

Legal Update

President Trump Signs the HFCAA into Law Prompting SEC to Change Course

On December 18, 2020, President Trump signed the Holding Foreign Companies Accountable Act (HFCAA) into law. Later that day, US Securities and Exchange Commission (SEC) Chairman Jay Clayton published a statement providing an update on a planned SEC rulemaking in light of the enactment of the HFCAA. Noting the significant overlap between the HFCAA and the planned SEC rulemaking, Chairman Clayton has directed the staff to revise the near-final rule proposal to incorporate the congressional mandate.

Mayer Brown's recent [Legal Update](#) reported on the passage of the HFCAA, which mandates that the SEC adopt rules applicable to reporting companies that use an auditor located in a jurisdiction where authorities restrict the Public Company Accounting Oversight Board's (PCAOB) ability to inspect or investigate the audit firm. Specifically, the SEC would have to promulgate rules requiring disclosure about ties to foreign governmental entities, including the Chinese Communist Party. In addition, the SEC would have to prohibit trading of a company's securities if the SEC determines that the company has had three "non-inspection years" related to its audit. At the time of publication, Mayer Brown noted that the legislation was being sent to President Donald Trump, who was expected to sign it into law.

The same Legal Update discussed the SEC's planned approach to addressing the issue of PCAOB-restricted access to audit work papers. In short, the SEC Chairman had directed the staff to begin drafting a rulemaking proposal consistent with the recommendation made this summer by the President's Working Group on Financial Markets (PWG). The PWG recommendation called for enhanced listing standards for companies traded on US securities exchanges.

PRACTICAL CONSIDERATIONS

The current Commission will no longer consider a rule proposal before the end of this year to implement the PWG recommendation as planned. Instead, Chairman Clayton has directed the staff to consider ways to implement the HFCAA in a manner that both protects investors and ensures the fair and orderly functioning of the US markets. Chairman Clayton referred to this directive as a "pragmatic step," and indeed it is in aligning the Commission process with the HFCAA, which requires more extensive SEC implementation work than the earlier rule proposal.

Chairman Clayton plans to leave the Commission by the end of this month, which will result in a four-member Commission consisting of two Democrat commissioners and two Republican commissioners. The SEC will have at least one acting chair before the Biden administration appoints a chair confirmed by the US Senate. This situation poses several uncertainties that could impact the direction and timing of the Commission process to implement the HFCAA: Will the staff continue to follow Chairman Clayton's directive and include the PWG recommendation in the proposed rule?¹ Will the staff be given a new directive by the next chair, or the interim acting chair? When will the HFCAA be implemented in full by SEC rulemaking?

Although there may be uncertainty as to the precise content of the SEC's rulemaking, the HFCAA contains a statutory mandate for the SEC to issue rules implementing the statute's disclosure requirement within 90 days of its enactment. However, given the complexity of the rulemaking and upcoming leadership changes at the SEC, it will likely take longer than 90 days for the SEC to adopt final rules. That said, we would expect proposed rules (at least as related to the disclosure requirements) to be released quickly for public comment. We would expect the public comment period to be between 30 and 90 days, but such comment period could be lengthened if the Commission so decides. Regardless, we expect this SEC rulemaking effort to implement the HFCAA to continue unabated, though we note that the final rule that the SEC ultimately adopts could be quite different from the PWG recommendation, depending on the SEC Chair at the time of adoption.

For more information about topics raised in this Legal Update, please contact any of the lawyers listed below.

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ENDNOTES

¹ In August 2020, Chairman Clayton directed the SEC staff to prepare proposals following the recommendations of the PWG. SEC Chairman Jay Clayton, SEC Division of Corporation Finance Director William Hinman, SEC Division of Investment Management Director Dalia Blass, SEC Division of Trading and Markets Director Brett Redfearn, SEC Office of International Affairs Director Raquel Fox, SEC Chief Accountant Sagar Teotia, Statement on SEC Response to the Report of the President's Working Group on Financial Markets (Aug. 10, 2020), available at <https://bit.ly/2KODiAV>.

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