does not presuppose any determination that the Board may make under the rule, because the Board would determine whether to make any future determinations based on the facts and circumstances at that time.

This section also discusses the economic impacts of four central features of the rule: (1) the Board's ability to make determinations as to a particular foreign jurisdiction; (2) limiting those jurisdiction-wide determinations to firms headquartered in the jurisdiction; (3) the Board's complementary ability to make determinations as to a particular registered firm; and

¹¹⁹ See Audit Reports Issued by PCAOB-Registered Firms in Jurisdictions where Authorities Deny Access to Conduct Inspections, available at <https://pcaobus.org/oversight/international/denied-access-to-inspections>. The information contained on this webpage does not constitute a Board determination under the HFCAA. The Board has not yet made any determinations under the HFCAA.

(4) the Board's publication of its determinations on its website. The analysis is qualitative in nature because of a lack of information and data necessary to provide reasonable quantitative estimates. Overall, the Board expects that the benefits of the rule will justify any costs and unintended negative effects.

i. Benefits

As previously noted, the Board believes that the rule would inform investors, registered firms, issuers, audit committees, foreign authorities, and the public at large as to how the Board will perform its functions under the HFCAA. The improved transparency and reduced regulatory uncertainty might help market participants make more efficient investment decisions and, hence, enhance capital formation. Furthermore, the rule will promote consistency in the Board's processes regarding determinations. It will also assist the Commission in its consistent implementation of the HFCAA and achieving the statute's intended objectives. These are the primary benefits of the rule. Several commenters agreed that a Board rule governing HFCAA determinations can improve regulatory transparency and consistency and reduce regulatory uncertainty.

The Board believes that the rule's jurisdiction-wide determinations would yield additional benefits. In the Board's experience, when foreign authorities take a position that impairs the Board's oversight access, the position applies generally to all firms within the jurisdiction. Consequently, jurisdiction-wide determinations would provide an efficient, effective means of making Board determinations under the HFCAA.

Jurisdiction-wide determinations would be beneficial even when a foreign authority limits the Board's ability to inspect or investigate *certain types* of issuer audit engagements. Typically, the foreign authority's position applies to any firm in the jurisdiction that performs that type of engagement. If the Board were unable to make jurisdiction-wide determinations and instead were required to single out for determination only the specific audit firms handling those issuer engagements at a particular time, those issuers potentially could evade the consequences of the HFCAA by routinely changing audit firms in response to each successive firm-specific determination issued by the Board.¹²⁰ Beyond that, issuing a jurisdiction-wide

¹²⁰ If the Board were to make only firm-by-firm determinations based on each firm's then-current client portfolio, the Board might need to establish a process requiring all registered firms to report auditor changes to the Board in real time so that the Board could monitor such changes and promptly make new determinations in response. Presently, the Board's rules require firms to report their issuer clients to the Board only after the firm's audit report on the issuer has been issued. See PCAOB Rule 3211(b), *Auditor Reporting of Certain Audit Participants* (Form AP must be filed within 35 days after the audit report is first included in a filing with the Commission, except that Form AP must be filed within 10 days if the audit report is included in a registration statement under the Securities Act). One commenter noted that jurisdiction-wide determinations would appear to be more efficient for the PCAOB's operations than determinations as to particular registered firms.

determination in such a scenario would help ensure that foreign authorities cannot, in essence, choose which firms within their jurisdiction the Board may inspect or investigate.

Limiting jurisdiction-wide determinations to firms headquartered in the jurisdiction would generate its own benefits. It would reduce the risk that a jurisdiction-wide determination sweeps too broadly by encompassing firms that merely have a physical presence or personnel in the jurisdiction but are headquartered elsewhere. Although a position taken by a foreign authority can naturally be understood to impact registered firms headquartered in the jurisdiction, its impact on firms that are headquartered elsewhere can turn on many factors, including the extent of the firm's presence in the jurisdiction and the nature and extent of the audit work it performs there. With that in mind, the rule provides that the Board could choose to make individualized determinations with respect to firms that are headquartered elsewhere but have an office in such a jurisdiction.

Determinations as to a particular registered firm would complement the Board's jurisdiction-wide determinations by providing an additional option when the Board concludes that an across-the-board jurisdiction-wide determination is not appropriate. Such a provision recognizes that although the Board generally expects to make jurisdiction-wide determinations, it cannot anticipate every scenario it might encounter in the future. If a position taken by a foreign authority applies solely to one firm, which is expected to happen infrequently, the Board's ability to make a determination as to that firm would be a critical tool for fulfilling the HFCAA's objectives. Additionally, by providing an avenue for the Board to make determinations as to registered firms that are headquartered in a cooperating jurisdiction but have an office in a noncooperating jurisdiction, this provision would help ensure that the Board's flexibility under the rule matches its mandate under the HFCAA.

The Board has also considered the potential benefits of making Board determinations public on its website. Such publication would inform investors, registered firms, issuers, audit committees, foreign authorities, and the public regarding Board determinations, thus promoting transparency and reducing regulatory uncertainty. Market participants may benefit from being informed of Board determinations promptly, rather than waiting for the Commission's identification of covered issuers.

ii. Costs and Unintended Consequences

The Board has also considered the potential costs and unintended consequences of the rule. The Board expects any such costs and consequences to be limited, as the rule merely establishes a framework for the Board to perform the responsibilities imposed upon it by the HFCAA.

The Board has evaluated the potential costs and unintended consequences of making jurisdiction-wide determinations. As explained above, such determinations treat all registered firms headquartered in the jurisdiction alike when the positions taken by authorities in the

jurisdiction apply equally to any firm performing the same audit work for issuers, whether or not a particular registered firm happens to be doing such work when the Board makes a determination. To mitigate any perceived overinclusiveness or underinclusiveness of a jurisdiction-wide determination, the rule limits those determinations to registered firms headquartered in the jurisdiction, while also permitting the Board, when appropriate, to supplement a jurisdiction-wide determination with a determination as to a particular firm that has an office in the jurisdiction but is not headquartered there.¹²¹ This approach, in the Board's view, would be unlikely to impose incremental additional costs or lead to unintended consequences relative to the baseline, which consists of, among other things, the historical practice of identifying publicly the jurisdictions where there are unresolved obstacles to Board inspections and investigations.

The Board does not expect that the second central feature of the rule—limiting jurisdiction-wide determinations to firms headquartered in the jurisdiction—would lead to additional costs or unintended consequences.

Related to the third central feature of the rule—the Board's ability to make determinations as to particular firms with an office in a foreign jurisdiction—one commenter encouraged the Board to consider the potential adverse impact on competition when assessing a potential future determination, and further encouraged the Board to provide equivalent treatment to similarly-situated firms. While any future determinations under the rule as to particular registered firms may potentially have an impact on competition, such determinations, as noted above, are expected to be infrequent. Moreover, the magnitude of any impact would depend on many factors, such as the number of firms within the jurisdiction, the size of the firm as to which the determination is made, and how the foreign authority's obstruction of the Board's inspections or investigations has already affected competition in the jurisdiction.

Separately, the Board has evaluated the potential costs and unintended consequences of making its determinations public. The Board believes that the incremental costs of such publication will likely be minimal because similar information has historically been available on the Board's website for approximately a decade.¹²² Moreover, many issuers currently disclose

¹²¹ Additionally, as noted in Section V.D, the Board has general residual exemption authority, subject to Commission approval, under Section 106(c) of the Act, and such authority could be used to address any potential overinclusiveness of a jurisdiction-wide determination.

¹²² See, e.g., Audit Reports Issued by PCAOB-Registered Firms in Jurisdictions where Authorities Deny Access to Conduct Inspections, available at <https://pcaobus.org/oversight/international/denied-access-to-inspections>.

in their annual reports the PCAOB's inability to inspect their auditor, as the Commission recently observed.¹²³

D. Alternatives Considered

As an alternative to a rulemaking, the Board considered issuing guidance related to its process or establishing a non-public process for making its determinations. The Board has determined, however, that a rule would reduce regulatory uncertainty for market participants by providing transparency and promoting consistency as to how the Board would perform its functions under the statute.

As discussed in Section IV.A, the Board also considered whether the rule should be limited to determinations as to particular registered firms. Without jurisdiction-wide determinations, however, the Board would have to make determinations only as to particular firms under subparagraph (a)(2) of the rule, potentially based on the present composition of each firm's client portfolio. The Board believes that such an approach would incentivize an issuer whose audit engagement cannot be inspected or investigated by the Board to switch audit firms frequently, possibly frustrating the intent of the HFCAA and potentially necessitating a new process for real-time reporting of auditor changes to the Board so that Board determinations could be made or reassessed on a timely basis.

Also as discussed in Section IV.A, the Board considered whether to extend its jurisdiction-wide determinations to all firms that have an office in the jurisdiction, rather than only those headquartered there. The Board elected not to do so, based on its oversight experience, because the impact of a position taken by a foreign authority on a firm headquartered elsewhere can vary based on the particulars of the firm's presence, audit work, and issuer clients in the jurisdiction.

When prescribing the grounds upon which a determination may rest, the Board considered whether the Board's commencement and subsequent inability to finish an inspection or investigation should be a prerequisite to a determination. As explained in Sections IV.A.1 and IV.C, the Board is not adopting that approach because the position taken by a foreign authority can frustrate the initiation of, or the ability to complete, an inspection or investigation. Moreover, commencing inspections or investigations in the face of such obstacles would be costly and fruitless, not only for the Board, but also for registered firms.

¹²³ See SEC Exchange Act Release No. 91364, at 26 (noting "a highly similar type and pattern of disclosure regarding the PCAOB's inability to inspect those firms included in the majority of the potential Commission-Identified Issuers' Item 3 (for Form 20-F filers) and Item 1A (for Form 10-K filers) discussion of risk factors").

Lastly, although it can exercise exemption authority under Section 106(c) of the Act with the Commission's approval,¹²⁴ the Board considered whether the rule should include a procedure for the Board to grant exceptions from a jurisdiction-wide determination. The Board did not include such a mechanism in the rule for five principal reasons:

- An exception procedure would be inconsistent with the rationale for jurisdiction-wide determinations, namely, that the foreign authority has taken a position of such general scope and application that it obstructs the Board's ability to complete inspections or investigations in that jurisdiction.
- To the extent that exception arguments would be based on the composition of a firm's client portfolio at a moment in time, entertaining such arguments would require speculation as to whether the foreign authority would impede the Board's ability to inspect or investigate those audits and would create a moving target as the firm gains and loses clients over time.
- Exceptions might increase the risk of a "shell game." If a firm becomes subject to a Board determination because the Board cannot inspect certain types of issuer audit engagements it performed, those issuers might simply migrate to an excepted firm, triggering the need for the Board to monitor auditor changes constantly and then modify its determinations or revise its exceptions.
- An exception procedure might encourage foreign authorities to manipulate the determination process by cherry-picking certain firms that the PCAOB can inspect, thereby casting doubt on the justification for the Board's jurisdiction-wide determination.
- Allowing firms to seek exceptions could effectively transform the Board's jurisdiction-wide approach to a firm-by-firm approach that consumes substantial Board resources and fails to protect investors.

One commenter indicated that the Board's existing exemption authority is adequate and expressed concern that granting exceptions could transform the Board's jurisdiction-wide approach into a firm-by-firm approach that consumes substantial resources and fails to protect investors. The Board agrees with this commenter and has not revised the rule to create a procedure for granting exceptions from a jurisdiction-wide determination.

¹²⁴ See Section 106(c) of the Act ("[T]he Board, subject to the approval of the Commission, may, by rule, regulation, or order, and as [the Board] determines necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions exempt any foreign public accounting firm, or any class of such firms, from any provision of this Act or the rules of the Board . . . issued under this Act.").

VI. EFFECTIVE DATE

As discussed in Section IV.A.3, if the rule is approved by the Commission, it would then become effective and the Board would promptly assess whether any determinations under the HFCAA are warranted, employing the framework established in the rule.

VII. TEXT OF RULE

RULES

SECTION 6. International

* * * * *

Rule 6100. Board Determinations Under the Holding Foreign Companies Accountable Act

(a) Determinations as to Inability to Inspect or Investigate Registered Firms Completely

(1) Determinations as to Registered Firms Headquartered in a Particular Foreign Jurisdiction

The Board may determine that it is unable to inspect or investigate completely registered public accounting firms headquartered in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction.

(2) Determinations as to a Particular Registered Firm With an Office in a Foreign Jurisdiction

The Board may determine that it is unable to inspect or investigate completely a registered public accounting firm that has an office that is located in a foreign jurisdiction because of a position taken by one or more authorities in that jurisdiction.

(3) Timing of Board Determinations

Promptly after the effective date of this rule, the Board will make determinations under subparagraph (a)(1) or (a)(2) to the extent such determinations are appropriate. Thereafter, the Board will consider, at least annually, whether changes in facts and circumstances support any additional determinations pursuant to subparagraph (a)(1) or (a)(2). The Board will make additional determinations under subparagraph (a)(1) or (a)(2), as and when appropriate, to allow the Commission on a timely basis to identify covered issuers pursuant to the Commission's rules.

(b) Factors for Board Determinations

When making a determination described in subparagraph (a)(1) or (a)(2), the Board will assess whether the position taken by the authority (or authorities) impairs the Board's ability to execute its statutory mandate with respect to inspections or investigations of such firm(s) in one or more of the following respects:

- (1) the Board's ability to select engagements, audit areas, and potential violations to be reviewed or investigated;
- (2) the Board'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 Board considers relevant to an inspection or investigation; and
- (3) the Board's ability to conduct inspections and investigations in a manner consistent with the provisions of the Act and the Rules of the Board, as interpreted and applied by the Board.

(c) Basis for Board Determinations

The Board may consider any documents or information it deems relevant when making the assessment described in paragraph (b), including, but not limited to:

- (1) laws, statutes, regulations, rules, ordinances, and other legal authorities purporting to have or treated as having the force of law in the foreign jurisdiction or any political subdivision thereof, and interpretations and applications thereof;
- (2) the existence or absence of any agreement (and, if applicable, the terms thereof) between the Board and any relevant authority in the foreign jurisdiction regarding the conduct of inspections and investigations, as well as the authority's (or authorities') interpretations of and performance under any such agreement; and
- (3) the Board's experience with respect to the foreign authority's (or authorities') other conduct and positions taken relative to Board inspections or investigations.

(d) Commencement of Inspection or Investigation Not Required

A determination pursuant to subparagraph (a)(1) or (a)(2) need not depend on the Board's commencement of, but inability to complete, an inspection or investigation of a registered public accounting firm located in the foreign jurisdiction.

(e) Form and Publication of Board Determinations**(1) Board Reports to the Commission**

When the Board makes a determination pursuant to subparagraph (a)(1) or (a)(2), its determination will be issued in the form of a report to the Commission. The report will describe the Board's assessment under paragraph (b) and the basis for the determination. An appendix to the report will identify the registered public accounting firm(s) to which the determination applies by (i) the name under which the firm is registered with the Board and (ii) the firm's identification number with the Board.

(2) Publication of Board Reports

Promptly after the issuance of a report pursuant to subparagraph (e)(1), a copy of the report will be made publicly available on the Board's website; provided, however, that the report's contents will be redacted to the extent required by Section 105 of the Act and applicable laws relating to the confidentiality of proprietary, personal, or other information.

(3) Transmittal of Board Reports to Subject Firms

Promptly after the issuance of a report pursuant to subparagraph (e)(1), a copy of the report will be sent by electronic mail to each registered public accounting firm that is listed in the appendix; provided, however, that the report's contents will be redacted to the extent required by Section 105 of the Act and applicable laws relating to the confidentiality of proprietary, personal, or other information. The electronic mail will be directed to the electronic mail address of the firm's primary contact with the Board.

(4) Updating the Appendix to a Board Report

A registered public accounting firm identified in an appendix to a report as referenced in subparagraph (e)(1) shall notify the Secretary of any change to the firm's information contained in the appendix within 5 days of such a change. The Board may issue an updated appendix to a report at any time. An updated appendix will be transmitted to the Commission, made publicly available in accordance with subparagraph (e)(2), and sent to registered public accounting firms that are listed in the appendix in accordance with subparagraph (e)(3). The issuance of an updated appendix does not constitute a reassessment of a determination under paragraph (h).

(f) Effective Date of Board Determinations

A determination pursuant to subparagraph (a)(1) or (a)(2) becomes effective on the date the Board issues its report to the Commission referenced in subparagraph (e)(1).

(g) Duration of Board Determinations

A determination pursuant to subparagraph (a)(1) or (a)(2) remains in effect until it is reaffirmed, modified, or vacated by the Board.

(h) Reassessment of Board Determinations

The Board, on its own initiative or at the Commission's request, may at any time reassess a determination that is in effect, and will do so at least annually. When reassessing such a determination, the Board will conduct the assessment set forth in paragraph (b). Based on such reassessment, the Board will reaffirm, modify, or vacate the determination.

(i) Reaffirmed, Modified, and Vacated Board Determinations

When the Board reaffirms, modifies, or vacates a determination, the Board will issue a report to the Commission in accordance with subparagraph (e)(1), and in the case of a reaffirmed or modified determination, will update the appendix to the report referenced in subparagraph (e)(1). The Board also will make a copy of that report publicly available in accordance with subparagraph (e)(2) and send a copy of that report to registered public accounting firms in accordance with subparagraph (e)(3). A reaffirmed or modified determination, or the vacatur of a determination, will become effective on the date the Board issues its report to the Commission. The reassessment procedures described in paragraph (h) apply to a reaffirmed or modified determination, and a reaffirmed or modified determination will remain in effect until it is reaffirmed, modified, or vacated by the Board.

* * * *

On the 22nd day of September, in the year 2021, the foregoing was, in accordance with the bylaws of the Public Company Accounting Oversight Board,

ADOPTED BY THE BOARD.

/s/ Phoebe W. Brown

Phoebe W. Brown

Secretary

September 22, 2021