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AMENDMENTS TO CONFORM PCAOB RULE 6100 TO THE CONSOLIDATED APPROPRIATIONS ACT, 2023

PCAOB Release No. 2023-002
March 28, 2023

PCAOB Rulemaking
Docket Matter No. 050

Summary: The Public Company Accounting Oversight Board (“PCAOB” or “Board”) is amending PCAOB Rule 6100, *Board Determinations Under the Holding Foreign Companies Accountable Act*, to conform the rule to an amendment of the Sarbanes-Oxley Act of 2002 set forth in the Consolidated Appropriations Act, 2023.

Board

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I. SUMMARY

The Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley”) 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.¹

In December 2020, recognizing the obstacles the Board has faced when attempting to conduct inspections and investigations in certain foreign jurisdictions, Congress enacted the Holding Foreign Companies Accountable Act (“HFCAA”), which amended Sarbanes-Oxley.² The HFCAA required 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

¹ See, e.g., Section 106(a)(1) of Sarbanes-Oxley, 15 U.S.C. § 7216(a)(1).

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

position taken by one or more authorities in that jurisdiction.³ The HFCAA also mandates that, after the Board makes such a determination, the U.S. Securities and Exchange Commission (“SEC” or “Commission”) shall require covered issuers⁴ that retain such firms to make certain disclosures in their annual reports and, eventually, if certain conditions persist, shall prohibit trading in those issuers’ securities.⁵

Following public comment, the Board adopted 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.⁶ Rule 6100 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.

On December 29, 2022, the President signed into law the Consolidated Appropriations Act, 2023 (“the 2023 Appropriations Act”),⁷ amending certain provisions of Sarbanes-Oxley that relate to Board determinations under the HFCAA. As a result, the Board is amending Rule 6100 to conform to the 2023 Appropriations Act’s amendment of Section 104(i)(2)(A)(ii) of Sarbanes-Oxley.⁸

II. DESCRIPTION OF THE AMENDMENTS TO PCAOB RULE 6100

The appendix to this release presents the amendments as incorporated into Rule 6100.

³ See Section 104(i)(2)(A) of Sarbanes-Oxley, 15 U.S.C. § 7214(i)(2)(A).

⁴ See Section 104(i)(1)(A) of Sarbanes-Oxley, 15 U.S.C. § 7214(i)(1)(A) (defining “covered issuer”).

⁵ See generally *Holding Foreign Companies Accountable Act Disclosure*, SEC Release No. 34-93701 (Dec. 2, 2021).

⁶ See *Rule Governing Board Determinations Under the Holding Foreign Companies Accountable Act*, PCAOB Rel. No. 2021-004 (Sept. 22, 2021); see also *Public Company Accounting Oversight Board; Order Granting Approval of Proposed Rule Governing Board Determinations Under the Holding Foreign Companies Accountable Act*, SEC Release No. 34-93527 (Nov. 4, 2021).

⁷ See Pub. L. No. 117-328 (Dec. 29, 2022).

⁸ The other amendments to Sarbanes-Oxley in the 2023 Appropriations Act relate to the timetable for trading prohibitions. See Section 301 of Division AA of the 2023 Appropriations Act (reducing, from three years to two years, the timetable for trading prohibitions set forth in Section 104(i)(3) of Sarbanes-Oxley). Because Rule 6100 does not address the timetable for such prohibitions, no related changes to Rule 6100 are necessary.

A. Rule 6100(a)

Consistent with the HFCAA,⁹ Rule 6100(a), as originally adopted, provided that a Board determination regarding its inability to inspect or investigate completely a registered public accounting firm could be based only on positions taken by authorities *in the foreign jurisdiction where the firm was headquartered* (for purposes of Rule 6100(a)(1)) *or in a foreign jurisdiction where the firm had an office* (for purposes of Rule 6100(a)(2)).¹⁰ Therefore, if the Board were unable to inspect or investigate a firm completely because of a position taken by an authority in a foreign jurisdiction where the firm neither was headquartered nor had an office, a determination under the HFCAA as to the firm could not be made.

The 2023 Appropriations Act amends Section 104(i)(2)(A)(ii) of Sarbanes-Oxley to allow the Board to make a determination as to a firm located in one foreign jurisdiction based on a position taken by an authority in a different foreign jurisdiction.¹¹ The Board is amending Rule 6100(a)(1) and (a)(2) to effectuate that change by replacing “in that jurisdiction” with “in a foreign jurisdiction” at the end of both provisions.

B. Rule 6100(c) and (d)

Relatedly, because future Board determinations could implicate two foreign jurisdictions—one where the firm is located and another whose authorities are taking positions that render the Board unable to inspect or investigate completely—the Board is amending Rule 6100(c) and (d) to eliminate potentially ambiguous or confusing references to “the foreign jurisdiction.” Specifically, the Board is deleting “in the foreign jurisdiction or any political subdivision thereof” in Rule 6100(c)(1); is replacing “any relevant authority in the foreign jurisdiction” with “any relevant foreign authority” in Rule 6100(c)(2); is replacing “the foreign authority’s” with “any relevant foreign authority’s” in Rule 6100(c)(3); and is deleting “located in the foreign jurisdiction” in Rule 6100(d).

⁹ See HFCAA § 2(i)(2)(A)(ii), 15 U.S.C. § 7214(i)(2)(A)(ii) (providing that a Board determination as to a registered firm can be based only on a position taken by an authority in “the foreign jurisdiction described in clause (i),” that is, the foreign jurisdiction where a branch or office of the firm is located).

¹⁰ See PCAOB Rule 6100(a)(1) (pre-amendment) (“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.”) (emphasis added); PCAOB Rule 6100(a)(2) (pre-amendment) (“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.”) (emphasis added).

¹¹ See Section 301 of Division AA of the 2023 Appropriations Act (striking “the foreign jurisdiction described in clause (i)” and inserting “a foreign jurisdiction” in Section 104(i)(2)(A)(ii) of Sarbanes-Oxley).

III. ADMINISTRATIVE CONSIDERATIONS

The amendments to Rule 6100 that the Board is adopting today reflect the statutory amendment to Section 104(i)(2)(A)(ii) of Sarbanes-Oxley. The amendments to Rule 6100 conform to the change enacted by Congress and the President and clarify the Board's authority to make a determination that the Board is unable to inspect or investigate completely a registered firm headquartered, or with an office in, a foreign jurisdiction because of a position taken by an authority in another foreign jurisdiction. Therefore, the Board believes that public notice and comment is unnecessary in advance of adopting these targeted amendments to Rule 6100.¹²

IV. EFFECTIVE DATE

The Board determined that the amendments to Rule 6100 take effect upon approval by the Commission. The effective date takes into consideration the statutory amendments to Sarbanes-Oxley and the limited, conforming nature of the changes to Rule 6100.

On the 28th day of March, in the year 2023, 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

March 28, 2023

¹² The amendments to Rule 6100 do 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 do they impose any "additional requirements" on auditors. Section 103(a)(3)(C) of Sarbanes-Oxley. Accordingly, the Board has concluded that Section 103(a)(3)(C) of Sarbanes-Oxley does not apply to this rulemaking.

Appendix – Amendments to Board Rules

The relevant portions of Section 6 of the Board’s rules are amended as set out below. Language deleted by these amendments is struck through. Language that is added is underlined.

RULES OF THE BOARD

SECTION 6. International

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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~~ a foreign 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~~ a foreign jurisdiction.

* * * *

(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 foreign 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~~ any relevant 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~~.

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