US HOLDING FOREIGN COMPANIES ACCOUNTABLE ACT: DOES IT SOLVE THE PROBLEMS AROUND ACCOUNTABILITY?

LU Yuanyuan*

LI Zhihui**

WANG Yihuai (Edward)*** & ZHAO Jingchen**** *

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** Associate Attorney, Garvish Immigration Law Group Atlanta, GA, USA.

*** Institute of International Business, J. Mack Robinson College of Business, Georgia State University, Atlanta, GA, USA.

**** Corresponding author, Guangdong University of Finance and Economics, Guangzhou, China, Jingchenzhao@yahoo.com.

* Nottingham Law School, Nottingham Trent University, England, United Kingdom.

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Abstract

The accuracy and reliability of companies' financial statements can be influenced when foreign companies are cross-listed in different countries' capital markets. If a foreign company listed in the US capital market does not provide its complete auditing documents and other financial information to the US federal government as required under the US security regulatory standard, it may cause big trouble to both the US federal government and its investors. Neither the US Securities and Exchange Commission nor the US federal government's audit watchdog, the Public Company Accounting Oversight Board, are able to inspect the auditing and financial statements produced by audit firms based in China, making it impossible for them to determine whether the financial statements provided to them reflect the true financial positions of these cross-listed companies. Therefore, the US federal government passed a new law- Holding Foreign Companies Accountable Act on December 18, 2020, aiming to protect the US investment market and its investors. The article aims to offer a detailed discussion from a theoretical perspective of the goals of the HFCA Act and an analytical comparison between the accountability requirement used in common law jurisdictions and the Wenze (问责) system that has been introduced to develop the Chinese legal system. Through this comparison, we will examine the current true obstacles restricting the US government's access to the accounting and auditing information of the Chinese listed companies in the US. Additionally, we will also discuss the regulatory conflict that already existed before the HFCA Act, between the Chinese regulators' need to safeguard their sovereignty and the US government's need to protect its capital market investors. This paper will also highlight several important issues in US law related to promoting more accountable Chinese companies listed in the US and provide some suggestions for the legislative directions in the future.

Keywords: Holding Foreign Companies Accountable Act, Corporate Accountability, Wenze System, Accounting and Auditing Information

I. INTRODUCTION

Accurate and reliable audited financial statements are critical to investors in making informed decisions. They are important to the overall well-being of the United States' (US) capital market.[1] However, the accuracy and reliability of statements can be influenced when foreign companies cross-listed in both foreign and US capital markets do not provide their total auditing and other financial information to US regulators as required under the US security regulatory standard. The inability of the SEC and the PCAOB to inspect the auditing documents of foreign companies listed in the US capital market may adversely affect US investors and influence the overall well-being of the capital market.

The Holding Foreign Companies Accountable Act (HFCA Act) was passed by the House of Representatives of the United States on December 2, 2020, and signed into law by the President of the US on December 18, 2020.[2] The HFCA Act requires foreign issues of securities, i.e., companies from other jurisdictions, that use a foreign accounting firm to prepare an audit report for each non-inspection year to disclose a series of information including[3] first, the percentage of shares owned by government entities where the issuer is incorporated; second, whether these government entities have a controlling financial interest; third, information related to any board members who are officials of the Chinese Communist Party; and fourth**,** whether the articles of incorporation of the issuer contain any charter of the Chinese Communist Party.

The primary aim of the Act is to enhance transparency and accountability among foreign companies listed on U.S. stock exchanges. The Act seeks to ensure that companies from foreign jurisdictions adhere to the same auditing and regulatory standards as U.S. companies. It was introduced to the US Senate by Senator John Kennedy in March 2019. Securities adversely impacted encompass prominent Chinese technology giants such as Alibaba, Tencent, JD.com, NetEase, and Baidu.com. Following that, The PCAOB signed a Statement of Protocol with the China Securities Regulatory Commission (CSRC) the Ministry of Finance of the People's Republic of China on August 26, 2022. This agreement marked a pivotal step in enhancing cross-border financial oversight and transparency. The accord aimed to facilitate the sharing of audit information and cooperation between the two entities, thereby bolstering the credibility and reliability of financial reporting for companies operating between the United States and China.

This agreement carried the potential to reshape the landscape of international financial regulations and foster greater accountability in the realm of global finance. While the signing of the Statement of Protocol is a welcome first step, there are still gaps in achieving a shared understanding regarding the understanding of the accountability notion as a main theme of the Act, leaving the future of Chinese companies listed in the US in an undecided state. The

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[1] David Sherman & S. David Young, *Where Financial Reporting Still Falls Short*, 6 HARV. BUS. REV. 76, 84 (2016).

[2] Holding Foreign Companies Accountable Act, Pub. L. No. 116-222, S. 945, 116th Cong. (2020).

[3] 15 U.S.C. § 7216.

legislative effort of the HFCA Act was inspired by outrage over US-listed China-based companies not playing by the same rules as other listed companies, and because of the relatively high frequency of fraud committed by these companies.[4] A regulatory gap as a result of cross-border listing arises when listed foreign companies from a weak regime move to a stronger one.[5] The elucidation of the nature, scope, and consequential implications of the HFCA Act concerning Chinese companies remains a subject of ongoing scholarly inquiry. The efficacy of the framework formulated within the confines of the Statement of Protocol in garnering implementation approval from regulatory bodies in the United States and China engenders an enduring sense of uncertainty.

This article endeavors to address these gaps by undertaking a meticulous examination of the HFCA Act, elucidating its theoretical underpinnings, and expounding on the ramifications of its extraterritorial ambit. Specifically, our focus shall be directed towards the quandary of establishing accountability for Chinese enterprises enlisted within the precincts of the US capital market. The ultimate aim is to foster competitiveness and accountability of these companies.

The rest of the article proceeds as follows. Section II provides a timeline and a comprehensive overview of the HFCA Act. Section III will offer a detailed critical analysis of the HFCA Act mainly through the lens of accountability, enabling a deep understanding of the nature and scope of the Act. Section IV will investigate the potential impact of the Act on Chinese companies listed in the US capital market, while Section V will offer an analysis of the accountability requirement used in common law jurisdictions and the *Wenze* system that has been introduced to develop the Chinese legal system. Current obstacles restricting the PCAOB's access to accounting and auditing information related to Chinese listed companies come from Chinese securities regulations, in particular, the China Securities Law; a regulatory conflict has already existed before the HFCA Act between Chinese regulators' need to safeguard their sovereignty and the US's need to protect its capital market investors.[6] This paper will highlight a few important issues related to promoting more accountable Chinese companies listed in China.

II. THE HOLDING FOREIGN COMPANIES ACCOUNTABLE ACT: A TIMELINE

4 Jesse M. Fried, *The China Audit Dispute: Why It Matters, but Why It Might Not Matter Much* (Dec. 11, 2020), paper presented at the Securities Regulatory Cooperation for Cross-border Listings and Transactions Online international conference, https://webapp3.law.cuhk.edu.hk/conf/wp-content/uploads/2020/12/Cross-border-regulatory-cooperation-conference-rundown1210.pdf.

5 Amir N. Licht, *Cross-Listing and Corporate Governance, Bonding or Avoiding?* 4 CHICAGO J. INT'L L. 141, 163 (2003).

6 Lanxu Zhou, Xueqing Jiang & Shijia Quyang, *Joint Efforts Needed to Allay Doubts over US Listing Bill*, CHINA DAILY, May 27, 2020.

AND A COMPREHENSIVE OVERVIEW

The section aims to provide an overview of the timeline for the introduction of the HFCA Act. The section will also critically analyze the Act in terms of its purpose, rationale, and effectiveness.

A. Legislative Rationale and Background of the HFCA Act

In this section, an analysis is conducted on the legislative rationale and background of the HFCA Act, to elucidate the institutional context surrounding the enactment of the Act. The US-China Economic and Security Review Commission (USCC) was created by the US Congress in October 2000 with the legislative mandate to monitor, investigate, and submit to Congress an annual report on the national security implications of the bilateral trade and economic relationship between the United States and the People's Republic of China. Where appropriate, the USCC will also provide recommendations to Congress for legislative and administrative action.[7]

In one of its annual reports to Congress, the USCC summarized all problems it has observed from trades and economic relationships with China and listed three major risks associated with investing in Chinese companies listed in the US, which can be characterized as a lack of transparency, a lack of legal protection in China over variable interest entities, and a US national security risk.[8] The USCC's concerns about these three risks have provided the foundation and directions for future US legislations focusing on securities issuers from China. Here we analyze each of these in turn.

1. Lack of Transparency

Transparency involves making disclosures and providing reports concerning the decisions of the board.[9] It refers to the extent to which a company openly and honestly discloses relevant information about its financial performance, operations, decision-making processes, and overall conduct to its stakeholders. Lack of transparency refers to the lack of audit oversight of the PCAOB over Chinese companies listed in the US. A Memorandum of Understanding (MOU) was signed in 2013 between the PCAOB, the China Securities Regulatory Commission, and the Chinese Ministry of Finance. However, the SEC and the PCAOB were both dissatisfied with the auditing conditions because of the obstacles to PCAOB inspection of auditors based in Mainland China and Hong Kong. Neither the SEC nor the PCAOB have full access to accounting documents, and neither are they able to enforce disclosure standards

[7] Please see the information about the US-China Economic and Security Review Commission, https://www.uscc.gov/about-us (last visited Sept.20, 2021).

[8] USCC, *Executive Summary and Recommendations, One Hundred Sixteenth Congress, Second Session*, (December 2020), https://www.uscc.gov/sites/default/files/2020-12/2020_Executive_Summary.pdf.

[9] Amir N. Licht, *Accountability and corporate governance* (Harry Radzyner Law Sch. Research paper), https://ssrn.com/abstract=328401.

for US-listed companies operating in China.[10] According to the PCAOB, 238 out of the total 260 companies for which the PCAOB is unable to conduct inspection are based in Mainland China and Hong Kong.[11] Cases of manipulation of critical financial information and the lack of compliance with international audit inspections raises questions over the reliability of the corporate financial statements guiding the valuation and investment of Chinese companies listed in the US and the need for regulation.

2. Lack of Legal Protection in China Over Variable Interest Entities

There is a risk that at least 125 Chinese companies listed in the US have used a complex fund-raising financial arrangement tool known as the variable interest entity (VIE).[12] VIEs in this article indicate complex exchanges of shareholdings between Chinese companies and the offshore corporate entities they use in the US capital market. Companies may have one operation entity based in China where the audit work is carried out by Chinese local accounting firms, but they may also incorporate their companies overseas. Additionally, VIE arrangements between Chinese companies and their associated offshore entities have no legal standing under Chinese law. This creates potential risks to investors in US exchanges who may be unable to protect their investments via the Chinese legal system. Although the USCC acknowledged in its report that there has been no VIE-related dispute to date, VIEs remain a potential investment risk to the US capital market because of their special corporate structures and related corporate auditing.

B. How the HFCA Act Was Enacted

In April 2020 Jay Clayton, the chairman of the SEC, issued a joint public statement with the chairman of the PCAOB and officials from the SEC regarding possible risks associated with investing in China.[13] In June 2020, a presidential memorandum directed federal agencies to develop regulatory measures to protect US investors, calling for "firm, orderly action to end the Chinese practice of flouting American transparency requirements without negatively affecting American investors and financial markets."[14] In July 2020, the SEC started its investigation of the emerging markets and found that the core of its investigation was the regulatory impasse between the US and China over the

[10] Jay Clayton et al., *Emerging Market Investments Entail Significant Disclosure, Financial Reporting and Other Risks; Remedies are Limited*, U.S. SEC. & EXCH. COMM'N (Apr. 21, 2020), https://www.sec.gov/news/public-statement/emerging-market-investments-disclosure-reporting.

[11] PCAOB, *Data about Our China-Related Access Challenges* (2021), https://pcaobus.org/oversight/international/china-related-access-challenges/data-about-our-china-related-access-challenges.

[12] Donald Clarke, *The Bonding Effect in Cross-Listed Chinese Companies: Is It Real?*, *in* ENFORCEMENT OF CORPORATE & SECURITIES LAW 88, 88–100 (Robin Hui Huang and Nicholas Howson eds., 2017).

[13] Clayton et al., *supra* note 10.

[14] MEMORANDUM ON PROTECTING UNITED STATES INVESTORS FROM SIGNIFICANT RISKS FROM CHINESE COMPANIES (June 4, 2020), THE WHITE HOUSE, https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-protecting-united-states-investors-significant-risks-chinese-companies/.

ability of the PCAOB to conduct inspections and investigations of Chinese accounting firms.[15]

In August 2020 the President's Working Group (PWG) on Financial Markets released its "Report on Protecting United States Investors from Significant Risks from Chinese Companies" ("PWG Report")[16], suggesting that the SEC take action to implement the five recommendations outlined in the report, including enhanced issuer disclosures, enhanced fund disclosures, greater due diligence of indexes and index providers, and guidance for investment advisers.[17] One of the recommendations echoes the theme of this article, i.e., enhancing the listing standards for Chinese companies in US stock exchange markets. As a result of the above risks associated with the legal, regulatory, and financial environments in China, from October 2020 to May 2021, 17 Chinese companies were delisted from the US capital markets by the US federal government.[18]

C. The Aim of the HFCA Act

In this section, we will clarify the aim of the Act in order to investigate its legislative aim and its impact. The HFCA Act primarily aims to address the restrictions China has placed on public company's accounting activities. **First**, amendments to the Sarbanes-Oxley Act 2002 give the SEC the authority to prohibit the securities of foreign companies from being traded in the US, if the company retains a foreign accounting firm that cannot be inspected or investigated completely by the PCAOB for three consecutive years beginning from 2021.[19] **Second**, if a company is delisted because of noncompliance, the company should certify to the SEC that it has retained a registered public accounting firm that the PCAOB has inspected. If the SEC requirements have been satisfied, the HFCA Act directs the SEC to end the prohibition against this company. If any non-inspection recurs after the SEC withdraws its prohibition, the SEC will prohibit the company's securities from being listed on any US national securities market for at least five years. This prohibition can only be removed if, after the five-year period, the company certifies to the SEC that it will retain an accounting firm that the PCAOB can inspect.

As a result of the enactment of the HFCA Act, certain promotors of public companies are also required to establish that they are not owned or controlled by a foreign government. The Act mandates that if the PCAOB cannot inspect the foreign accounting firm's work, the company shall submit to the SEC

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[15] Div. of Corp. Fin. of U.S. Sec. & Exch. Comm'n, *Disclosure Consideration for China-Based Issuers*, SEC (Nov. 23, 2020), https://www.sec.gov/corpfin/disclosure-considerations-china-based-issuers/.

[16] TREAS, *President's Working Grp. on Fin. Mkt., Report on Protecting United States Investors from Significant Risks from Chinese Companies* (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 PWG Report includes five recommendations for the SEC that are centered on strengthening protections for investors and promoting the integrity of US capital markets by: (1) leveling the playing field for all companies listed on US exchanges, and (2) improving disclosure regarding, and consideration by fiduciaries and other market professionals of, the risks of investing in emerging markets, including China.

[17] *Id*.

[18] *Id*.

[19] 15 U.S.C. § 7211.

documentation certifying that the company is not owned or controlled by a governmental entity in the foreign jurisdiction in which its registered public accounting firm is located. Additionally, for each year that the PCAOB is unable to inspect a company's accounting firm, the company will be required to disclose in a form filed with the SEC, among other things, the percentage of the company's shares owned by governmental entities and its relationship with the Chinese government.

D. Implications of the HFCA Act and the Advancement of the Act Compared with the PWG Report

In this section, we will investigate the implications of the HFCA Act and the main differences between the Act and the PGW to clarify the advancement of the Act. The HFCA Act required the SEC to issue new rules for how to implement the Act within ninety days of enactment. There is an overlap between the SEC's proposal and the Act, with a single consolidated proposal for the Commission's consideration on issues relating to the PCAOB's access to audit working papers, exchange listing standards, and trading prohibitions. There are additional issues concerning the implementation of the Act, including how disclosure requirements embedded in the Act can be implemented expeditiously, and how any actual or perceived uncertainty can be addressed in a manner consistent with congressional intent as well as investor protection and the fair and orderly operation of the markets.

We have contextualized three main differences between the Act and the PGW Report.[20] **First**, setting a standard for initial listing companies is not required by the Act. The PWG report recommends enhancing the listing standards of US securities markets, which would give power to stock exchange institutions such as NYSE and Nasdaq as a condition of initial and continued exchange listing on such institutions. However, the Act would only apply to all the covered issuers listed on the US securities markets, and the SEC would have the power to enforce the Act and related investigations.

Second, there is variation in the details of the transition period. The PWG report recommends a transition period until January 1, 2020, for currently listed companies, and suggests applying the new listing standards immediately to new company listings once the necessary rulemaking and/or standard-setting have been achieved. However, the Act regulates that the SEC shall decide whether listed companies have non-inspection years after 2021, and does not impose any additional restrictions on new listing companies.

Third, the co-audit arrangement is also different. In the delisting provisions, the PWG suggested that a co-audit arrangement should exist for foreign listed companies, which would be required to engage an affiliated US member-registered public accounting firm to serve as the principal auditor of the company's financials and supervise the work of accounting firms in any jurisdiction

[20] President's Working Group on Financial Markets: Report on Protecting United States Investors from Significant Risks from Chinese Companies, *supra* note 16.

that does not provide the PCAOB with sufficient access, i.e., accounting firms in China.

E. The SEC's Amendment in May 2021

We will discuss the most recent amendment in this Section to present a comprehensive picture of the Act. The SEC is empowered by the HFCA Act to identify any issuers[21] that have retained a registered public accounting firm to audit their business where this registered public accounting firm has a branch or office that is: (1) located in a foreign jurisdiction; and (b) where the PCAOB has determined that it is unable to inspect or investigate completely because of restrictions from any foreign authority/government.[22]

These "commission-identified issuers" will be required to submit documentation to the SEC on or before the annual report due date establishing that they are not owned or controlled by a government entity in that foreign jurisdiction.[23] Registrants are also required to disclose their audit arrangements and any other governmental influence on them in the annual report. If any registrant company is found to be a commission-identified issuer for three consecutive years, Section 2 of the HFCA Act then gives the SEC the authority to delist this company and prohibits its trading of securities in the US capital market.

Specifically, according to the SEC's interim rule published on March 24, 2021, Section 3 of the Act provides that companies like these commission-identified issuers will be subject to a number of specific disclosure requirements.[24]

The SEC provides its interim rule as an amendment to the implementation of Section 2 of the HFCA Act, which is a final amendment in the implementation of a process for this requirement. On December 2, 2021, the SEC declared

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[21] The Sarbanes-Oxley Act Section 104(i)(1)(A) provides a definition for such issuers as any issuer required to file reports under Section 13 (15 USC 78m) or Section 15(d) (15 USC 78o(d)) of the Exchange Act. Issuers filing reports under the Exchange Act are referred to in SEC forms as "registrants". However, the SEC uses the term "issuer" when referring to the HFCA Act, and the word "registrant" when discussing the forms and form requirements for filings to the SEC.

[22] When a branch or office of an international firm network is a separate legal entity from the US-based or international firm network and that branch or office signs the audit report in its own name, the SEC will then look to the PCAOB determination for that branch or office and will not apply that determination to the US-based or other branches or offices of that firm network that are not based in the PCAOB-identified foreign jurisdiction. On September 22, 2021 the PCAOB adopted PCAOB Rule 6100, Board Determinations Under the Holding Foreign Companies Accountable Act, which was approved by the SEC on November 4, 2021. *See* PUBLIC COMPANY ACCOUNTING OVERSIGHT BD., RELEASE NO. 34-93527, ORDER GRANTING APPROVAL OF PROPOSED RULE GOVERNING BOARD DETERMINATIONS UNDER THE HOLDER FOREIGN COMPANIES ACCOUNTABLE ACT (2021). The PCAOB Rule 6100 establishes a framework for the PCAOB to make its determinations required by the manner of its its rules; the factors the PCAOB 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 PCAOB will reaffirm, modify, or vacate any such determinations.

[23] A commission-identified issuer must: (1) make the submission required under Section 104(i)(2)(B) of the Sarbanes-Oxley Act; and (2) meet the disclosure obligations set forth in Section 3 of the HFCA Act that SEC set as an addendum to the HFCA Act.

[24] U.S. Sec. & Exch. Comm'n, *SEC Issues Amendments, Seeks Public Comment on Holding Foreign Companies Accountable Act*, U.S. SEC. & EXCH. COMM'N (March, 2021), https://www.sec.gov/news/press-release/2021-53.

that its amendment had become final, albeit with a minor modification[25] concerning a special corporate structure that applied to US-listed Chinese companies, namely variable interest entities (VIEs).

III. AN IN-DEPTH EXAMINATION OF THE HFCA ACT FROM AN ACCOUNTABILITY PERSPECTIVE: CONFLICTS AND INCONSISTENCIES IN THE US LEGISLATION

The HFCA Act is an extraterritorial application of securities law, since the legislative approach originates in the US which has a long and rich history in securities development and regulation.[26] Ascertaining the nature of the notion of the HFCA Act should include clear discussions on the words 'companies (company)', 'foreign', and 'accountable (accountability)'. The word 'company' defines the legislative object and the word 'social' clarifies the scope of the legislation, but what 'accountable (accountability)' entails is more uncertain and needs further investigation. It will help us to ascertain how the SEC addendum together with the HFCA Act may affect Chinese listed companies in the US market, we will first discuss our understanding of the Act from a theoretical perspective, with a particular emphasis on the nature and scope of the term "accountability" and its implication in the domain of corporate governance.

A. The Nature of the HFCA Act

The HFCA Act is a legislative approach with extraterrestrial reach, which is the power of one country to formulate norms for institutions, citizens, and affairs outside its jurisdiction.[27] Moreover, the HFCA Act is an *ex post* legislative approach that imposes delisting penalties on non-compliant companies. However, it has been suggested that a much more effective and less politicized approach to improving the transparency of the targeted companies of the HFCA Act would be to take an *ex ante* view. Kole argues that it would be more effective for the SEC and stock exchanges to introduce additional *ex ante* safeguards during the initial public offering process as well as imposing disclosure requirements, so that the audit issue may be addressed from a more technical angle.[28]

B. Accountability as a Virtue for Good Governance and the Conflict with

[25] U.S. Sec. & Exch. Comm'n, HOLDING FOREIGN COMPANIES ACCOUNTABLE ACT: FINAL AMENDMENTS, U.S. SEC. & EXCH. COMM'N (2021), https://www.sec.gov/files/34-93701-fact-sheet.pdf.

[26] Tao Du, Present at the Securities Regulatory Cooperation for Cross-border Listings and Transactions Online international conference: U.S. Federal Courts Practice of Extraterritorial Jurisdiction over Securities and its Inspiration to China (Dec. 11-12, 2020).

[27] *Id*.

[28] Alissa Kole, *The Capital Market's Tug-of-War Between US and China*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (Feb. 27, 2021), https://corpgov.law.harvard.edu/2021/02/27/the-capital-markets-tug-of-war-between-us-and-china.

the HFCA Act

Accountability is a "buzzword of modern governance"[29] and "a golden concept that no one can be against".[30] Bovens contextualized the use of the term accountability "as a synonym for many loosely defined political desiderata, such as good governance, transparency, equity, democracy, efficiency, responsiveness, responsibility, and integrity".[31] Being accountable is a proxy indicator for **good governanc**e in both the public and private sectors, and the relationships in this mechanism normally relate to scenarios characterized by strong, fair, and equitable governance.[32] Accountability in corporate governance and public governance has shared dimensions and components such as transparency. As far as fairness and equitable governance are concerned, the accountability mechanisms should treat every accountee fairly. In the HFCA Act, being accountable was used in the title of the legislation, in alignment with the aim to ensure that companies publicly listed on stock exchanges in the United States are not owned or controlled by any foreign governments[33] so that these companies can be held accountable to their investors.

The Act was introduced in the wake of the prominent financial scandal related to the Chinese company Luckin Coffee, a coffee chain listed on the Nasdaq stock market, which committed accounting fraud by intentional fabrication of around $310 million in sales in 2019. It was subsequently issued with a $180 million penalty to settle the fraud.[34] The company asserted that their senior employees had fabricated the company's financial report and forged sales figures. The scandal "should be a major wake-up call for policymakers and regulators that the time for action is now", said Senator Marco Rubio (Republican) of Florida,[35] since the case implied that a company's financial statements could not be relied on by investors. News of the scandal caused the company's stock price to plummet, and Nasdaq delisted the shares in July 2020.

Even though the HFCA Act requires Chinese companies listed on US markets to be accountable to the same extent as US accountors, we have observed

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[29] Mark Bovens, Thomas Schillemans & Robert E. Goodin, *Public Accountability*, THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY 1, 1 (Mark Bovens, Robert E. Goodin, & Thomas Schillemans eds., 2016).

[30] Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 EUR. L. J. 447, 448 (2007).

[31] Mark Bovens, *Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism*, 33 WEST EUR. POL. 946, 946 (2010).

[32] Mark Bovens, *Public Accountability*, *in* THE OXFORD HANDBOOK OF PUBLIC MANAGEMENT 182, 183 (Ewan Ferlie, Laurence E. Lynn Jr., & Christopher Pollitt eds., 2005).

[33] Chris Matthews, *Senate Passes Bill that could Delist Chinese Companies from US Stock Exchanges*, MARKET WATCH (May 20, 2020), https://www.marketwatch.com/story/senate-could-vote-on-bill-that-could-delist-chinese-companies-from-us-stock-exchanges-2020-05-19.

[34] Katanga Johnson, *Luckin Coffee to pay $180 million penalty to settle accounting fraud charges -U.S. SEC*, REUTERS, (Dec. 16, 2020), https://www.reuters.com/article/us-usa-sec-luckincoffee/luckin-coffee-to-pay-180-million-penalty-to-settle-accounting-fraud-charges-us-sec-idUSKBN28Q34P.

[35] U.S. Senate, *Rubio Applauds POTUS Push to Ensure Chinese Companies Follow U.S. Securities Laws & Regulations* (May 14, 2020), https://www.rubio.senate.gov/rubio-applauds-potus-push-to-ensure-chinese-companies-follow-u-s-securities-laws-regulations/.

that some aspects of the legislation are designed with a very strong and targeted regulatory impact on Chinese companies, which is inconsistent with fairness as the principle of good governance by treating all accountees (all foreign companies) equally. The information disclosed by Chinese issuers involves the percentage of shares held by the Chinese government and the names of board members who are Chinese Communist Party officials.[36] Therefore, it is important to ensure a firm and clear understanding of the nature and scope of the legislation among Chinese companies and regulators as well as the US regulatory and supervisory bodies.

C. Corporate Governance and Accountability

Just as in other areas, in corporate governance, accountability is a concept that has attracted enduring attention from academics and policymakers. We will delve into the notion of accountability in detail in a corporate setting, in general, to help us better understand the Act. The concept of accountability has been widely used in corporate governance discussions. In the wake of the financial crisis in 2008, there was much discussion about whether boards are sufficiently accountable, and there were manty suggestions for stricter corporate governance norms with a focus on accountability.[37] Commentators suggested that to improve corporate governance practices it was necessary to foster the effectiveness and accountability of members of the board.[38] Research on corporate governance has traditionally adopted an agency theory approach, focusing exclusively on resolving conflicts of interest (agency problems) between the corporate manager and the shareholder,[39] and therefore the majority of research on the accountability in corporate governance has used shareholder-centric definitions. The G20/OECD stated that "[t]he corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders."[40] However, when ascertaining the purpose of corporate governance, a more pluralist approach was sometimes adopted to "help build an environment of trust, transparency and accountability necessary for fostering long-term investment, financial stability and business integrity, thereby supporting stronger growth and more inclusive societies".[41] What does accountability in this context actually entail?

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[36] David R. Burton, *Regulation of International Investment: Focus on China* (August 2020), https://www.heritage.org/international-economies/report/regulation-international-investment-focus-china.

[37] For example, see the Sarbanes–Oxley Act of 2002 (Pub.L. 107–204, 116 Stat. 745, enacted July. 30, 2002) in the US.

[38] Igor Filatotchev, Howard Gospel, Gregory Jackson & Deborah Allcock, *Key Drivers of "Good" Corporate Governance and the Appropriateness of UK Policy Responses*: *Final Report to the Department of Trade and Industry*, (January 2007), https://eprints.hud.ac.uk/id/eprint/473/.

[39] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 306 (1976).

[40] G20/OECD, *Principles of Corporate Governance 45* (2015), https://doi.org/10.1787/9789264236882-en.

[41] G20/OECD, *Principles of Corporate Governance 1* (2015), https://doi.org/10.1787/9789264236882-en.

Although accountability is mentioned frequently in the corporate governance literature, has often been used in definitions of corporate governance, and has been relied on as a critical factor in corporate governance by a variety of sources,[42] there have been few attempts to explain what it actually means, certainly in this particular context. The reason for this might be that accountability is a complicated and elusive concept that is notoriously difficult to articulate.[43] Therefore, a precise sense of what accountability actually involves has been lacking.[44] Interpreted through its literal meaning, accountability in corporate governance would be the process of giving an account of corporate decisions. The notion is usually interchangeable with several other notions in corporate governance such as "delegation, responsibility, disclosure, autonomy, authority, power and legitimacy".[45] Within the accountability mechanism in corporate governance, the accountor, primarily a company as a legal person, the board of directors collectively, or the directors personally, needs to accept responsibility for their actions or inactions.[46]

One of the most problematic notions in clarifying accountability is the term responsibility. If responsibility means that directors are responsible for an act they commit, accountability means they can be called to account for their actions or inactions. If a person is not responsible for something, in the sense either of being assigned particular duties in respect of it or of having caused the result, he or she would not usually be held to account for it.[47] Compared with accountability, responsibility refers to something for which one is responsible, and it can be shared. Corporate responsibilities may be shared by board members, managers, supervisors, etc. Moreover, corporate responsibility executed by board members is always task-oriented; the CEO, CFO, COO, and CTO all have their separate responsibilities. Accountability is normally considered after a corporate decision has been made and the board members have responded to the decision; they may therefore undertake the results of that action.

Besides being responsible for corporate conduct, being accountable also means being ultimately answerable for actions. Acceptance of the need for board members to be accountable does not, of itself, necessarily demand any action, but it is an attitude that should exist within boards. Accountability can

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[42] For example, see ISTEMI S. DEMIRAG, CORPORATE GOVERNANCE, ACCOUNTABILITY AND PRESSURE TO PERFORM: AN INTERNATIONAL STUDY (1998); Ruth V. Aguilera, *Corporate Governance and Director Accountability: An Institutional Comparative Perspective*, 16 BRIT. J. MGMT S39 (2005); Renee M. Jones, *Law, Norms and the Breakdown of the Board: Promoting Accountability in Corporate Governance*, 92 IOWA L. REV. 105 (2006); Harry G. Hutchison, *Director Primacy and Corporate Governance: Shareholder Voting Rights Captured by the Accountability/Authority Paradigm*, 36 LOY. U. CHI. L. J. 1111 (2005).

[43] ROBERT D. BEHN, RETHINKING DEMOCRATIC ACCOUNTABILITY 221 (2001); Amanda Sinclair, *The Chameleon of Accountability: Forms and Discourses*, 20 ACCT. ORG. & SOC. 219, 221(1995).

[44] Melvin L. Dubnick & Kaifang Yang, *The Pursuit of Accountability: Promise, Problems, and Prospects*, in THE STATE OF PUBLIC ADMINISTRATIONS: ISSUES, CHALLENGES, AND OPPORTUNITIES 171, 176 (Donald C. Menzel & Harvey E. White eds., 2011).

[45] Karen Chabala Chansa, *Accountability: A Case Study of ZSIC* (2006), https://economybuilding.files.wordpress.com/2011/02/accountability_in_zambia.pdf

[46] Amanda Sinclair, *The Chameleon of Accountability: Forms and Discourses*, 20 ACCT., ORG. & SOC'Y 219, 220–21 (1995).

[47] Richard Mulgan, *Accountability: An Ever-Expanding Concept?* 78 PUB. ADMIN. 555, 561(2002).

be seen as a mechanism to deal with the risks and responsibilities attached to corporate actorhood.[48]

In the daily life of directors and other agents of companies operating in corporate governance, there are two different types of potential accountability relationships: organizational accountability and professional accountability. In organizational accountability, the company will frequently and sometimes formally ask directors to account for their strategy and conduct. This type of accountability may be based on particular guidance or operating procedures, such as corporate governance codes, but directors are working in a highly professional setting and will have a considerable amount of autonomy based on the business judgment rule.[49] In terms of professional accountability, directors are professionals with high levels of talents, in-depth knowledge, and experience in their business; their skills and expertise imply that this type of accountability relationship may be monitored and enforced by standards or rules such as the set of duties required by company law.

Accountability generally, and certainly in the context of corporate governance, is not about a simple single meaning. It has been argued, and we accept here for discussion and analysis, that accountability concerning corporate governance, certainly as far as Anglo-American corporate governance is concerned, entails a process involving several stages.[50] It is a highly nuanced term, and it has been argued that there are in fact four stages involved in the accountability of boards,[51] all of which contribute to the meaning of the word.

The first stage is the board providing accurate information concerning its decisions and actions, so that shareholders can be informed about what has been done by the board on behalf of the company. An important part of this stage is transparency, which involves making disclosures and providing reports concerning the work of the board.[52] The second stage involves a board explaining and justifying the things for which it is responsible, including what it has done and what it has failed to do. Often this is seen as the predominant aspect of accountability, with the board being answerable for what it has done, and it is often the focus of elements of the accountability literature dealing with other

[48] BORIS HOLZER, MORALIZING THE CORPORATION: TRANSNATIONAL ACTIVISM AND CORPORATE ACCOUNTABILITY 118 (2010).

[49] The only formal definition of business judgment is in the Australian Corporations Act 2001. Section 180(3) of the Corporations Act states that business judgment means "any decision to take or not take action in respect of a matter relevant to the business operations of the corporation". This clearly comes within the decision meaning of the word "judgment". The Business Judgment Rule affirms the director's or officer's belief that their judgment that something is in the best interests of the corporation is a rational one. The rule protects directors from liability and allows them to make efforts to act in an "informed fashion", as long as they are free of personal conflict of interests. For the US law see Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971); Grobow v. Perot, 539 A.2d 180 (Del. 1988); Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985); *See also* the UK law cases Brehm v Eisner [2000] 746 A 2d 244; Secretary of State for Trade and Industry v Baker [1999] 1 BCLC 433; *See also* Andrew Keay & Joan Loughrey, *The Framework for Board Accountability in Corporate Governance,* 35 LEGAL STUD. 252, 256 (2015).

[50] *See* Keay & Loughrey, *supra* note 49, 256 (2015).

[51] *Id*.

[52] Amir Licht, *Accountability and Corporate Governance* (Oct. 11, 2002), http://ssrn.com/abstract=328401.

areas of society and law. This stage requires the board to justify and explain what it has done (or not done), and why. The third stage is questioning and evaluating the board's reasons for what has been done, and the fourth and final stage is the possibility, but not the requirement, of the imposition of consequences.

Readers may question our emphasis on the domain of corporate governance and suggest that we are confusing corporate accountability with board accountability. We acknowledge that there is a distinction between corporate accountability and board accountability, because of the different accountors. Corporations with independent legal status[53] can operate as unitary accountors and be held accountable accordingly.[54] While companies are collectively responsible for their own long-term success, they must be led by an effective director or board of directors with a continuing duty to promote the success of the company, either individually or collectively. These actors are scrutinized on a regular basis, with the implementation of effective corporate governance arrangements being "a never-ending pursuit".[55]

Therefore, boards of directors may be held accountable collectively as the whole board, or individually as members of the board. The board is a vehicle for debate, discussion, mutual support, collective recognition, and ultimately decision making. It does not have legal status, and liability will be imposed upon companies or individual directors. Both corporate accountability and board accountability may lead to the imposition of legal and administrative corporate liability, which is likely to be operationalized through the individual liability of board members. Each individual director will be held proportionately liable for her/his personal contribution to the wrongful conduct of the company.[56]

The accountee may turn directly to companies and hold them accountable for corporate collective actions that are primarily performed by boards of directors in public companies. As the board is the designer, enforcer, facilitator and promoter of corporate strategies, it seems likely that strictly differentiating board accountability from corporate accountability will make little difference to our understanding.

Globally, the notion of accountability in corporate settings has become increasingly important because of criticism of MNEs for causing a number of social, environmental, and human rights problems.[57] Somewhat unfairly, MNEs are usually parent companies with subsidiaries in developing countries, and they may not always be held accountable for misconduct for multiple

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[53] *See* Salomon v. A Salomon & Co Ltd [1896] EWHC (Civ) 1 [2], [1897] AC 22 (Eng.).

[54] Mark Bovens, *Public Accountability*, in THE OXFORD HANDBOOK OF PUBLIC MANAGEMENT 182, 182 (Ewan Ferlie, Laurence E. Lynn Jr., & Christopher Pollitt eds. 2005).

[55] Emma Andrews, *Board Accountability is a Key Element of Strong Corporate Governance* (May 9, 2017), http://www.grantthorntonni.com/news-centre/board-accountability-is-a-key-element-of-strong-corporate-governance/.

[56] HENK ADDINK, GOOD GOVERNANCE: CONCEPT AND CONTEXT 168 (2019).

[57] *See* generally Igor Filatotchev & Günter K., *Towards Transnational CSR. Corporate Social Responsibility Approaches and Governance Solutions for Multinational Corporations* 44 ORG. DYNAMICS 121 (2015).

reasons such as their significant power in a particular jurisdiction, the lack of a functioning legal system, or sufficient resources to bring them to justice, or as the result of interference from lawyers or public relations companies that is tantamount to greenwashing the "sins" of the company from media and public scrutiny.[58]

In order to bridge the accountability gap created by globalization and the increasing power of MNEs and their corporate groups, accountable companies need to guarantee relevant, timely, and effective remedies to individuals who have suffered as a result of noncompliance with soft and hard laws.[59]

In the US, the Sarbanes-Oxley Act, named for bill sponsors US Senator Paul Sarbanes and US Representative Michael G. Oxley and passed in 2002, is a federal law that provided new financial disclosure requirements for public companies in the US. The Sarbanes-Oxley Act aims to protect investors by focusing on improving financial accountability, consisting of eleven titles that set out provisions to help improve transparency, reduce fraud, and outline penalties for violators. A key objective of the Act is to achieve enhanced personal accountability.[60]

IV. IMPACT OF THE HFCA ACT ON CHINESE COMPANIES LISTED IN THE US CAPITAL MARKET

As discussed in Section II, the special corporate structure used by most of the Chinese companies listed in the US capital market is the VIE, i.e., where one company is incorporated in the US with a consolidated operating corporation organized and running under the company law of another jurisdiction, such as Chinese company law. Although the VIE organization is used for legitimate business purposes, this special corporate governance and ownership structure allows parent companies in China to manipulate their financial statements in order to hide losses and fabricate earnings.[61] This brings the potential risk that these VIE companies from China may cause US investors to invest based on misleading information, meaning that US regulators need to develop regulatory rules targeting misconduct by these companies.

In this section, we will analyze VIE companies and discuss how the HFCA Act will apply to them.

A. Concerns about the Application of the HFCA Act to VIE companies

[58] For example, in the case HRH Emere Godwin Bebe Okpabi & Ors v Royal Dutch Shell Plc & Anor [2017] EWHC 89 (TCC); within the corporate family of Shell companies there are 1,367 different companies which are located in 101 different countries; *See* para 82.

[59] Youseph Farah, *Toward a Multi-Directional Approach to Corporate Accountability*, in CORPORATE ACCOUNTABILITY IN THE CONTEXT OF TRANSITIONAL JUSTICE 27, 27 (Sabine Michalowski ed, 2012).

[60] Lisa M Fairfax, *Form over Substance: Officer Certification and the Promise of Enhanced Personal Accountability under the Sarbanes-Oxley Act,* 55 RUTGERS L. REV. 1, 2 (2002).

[61] Li Guo, *Chinese Style VIEs: Continuing to Sneak under Smog?,* 47 CORNELL INT'L L. J. 569, 580 (2014).

listed in the US.

It is difficult to verify the ownership structure of a Chinese-listed company in the US and provide solid evidence of an affiliation with the Chinese military. There is a risk of over-generalization of this complex reality; in what follows we provide a summary of three different categories of ownership structure that are common among the Chinese companies listed in the US capital market. We also propose that for each category there should be different regulatory requirements.

1. State-owned Companies

The first category is Chinese state-owned enterprises (SOEs) that are listed in the US capital market. SOEs are those in which the state exercises ownership or control through full, majority, or significant minority ownership. In 2020, China had 124 companies included in the Fortune Global 500 companies, and 73% of these biggest Chinese companies are state-owned enterprises. The share of state-owned enterprise capital was 194% of China's total GDP in 2020,[62] a statistic that far exceeds all the other major economies in the world even though private Chinese companies have a much higher average return on assets and average profit margin. There are nine Chinese SOEs on the three major US exchanges.[63]

On October 9, 1992, Brilliance Auto (NYSE: CBA) became the first Chinese company to be listed in the US stock exchange market; in fact, it was the first company from a Communist country to be listed. Brilliance is a Chinese state-owned auto maker,[64] and its parent company Jinbei was owned by the Shenyang City government. In 2003 it formed a successful joint venture with BMW to manufacture the popular BMW 3 Series and 5 Series, largely due to its reputational advantage brought by being a listed firm in the US. Brilliance was registered in Bermuda, and the publicly listed firm was not its parent company Jinbei. As two separate legal entities, Brilliance controlled 51% of Jinbei Bus,[65] but the assets that Brilliance listed publicly were owned by Jinbei. Through a series of complicated transactions, the Brilliance listing avoided the requirement to obtain approval from the Chinese government. Brilliance's founder, Yang Rong, has been in exile since 2002.[66]

The case of Brilliance offers a model for us to understand how Chinese SOEs and private companies can get listed in the US. The ownership structure

[62] ChinaPower, *How Dominant are Chinese Companies Globally?*, (Sept. 13, 2019), https://chinapower.csis.org/chinese-companies-global-500/.

[63] China Life Insurance Company Limited, PetroChina Company Limited, China Petroleum and Chemical Corporation, China Southern Airlines Company Limited, Huaneng Power International Inc., China Eastern Airlines Corporation Ltd., Aluminum Corporation of China Limited, SINOPEC Shanghai Petrochemical Company, Ltd., and Guangshen Railway Company Limited. *See* Supra note… USCC, Chinese Companies Listed on Major U.S. Stock Exchanges.

[64] Bloomberg, *Search and Information of CBA: GR*, https://www.bloomberg.com/quote/CBA:GR.

[65] *Id*.

[66] Leo Breevoort, *The Big Read: History of Brilliance Jinbei (part 1)*, CARS NEWS CHINA (August 29, 2021), https://carnewschina.com/2021/08/29/automaker-profile-brilliance-jinbei-part-1/.

of publicly traded Chinese firms in the US capital market is typically complex to avoid regulatory restrictions both in China and overseas. Some companies may not be owned by the state but have close unofficial ties to branches of the Chinese government. Meanwhile, some companies may be owned by the State but follow international rules and do not have any associations with the Chinese military.

Thus, considerations from the SEC and PCAOB about delisting certain Chinese companies from the US capital market must not simply consider shares held by either the Chinese government or the Chinese military. The SEC's amendment rules are well prepared for this situation and have solved the problems caused by the HFCA Act by setting out rules for delisting Chinese companies listed in the US markets if they may be owned or controlled by the Chinese government or military. According to the HFCA Act and the SEC's amendment to the Act, the SEC can prohibit the trading of securities of certain Chinese companies listed in US markets only if the SEC thinks that these companies are owned or controlled by a governmental entity in China and they cannot provide the required documents to the SEC within a certain period.[67] Therefore, the SEC can delist these companies only if they cannot provide certain documents required by the SEC, not simply based on their relationship with the Chinese government.

To take a further example, Lufax (NYSE: LU) is an internet finance marketplace founded in 2011. Lufax is owned by the Shanghai Lujiazui International Financial Asset Exchange Co. Ltd., the second largest lender in P2P lending, which is an associate of the China Ping An Group. Lufax's CEO and Co-Chairman is Mr. Greg Gibb, who was a senior partner at McKinsey & Co. Ping An Insurance was a Chinese SOE that has its complex ownership structure; Shenzhen Investment Holdings, founded by the Shenzhen City government, owns a 5.27% stake of China Ping An Group, and is the second largest shareholder. Therefore, it is difficult to determine whether Lufax is a Chinese SOE or not.

Companies in China, including foreign firms, are required by law to establish a party organization. The presence of the Communist Party of China (CPC) units has long been a fact of doing business in China. CPC organizations also play a very important role in more than 1.585 million privately owned companies, accounting for more than 75% of all Chinese privately owned companies.[68]Within the Chinese central government, military units, and regional governments are all branches of the CPC. It is irrational for the US government to legislate treatments for Chinese firms based on their ties with Chinese government branches. However, a fair and effective distinction is required, and here the SEC provides a discretionary amendment by requiring companies to

[67] *See* SEC Fact Sheet, *supra* note 25.

[68] Yan Yan & Duan Chenqian (闫妍&段晨茜), *Zhongguo de Minying Qiye Wei Shenme Yao Jiaqiang Dang de Jianshe?* (中国的民营企业为什么要加强党的建设?) [*Why Private Companies in Chine are in need of Communist Contribution?*] PEOPLE'S DAILY ONLINE (Oct. 15, 2019), http://politics.people.com.cn/n1/2019/1015/c429373-31400444.html.

provide further information about themselves to prevent them from being delisted from the US markets.

2. Private and Start-up Companies

The second category of Chinese listed companies in the US is privately owned start-up enterprises. Some companies in this category have been suspected of acting suspiciously by offering falsified financial information, such as Luckin Coffee Inc. LKNCY (OTCMKTS). This Chinese start-up doubled its value to $12 billion in eight months after it was listed in the US, before admitting to revenue fabrication.[69]

There are regulatory requirements to protect investors in US stock markets from companies like Luckin Coffee. In response, Chinese regulations have been invoked to limit the access of foreign governments to Chinese companies' auditing documents.[70] The amended China Securities Law 2020 enacted on March 1, 2020, requires that the financial records of Chinese publicly listed companies must retain "documents or materials related to securities business activities" in China, and "the securities regulatory authorities of other countries or regions shall not directly carry out investigation and evidence collection within the territory of the People's Republic of China".[71]

Therefore, if the SEC ever considers private companies from China to be commission-identified issuers and requires them to submit disclosure documents according to the amendments to the HFCA Act, the only obstacle in the way of them submitting these documents to the SEC may be the Chinese Securities Law. Further, if the private companies are able to disclose according to the requirements of the SEC, they will be able to prevent themselves from being delisted from US markets.

3. Large Private Companies

The third category is private companies in China, some of which have a relatively long history of business operations and have established creditability. Chinese technology giants such as Alibaba and Tencent have performed well in the market. These companies present investment opportunities for US investors, but the turbulence in relations between the US and China has seriously affected the valuations of these leading Chinese tech firms.[72] US investors in

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[69] Jing Yang, *Behind the Fall of China's Luckin Coffee: A Network of Fake Buyer and a Fictitious Employee,* WALL ST. J. (May 18, 2020), https://www.wsj.com/articles/behind-the-fall-of-chinas-luckin-coffee-a-network-of-fake-buyers-and-a-fictitious-employee-11590682336.

[70] Cydney Posner, *SEC Preparing Proposals to Implement Recommendations Regarding Emerging Market Listings*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 30, 2020), https://corpgov.law.harvard.edu/2020/08/30/sec-preparing-proposals-to-implement-recommendations-regarding-emerging-market-listings/.

[71] Zhengquan Fa (证券法) [Securities Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2019, effective Mar. 1, 2020), art 177, 2020 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 4, 26 (China).

[72] Jacky Wong & Nathaniel Taplin, *The End of the U.S.-China Tech Stock Bromance*, WALL ST. J. (July 8, 2021), https://www.wsj.com/articles/the-end-of-the-u-s-china-tech-stock-bromance-11625744592.

these firms may be affected by this uncertainty if these companies are subject to strict investigations by the SEC and the PCAOB.

This third category of Chinese companies in US stock exchanges are usually multinational enterprises that list their business subsidiaries in China on the US stock exchanges, such as YUM China (NYSE: YUMC). Its parent firm is YUM, which is also listed on the NYSE. According to the regulation, these companies are considered Chinese companies. However, if they catch the eye of the SEC or the PCAOB and are delisted simply because they are seen as Chinese companies with special relationships with the Chinese government, this may lead to losses in the US capital markets and even to US investors, which would contradict the main purpose of the HFCA Act to protect investors in the US.

B. Consequences if Chinese Companies are Delisted from the US Capital Market

Delisting is the removal of a listed security from a stock exchange. Its efforts by the US government have taken the form of legal challenges. The case of the investment blacklisting of Xiaomi further proves our theory that the different categories of Chinese-listed companies in the US require different legal measures to manage them. In January 2021, Xiaomi and eight other Chinese enterprises were blacklisted by the US government, according to a list provided by the US Department of Defense. The Pentagon's list of Chinese Communist Military Companies was published in November 2020, following an order by the US administration forbidding American investors from making new investments in the listed companies.

The blacklisting of Xiaomi took many by surprise since the company focuses on manufacturing consumer electronics. Xiaomi, which has no state ownership, denied any military links and filed a lawsuit in the US District Court in Washington DC., seeking to overturn the decision. In March 2021, federal judge Rudolph Contreras ruled to block the enforcement of the US investment ban on Xiaomi, calling the blacklist decision "deeply flawed". According to the judge's opinion, "Xiaomi is a publicly traded company that produces commercial products for civilian use, is controlled by its independent board and controlling shareholders, and is not effectively controlled or associated with others under the ownership or control of the PRC or its security services."[73]

The Department of Defense justified its blacklisting decision by citing a Chinese award given to Xiaomi's founder, Lei Jun, in 2019 for his service to the state, as well as the company's investment plans in 5G and artificial intelligence. However, the judge ruled that this rationale was deficient; more than 500 Chinese entrepreneurs have received similar awards. The court also described 5G and AI as quickly becoming industry standards for consumer electronics devices, and therefore investment plans in these technologies did not

[73] Xiao Mi Corp. v. U.S. Dep't of Defense, No. 21-cv-00280-RC, (D. D.C. filed Feb. 05, 2021) https://www.cato.org/sites/cato.org/files/2021-04/xiaomi%20complaint%20amended.pdf.

necessarily prove a military link. In May 2021, the US Defense Department reversed its decision by removing Xiaomi from the blacklist, but other Chinese listed companies such as China Mobile Ltd, China Unicom Ltd, China Telecom Corp, and China National Offshore Oil Corporation lost their appeals and were removed from the US stock exchange markets.[74]

However, the delisting has had little practical effect on these companies, as they are also widely held in the Hong Kong and Chinese stock exchange markets. The US market was once the only choice for the majority of Chinese technology companies that wanted to go public. However, the global financial markets are becoming increasingly decentralized as a result of delisting efforts.[75]

One of the main consequences of the delisting effort has been that more Chinese firms listed in the US are seeking home-return listings in search of a stable environment and higher valuations. Since the 2008 financial crisis, the US stock market has experienced a long period of stability and strong growth. However, increasing hostility and uncertainty have damaged investor confidence in Chinese-listed companies in the US.

In conclusion, there are three major issues with the current delisting policy imposed by US regulators: First, the HFCA Act in its current form does not provide sufficient solutions to the challenges of protecting investors' interests in US stock markets. The regulation does not enforce transparency and disclosure, but simply takes investment opportunities away. Second, the HFCA Act does not ensure the protection of national interests while maintaining accuracy and fairness. Finally, there is a lack of consistency in the rules and regulations regarding Chinese listed companies in the US due to the current delisting policy. It is a significant challenge to make a distinction between privately owned Chinese companies and state-owned companies. Delisting a few Chinese SOEs from US stock markets does not serve the goal of national security protection, being merely a symbolic gesture. Therefore, we call for clearer, more consistent, and more flexible measures for monitoring and governing Chinese companies listed in the US.

C. Options for Chinese Companies if they get Delisted from the US Capital Market

More than 700 Chinese companies are traded on US stock and bond markets. In cases of delisting, these companies have different options. Compliance is one of the options; by not allowing inspections, China could trigger a ban and force Chinese companies listed on US stock markets to leave the US stock exchanges, with some possibly relisting in Shenzhen or Shanghai. Fried predicted that China would not cave on inspection requirements in order to restrain an

[74] Dan Strumpf, *US Blacklisted China's Xiaomi Because of Award Given to its Founder*, WALL ST. J. (Mar. 5, 2021), https://www.wsj.com/articles/u-s-blacklisted-chinas-xiaomi-because-of-award-given-to-its-founder-11614947281.

[75] Gideon Rachman, *The Decoupling of the US and China Has Only Just Begun: Business Logic Has Been Displaced by Strategic Rivalry*, FIN. TIMES (Aug. 17, 2020), https://www.ft.com/content/9000d2b0-460f-4380-b5de-cd7fdb9416c8.

overseas individual from investigating domestic commercial transactions in connection with party officials, and "exits would be arranged by Chinese controllers to enrich themselves at public investors' expense".[76] Bans may be introduced on account of state secrets and national security.[77] Meanwhile, the HFCA Act may offer an opportunity for large technology companies, particularly famous tech giants such as Alibaba and Baidu, to consider relisting back in the home market.[78]

Alternatively, the enactment of the HFCA Ac may result in delisted issuers, which could nevertheless continue trading on the Hong Kong Stock Exchange. This is seen as a listing venue between the Chinese stock market and the US market since it is controlled by the Chinese government but US investors are eligible to keep their holdings. Following this logic, future cross-listings by Chinese companies may become increasingly difficult to manage in terms of US investor protection if China continues to refuse inspections. A much more effective and less politicized approach to improving the transparency of these companies would be for the SEC and the stock exchanges to embed additional safeguards in the offering process and their ongoing disclosure requirements.

V. PROMOTING MORE ACCOUNTABLE COMPANIES BY MITIGATING CONFLICT AND INCONSISTENCIES

In this Section, we explore the nature and scope of the HFCA Act and issues to bear in mind when using the Act to promote more accountable companies, with a focus on Chinese-listed companies.

A. The Nature and Scope of the HFCA Act

The introduction of the HFCA Act was intended to provide guidelines for negotiations with the Chinese government on the issue of compliance. The apparent goal of the HFCA Act was to press China to agree to inspections imposed by the PCAOB, which "would make it harder for insiders of China-based firms to defraud American investors".[79] The enforcement of the Act allows the PCAOB, as auditor's auditor or auditor's regulator, to inspect the working papers of audits of non-US operations as required by the Sarbanes-Oxley Act of 2002. The PCAOB is a private-sector, non-profit corporation that was established by Congress to oversee the audits of public companies.[80]

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[76] Jesse Fried, *Delisting Chinese Companies Plays Straight into Their Hands Controlling Shareholders and Beijing are Likely to Exploit A Ban to Further Their Objectives,* FIN. TIMES (Jun. 1, 2020), https://www.ft.com/content/7bb80406-a0c6-11ea-ba68-3d5500196c30.

[77] Alissa Kole, *The Capital Markets Tug-of-War Between US and China*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 27, 2021), https://corpgov.law.harvard.edu/2021/02/27/the-capital-markets-tug-of-war-between-us-and-china/.

[78] Fried, *supra* note 76.

[79] Fried, *supra* note 4..

[80] *See* PCAOB: "The PCAOB is a nonprofit corporation established by Congress to oversee the audits of public companies in order to protect investors and further the public interest in the preparation of informative, accurate, and independent audit reports. The PCAOB also oversees the audits of brokers and dealers, including

The nature of the HFCA Act is that it is a mandatory disclosure regulation for issuers, in order to foster an efficient securities market and ensure effective investor protection. It is intended to ensure that eligible foreign companies will be accountable to various accountees, including investors and American regulations, at the same level as US listed companies. The HFCA Act applies to any company listed on US stock exchanges that is incorporated outside the United States, including Mainland China, Hong Kong and some European countries such as France and Belgium. However, it is understood that the legislation particularly targets Chinese companies in response to the restrictions imposed by the Chinese government. Around 200 Chinese companies currently audited by Certified Public Accountant firms in mainland China and Hong Kong will be negatively impacted and feel the brunt of the HFCA Act, including popular stocks such as Alibaba, Baidu, JD, and Nio, with collective market capitalizations of over $1 trillion.

The bill may have an adverse impact on Chinese issuers because it will deny them access to US capital markets unless the Chinese government and Chinese accounting firms allow PCAOB inspections. On one hand, the PCAOB inspections of China-based audit records would violate state secrecy laws. On the other hand, the PCAOB aims to pursue available options to support the interests of investors and the public through informative, accurate, and independent audit reports.[81] The PCAOB claims that it works collaboratively with audit regulators in other jurisdictions, and has accommodated the specific legal requirements of individual jurisdictions without either altering the core principles that are fundamental to their statutory mandate or sacrificing investor protection.[82]

The PCAOB's regulatory powers are the result of both internal and external pressures. Internal pressure primarily comes from Senators' calls to promote the financial transparency and accountability of foreign companies to US investors and the US regulatory framework. External pressure mainly comes from the fact that China has prohibited audit firms located in China and Hong Kong from providing the PCAOB with access to audit working papers.[83]

One of the rationales for introducing the HFCA Act was to mitigate the vulnerability in a corporate setting, as the condition resulting from processes or factors that make a corporate actor more susceptible to hazards and reduce the ability to resist or respond to them.[84] For US-listed Chinese companies, US investors have restricted access to information, and financial statements are unreliable. Many of these companies are incorporated in the Cayman Islands, and

compliance reports filed pursuant to federal securities laws." *About*, PCAOB, https://pcaobus.org/about (last visited Jan. 7, 2024).

81 PCAOB, *China-Related Access Challenges* (2021), https://pcaobus.org/oversight/international/china-related-access-challenges.

82 *Id*.

83 *See* President's Working Group on Financial Markets, *Report on Protecting United States Investors from Significant Risks from Chinese Companies* (Jul. 24, 2020), https://home.treasury.gov/system/files/136/. PWG-Report-on-Protecting-United-States-Investors-from-Significant-Risks-from-Chinese-Companies.pdf.

84 *See* United Nations office for disaster risk reduction, *'Vulnerability'*, https://www.undrr.org/ terminology/vulnerability.

investors are more vulnerable to this tactic than investors in public US companies.[85] However, the legislation introduces coping mechanisms to mitigate and compensate for this vulnerability; American investors investing in companies incorporated in the Cayman Islands are protected by the fact that court judgments in the US or the Cayman Islands can be enforced in China, where the insiders and assets of corporations are located.[86] Before this measure, the vulnerability of US investors investing in these companies was clear, considering the difficulty of accessing audit papers.

B. Wake-up Call for Chinese Companies: Compliance or Exit?

As discussed in the previous sections, the HFCA Act has its inefficiencies. The regulatory attempts may serve as a wake-up call for Chinese companies to reconsider the soundness of their corporate governance. In this section, we are going to investigate if the Act may be seen as a wake-up call for companies.

The SEC's implementation of the HFCA Act will be complicated by the fact that the agency is already working on proposing rules to implement the recommendations of the President's Working Group on Financial Markets (PWG) on how to address non-compliance with PCAOB audit inspection requirements.[87]

It is unclear how Chinese SEC-reporting issuers will respond to the HFCA Act and the new amendment rules issued by the SEC. One potential aspect is to encourage Chinese companies to comply with foreign law more effectively and promote their international competitiveness.

One of the reasons for the enactment of the HFCA Act was the change in the corporate governance model in China, with the government advancing a transformative corporate governance model. The model is a more effective and accountable corporate governance model that is more transparent with the supervision of the public enforcement bodies such as CSRC. It also gives the Chinese listed companies to reconsider the suitability of the foreign stock markets.

In response to the enactment of the HFCA Act, in the absence of a compromise resolution prior to the adoption of any trading prohibitions between the PCAOB and Chinese auditing firms, Chinese companies should prepare for a smooth withdrawal from US markets by exploring or effecting secondary listings and other transactions.[88]

Fried also expresses some concerns over the effectiveness of the HFCA Act, suggesting that "the cure could be worse than the disease" as both the controlling shareholders and the government in China are likely to exploit the ban

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[85] Fried, *supra* note 76..

[86] *Id.*

[87] Andrew Olmem & Christina M. Thomas, *Congress Passes the "Holding Foreign Companies Accountable Act"* (Dec. 8, 2020), https://www.mayerbrown.com/en/perspectives-events/publications/2020/12/. congress-passes-the-holding-foreign-companies-accountable-act.

[88] Hyung Ahn et al., *SEC Takes First Steps to Put in Force the Holding Foreign Companies Accountable Act* (Mar. 30, 2021), https://www.linklaters.com/en/knowledge/publications/alerts-newsletters-and-guides/2021/march/30/sec-takes-first-steps-to-put-in-force-the-holding-foreign-companies-accountable-act.

to further their objectives at the expense of US investors.[89] The worry is that Chinese companies may arrange confiscatory "take-private" transactions so that they can be delisted in the US market when the buyout price of their shares is low, and then relist in China at a much higher valuation.[90]

C. Lost in Translation: Differences in the Understanding of Accountability

In this Section, we are going to investigate the unique understanding of the accountability notion in the domain of corporate setting and discuss the potential risk of getting lost in translation. As mentioned earlier, the English word 'accountability' is not easily translated into different languages, and over time there have been several Chinese words used to translate accountability,[91] and a number of Chinese words translated as accountability in English-language documents. One word that is frequently used is *wenze*; it has been argued that this is the most used and most appropriate Chinese word to encompass the meaning of 'accountability.'[92] It is translated as accountability in many English language documents, especially in relation to corporate governance. Keay and Zhao noted that when combined with '*zhi*' it provides a term that can be translated as 'accountability system'. [93]

It has been suggested that the content and procedure of a *wenze* system in the context of corporate governance would be able to facilitate an effective accountability mechanism as far as China is concerned, for example by providing investors with the means to make inquiries and assess the actions of boards of directors and senior managers in order to hold them accountable for their decisions and actions. While a *wenze* system has not been introduced in either legislation or the corporate governance code thus far,[94] it has been argued that it could be introduced into either or both to good effect.[95]

Accountability is not something that is limited to corporate governance. The term "accountability" is often used as a conceptual umbrella covering an array of concepts. It has a long tradition in areas such as political science, public policy, corporate governance, law, and financial accounting. The understanding of the term in one discipline may differ from one country to another due to cultural, historical, political, and economic factors. In China, political reforms involving the introduction of an accountability system have been introduced to make government officials more responsive to societal demands and more accountable for their performance as civil servants. Government institutions have been established for this purpose, including legislative oversight committees, supervision committees, Communist Party discipline committees, and internal

[89] Fried, *supra* note 76..

[90] *Id*.

[91] *See* Andrew Keay and Jingchen Zhao, *Ascertaining the Notion of Board Accountability in Chinese Listed Companies*, 46 HONG KONG L. J. 671, 689–695 (2016).

[92] *Id*.

[93] *Id.*

[94] China Securities Regulatory Commission, *Code of Corporate Governance for Listed Companies in China (*2001).

[95] Andrew Keay & Jingchen Zhao, supra note 91, at 671.

administration reconsideration procedures. An accountability system for government officials (‘*ganbu wenze zhi*’, 干部问责制) is regarded as the most important of these.[96] The importance placed on the inquiry process within the *wenze* system is regarded as a consequence of government officials not being accountable for their decisions. The development of the market economy makes government accountability reforms particularly important as China becomes increasingly open and diverse.

In relation to corporate governance, it is recognized that directors’ rights and responsibilities in Chinese-listed companies need to be clarified in order to make their enforceability more credible. The professionalism and competitiveness of Chinese directors on boards have been questioned, and reforms through corporate governance mechanisms and corporate law changes have been recommended.[97] These problems are widely recognized in China, especially for directors in SOEs, and they are equally important for the enhancement of greater transparency and accountability in companies generally.

The concept of a *wenze* accountability system provides opportunities to develop *wenze* in a manner that would tend to promote accountability in companies that would benefit the development of the Chinese corporate governance system. The *wenze* system could include dimensions with a wider scope relating to a process of balancing rights and responsibilities through inquiry and disclosure. This *wenze* system may be regarded as a trend that should be adopted in relation to Chinese corporate governance, to enable China to develop its unique accountability system based on a constantly changing and unique corporate governance model and reflect the fact that the development of its corporate governance is affected by path dependence. Because of the influence of a number of factors, China’s corporate governance is unique. These factors include the deeply-rooted Confucian philosophy, government interference and participation in companies (especially SOEs), and a distinctive shareholder structure that resulted from privatization, as well as the unique *guanxi* tradition.

The uniqueness of the *wenze* system works within the hybrid corporate governance system with a hybrid framework that incorporates elements of both administrative and economic governance. This is particularly significant due to the specific requirement for research focused on a distinct corporate governance system, which is essential given China’s unique institutional setting and the necessity to regulate its transitional economy.[98] Consequently, the varying interpretations and implementations of the accountability system in the US and China, as well as the different corporate governance models, may necessitate

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[96] Suisheng Zhao, *The China Model of Development: Can it Replace Western Model of Modernization?* in RESEARCH OF CHINA’S DEVELOPMENT MODEL: BEYOND THE BEIJING CONSENSUS ABINGDON 45, 52 (S. Philip Hsu, Yu-Shan Wu & Suisheng Zhao eds. 2011).

[97] *See* Guangdong Xu, Tianshu Zhou, Bin Zeng & Jin Shi, *Directors’ Duties in China,* 14 EUR. BUS. ORG. L. REV. 57 (2013).

[98] *See* Andrew Keay and Jingchen Zhao, *Transforming Corporate Governance in Chinese Corporations: A Journey, Not a Destination*, 38 NW. J. INT’L L. & BUS. 187 (2018).

more systematic adjustments to ensure the Act functions effectively without bias.

D. Public Enforcement in the US and China

In order to make the legislation effective, the enforcement of the HFCA Act is as important, if not more important, than the legitimacy and comprehensiveness of the notion itself. Due to the nature of the HFCA Act, the effectiveness of public enforcement measures should be also discussed to build a comprehensive picture of the Act. Public enforcement measures are those with the involvement of a public enforcer, which could be the Secretary of State, a securities commission, a central bank, or some other supervisory body. Public enforcement measures include litigation brought by these public enforcers, as well as various *ex ante* rights of approval exercised by public actors. The core areas of regulatory concern for public enforcement include violations of disclosure laws, market manipulation, and insider trading. The most often observed approach is the imposition of mandatory disclosure regulation on issuers to overcome information asymmetries, which affect the level of investor protection. The disclosure requirement is designed to promote accountability since accountability and transparency are seen as principles of governance that are not really distinguishable, but which nevertheless complement one another to facilitate good governance.[99] Public enforcement measures are designed to foster an efficient securities market.

The authorized legal actions in the HFCA Act will be public enforcement actions initiated by the SEC, fulfilling its duty to review issuers' financials and disclosures and penalize unaccountable companies and directors. Public enforcement is introduced to deal with the problems caused by exacerbated information asymmetries between directors and shareholders and among various kinds of shareholders, whereas market-oriented mechanisms would not yield suboptimal levels of disclosure.[100]

A successful experience may be observed in Australian corporate law, where the public enforcement of breaches has been permitted and proved to be effective in the last two decades.[101] There are also some self-regulatory and quasi-regulatory authorities in other jurisdictions, such as national stock exchanges and the UK's Financial Reporting Council,[102] which can act as "public enforcers." Such bodies are *enforcers* to the extent that they are practically able to compel compliance with their rules *ex ante* or to impose penalties for rule violations *ex post*, whether these penalties are reputational, contractual, or civil. Moreover, they can meaningfully be described as public enforcers where their

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[99] Christopher Hood, *Accountability and Transparency: Siamese Twins, Matching Parts, Awkward Couple?* 33 WEST EUR. POL. 989 (2010).

[100] *See* John C. Coffee, *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717 (1984).

[101] *See* VICKY COMINO, COMPANY LAW WATCHDOG-ASIC AND CORPORATE REGULATION (2015).

[102] The UK's Financial Reporting Council, through its Conduct Committee, reviews the financial statements of publicly traded companies for compliance with the law.

regulatory efficacy is spurred by a credible threat of state intervention, and when they can be seen as public franchisees.

Keay suggested a series of benefits of public enforcement, including protection for shareholders who cannot fund a derivative action and for stakeholders who cannot bring derivative actions based on current corporate law, for example in UK company law;[103] the enhancement of public interests; sending messages to directors about the importance of their duties and deterrence; and possibly enhancing the efficacy of private enforcement.[104] A public enforcer would be able to make independent and objective judgments against the directors, and as a result, active and effective public enforcement would not only deter market misconduct but also enable investor compensation.[105]

Compared with measures of private enforcement, public enforcement in response to non-compliance would aim to maintain the collective and public interest in a transparent and efficient market.[106] The Australian experience is again worth referencing here, since the public authority is expressly conferred powers to commence litigation in order to obtain compensation for a listed company and/or the investors. However, the Australian Securities and Investments Commission (ASIC) will only take action when it is in the public interest, and the concept of public interest can be broadly interpreted according to the Australian Securities and Investments Act 2001.[107]

Scholars have also raised concerns about the effectiveness of public enforcement, primarily resting on the independence and competitiveness of the public enforcer. Kedia and Rajgopal cast doubt on whether public enforcers have sufficient resources to successfully perform their oversight duties.[108] The consistent competence of a public enforcer may be also affected by variations between industries, or mitigated by path-dependence factors such as political issues.[109]

Moreover, public enforcement is often the same in nature but different in process. Public enforcement is closely associated with the breadth and depth of stock markets.[110] Public enforcement serves as a powerful deterrent against non-compliance, upholds transparency in financial reporting, safeguards the

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[103] *See* Section 260-263 UK CA 2006; however, the approach with a broader range of applicants is adopted in Canada and Singapore. See Section 216A (1)(c) of the Singaporean Companies Act 2006 and Section 238 (a) of the Canada Business Corporations Act 1985.

[104] Andrew Keay, *The Public Enforcement of Directors' Duties: A Normative Inquiry,* 43 COMMON L. WORLD REV. 89, 118-119 (2014).

[105] Wai Yee Wan, Christopher Chen & Say H. Goo, *Public and Private Enforcement of Corporate and Securities Laws: An Empirical Comparison of Hong Kong and Singapore*, 20 EUR. BUS. ORG. L. REV. 319, 326 (2019).

[106] Iris H-Y. Chiu, *Private vs Public Enforcement of Shareholder Duties*, in ENFORCING SHAREHOLDERS' DUTIES 106, 113 (Hanne S. Birkmose, Sergakis, Konstantinos eds. 2019).

[107] *See* Section 50. Australian Securities and Investments Act 2001.

[108] Simi Kedia & Shiva Rajgopal, *Do the SEC's Enforcement Preferences Affect Corporate Misconduct?* 51 J. ACCT. & ECON. 259, 278 (2011).

[109] Jonas Heese, *The Political Influence of Voters' Interests on SEC Enforcement*, 36 CONTEMPORARY ACCT. RES. 869-903 (2019).

[110] Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence,* 93 J. FIN. ECON. 207, 238 (2009).

interests of shareholders, and ensures fair competition within U.S. capital markets. Through public enforcement, the HFCAA not only holds foreign companies accountable for their reporting and auditing obligations but also maintains the integrity of the market, fostering investor confidence and protecting the reputation of compliant businesses.

The public enforcement of company law in China is also unique. It is shaped by its distinct regulatory and administrative governance, where government agencies such as the State Administration for Market Regulation CSRC exercise significant authority. This approach is influenced by China's historical, political and cultural context, creating a business environment where compliance with legal frameworks and alignment with international standards can be complex. Moreover, China's corporate governance practices make public enforcement in China a unique and often elaborate challenge for companies operating in or engaging with the Chinese market.

The efficacy of the HFCA Act will benefit from public enforcement mechanisms in both China and the US, since it is important for Chinese companies listed in the US stock exchange to have a market-oriented and Westernized understanding of accountability and public enforcement. However, the majority of the stakeholders in these companies are probably located in China. It is equally valuable for US legislators to understand the unique features of accountability and public enforcement in a corporate setting in China so as to design more appropriate legislative documents with extraterrestrial impact. To minimize the impact of and prevent future "lost in translation", it may be useful for the US government to revise the Act by using simple legislative language, providing guidance, and recognizing the cultural differences and other factors that may lead to confusion on the Act.

VI. CONCLUSION

The recently enacted HFCA Act, as passed by the US Senate, mandates the disclosure of foreign government ownership or control by certain foreign companies listed on US securities exchanges. This legislation has garnered considerable attention and is heralded as a "watershed" development with profound implications for the global economic landscape and enhanced transparency. Given the substantial presence of Chinese firms cross-listed on US stock exchanges, it is anticipated that the HFCA Act will exert a substantial and enduring influence on Chinese corporations, their accounting entities, US investors, and the broader capital markets.

However, the extent of the Act's impact is contingent upon the nuanced interpretations of accountability within the sphere of corporate governance and hinges upon the efficacy of public enforcement mechanisms. Notably, tensions and incongruities emerge, principally between the concept of accountability as a fundamental tenet of sound governance and the equitable considerations and ramifications associated with the HFCA Act's pronounced focus on Chinese enterprises. Moreover, apprehensions have been expressed regarding the applicability of the HFCA Act to Variable Interest Entity (VIE) companies listed in the US, prompting discussions concerning potential consequences and strategic alternatives available to Chinese firms should they face delisting from the US capital market.

Turning to the future landscape, the nomination of Gary Gensler as the prospective Chair of the SEC introduces an element of uncertainty. It remains to be seen whether the SEC under Gensler's stewardship and the broader policies of the Biden Administration will adopt a more conciliatory stance towards China and Chinese corporations, preferring to evaluate the full ramifications of the HFCA Act on US capital markets. [111]

While numerous queries persist, the effective implementation of the HFCA Act necessitates a progressive series of actions aimed at addressing several pivotal challenges. Interim measures assume considerable importance as a significant stride towards establishing a regulatory framework for listed companies, particularly in cases where the Public Company Accounting Oversight Board (PCAOB) encounters impediments in conducting comprehensive inspections and investigations due to resistance from foreign governmental authorities. Ideally, the regulatory bodies in both China and the United States will arrive at a consensus to surmount barriers related to auditing information access for Chinese-listed firms[112] and ameliorate issues arising from potential misinterpretations or "lost in translation" scenarios.

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[111] Patterson Belknap Webb & Tyler LLP, *The Holding Foreign Companies Accountable Act and its Potential Repercussions* (Mar. 17, 2021) https://www.lexology.com/library/detail.aspx?g=97bd93b1-9844-4223-9752-84ee8a35f876.

[112] Nicolas Grabar, Shuang Zhao, and Robert Williams, *SEC Roundtable: Emerging Markets, Including China* (Aug. 10, 2020) https://corpgov.law.harvard.edu/2020/08/10/sec-roundtable-emerging-markets-including-china/.