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**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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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