Council of Institutional Investors®
The voice of corporate governance

Via E-Mail

May 5, 2021

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: File No. S7-03-21

Dear Madam Secretary:

I am writing of behalf of the Council of Institutional Investors (CII) in response to the Securities and Exchange Commission's (SEC or Commission) request for comment on its "Interim Final Rule" entitled "Holding Foreign Companies Accountable Act Disclosure" (Interim Rule).[1]

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

As the leading voice for effective corporate governance and strong shareholder rights, CII believes that accurate and reliable audited financial statements are critical to investors in making informed decisions, and vital to the overall well-being of our capital markets.[3] Consistent with

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[1] Holding Foreign Companies Accountable Act Disclosure, Exchange Act Release No. 91,364, Investment Company Release No. 34,227, 86 Fed. Reg. 17,528 (Mar. 18, 2021), https://www.federalregister.gov/documents/2021/04/05/2021-06292/holding-foreign-companies-accountable-act-disclosure.

[2] For more information about the Council of Institutional Investors ("CII"), including its board and members, please visit CII's website at http://www.cii.org.

[3] *See* CII, Policies on Other Issues, Independence of Accounting and Auditing Standard Setters (updated Mar. 1, 2017), http://www.cii.org/policies_other_issues#indep_acct_audit_standards ("Audited financial statements including related disclosures are a critical source of information to institutional investors making investment decisions [and] [t]he efficiency of global markets—and the well-being of the investors who entrust their financial present and future to those markets—depends, in significant part, on the quality, comparability and reliability of the information provided by audited financial statements and disclosures.").

our membership approved policies,[4] we have long been troubled by the lack of cooperation of China's regulators with the SEC and the Public Company Accounting Oversight Board (PCAOB) and their efforts to promote high quality audits of financial reports of Chinese companies that are listed on U.S. exchanges.[5] In recent years those concerns have grown as the number of Chinese companies listed has increased significantly.[6] What is also concerning is that many of those companies have adopted variable interest entity (VIE) and dual-class stock structures,[7] both of which are complex and involve risks that are not fully understood by many market participants.[8]

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[4] *See id.*; Council of Institutional Investors, Policies on Other Issues, Financial Gatekeepers (adopted Apr. 13, 2010), https://www.cii.org/policies_other_issues#fin_gatekeepers ("Auditors . . . and other financial 'gatekeepers' play a vital role in ensuring the integrity and stability of the capital markets [and] [t]hey provide investors with timely, critical information they need, but often cannot verify, to make informed investment decisions.").

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

[6] *See* Tabby Kinder & Michael O'Dwyer, Accountancy, Big Four Auditors Squeezed Between US and China, Fin. Times (Apr. 29, 2021) (on file with CII) ("The number of Chinese companies listed on U.S. exchanges has ballooned since [2002] . . . and investment in Chinese IPO's on U.S. markets reached record levels this year."); Hudson Lockett & Tabby Kinder, U.S. China Trade Dispute, China Stock Sales in U.S. Surge To Record Despite Delisting Threat, Fin. Times (Apr. 25, 2021) (on file with CII) ("Chinese companies have raised a record $11bn this year on the New York Stock Exchange and Nasdaq via initial public offerings, follow-on share sales and issuance of convertible bonds, according to data from Dealogic."); Dave Michaels & Alexander Osipovich, SEC Pursues Plan Requiring Chinese Firms To Use Auditors Overseen By U.S., Wall St. J. (Nov. 17, 2020) (on file with CII) ("More than 170 companies based in China or Hong Kong have completed IPOs in the U.S. since January 2014, raising about $58.7 billion, according to data from S&P Global Market Intelligence."); Jing Yang, 'The Gold Standard:' Why Chinese Startups Still Flock To The U.S. For IPO's, Wall St. J. (Aug. 13, 2020) (on file with CII) ("The U.S. remains a magnet for initial public offerings of Chinese technology companies, despite rising political, trade and regulatory tensions between the world's two largest economies."); Jon Swartz, A Chinese IPO Just Raised More Than $2 Billon Amid Tensions Between U.S., China, Mkt.Watch (Aug. 13, 2020), https://www.marketwatch.com/story/ke-holdings-shares-are-off-to-a-flying-start-in-ipo-debut-that-raises-212-billion-2020-08-13 ("Investors have dumped billions into Chinese companies in recent years, even as shareholder advocates such as the Council of Institutional Investors warn of risks associated with low-visibility stocks far, far away."); Michael Rapoport, They'd Find Fraud, Fraud, Fraud, Institutional Inves. (July 22, 2020), https://www.institutionalinvestor.com/article/b1mlyjys554sgd/They-d-Find-Fraud-Fraud-Fraud ("Fraud allegations involving Chinese companies that trade in the U.S. have plagued investors for years."); Press Release, Senate Passes Kennedy and Van Hollen's Bill To Kick Deceitful Chinese Companies Off U.S.Exchanges (May 20, 2020), https://www.kennedy.senate.gov/public/2020/5/senate-passes-kennedy-and-van-hollen-s-bill-to-kick-deceitful-chinese-companies-off-u-s-exchanges ("In the last 10 years, the number of Chinese companies listed on U.S. stock exchanges has increased significantly, as those firms take advantage of the capital available in America.").

[7] *See, e.g.,* CII, Dual-Class Snapshot: Statistics (as of May 4, 2021) (on file with CII) (In 2020, 5.5% of initial public offerings (IPOs) were foreign private issuers (FPIs) from China (24 out of 433), of these 24 Chinese FPIs, 10 (41.67%) have a dual-class structure and 19 (79.1%) have a Variable Interest Entity (VIE) structure, and thus far 3.5% of IPOs in 2021 have been Chinese FPIs (13 out of 370), of these 13 Chinese FPIs, 4 (31%) has a dual-class structure and 9 (69%) have a VIE structure.).

[8] *See* Yujing Liu, Legally Ambiguous 'VIE' Structure Means Foreign Investors Don't Technically Own Overseas - Listed Chinese Stocks – And That Could Spell Disaster, S. China Morning Post (Dec. 21, 2020),

To be clear, CII is focused foremost on the quality and integrity of U.S. capital markets. Our members have a variety of investment strategies for emerging and frontier markets, and understand risk has to be calibrated to rewards. But we expect that U.S. capital markets should adhere to their articulated standards.[9] And this is not happening where U.S.-listed companies are audited by firms that are not inspected by the PCAOB.[10]

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https://www.scmp.com/business/markets/article/3114557/legally-ambiguous-vie-structure-means-foreign-investors-dont ("As China reasserts control over its powerful private enterprises, US and Hong Kong investors in Chinese stocks need to be aware of a rarely discussed risk that has the potential to jeopardise their holdings: the fact that they do not technically own the companies."); SEC CF Disclosure Guidance: Topic No. 10 (Nov. 23, 2020), https://www.sec.gov/corpfin/disclosure-considerations-china-based-issuers ("These China-based Issuer VIE structures pose risks to U.S. investors that are not present in other organizational structures."); Chinese VIE Structure: Wall Street Continues To Ignore The Risks, CGI (Nov. 10, 2020), https://globescancapital.com/chinese-vie-structure-wall-street-continues-to-ignore-the-risks/ ("Most of the Western investment community does not even talk about the VIE structure – they either don't know about it, don't understand how it works, or don't care to learn."); Jonathan Barnett, Lessons From Luckin Coffee: The Underappreciated Risks Of Variable Interest Entities, CLS Blue Sky Blog (July 28, 2020), https://clsbluesky.law.columbia.edu/2020/07/28/lessons-from-luckin-coffee-the-underappreciated-risks-of-variable-interest-entities/ ("it is unclear that individual investors in an 'irrationally exuberant' stock such as Luckin typically appreciate the issuer's multi-layered VIE structure, often bundled . . . with a dual-class voting structure that doubly disadvantages public shareholders"); Letter from Marco Rubio, U.S. Senator to The Honorable Steven Mnuchin, Secretary, U.S. Department of the Treasury (July 21, 2020), https://www.rubio.senate.gov/public/_cache/files/30ba40e5-7359-4706-9ccc-4126c2e78478/C09DEAFE10626E89603CCC9B7CEB5A9C.20.07.21-rubio-to-president-s-working-group-on-financial-markets-re-china-investment.pdf ("To skirt China's foreign ownership restrictions, these [VIE] firms operate in a state of contradiction, telling the Chinese government that they are not owned by foreign investors, while effectively telling foreign investors the opposite."); CII Research Analyst Brandon Whitehill, Buyer Beware: Chinese Companies And The VIE Structure 2 (Dec. 2017), https://www.cii.org/files/publications/misc/12_07_17%20Chinese%20Companies%20and%20the%20VIE%20Structure.pdf ("VIEs are fraught with complexity and risk for investors, including vulnerability to Chinese government pressures and management conflicts of interest"); *see also* U.S. Securities and Exchange Commission, Office of Investor Advocate, Report on Activities 10 (Dec. 29, 2020), https://www.sec.gov/advocate/reportspubs/annual-reports/sec-investor-advocate-report-on-activities-2020.pdf ("In our view, . . . minimum listing standards should . . . include the following requirements: . . . If a company chooses to issue multiple classes of stock with differing voting rights, then the dual-class stock must contain a 'sunset' provision."); Letter from Ash Williams, Chair, CII, et al. to John Zecca, Senior Vice President, General Counsel, North America and Chief Regulatory Officer, NASDAQ Stock Market 3-4 (Oct. 24, 2018), https://www.cii.org/files/issues_and_advocacy/correspondence/2018/20181024%20NASDAQ%20Petition%20on%20Multiclass%20Sunsets%20FINAL.pdf ("over time and on average, the valuation of these [dual class stock structure] firms tends to decline, as the "wedge" between ownership and control widens, the agency costs of insider control and lack of shareholder accountability increase, founder's entrepreneurial skills and insights that initially propelled a company become dated, and opportunities and risks change in ways not foreseeable by investors at IPO.).

[9] *See* Soyoung Ho, Trump Administration Seeks To Delist U.S.-Listed Chinese Companies For Blocking Audit Inspections, Thomson Reuters Tax & Acct. (Aug. 10, 2020), https://tax.thomsonreuters.com/news/trump-administration-seeks-to-delist-u-s-listed-chinese-companies-for-blocking-audit-inspections/ (quoting Thomas Gorman, a partner with Dorsey & Whitney LLP that **Sarbanes-Oxley** 'provides the SEC and PCAOB with all the tools necessary to ensure that investors purchasing shares in the U.S. markets are protected,' pointing to the law's requirement for inspections."); Michael D. Mann & Arthur Levitt Jr., Opinion|Commentary, The SEC's China Evasion, Wall St. J. (May 6, 2020) (on file with CII) ("leaving it to investors to protect themselves, fails to carry out the SEC's statutory mandate[,] [i]t can only diminish U.S. Markets [and] [i]t sells short the recourse the SEC has in this situation: Failure to comply with its rules, or to cooperate with its investigations, can be the basis for stopping a listing, suspending trading or barring a person or company from participating in the U.S. markets").

[10] *See, e.g.,* Presidential Documents, Memorandum, Protecting United States Investors from Significant Risks for Chinese Companies 85 Fed. Reg. 35,171 (June 4, 2020), https://www.federalregister.gov/documents/2020/06/09/2020-12585/protecting-united-states-investors-from-

CII's preference is for the PCAOB to inspect the audit work and practices of PCAOB-registered firms in China. However, after more than a decade of negotiations China has refused to permit such inspections.[11] We agree with Daniel Goelzer, former acting PCAOB Chairman and former SEC General Counsel, that '"[i]t isn't sustainable for the U.S. to have an audit inspection requirement and to enforce it against all auditors, except those from China'"[12]

CII first took a public position on the Holding Foreign Companies Accountable Act (HFCA Act)[13] in connection with a June 2019 hearing of the Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets of the Committee on Financial Services in which a draft bill was discussed.[14] At that time, we stated:

> We acknowledge that there are a number of possible alternative actions the SEC, the PCAOB, the stock exchanges, or Congress could potentially take to address, at least in part, the investor protection and general oversight issues that exist for U.S. Chinese listed companies. In our view, the provisions of the Accountab[le] Act are not an unreasonable response, particularly in light of the apparent increasing size, scope, and significance of those issues.[15]

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significant-risks-from-chinese-companies ("Preventing the PCAOB from complying with its statutory mandate means that investors cannot have confidence in the financial reports of audited companies and creates significant risks to investors in the securities listed on United States stock exchanges").

[11] *See* 2007 PCAOB Ann. Rep. 18 (2008), https://pcaobus.org/About/Administration/Documents/Annual%20Reports/2007.pdf ("in 2007, the PCAOB had bilateral contact or discussions regarding auditor oversight with many countries around the world, including . . . China"); *see also* Tabby Kinder & Michael O'Dwyer, Accountancy, Big Four Auditors Squeezed Between US And China, Fin. Times ("Since Sarbanes-Oxley, US regulators have tried a number of ways to force compliance, including negotiating with Chinese regulators and suing audit firms"); Soyoung Ho, Trump Administration Seeks To Delist U.S.-Listed Chinese Companies For Blocking Audit Inspections, Thomson Reuters Tax & Acct. ("the PCAOB has not been able to get Chinese authorities to agree to a joint inspection program despite over 13 years of off-and-on negotiations"); Bethany Allen-Ebrahimian et al., China, Public Markets And Secrecy, Axios (June 20, 2020), https://www.axios.com/china-public-markets-threat-76888ca3-45da-4d12-a93e-37e0b3a4a120.html ("In May 2013, the . . . PCAOB[] signed a memorandum of understanding with the China Securities Regulatory Commission and the Ministry of Finance . . . to help facilitate these third-party audit requests . . . [b]ut Chinese companies have violated the agreement, according to the PCAOB as well as current and former U.S. officials.").

[12] *See* Soyoung Ho, Trump Administration Seeks to Delist U.S.-Listed Chinese Companies for Blocking Audit Inspections, Thomson Reuters Tax & Acct. ("'It isn't sustainable for the U.S. to have an audit inspection requirement and to enforce it against all auditors, except those from China," [and] . . . '[t]herefore, something like . . . the HFCA legislation will have to be implemented.'"); Capital Markets and Emergency Lending in the COVID-19 Era: Before H. Comm. on Fin. Servs. Inv't Prot., Entrepreneurship, & Capital Mkts. Subcomm., 116th Cong. (June 25, 2020) (testimony of Jay Clayton, Chairman, U.S. Securities and Exchange Commission at 9), https://www.sec.gov/news/testimony/clayton-2020-06-25 ("I believe the status quo has come to be unacceptable . . . .").

[13] Holding Foreign Companies Accountable Act, Pub. L. No. 116-222 (Dec. 18, 2020), https://www.congress.gov/116/plaws/publ222/PLAW-116publ222.pdf.

[14] Putting Investors First: Examining Proposals to Strengthen Enforcement Against Securities Law Violators, H. Comm. on Fin. Servs. Inv't Prot., Entrepreneurship, & Capital Mkts. Subcomm. (June 19, 2019), https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=403833.

[15] Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to The Honorable Carolyn B. Maloney, Chair, H. Comm. on Fin. Servs. Inv't Prot., Entrepreneurship, & Capital Mkts. Subcomm. et al. 6 (June 18, 2019) (footnotes omitted),

CII subsequently supported the passage of the HFCA Act. And we now support an effective and timely implementation of the HFCA Act by the Commission. In that regard, the following includes our specific responses to select questions raised in the Interim Rule:

1.c. Should we publish a list of Commission-Identified Issuers on our website? Should Commission-Identified Issuers be identified on EDGAR so investors may more easily identify which registrants are on the list? If we publish a list of Commission-Identified Issuers, how should the Commission address any potential errors in identification relating to a registrant's status? Should the Commission provide guidance or prescribe rules relating to disclosure or procedures for identification of errors relating to a registrant's status?[16]

CII generally supports "Commission-Identified Issuers" being provided on the Electronic Data Gathering, Analysis, and Retrieval system.[17] We believe this action will further the ability of investors to more efficiently and rapidly identify which registrants are on the list and potentially incorporate that information into their investment or proxy voting decisions.

1.d. To facilitate satisfaction of HFCA Act requirements, should we introduce a structured data tagging requirement pertaining to the auditor name and jurisdiction on the audit report signed by the registered public accounting firm in the registrant's Form 10–K, Form 20–F, and Form 40–F? Such tagging would provide machine-readable data directly from the registrant identifying the audit firm retained by it, and may therefore facilitate the Commission's determination of the registrants it should designate as Commission-Identified Issuers. If we introduced such a requirement, should the information be required to be tagged in Inline XBRL? Should we instead consider a tagging requirement to facilitate the determination of Commission-Identified Issuers that would not specify a particular structured data language to be used? Would the use of tagging also facilitate the ability of investors and other interested parties to identify registrants at risk of trading prohibitions resulting from three consecutive noninspection years? What would be the costs associated with introducing a structured data tagging requirement pertaining to the auditor name and jurisdiction? Should we introduce this structured data tagging requirement for Form N–CSR? Is there any circumstance when that tagged information in the Form N–CSR would differ from the information the Commission already collects on Form N–CEN (17 CFR 249.330) in a structured data format regarding a fund's auditor?[18]

CII supports the introduction of a structured data tagging requirement for the auditor's name and jurisdiction on the audit report signed by the registered public accounting firm in the registrant's

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https://www.cii.org/files/April%209%202019%20Letter%20to%20Subcommittee%20on%20Investor%20Protection%20Entreprenuership%20and%20Capital%20Markets%20(finalV)%20KB.pdf.

[16] 86 Fed. Reg. at 17,523.

[17] *See, e.g.,* Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Vanessa A. Countryman, Secretary, Securities and Exchange Commission 6 (Mar. 18, 2021), https://www.cii.org/files/issues_and_advocacy/correspondence/2021/March%2018%202021%20Rule%20144%20letter.pdf (supporting "mandatory electronic filing [of Form 144] on EDGAR").

[18] 86 Fed. Reg. at 17,523.

Form 10–K,[19] Form 20–F[20] and Form 40–F.[21] We believe such a requirement would facilitate the ability of investors and other interested parties to identify registrants at risk of trading prohibitions resulting from three consecutive non-inspection years. We would also support a requirement that the information be tagged in Inline XRBL. We believe Inline XBRL improves "the functionality of EDGAR and makes disclosure documents more valuable and cost-effective for a broad range of users, including market analysts and data vendors that conduct research . . . ."[22]

5. The interim final amendments do not require the HFCA Act Section 3 disclosure until an issuer has been identified by the Commission and in no event would disclosure be required for fiscal years ending on or before December 31, 2020. Should we provide additional guidance on the required timing and disclosure? What additional guidance would be useful?[23]

CII believes the Commission should provide additional guidance on the required disclosure under the HFCA Act Section 3[24] when the registrant has a VIE or dual-class stock structure. We note that the Interim Rule states: "[C]ompliance with the HFCA Act will require disclosures and submissions pertaining to the ownership or control of a registrant by a governmental entity in the foreign jurisdiction of the registered public accounting firm that the PCAOB is unable to inspect or investigate completely."[25]

As indicated, many companies that would be subject to the HFCA Act required disclosures are likely to have VIE or dual-class stock structures, both of which are complex and involve risks that are not fully understood by many market participants. Moreover, the Interim Rule indicates the "levels of detail and specificity associated with [VIEs]. . . disclosures vary . . .. and the information often is not easily comparable across filings . . . ."[26] As a result, CII believes that without additional disclosure guidance for VIE and dual-class stock structures, investors and other market participants may have a more difficult task fully understanding the ownership or control of those registrants subject to the HFCA Act.[27]

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[19] SEC, Form 10-K (last visited May 5, 2021), https://www.sec.gov/files/form10-k.pdf.
[20] SEC, Form 20-F (last visited May 5, 2021), https://www.sec.gov/files/form20-f.pdf.
[21] SEC, Form 40-F (last visited May 5, 2021), https://www.sec.gov/about/forms/form40-f.pdf.
[22] Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Nicole Puccio, Branch Chief, Securities and Exchange Commission 2-3 (July 19, 2018), https://www.cii.org/files/July%2019%202018%20SEC%20Strategic%20Plan%20final%20(003).pdf.
[23] 86 Fed. Reg. at 17,533.
[24] *See* Holding Foreign Companies Accountable Act, Pub. L. No. 116-222, §3(b).
[25] 86 Fed. Reg. at 17,535.
[26] *Id.*
[27] *See* Letter from Jeffrey P. Mahoney, General Council, Council of Institutional Investors to The Honorable Jeb Hensarling, Chairman, Committee on Financial Services 6 (July 10, 2018), https://www.cii.org/files/July%2010%202018%20Letter%20to%20Committee%20on%20Financial%20Services(1).pdf ("We believe that improving disclosure about public companies with multi-class structures is an important supplement to amending existing U.S. stock exchange listing standards to require meaningful, time-based sunsets."); See also CII Research Analyst Brandon Whitehill, Buyer Beware: Chinese Companies And The VIE Structure at 16 ("In view of its investor protection mandate, the SEC should consider probing VIEs and ensuring greater transparency . . . .").

For registrants that have VIE structures and are subject to the HFCA Act, CII would respectfully request that the SEC consider, at a minimum, requiring the following additional disclosures:

- Full legal opinion regarding the contracts on which the registrant relies as the basis for consolidating the VIE,[28]
- Financial statements of the parent company and each of the consolidating companies when the VIE structure allows parties to take assets out of the registrant that would otherwise be available to common shareowners and[29]
- Applicable tax rates of moving cash flow through or out of the VIE structure.[30]

In addition, for registrants that have dual-class stock structures[31] and are subject to the HFCA Act, CII would respectfully request that the SEC consider, at a minimum, requiring the following additional disclosure:

- Data that illustrates the divergence between economic ownership and control at the company, including:
    - Quantitative metrics illustrating the numerical gap between a person's beneficial ownership and voting rights arising from the dual-class stock structure and
    - Minimum beneficial ownership that persons with special voting shares can hold while still retaining majority control without further approval by other shareholders.[32]

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[28] *See* Brandon Whitehill, Council of Institutional Investors, Buyer Beware: Chinese Companies and the VIE Structure at 16 (recommending requiring "Chinese companies using VIE structures to disclose in their 20-F filings the full legal opinion regarding the contracts on which they rely as the basis for consolidating the VIE").

[29] *See id.* (recommending requiring "separate, unconsolidated financial statements for each entity—the VIE, the WFOE, and the ListCo—so investors can understand where the company's operations exist and the cash flow between the entities"); *cf.* Financial Statements and Periodic Reports For Related Issuers and Guarantors, Securities Act Release No. 7,878, Exchange Act Release No. 43,124 (final rule Aug. 8, 2020), https://www.sec.gov/rules/final/33-7878.htm ("Rule 3-10(a) requires, as a general rule, separate financial statements for 'every issuer of a registered security that is guaranteed and every guarantor of a registered security.'").

[30] *See* Brandon Whitehill, Council of Institutional Investors, Buyer Beware: Chinese Companies and the VIE Structure at 16 (recommending promoting "higher quality implementation of the accounting for deferred tax liabilities, including disclosing the potentially applicable tax rates of moving cash flow through the VIE structure").

[31] *See generally*, Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to The Honorable Sherrod Brown, Chairman, Committee on Banking, Housing & Urban Affairs, United States Senate et al. 2-5 (Mar. 18, 2021), https://www.cii.org/files/issues_and_advocacy/correspondence/2021/2021%20Investor%20Advocate%20Letter.pdf (discussing the need for proposed reforms of dual-class stock companies).

[32] *See* Committee on Capital Markets Regulation, The Rise of Dual Class Shares: Regulation and Implications 31 (Apr. 2020), https://www.capmktsreg.org/wp-content/uploads/2020/04/The-Rise-of-Dual-Class-Shares-04.08.20-1.pdf (supporting additional disclosures by companies with dual-class structures, including "(i) straightforward quantitative metrics illustrating the numerical gap between a person's beneficial ownership and voting rights arising from the dual-
class share structure and (ii) the minimum beneficial ownership that persons with special voting shares can hold while still retaining majority control without further approval by other shareholders."); *see also* Enhancing Multi-Class Share Disclosures Act, H.R. 6322, 115th Cong. § 2(k)(2) (July 31, 2018), https://www.congress.gov/bill/115th-congress/house-bill/6322/text (proposing a new federal securities law

6. If a registrant is determined to be a Commission-Identified Issuer for three consecutive years, Section 2 of the HFCA directs the Commission to prohibit the securities of the registrant from being traded in the U.S. market. As mentioned earlier, implementation of such trading prohibitions will be addressed separately. Are there any considerations we should take into account while determining how to best implement the trading prohibition requirements of the HFCA Act?[33]

CII believes that in implementing the trading prohibition requirements of the HFCA Act, the SEC should consider the language and intent of the HFCA Act with respect to the timing of the implementation of the trading prohibition. More specifically, Section 104(i)(3)(A) of the HFCA Act states: "if the Commission determines that a covered issuer has 3 consecutive non-inspection years, the Commission shall prohibit the securities of the covered issuer from being traded . . . . ." And non-inspection year "means, with respect to a covered issuer, a year -- '(i) during which the Commission identifies the covered issuer under paragraph (2)(A) with respect to every report described in subparagraph (A) filed by the covered issuer during that year; and '(ii) **that begins after the date of enactment of this subsection**."[34]

Given the HFCA Act's enactment in December 2020, CII believes that any deferral of the commencement of the trading prohibition beyond 2024 is not only inconsistent with the language and intent of the HFCA Act,[35] but it is also inconsistent with the related July 2020 recommendations of the President's Working Group on Financial Markets.[36] Moreover, CII

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disclosure to include with respect to each person who is a director, director nominee, or named executive officer of the issuer, or who is the beneficial owner of securities with 5 percent or more of the total combined voting power of all classes of securities entitled to vote in the election of directors—'(A) the number of shares of all classes of securities entitled to vote in the election of directors beneficially owned by such person, expressed as a percentage of the total number of the outstanding securities of the issuer entitled to vote in the election of directors; and '(B) the amount of voting power held by such person, expressed as a percentage of the total combined voting power of all classes of the securities of the issuer entitled to vote in the election of directors."); U.S. Securities and Exchange Commission, Investor Advisory Committee, Recommendation of the Investor as Owner Subcommittee, "Dual Class and Other Entrenching Governance Structures in Public Companies" 6 (Feb. 27, 2018) ("Require public companies that have dual class or other entrenching governance structures to prominently and clearly disclose the numerical relationship between (a) the amount of common equity or its equivalent economic beneficial ownership interest held by any person entitled to control or direct the voting of five percent or more of shares entitled to voting rights in the election of directors or the equivalent body . . . and (b) the amount of voting rights held or controlled by such a person . . . ."), https://www.sec.gov/spotlight/investor-advisory-committee2012/iac030818-investor-as-owner-subcommittee-recommendation.pdf.

[33] 86 Fed. Reg. at 17,533.

[34] Holding Foreign Companies Accountable Act, Pub. L. No. 116-222, §2(i)(1)(B) (emphasis added).

[35] *But see* Andrew Olmem, Christina Thomas, & Jason Elder, Mayer Brown LLP, Congress Passes The "Holding Foreign Companies Accountable Act," Harv. L. Sch. F. on Corp. Governance (Jan. 10, 2021), https://corpgov.law.harvard.edu/2021/01/10/congress-passes-the-holding-foreign-companies-accountable-act/ (suggesting, despite the language and intent of the Holding Foreign Companies Accountable Act (HFCA Act), that the Securities and Exchange Commission might implement the HCFA Act so that "it is possible that the three consecutive noninspection years required for delisting . . . would not begin to be counted until 2022, meaning that no company would be delisted until 2025 at the earliest").

[36] President's Working Group on Financial Markets: Report on Protecting United States Investors from Significant Risks from Chinese Companies 3 (July 24, 2020), https://home.treasury.gov/system/files/136/PWG-Report-on-Protecting-United-States-Investors-from-Significant-Risks-from-Chinese-Companies.pdf ("The recommendations of the PWG in this report include: . . . Enhancing the listing standards of U.S. exchanges to require as a condition to initial and continued exchange listing: a) PCAOB access to work papers of the principal audit firm for the audit of

believes that prompt implementation of HFCA Act's trading prohibition is consistent with the principles of investor protection and efficient capital markets.[37]

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

Sincerely,

Jeffrey P. Mahoney
General Counsel

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the listed company; . . . [t]o reduce market disruption, the new listing standards could provide for a transition period until January 1, 2022 for currently listed companies from NCJs to come into compliance [and] [t]he new listing standards would apply immediately to new company listings once the necessary rulemakings and/or standard-setting are effective.").

[37] *See, e.g.,* U.S. Securities and Exchange Commission, Office of Investor Advocate, Report on Activities at 10 ("We were pleased with the adoption of this legislation, which addressed a significant risk to U.S. investors, and we encourage Congress to consider other threats to investor protection that have arisen because of weak qualitative listing standards.").