



Yum China Holdings, Inc.



May 4, 2021

VIA E-MAIL ([rule-comments@sec.gov](mailto:rule-comments@sec.gov))  
Vanessa A. Countryman  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090

Re: File Number S7-03-21

Dear Ms. Countryman:

We appreciate the opportunity to comment on the interim final amendments to Form 10-K by the Securities and Exchange Commission (the “Commission”) to implement the disclosure and submission requirement of the Holding Foreign Companies Accountable Act (the “Act”), which apply to registrants that the Commission identifies as having filed an annual report with an audit report issued by a registered public accounting firm that is located in a foreign jurisdiction and that the Public Company Accounting Oversight Board (“PCAOB”) is unable to inspect or investigate completely because of a position taken by an authority in that jurisdiction (the “Interim Final Rule”). Yum China Holdings, Inc. (“Yum China” or the “Company”) recognizes the importance of the PCAOB’s ability to inspect or investigate public accounting firms. We respectfully submit this comment letter to apprise the Commission of the severely undesirable consequences that the implementation of the Act and Interim Final Rule would have on a domestic issuer, such as Yum China, and its security holders. The Company urges the Commission to consider our responses to certain of the questions presented in the Interim Final Rule.



## BACKGROUND AND OVERVIEW

Yum China is a U.S. Fortune 500 company incorporated in Delaware with a market capitalization of approximately \$26 billion. In October 2016, we were spun-off from Yum! Brands, Inc., a domestic issuer based in Louisville, Kentucky, and became an independent public company. Since becoming an independent public company, our shares have traded on the New York Stock Exchange (“NYSE”), and starting in September 2020, on the Main Board of The Stock Exchange of Hong Kong Limited (the “Hong Kong Stock Exchange”). Today, Yum China is China’s largest restaurant company; we have the exclusive right to operate well-known American brands – KFC, Pizza Hut and Taco Bell – in China. Including other brands in our portfolio, Yum China operates more than 10,700 restaurants in over 1,500 cities throughout China. The Company is Yum! Brands’ largest franchisee, and our financial results significantly affect this American quick service restaurant company.<sup>1</sup> After our separation from Yum! Brands, shares of Yum China common stock continue to be widely held and actively traded by a diverse, U.S.-centered public shareholder base. Unlike companies incorporated or operating in China and other foreign private issuers, Yum China has no controlling shareholder, and our common stock is held entirely by public investors, both retail and institutional.

As a domestic issuer listed on the NYSE, Yum China is subject to the highest level of disclosure, corporate governance and shareholder rights standards under state and federal laws, the rules of the Commission and the NYSE, and it complies strictly with all its disclosure obligations under these standards. As a Delaware-incorporated company, the Company’s internal affairs are governed by Delaware law, including the fiduciary duties and obligations of Board of Directors (the “Board”) and executive officers, and the rights of the shareholders. The Company is also subject to U.S. federal securities laws as a listed domestic issuer, including the significant disclosure and shareholder protection standards under the rules of the Commission and the NYSE. The Company is a “well-known seasoned issuer” as defined by Rule 405 of the Securities Act of 1933 and is a Form S-3 registrant. Yum China’s Board is comprised of eleven members, of whom ten are independent under applicable Commission and NYSE rules, a much higher percentage of independent directors compared to most foreign private issuers. Further, the Company’s Audit Committee exceeds

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<sup>1</sup> See Yum! Brands most recent Form 10-K filed with the Commission on February 22, 2021 available at <https://www.sec.gov/ix?doc=/Archives/edgar/data/1041061/000104106121000012/yum-20201231.htm>.

requirements under applicable Commission and NYSE rules in a number of ways. First, the Audit Committee is comprised of five independent members, exceeding the minimum requirement for three independent directors. Second, four qualify as an audit committee financial expert, far exceeding the NYSE minimum requirement of one. The Board has also determined that each member of the Audit Committee is financially literate within the meaning of the NYSE rules. As the Company is a Delaware corporation and a listed issuer on the NYSE, our shareholders have many avenues for protection, including the right to bring personal actions or a class action directly against the Company and otherwise to seek remedies in the courts of the United States. Since becoming a public reporting company, the Company has been filing our required disclosures promptly and has never been the subject of any investigations by the Commission. Beyond mandatory governance standards, we have voluntarily adopted measures that give our shareholders greater rights than those compelled by law and regulation, such as proxy access. In contrast to foreign private issuers, Yum China is also evaluated by third party governance rating organizations like Institutional Shareholder Services (“ISS”) and Glass Lewis. As of May 2021, Yum China’s ISS QualityScore is “1,” the highest possible, indicating that our governance is best in class among U.S. public companies.

As of March 2021, Yum China’s common stock is held by over 40,000 registered holders. A majority of Yum China’s outstanding shares are held by U.S.-based investors, including large institutional holders such as Invesco, BlackRock and Goldman Sachs. Over 80 percent of our trading volume takes place on the NYSE.

Due to the nature of Yum China’s business operations and the fact that substantially all of our revenue is derived from our operations in China, our independent public accounting firm (KPMG Huazhen LLP) and the documentation related to its audit report included in the Company’s annual report on Form 10-K are located in China. The PCAOB is currently unable to conduct full inspections in China or review audit documentation located within China without the approval of Chinese authorities. From the Company’s perspective, there is no administratively feasible way for the Company to allow or facilitate PCAOB inspection of our auditors in China. In accordance with SEC guidance



on the topic,<sup>2</sup> Yum China makes extensive disclosures, including in its risk factors, about this fact and its potential effect on shareholders.

Yum China is concerned that the Interim Final Rule is implementing a much broader rule than what was intended by Congress. In our view, the Congressional intent of the Act is narrower than that achieved by the Interim Final Rule. If implemented, the Act and the Interim Final Rule may ultimately force a large American company whose shares trade primarily on the NYSE off of U.S. securities exchanges, restricting our access to the U.S. capital markets and triggering a large amount of our capital stock to move out of the U.S. This may lead to unintended consequences for U.S. investors, and in particular retail investors. While shares of the Company trade on the Hong Kong Stock Exchange, there are logistical challenges for retail investors in repositioning their shares to the Hong Kong Stock Exchange. Retail investors may struggle to sell holdings or be forced to sell at unnaturally depressed prices. More broadly, we are concerned that the Act may promote numerous going private transactions if wholesale trading prohibitions and delistings were to occur. The Act and the Interim Final Rule may also result in companies listing their shares on competing exchanges in jurisdictions outside of the U.S., which could confer a competitive advantage on such exchanges and weaken the global role of the U.S. capital markets.

In view of the many regulations that apply to Yum China as a U.S. company and Yum China's robust corporate governance practices, Yum China believes that our continued participation in the U.S. capital markets does not present the level of risk that the Act and Interim Final Rule are seeking to address. We urge the Commission to consider these factors and the detrimental impact on U.S. investors and the U.S. capital markets should Yum China be forced to stop trading on the NYSE.

### **SPECIFIC RECOMMENDATIONS**

The remainder of this letter responds to the specific items identified by the Commission in the request for comment regarding (1) the determination of Commission-Identified Issuers (as defined in the Interim Final Rule) and (2) the submission requirement in Section 2 of the Act.

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<sup>2</sup> See Disclosure Considerations for China-Based Issuers (Nov. 23, 2020), available at <https://www.sec.gov/corpfin/disclosure-considerations-china-based-issuers> and Emerging Market Investments Entail Significant Disclosure, Financial Reporting and Other Risks; Remedies are Limited (April 21, 2020), available at <https://www.sec.gov/news/public-statement/emerging-market-investments-disclosure-reporting>.

## **Determination of Commission-Identified Issuers**

*Timing of Determination.* The Commission is considering determinations of Commission-Identified Issuers annually, not earlier than a date after the annual report forms for registrants with December 31 fiscal year ends are due to be filed, and has asked, among other things, whether the determinations should be made more often. Yum China believes the Commission should not make the determinations of Commission-Identified Issuers more often than annually, as this would exceed the mandate of the Act without any practical benefit for the public or the Commission. The Act does not contemplate any interim submission or disclosure requirements. Because the Commissions' determinations would be based on the audit reports contained in registrants' annual reports, it is unclear on what basis interim determinations could be made. Furthermore, determinations made more often than annually may be unnecessarily disruptive to registrants' current filing and reporting obligations and operations.

The Commission should consider making the determination as early as possible after the filing of the annual report for each issuer to permit registrants the maximum available time to prepare for the submission or disclosure and the potential impact of designation as a Commission-Identified Issuer. In view of the impact on registrants and investors of a trading prohibition, the Commission should provide issuers notice as soon as possible after the filing of the annual report. We request the Commission to consider determination dates tied to the applicable annual report due dates as the Commission will have the audit report information for large accelerated filers sooner than other filers. Further, because the impact of the determination on large, well-known seasoned issuers with a U.S.-centered shareholder base, such as the Company, will have a greater relative effect on the U.S. capital markets vis a vis smaller issuers, the Commission should consider providing such registrants additional time for planning and preparation in relation to others.

*Identifying Commission-Identified Issuers; Guidance.* The Commission has asked whether it should publish a list of Commission-Identified Issuers on its website or identify Commission-Identified Issuers on EDGAR. Yum China believes that publishing such a list or identifying Commission-Identified Issuers on EDGAR is unnecessary since companies like Yum China are already subject to comprehensive disclosure obligations that would require them to consider putting investors on notice regarding the company's status as a Commission-Identified Issuer as appropriate for their individual circumstances. Furthermore,

publishing such a list or identifying Commission-Identified Issuers on EDGAR is not contemplated by the Act and would go beyond its statutory mandate. The Commission has also asked whether it should provide guidance rather than prescribe rules relating to disclosure or procedures for identification of errors relating to a registrant's status. Yum China believes that the Commission should publish guidance rather than prescribe rules since this approach affords the Commission flexibility to subsequently review, refine and revise its views. Guidance would also provide registrants flexibility in responding to the Act's requirements. That flexibility is particularly helpful as the Commission and registrants assess the impact of the Act's requirements and seek to reduce the cost of compliance.

### **Submission Requirement Under the Act**

*Date and Location of Submission Requirement; Form 8-K.* The submission requirement for documentation relating to governmental ownership or control is included in certain annual report forms (*i.e.*, Form 10-K, Form 20-F, Form 40-F and Form N-CSR). The Commission has asked whether there should be a different due date for the submission. Since the Act provides that the submission be provided "to the Commission" and there is no mandate for public disclosure of the submission, we request the Commission prescribe a different due date for the submission that is later than the due date for the annual report. To require that the submission be provided on the same date as the annual report provides no meaningful benefit to investors. A later and different due date for the submission would afford issuers additional time to prepare the submission and assist with a reduction in the costs of compliance. In our view, rather than tie the due date to the annual report, the Commission should establish a universal submission due date for all issuers, so as not to disadvantage large accelerated filers, who would otherwise be subject to the submission requirement ahead of other issuers.

The Commission has also asked if it should locate the submission requirement in a different form or rule, such as Form 8-K or Form 6-K. Yum China believes the submission requirement should not be relocated in a different form or rule such as a Form 8-K, as this would be inconsistent with the purpose of Form 8-K disclosure, which requires disclosure of "unquestionably or presumptively material events that must be disclosed currently."<sup>3</sup> The

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<sup>3</sup> See Final Rule: Additional Form 8-K Disclosure Requirements and Acceleration of Filing Data, available at [https://www.sec.gov/rules/final/33-8400.htm#P82\\_5289](https://www.sec.gov/rules/final/33-8400.htm#P82_5289).



submission of documentation establishing that the issuer is not owned or controlled by a governmental entity in the foreign jurisdiction, such as a certification as discussed below in the section titled “*Types of Documentation*,” should not be categorized as a material event that requires disclosure on a “rapid and current basis.”<sup>4</sup> Furthermore, relocating the submission requirement to a different form or rule such as a Form 8-K would be beyond the statutory mandate of the Act, which requires submission of documentation rather than disclosure.

Similarly, the Commission has asked whether it should amend Form 8-K to require disclosure by a registrant of the Commission’s determination that the registrant is a Commission-Identified Issuer. Yum China believes that Form 8-K should not be amended to require disclosure that a registrant is a Commission-Identified Issuer. Although the determination is likely important information for shareholders, in light of the fact that many potentially affected registrants have already disclosed this risk to investors, it does not rise to the level of being an “unquestionably or presumptively material” event that must be disclosed on a “rapid and current basis”<sup>5</sup> on Form 8-K. Instead, we recommend the Commission leave the decision to the individual issuer’s discretion based on any particular facts and circumstances that it has to consider under existing periodic reporting obligations.

*Public Submission.* The Commission has asked whether documentation submitted to the Commission pursuant to Section 2 of the Act should be made publicly available and/or whether the registrant should be allowed to request confidential treatment for some or all of the submission. The Commission also asks whether the submission should be publicly filed as an exhibit to the form or filed with the Commission in some other way. Yum China believes that making the documentation called for by Section 2 of the Act publicly available or filed as an exhibit would exceed the actions authorized by the Act, which requires issuers to submit the documentation *to the Commission*. Anything beyond a submission to the Commission, such as required public disclosure or a public filing as an exhibit would create a requirement not directed by Congress and should not be implemented. Neither the text of the Act nor any other legislative expression suggests any Congressional intent to impose such a requirement. Yum China also believes registrants may request confidential treatment for some or all of the submission under the Commissions existing rules. Forbidding such

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

requests would not be possible without an amendment to Rule 83, which includes no limitation on the subjects for which confidential treatment may be claimed.

*Types of Documentation.* The Commission has asked whether it is appropriate to retain flexibility for registrants to determine what documentation to provide under the Act's submission requirement, and if so, whether additional guidance is necessary for registrants to determine the sufficiency of documentation to establish that they are not owned or controlled by a governmental entity in the foreign jurisdiction. Yum China believes it is important and appropriate for registrants to retain flexibility to determine what documentation to provide to meet the Act's submission requirement. The type of documentation establishing that an issuer is not owned or controlled by a governmental entity in the foreign jurisdiction will depend on facts and circumstances related to the issuer's domicile, ownership structure and other factors. Permitting registrants to determine what documentation will meet this requirement will reduce the overall burden on issuers. The Act directs the Commission to identify the "manner and form in which a covered issuer shall make a submission." The import of the statutory text suggests that these measures must be part of the rule itself. Beyond the Act's mandate, the publication of commentary, including non-exclusive methods to satisfy the Act's requirements would be extremely valuable. One of the potential non-exclusive methods to satisfy the Act's requirements could be, for a U.S. domestic registrant and where there is no (1) Schedule 13D or 13G filing by a government related entity in the foreign jurisdiction, (2) material contract with a foreign governmental party or (3) foreign government representative on the company's board of directors, a certification by the company that it is not owned or controlled by a governmental entity in the foreign jurisdiction.

*Additional Guidance Regarding "Ownership."* The Commission has provided guidance that the terms "owned or controlled," "owned," and "controlling financial interest" should be read with reference to how the term "control" is used in the Exchange Act and the existing definition in the Exchange Act rules, and has asked whether additional guidance as would be helpful. Yum China believes that additional guidance on this point, such as examples of potential non-exclusive methods to satisfy the Act's requirements cited in "Types of Documentation" above would be helpful for issuers to comply with the Act and should be provided by the Commission. Such examples would provide clarity to registrants and greatly reduce the cost of complying with the Act.



Trading Prohibition. Section 2 of the Act directs the Commission to prohibit the securities of a registrant from being traded in the U.S. market if such registrant is determined to be a Commission-Identified Issuer for three consecutive years. Yum China urges the Commission to take into account that if implemented, the trading prohibition would force a low-risk U.S. company operating well-known American brands off of the NYSE and restrict its access to the U.S. capital markets. Forced abandonment of the U.S. markets may lead to adverse consequences for U.S. investors, which represent the majority of Yum China's \$26 billion market capitalization, particularly retail shareholders who may face logistical impediments to repositioning their shares to the Hong Kong Stock Exchange and may struggle to sell holdings or be forced to sell at unnaturally depressed prices.

We acknowledge that the Commission is required by the Act to enforce the statutory trading prohibition. However, we note the directive may be incompatible with the mission of the Commission to maintain fair, orderly and efficient markets. The Commission may suspend trading in a stock when the action is required to protect investors and the public interest. Circumstances that typically warrant a suspension in trading include: (1) a lack of current, accurate or adequate information about the company, as when a company is not current in its filings of Exchange Act reports; (2) questions about the accuracy of publicly available information, including in company press releases and reports, about the company's current operational status, financial condition or business transactions; and (3) questions about trading in the stock, including trading by insiders, potential market manipulation and the ability to clear and settle transactions in the stock. The Commission has stated that it suspends trading in a security only when it believes that the public may be making investment decisions based on a lack of information, or false or misleading information or to prevent potential investors from being victimized by a fraud.<sup>6</sup>

Yum China does not meet any of these criteria and implementing a trading prohibition of a company like Yum China would be inconsistent with the Commission's purpose of maintaining fair, orderly and efficient markets. As stated above, Yum China strictly complies with its disclosure obligations, promptly files its required disclosures and has never been the subject of any investigations by the Commission. There have been no concerns or questions about the accuracy of publicly available information about Yum China's current operational

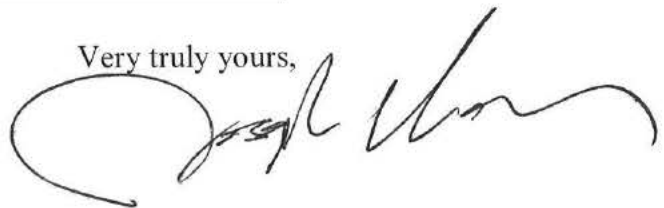
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<sup>6</sup> See Investor Bulletin: Trading Suspensions (Dec. 3, 2018), available at <https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/investor-5>.

status, financial condition or transactions, nor have there been any questions about trading in the stock, including by insiders, potential market manipulation or the ability to clear and settle transactions in the stock. As noted above, Yum China is subject to the highest level of disclosure, corporate governance and shareholder rights standards under state and federal laws, the rules of the Commission and the NYSE, and voluntarily goes beyond these requirements to ensure good corporate governance. Yum China maintains, and monitors compliance with, policies against insider trading and hedging or other speculative trading of Company stock and actively engages with its shareholders. Given these factors, there is very little risk that the public may be making investment decisions based on a lack of information or false or misleading information or that it may be victimized by fraud by Yum China. Yum China strongly urges the Commission to consider the negative impact of a literal implementation of the trading prohibition of the Act on a U.S. domestic issuer like Yum China.

If you have any questions about Yum China's comments or would like additional information, please contact me at [REDACTED]

Very truly yours,

A handwritten signature in black ink, appearing to read 'Joseph Chan', written over a large, stylized circular flourish.

Joseph Chan  
Chief Legal Officer  
Yum China Holdings, Inc.