

Washington Insider Briefing: Critical Insight on Proposed US Law Affecting Non-US Companies

Latham's SEC Team answers seven key questions about pending legislation that could force delisting of foreign companies.

Key Points

- Latham's "We've Got Washington Covered" SEC Team provides knowledgeable viewpoints on legislation
- Foreign companies should monitor developments and continue US presence and plans

What happened?

The US Senate recently passed a bill entitled "Holding Foreign Companies Accountable Act" that gives the SEC the authority to delist any US-listed company if the company's audit firm has a non-US office in a country in which the US Public Company Accounting Oversight Board (PCAOB) is unable to conduct complete inspections of foreign audit firms. The bill also calls for companies to provide additional disclosures with respect to foreign government control and ownership, which appears largely duplicative of existing SEC disclosure requirements for foreign companies.

And why?

The bill appears to stem from US policy makers' continued frustration with the PCAOB's inability to conduct inspections in some foreign countries, especially China. The PCAOB inspection regime dates from the adoption of the Sarbanes-Oxley Act in 2002. Independent auditors that issue the audit reports included in SEC filings (such as offering prospectuses and annual reports) are required to register with PCAOB. As such the independent auditors are required by US law to undergo regular PCAOB inspections to assess their compliance with US laws and professional standards. However, auditors located in China, a jurisdiction where the PCAOB is currently unable to conduct inspections without the approval of the Chinese authorities, are not currently inspected by the PCAOB.

What does the SEC think?

The SEC generally does not express a view on legislation and it has not here. The SEC and the PCAOB have issued a number of statements highlighting continued challenges US regulators face in their oversight of financial statement audits of US-listed companies with significant operations in China. SEC Chairman Jay Clayton, in a letter to a US Senator, stressed the "collateral consequences" to market participants that would be associated with forced delistings.

Will the bill become a law?

The future of the bill is very unclear. This bill has been introduced in the US Senate, so to become law, the US House of Representatives would need to introduce and vote on a companion bill of its own, and also need to resolve any differences between the House and Senate versions of the bill. After that, the bill would need to be signed by President Donald J. Trump. Even if adopted, the legislation would require implementation actions by the SEC, which often take several months. Latham will continue to monitor developments with this and similar legislation.

If the bill became a law, would companies face immediate delisting?

It does not appear so. The bill directs the SEC to take actions to effect delisting and also to ban trading in the US over-the-counter market. As with virtually all regulatory actions, the SEC would presumably provide a procedure that would be subject to US due process / notice and comment protocols. Also, the bill appears to provide that any delisting could not occur until at least three years after enactment, and that the SEC demonstrate that the company's audit firm could not be inspected during that entire period.

What about IPOs?

Notably, the bill does not prohibit impacted companies from making initial public offerings and US listings. Rather, companies could list in the United States, and would likely provide appropriate disclosure addressing the possible risk of delisting.

What comes next?

Latham lawyers in Washington, D.C. will closely follow Congressional, SEC, and Trump White House developments on this matter. Two weeks before the Senate bill, the SEC had already announced a public roundtable that would address audit inspections in China and other emerging market issues.

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