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January 22, 2021
Via electronic mail

Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Shareholder Proposal to Goldman Sachs Regarding Underwriting Multiclass Stock on behalf of James McRitchie

Ladies and Gentlemen:

James McRitchie (the "Proponent") is beneficial owner of common stock of Goldman Sachs (the "Company") and has submitted a shareholder proposal (the "Proposal") to the Company. I have been asked by the Proponent to respond to the letter dated December 23, 2020 ("Company Letter") sent to the Securities and Exchange Commission (the "SEC") by Beverly O'Toole. In that letter, the Company contends that the Proposal may be excluded from the Company's 2021 proxy statement.

Based on Proposal, as well as the letter sent by the Company, we respectfully submit that the Proposal must be included in the Company's 2021 proxy materials and that it is not excludable under Rule 14a-8. A copy of this letter is being emailed concurrently to Beverly O'Toole.

SUMMARY

The Proposal requests a study of the external costs associated with the Company's underwriting of multi-class offerings, i.e., offerings of corporate stock that deviates from the "one-share, one-vote" rule. The Company asserts that the Proposal is excludable either as relating to ordinary business (Rule 14a-8(i)(7)), or that the Proposal is vague and misleading (Rule 14a-8(i)(3)).

The Proposal is not excludable pursuant to Rule 14a-8(i)(7) because it solely addresses a significant policy issue posed by multiclass share structures. Such structures have been controversial throughout history because they undercut insider accountability, create incentives for insiders to manage the company in a manner harmful to society and the environment (and therefore diversified investors), and result in systemic reductions in economic productivity and efficiency.

Even though the Company's own communications with investor-customers have raised these concerns about the lack of accountability created by multiclass offerings, the Company continues to underwrite them without addressing these impacts. Concern about the emergence of persistent multiclass share ownership has been expressed by leading investors, SEC Commissioners, the SEC Investor Advocate, and the financial sector's Committee on Capital Market Regulation, which expressed concern that the prevalence of multiclass structures could damage "the economy as a whole." This is a significant policy issue of great concern to investors, and therefore transcends the ordinary business of the Company. Moreover, the scope of the Proposal does not stray into ordinary business matters.

The Company asserts that the Proposal is vague, yet reading the language of the Proposal, neither the Company nor shareholders would have difficulty in ascertaining how to go about implementing the Proposal and therefore, the Proposal is not vague within the meaning of Rule 14a-8(i)(3).

THE PROPOSAL

ITEM 4* – External Corporate Governance Cost Disclosure

RESOLVED, shareholders ask that the board commission and disclose a study on the external costs created by the Company underwriting multi-class equity offerings and the manner in which such costs affect the majority of its shareholders who rely on overall stock market return.

Our Company underwrites initial public offerings providing perpetual control to insiders with high-vote stock,¹ contributing to poor governance that harms investors as a class, including

¹ See, e.g., <https://www.sec.gov/Archives/edgar/data/1792789/000119312520292381/d752207ds1.htm> (Door Dash); <https://www.sec.gov/Archives/edgar/data/1559720/000119312520294801/d81668ds1.htm> (Airbnb).

companies with three classes of stock having 20, 1 and 0 votes, respectively.² As the Company advised the investors, its most critical stakeholder group, “[u]sing multi-class voting to insulate management from its own shareholders comes at a significant long-term cost.”³

In addition to risk of poor returns for their own shareholders, these structures give unchecked power to insiders, whose concentrated interests are misaligned with the interests of typical diversified shareholders. As a working paper co-authored by a Nobel Laureate notes, “initial entrepreneurs are not well-diversified and so they want to maximize the value of their own company, not the joint value of all companies.”⁴

By lending reputation and expertise to marketing governance structures that risk both underperformance and misalignment of corporate control with shareholder interests, the Company jeopardizes the viability of the one share, one vote governance model that creates significant economic wealth for shareholders and society. As a 2020 study noted, “if many similarly-situated companies [accept a higher cost of capital for multi-class shares], then the prevalence of dual class shares might have negative consequences for the economy as a whole.”⁵

Understanding this information is essential to the Company’s shareholders, who are almost all broadly diversified. Indeed, as of June 2020, the top three holders of our shares are Vanguard, BlackRock, and State Street—investment managers with indexed or otherwise broadly diversified investors. Their beneficial owners are materially harmed by facilitation of governance that may lower GDP, thus reducing equity market values.⁶ While the Company may profit by ignoring externalized costs, its diversified shareholders ultimately pay them.

The Company’s facilitation of poor corporate governance across the economy is a social issue of great importance. A study would help shareholders determine whether to seek a change in corporate direction, structure, or form in order to better serve their interests.

Please vote for: External Corporate Governance Cost Disclosure – Proposal [4*]

¹ See, e.g.,

<https://www.sec.gov/Archives/edgar/data/1792789/000119312520292381/d752207ds1.htm> (Door Dash);

<https://www.sec.gov/Archives/edgar/data/1559720/000119312520294801/d81668ds1.htm> (Airbnb).

² See Adams and Ferreira, *One Share-One Vote: The Empirical Evidence*, 12 Rev. of Fin. 51 (2008); Bebchuk and Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 Virginia L. Rev. 585, 594 (2017).

² See Adams and Ferreira, *One Share-One Vote: The Empirical Evidence*, 12 Rev. of Fin. 51 (2008); Bebchuk and Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 Virginia L. Rev. 585, 594 (2017).

³ <https://www.forbes.com/sites/simonconstable/2019/09/30/goldman-sachs-warning-one-share-one-vote-or-else-the-stocks-shares-will-suffer/?sh=6cb9916e71da>

⁴ Broccardo, Eleonora and Hart, Oliver D. and Zingales, Luigi, *Exit vs. Voice* (August 24, 2020), <https://ssrn.com/abstract=3680815> or <http://dx.doi.org/10.2139/ssrn.3680815>

⁵ <https://www.capmksreg.org/wp-content/uploads/2020/04/The-Rise-of-Dual-Class-Shares-04.08.20-1.pdf>

⁶ See, e.g., <https://www.advisorperspectives.com/dshort/updates/2020/11/05/market-cap-to-gdp-an-updated-look-at-the-buffett-valuation-indicator> (total market capitalization to GDP “is probably the best single measure of where valuations stand at any given moment”) (quoting Warren Buffet).

³ <https://www.forbes.com/sites/simonconstable/2019/09/30/goldman-sachs-warning-one-share-one-vote-or-else-the-stocks-shares-will-suffer/?sh=6cb9916e71da>

⁴ Broccardo, Eleonora and Hart, Oliver D. and Zingales, Luigi, *Exit vs. Voice* (August 24, 2020),

<https://ssrn.com/abstract=3680815> or <http://dx.doi.org/10.2139/ssrn.3680815>

⁵ <https://www.capmksreg.org/wp-content/uploads/2020/04/The-Rise-of-Dual-Class-Shares-04.08.20-1.pdf>

⁶ See, e.g., <https://www.advisorperspectives.com/dshort/updates/2020/11/05/market-cap-to-gdp-an-updated-look-at-the-buffett-valuation-indicator> (total market capitalization to GDP “is probably the best single measure of where valuations stand at any given moment”) (quoting Warren Buffet).



ANALYSIS

1. Rule 14a-8(i)(7)

The Staff has indicated that a shareholder proposal that might otherwise be excludable as relating to ordinary business under Rule 14a-8(i)(7) may not be excludable if it raises significant social policy issues. Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018, (May 21, 1998). In explaining ordinary business, the Release noted:

Certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. Examples include the management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers. However, proposals relating to such matters but focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.

The determination as to whether a proposal deals with a matter relating to a company's ordinary business operations is made on a case-by-case basis, taking into account factors such as the nature of the proposal and the circumstances of the company to which it is directed.

Shareholder proposals involve significant social policies if they involve issues that engender widespread debate, media attention and legislative and regulatory initiatives. Staff Legal Bulletin 14E (October 27, 2009) addressed considerations relevant to the present matter as well since the Proposal implicates certain risks to investors. Under the guidance of the bulletin, a proposal that requests analysis of risks to investors does not necessarily render the proposal excludable. Instead, the Staff suggested that a key question is whether the particular risk that is being analyzed involves a significant policy issue:

On a going-forward basis, rather than focusing on whether a proposal and supporting statement relate to the company engaging in an evaluation of risk, we will instead focus on the subject matter to which the risk pertains or that gives rise to the risk. The fact that a proposal would require an evaluation of risk will not be dispositive of whether the proposal may be excluded under Rule 14a-8(i)(7). Instead, similar to the way in which we analyze proposals asking for the preparation of a report, the formation of a committee or the inclusion of disclosure in a Commission-prescribed document — where we look to the underlying subject matter of the report, committee or disclosure to determine whether the proposal relates to ordinary business — we will consider whether the underlying subject matter of the risk evaluation involves a matter of ordinary business to the company. In those cases in which a proposal's underlying subject matter transcends the day-to-day business matters of the company and raises policy issues so significant that it would be appropriate for a shareholder vote, the proposal generally will not be excludable under Rule 14a-8(i)(7) as long as a sufficient nexus exists between the nature of the proposal and the company. Conversely, in those cases in which a proposal's underlying subject matter involves an ordinary business matter to the company, the proposal generally will be excludable under Rule 14a-8(i)(7). In determining whether the subject matter raises significant policy issues and has a sufficient nexus to the company, as described above, we will apply the same standards that we apply to other types of proposals under Rule 14a-8(i)(7)

As we will discuss below, in the present matter, the reporting on risks and costs requested by the Proposal relate to an underlying significant policy issue, the proliferation of multiclass share ownership.

Significant policy issue: proliferation of multiclass IPOs raises major public controversy

The debate over multiclass share ownership in the U.S. dates to the nineteenth century. As discussed in more detail in Appendix A, debates around the Delaware Constitution of 1897,

which authorizes the corporate statute used for most IPOs,⁷ focused on the question and President Calvin Coolidge considered acting on the question in the 1920s. The key policy concern is that entrenched corporate insiders are significantly less aligned with US economic success over the long term than are the typical diversified shareholders that own a majority of publicly traded shares. In addition, multiclass shares that create shares with zero votes not only entrench insiders but also deprive shareholders of the right to bring shareholder proposals and exercise other rights due voting shares under the rules promulgated pursuant to the Securities and Exchange Act of 1934, threatening the policies behind Section 14a-8 itself.

The long-simmering debate over the propriety of multiclass share voting structures led in the late 1980s and early 1990s to some limitations on conversion to multiclass share structures on the major exchanges. (This phase of the debate is discussed in more detail in Appendix A.) While a firm can effectuate an initial public offering with a multiclass voting structure, the exchanges currently prohibit conversion into such a structure once listed.

As the use of multiclass structures for IPOs has increased over the last 15 years, experience has borne out the concerns about unaccountability, mismanagement, inefficiency, and self-dealing by insiders who permanently control voting power at the companies. Beginning with Google's issuance of low-vote stock in 2004, an increasing number of IPOs have taken advantage of this opportunity, reaching a crescendo in 2017, when Snap, Inc. offered non-voting shares to the public. Investor concerns based on experience with the multiclass companies over recent years led to concerted efforts by investors to address the issue⁸ and a 2018 Council of Institutional Investors petition to Nasdaq, the NYSE, and the SEC to prohibit such structures and institute a one-share/one-vote policy for public companies.⁹ CII explained that multiclass voting was in violation of "bedrock" principles:

[T]his "founder knows best" approach challenges the bedrock corporate governance principle of "one share, one vote": Providers of capital should have a right to vote in proportion to the size of their ownership. A single class of common stock with equal voting rights makes the board of directors accountable to all of the shareholders—and more likely to respond when management stumbles. Multi-class structures deprive public shareholders of a meaningful voice in how the company is run because the public shareholders lack the votes to influence the board or management.¹⁰

At least one US senator joined in urging action by the exchanges,¹¹ clearly articulating

⁷ *Delaware is the Jurisdiction of Choice for U.S. IPOs* (2014) ("In 2013, 83 percent of all new U.S. Initial Public Offerings (IPOs) chose to incorporate in Delaware"), available at <https://export.delaware.gov/2014/06/02/delaware-is-the-jurisdiction-of-choice-for-u-s-ipos/>.

⁸ See generally, Andrew Winden and Andrew Baker, *Dual Class Exclusion*, Rock Center for Corporate Governance (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3201578; Bebhuck and Kastiel, *supra* n. 2.

⁹ The CII is a nonprofit association of institutional investors including asset owners with over \$4 trillion in assets under management and asset managers with over \$25 trillion in assets under management.

¹⁰ CII press release (October 24, 2018) available at <https://www.prnewswire.com/news-releases/investors-petition-nyse-nasdaq-to-curb-listings-of-ipo-dual-class-share-companies-300737019.html>

¹¹ Letter from Elizabeth Warren, U.S. Senator, to John Carey, Vice President-Legal, NYSE Regulation, Inc. and NYSE Euronext

the policy concern as one of the basic rights of American investors:

If a company goes to the public markets to raise money, long-term ordinary common stock investors - a category that includes directly or indirectly millions of retirees and workers - should be entitled to certain basic rights. One of the most basic of those rights is one-share-one vote.¹²

Once again, this letter from a US Senator to the leading stock exchanges seeking to protect “[o]ne of the most basic rights” signifies that the underwriting of offerings from multiclass structures implicates deeply important public policy questions.

Widespread investor opposition to multiclass structures and index modification

Institutional investors have lodged continuing objections to the proliferation of multiclass voting. In addition to the actions of CII, commentators have described the objections of asset owners and asset managers:

Leading public pension funds, such as CalPERS and CalSTRS, asset managers, such as Fidelity, State Street, T. Rowe Price and Vanguard, and proxy advisory services, such as Institutional Shareholder Services, have stated their opposition to dual-class structures in their proxy voting guidelines, threatening to vote against the directors of companies that have such structures. In January 2017, the Investor Stewardship Group, a new organization of influential institutional investors and asset managers holding an aggregate of \$17 trillion in assets under management, announced its Corporate Governance Principles, which state that shareholders should be entitled to voting rights in proportion to their economic interest, newly public companies should adopt one-share/one-vote structures and directors of existing dual-class companies should phase out their controlling structures.¹³

Stymied at the regulators, investors sought protection from index providers, arguing that because many investors chose to diversify their holdings by investing in funds or asset pools that followed established indexes, they were forced to buy into governance structures they did not want to own if those corporations were included in indexes.¹⁴

The three largest index providers began consultations on this question in the Spring of

& Edward Knight, Executive Vice President and General Counsel, NASDAQ OMX (June 5, 2013), <https://www.warren.senate.gov/files/documents/Senator%20Warren%20letter%20to%20NYSE,%20Nasdaq%20-%206-5-2013.pdf>.

¹² *Id.*

¹³ Winden and Baker, *supra* n. 8 at 10-11.

¹⁴ *Id.*

2017.¹⁵ The exchanges responded in different manners, with one provider excluding new issuances of multiclass shares, another requiring a minimum public float of all classes of stock and the third adjusting index weighting according to voting inequality.¹⁶

Research supports policy concerns

Evidence for the validity of these concerns was provided by a study published in 2004 by the National Bureau of Economic Research indicates that voting control by insiders can lead to management entrenchment that can have a negative impact on firm investment):¹⁷

*Dual-class common stock allows for the separation of voting rights and cash flow rights across the different classes of equity. We construct a large sample of dual-class firms in the United States and analyze the relationships of insider's cash flow rights and voting rights with firm value, performance, and investment behavior. We find that relationship of firm value to cash flow rights is positive and concave and the relationship to voting rights is negative and convex. Identical quadratic relationships are found for the respective ownership variables with sales growth, capital expenditures, and the combination of R&D and advertising. Our evidence is consistent with an entrenchment effect of voting control that leads managers to underinvest and an incentive effect of cash flow ownership that induces managers to pursue more aggressive strategies.*¹⁸

The authors noted that "some firms adopt dual-class structures when their original owners are reluctant to cede control." These firms are less likely to tap the capital markets, typically invest less, grow more slowly, and have lower valuations.¹⁹ Similarly, in their 2017 paper, Bebchuk and Kastiel noted:

Our analysis demonstrates that the potential advantages of dual-class structures (such as those resulting from founders' superior leadership skills) tend to recede, and the potential costs tend to rise, as time passes from the IPO. Furthermore, we show that controllers have perverse incentives to retain dual-class structures even when those structures become inefficient over time. Accordingly, even those who believe that dual-class structures are in many cases efficient at the time of the IPO should recognize the substantial risk that their efficiency may decline and disappear over time. Going forward, the debate should focus on the permissibility of finite-term dual-class structures — that is,

¹⁵ *Id.* at 24.

¹⁶ *Id.* at 24-31.

¹⁷ Gompers, Ishii and Metrick, *Incentives vs. Control: An Analysis of U.S. Dual-class Companies* (Jan. 2004, available at <https://www.nber.org/papers/w10240>).

¹⁸ *Id.* (abstract).

¹⁹ *Id.* at 20.

*structures that sunset after a fixed period of time (such as ten or fifteen years) unless their extension is approved by shareholders unaffiliated with the controller.*²⁰

In 2020, the Committee on Capital Markets Regulation, whose membership includes forty leaders drawn from across the financial sector, including banks, broker-dealers, asset managers, private funds, and insurance companies, issued a report surveying multiclass structures around the world and recommending new disclosure requirements in the US.²¹ An international comparative legal guide published a study addressing the “controversy:”

*For some time, dual-class share structures have been a major source of controversy amongst corporate governance professionals. However, the recent IPO filings of prominent technology companies featuring dual-class share structures have served to reignite the debate.*²²

This issue is not going away. The increasing trend of IPOs to use these control preserving devices threatens the viability of our economy. The continued willingness of market leaders like Goldman Sachs to participate in the multiclass stock structure trend—against their own best judgment of what is good for shareholders--²³ is a looming threat and implicates a critical policy issue.

Commission Level Discussion

Further proof that multiclass equity offerings are controversial, and a significant policy issue comes from the focus on the issue by SEC Commissioners. Two SEC commissioners have spoken out against multiclass structures. In a 2018 speech, Commissioner Kara Stein addressed the broad social policy concerns created by dual class structures:

*Structures where a minority of insiders lock out the interests and rights of the majority may also have collateral effects on our capital markets. They may be harmful not just for those companies, their shareholders, and their employees, but for the economy as a whole.*²⁴

²⁰ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2954630 and summary at <https://corpgov.law.harvard.edu/2017/04/24/the-untenable-case-for-perpetual-dual-class-stock/>.

See also *The Perils of Small-Minority Controllers*, Georgetown Law Journal, Vol. 107, 2019, pp.1453-1514

[European Corporate Governance Institute \(ECGI\) - Law Working Paper No. 434/2018](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3128375)

Harvard Law School John M. Olin Center Discussion Paper No. 985.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3128375

²¹ *The Rise of Dual Class Shares: Regulation and Implications* (April 2020) available at

<https://www.capmksreg.org/2020/04/08/the-rise-of-dual-class-shares-regulation-and-implications/>

²² George Schoen and Keith Hallam, *Dual Class Structures in the United States* in *Corporate Governance 2020* (ICLG 2020).

²³ See Policy, Procedures and Guidelines for Goldman Sachs Asset Management Global Proxy Voting (2020) (recommending votes FOR conversion to one-share, one vote structures and AGAINST conversion to or maintenance of multiclass voting structures) available at

https://www.gsam.com/content/dam/gsam/pdfs/us/en/miscellaneous/voting_proxy_policy.pdf?sa=n&rd=n.

²⁴ (Emphasis added), available at https://www.sec.gov/news/speech/speech-stein-021318#_ednref45.

That same year, Commissioner Robert Jackson gave a speech titled “Perpetual Dual-Class Stock: The Case against Corporate Royalty,”²⁵ in which he criticized not simply multiclass structures, but those that did not have definite endpoints:

Many have argued forcefully, however, that one-share, one-vote should be the rule for all public corporations. Whatever the benefits may be of permitting dual-class in a few well-known cases, these advocates argue, the costs for investors—who are left with no way to hold management’s feet to the fire while dual-class is in place—outweigh those benefits.

But the question I want to ask today is not whether dual-class ownership is always good or bad. It’s whether dual-class structures, once adopted, should last forever. Do Main Street investors in our public markets benefit when corporate insiders maintain outsized control in perpetuity?

This is not an academic exercise. You see, nearly half of the companies who went public with dual-class over the last 15 years gave corporate insiders outsized voting rights in perpetuity. Those companies are asking shareholders to trust management’s business judgment—not just for five years, or 10 years, or even 50 years. Forever.²⁶

As Commissioner Stein noted, the public policy implications are not limited to the effects a multiclass structure has on the financial return of the corporation in question. A Columbia Law School professor explained that our entire economy can be affected by the unaccountability inherent when insiders capture control through such mechanisms:

The public/private hinge becomes relevant in addressing these questions. Mismatches between control rights and cash flow rights give rise not only to private agency costs, the focus of much corporate governance theorizing, but what might be called “public” agency costs. These refer to our concerns about unaccountable power in the socio-political realm. A match between cash flow rights and control rights naturally constrains these public agency costs.²⁷

The SEC’s own Investor Advocate underscored the risk in a recent speech:

²⁵ Available at <https://www.sec.gov/news/speech/perpetual-dual-class-stock-case-against-corporate-royalty>.

²⁶ *Id.* To be clear, the Company underwrites the very type of perpetual control structures that Commissioner Jackson described and about which he asked critical policy questions.

²⁷ Jeffrey Gordon, *Dual Class Common Stock: An Issue of Public and Private Law*, CLS Blue Sky Blog (January 2, 2019) (emphasis added) available at <https://clsbluesky.law.columbia.edu/2019/01/02/dual-class-common-stock-an-issue-of-public-and-private-law/>.

Today I would like to discuss a troubling trend—the increased use of dual-class shares by companies that seek to go public.

...

It is true that a few well-known companies have thrived with long-term founders. But less noticeable are the hundreds of public companies that now have entrenched management. A growing body of research suggests that, over the long term, entrenchment of founders produces lower returns for investors. Specifically, companies with dual-class structures tend to underperform companies with dispersed voting power.

And there is an even larger danger, from my perspective. Namely, without an appropriate level of accountability to shareholders, it is easy to predict that this trend will not end well. Investors will be hurt, and badly, if we continue down this path.

...

*In my view, what we now have in our public markets is a festering wound that, if left untreated, could metastasize unchecked and affect the entire system of our public markets. The question, then, is what can be done to avoid the inevitable reckoning.*²⁸

The Proposal advances a private ordering response to multiclass share ownership externalities

The public statements of the SEC Commissioners demonstrate that this is a significant policy issue. They also demonstrate the functional responsiveness and flexibility of the ordinary business doctrine to respond to significant policy issues on which the SEC is not yet prepared to act by fostering investor private ordering and policy experimentation through the shareholder proposal process. The SEC has a long tradition of recognizing the importance of private ordering, including the important role of the shareholder proposal process, through which investors and companies can develop effective remedies to market challenges and inefficiencies.

Commission Chair Mary Jo White gave a speech in 2016 describing the prominent examples of market-wide success in private ordering, including the near disappearance of staggered boards, majority vote standards becoming the norm across the S&P 500, and the recent successes of proxy access proposals resulting in 35% of the S&P 500 adopting proxy access, compared to 1% just two years prior.²⁹ For each of these examples of private ordering, the shareholder proposal process was a pivotal engine for change.

Commissioner Hester Peirce delivered a keynote speech at a public symposium on “Protecting the Public While Fostering Innovation and Entrepreneurship: First Principles for

²⁸ Rick Fleming, *Dual-Class Shares: A Recipe for Disaster* (October 15, 2019) (emphasis added).

²⁹ Mary Jo White, *Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability*, June 27, 2016, <https://www.sec.gov/news/speech/chair-white-icgn-speech.html>

Effective Regulation.” Peirce quoted from Professor Thomas Lambert’s book *How to Regulate: A Guide for Policymakers* in her speech:

Private ordering is the baseline because, as the book explains, ‘when property rights are well defined and transferable, and individuals are able to strike trustworthy exchange agreements, markets will emerge and channel productive resources to ... [the] production of the goods and services individuals value most.’³⁰

While continuing to deliberate on any policy fixes that the Commission might choose to enact, the Proposal represents an important opportunity for the market to begin to develop better data, analysis and engagement regarding the multiclass offerings and underwriting.

Staff Precedents on ordinary business and multiclass offerings demonstrate that the Proposal is not excludable as ordinary business.

The Staff has had numerous opportunities in the past to evaluate proposals attempting to address the issue of multiclass stock structures against the ordinary business standard. The Staff has repeatedly concluded that proposals regarding dual class or multiple class stock ownership were not excludable as relating to ordinary business. In the past, the proposals have typically requested various companies to recapitalize to eliminate dual class voting structures. *Ford Motor Company* (March 07, 2005), *Cablevision Systems Corporation* (March 14, 2014), *Affiliated Computer Services, Inc.* (August 09, 2005) *Vishay Intertechnology, Inc.* (March 23, 2009). The Staff has repeatedly found, despite the insistence of boards and management that these issues ought to be reserved to their discretion, that these are appropriate issues for shareholders to vote on.

Since the subject matter of the Proposal, the impacts of multiclass share ownership structures, has already been determined by the Staff to transcend ordinary business, the only remaining ordinary business question is whether somehow the form of the Proposal, focused on disclosure of the systemic/market wide impacts of underwriting multiple such issues, rather than immediate recapitalization of a single company to eliminate dual class structures, would be ordinary business and excludable while those proposals were not.

This is where the interpretive guidance of Staff Legal Bulletin 14E is clearly instructive.³¹ The bulletin states that the staff “will consider whether the underlying subject matter of the risk evaluation involves a matter of ordinary business to the company.” In this instance, the underlying subject matter involves looking to the economy-wide impact of multiclass share ownership. As in the prior Staff decisions, this is a controversy in which the factual context

³⁰ Hester Peirce, Keynote Speech: Protecting the Public While Fostering Innovation and Entrepreneurship: First Principles for Effective Regulation,” University of Missouri, (Feb. 8, 2019) <https://www.sec.gov/news/speech/peirce-regulation-view-inside-machine>.

³¹ While the 14E bulletin used the term “risks to investors” and the Proposal uses the term “costs to investors”, they each refer to the same concern—that investors’ expectations will not be met, in the case of the Proposal because the misaligned incentives of controlling insiders will lead them to externalize costs and thus lower GDP. See John Kay and Mervyn King, RADICAL UNCERTAINTY; DECISION-MAKING BEYOND NUMBER at 123 (2020) (“Risk is failure of a projected narrative, derived from realistic expectations, to unfold as envisaged.”)

(including long-lived and widespread debate and treatment at the highest levels of the SEC) confirms the matter's transcendence of ordinary business.

The Proposal concerns a significant policy issue and should not be excluded because it touches on products and services

The Company Letter argues for an exclusion under Rule 14a-8(i)(7) because the Proposal addresses products and services offered to customers. Where the focus of the Proposal is clearly on a significant policy issue, the fact that it may touch on issues related to products and services does not cause it to be excludable. This was made clear in the Staff Legal Bulletin 14H, October 22, 2015:

[T]he Commission has stated that proposals focusing on a significant policy issue are not excludable under the ordinary business exception "because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote." [Release No. 34-40018] Thus, a proposal may transcend a company's ordinary business operations even if the significant policy issue relates to the "nitty-gritty of its core business." [emphasis added]

The Company Letter cites prior Staff decisions where, generally, the proposal focused on products and services and lacked an overriding significant policy issue, or where the proposal sought to dictate outcomes at the company in offering of particular products or services. This is not an instance in which the proposal focuses on attempting to limit or prescribe the sale of particular products or services. Instead, it asks the company to study the impacts that it has already acknowledged in a manner that will allow its diversified investors to more clearly understand the costs and risks associated with the continued practice of underwriting multiclass offerings.

In this instance, the distinction comes down to two particular factors: first, that the focus is on a significant policy issue rather than merely on underwriting policy, and second, that it does not actually require any changes to products or services sold, but only an assessment relative to the significant policy issue.

Lending criteria have been the permissible subject matter of shareholder proposals focused on predatory lending, for instance. In *JPMorgan Chase & Co.* (March 4, 2009), a proposal recommended that the company issue a report related to its credit card marketing, lending, collection practices, and the impacts the practices have on borrowers. The staff rejected exclusion on the basis of Rule 14a-8(i)(7). The same was found in *Bank of America Corporation* (February 26, 2009) and *Citigroup Inc.* (February 11, 2009). See, also *Conseco, Inc.* (April 5, 2001) (proposal calling for independent committee of outside directors to develop and enforce policies to ensure that Conseco does not engage in predatory lending). See also, *Associates First Capital Corporation* (March 13, 2000), *Cash America International, Inc.* (February 13, 2008); *Bank of America Corporation* (February 23, 2006), *JP Morgan Chase & Co.* (March 2, 2009). In all of these

instances, the company argued for the ordinary business exclusion of proposals geared toward addressing predatory lending, because the proposal in question focused on the company's lending practices. The staff universally rejected such claims.

In *Bank of America Corporation* (March 14, 2011), a proposal asked the board to have its audit committee conduct an independent review of the company's internal controls related to loan modifications, foreclosures, and securitizations, and to report to shareholders its findings. The Staff rejected the ordinary business claim; even though this clearly related to lending practices, the heightened focus on failing controls in the aftermath of the 2008 financial crisis demonstrated this was a valid and significant policy concern for shareholders.

Other significant policy issues have been at the core of proposals addressing lending policies, including proposals that may have had the effect of leading to criteria that change who the company chooses to do business with, and under what conditions -- far more prescriptively than the Proposal. For instance, in *Citicorp* (January 23, 1991), the proposal sought a report on the Company's lending policies in the developing world. The Staff noted in rejecting the ordinary business challenge, "[i]n reaching a position, the staff particularly notes that the proposal appears to involve questions of substantial economic importance that go beyond the Company's ordinary business operations."

This followed in the footsteps of *Merrill Lynch & Co.* (February 25, 2000), where the proposal requested that the board issue a report reviewing the underwriting, investing, and lending criteria of Merrill Lynch with a view to incorporating criteria related to a transaction's impact on the environment, human rights, and risk to the company's reputation. The proposal was found not excludable under Rule 14a-8(i)(7).³²

In short, there is no basis for an assertion that a proposal, regardless of whether it addresses a significant policy issue, is excludable simply because it touches upon lending or underwriting criteria. The key question demonstrated by prior Staff decisions is whether the subject matter requiring a focus on lending or investing criteria is limited to a significant policy issue and whether the proposal is written in a manner that does not micromanage. The Proposal is compliant and not excludable under Rule 14a-8(i)(7).

Scope is limited to the significant policy issue

Exceptions to the general rule allowing a proposal that transcends ordinary business to be excludable have been made where the proposal addresses both ordinary business and transcendent social policy issues. Examples of proposals that have crossed the line to address

³² Similarly, proposals addressing climate change have been found not excludable under Rule 14a-8(i)(7) despite addressing a company's lending and investment portfolio. The Staff has long determined that proposals addressing climate risk are appropriate for financial services companies so long as such proposals do not delve into the individual application of such policies to customers. For instance, in *PNC Financial Services Group, Inc.* (February 13, 2013) the Proposal requested that the Board report to shareholders PNC's assessment of the greenhouse gas emissions resulting from its lending portfolio and its exposure to climate change risk in lending, investing, and financing activities. The Staff determined that the Proposal was not excludable because it addressed the significant policy issue of climate change. PNC had argued, as the Company does here, that the Proposal micromanaged the business. The Staff rejected the claim. The present proposal is analogous, because it looks to specific impacts on the economy and investors of current underwriting practices, much as the PNC Financial Services proposal looking to quantify the greenhouse gas impact.

both ordinary and transcendent issues include *Bank of America Corporation* (February 26, 2019) where the proposal requested that the company begin an orderly process of retaining advisors to study strategic alternatives and empower a committee of its independent directors to evaluate those alternatives with advisors in exercise of their fiduciary responsibilities to maximize shareholder value. The staff noted that “the Proposal appears to relate to both extraordinary transactions and non-extraordinary transactions and therefore allowed exclusion. Same result *Donegal Group Inc.* (February 15, 2013), *Analysts International Corp* (March 11, 2013), *Anchor Bancorp, Inc.* (July 11, 2013). Another example of this phenomenon occurred in *Exxon Mobil Corporation* (March 6, 2012) where the proposal requested that the Board prepare a report discussing possible short and long term risks to the company's finances and operations posed by the environmental, social, and economic challenges associated with the oil sands. Because the proposal included reporting on “economic challenges associated with oil sands” that was not limited in scope to environmental and social issues, it included reporting on both ordinary business and transcendent policy issues and therefore exclusion was allowed under Rule 14a-8(i)(7).

In contrast, the scope of the Proposal is narrowly and correctly drawn to only address the significant policy issues--the subject of widespread debate--associated with multiclass share ownership. It does not extend beyond the relevant social policy issue.

The focus on economic impact of the company’s underwriting activities does not make it an excludable ordinary business matter when the reason for the issue involved to be a significant policy issue revolves around economic impact on investors and the economy. For example, *J.P. Morgan Chase & Co.* (March 19, 2010) denied an ordinary business exclusion for a proposal that requested a report to shareholders on the firm’s policy concerning the use of initial and variance margin (collateral) on all over-the-counter derivatives trades and its procedures to ensure that the collateral is maintained in segregated accounts and is not rehypothecated. The proponents had noted in the supporting statement that “For many years, the proponents have been concerned about the long-term consequences of irresponsible risk in investment products and have expressed these concerns to the company We believe that the report requested in this proposal will offer information needed to adequately assess our company’s sustainability and overall risk, in order to avoid future financial crises.” In denying the request for no-action, the Staff specifically noted “We note that the proposal raises concerns regarding the relationship between JPMorgan Chase’s policies regarding collateralization of derivatives transactions and systemic financial risk. In our view, the proposal focuses on a significant policy issue for JPMorgan Chase.”

Contrast the case cited by the Company, *Ameren Corporation* (February 8, 2018), where the proposal requested disclosure of costs to investors associated with the continued storage of high-level waste at a nuclear power plant. The Staff allowed exclusion as relating to ordinary business. In that instance, however, there was no predominant focus on a significant policy issue. Rather, the focus of the proposal was exclusively on impacts to investors of a routine regulated activity at the operation, the storage of high-level waste. The proposal did not focus on environmental impacts of the waste, which is an identified significant policy issue, but only on the impacts on investors.

Here, the Proposal directly addresses the economic impact caused by the significant policy issue of multiclass share offerings.

Nexus between the Proposal and the Company is clear

In the present instance, the nexus between the nature of the Proposal and the Company is clear. The Proposal asks for a report on the effect of underwriting multiclass IPOs. That phenomenon is increasing at an alarming rate: More than 20 percent of the companies listing shares on U.S. exchanges between 2017 and 2019 had a dual class structure, and from less than 5% of IPOs in 1984, the percentage is now approaching 25%.³³ But this understates the problem. More than a third of the money raised in IPOs may well be going to corporations with multiclass structures. As the Company reported in September of 2019:

In 2019, seven of the ten largest IPOs have issued shares with unequal voting rights. These firms account for 36% of the \$37 billion of IPO proceeds raised YTD³⁴

The Company is one of the leading underwriters of IPOs, holding the coveted bookrunner position on 120 IPOs in 2020 valued at over \$20 billion; it was the number one underwriter of IPOs in the combined years of 2019 and 2020.³⁵ The Company's underwriting decisions as a major financial institution have a significant effect on the direction taken by the market. Moreover, this is an issue the Company has already taken a position on in other parts of its investment banking business. As an asset manager, the Company has already decided to take action *against* multiclass voting structures whenever the opportunity arises—the policy for accounts they manage is to vote against all multiclass structures:

Vote FOR resolutions that seek to maintain or convert to a one-share, one-vote capital structure. Vote AGAINST requests for the creation or continuation of dual-class capital structures or the creation of new or additional super voting shares.³⁶

The Company's research business also publicly recognizes the problems with multiclass structures, stating “institutional investors overwhelmingly prefer a ‘one share-one vote’ governance structure and that, “the debatable benefit of insulating management from its own shareholders comes at a significant long-term cost.”³⁷ Thus, the nexus of this issue to the Company is so tight that two of its other businesses have already taken a position against this structure.

The Proposal is not excludable pursuant to Rule 14a-8(i)(3)

The Company's argument that the Proposal is vague is grasps at straws to try to find

³³ *Supra*, n. 21 at 3.

³⁴ Goldman Sachs, *Weekly Kickstart* at 2 (27 September 2019).

³⁵ See Dealogic, *Investment Banking Scorecard*, <http://graphics.wsj.com/investment-banking-scorecard/>.

³⁶ Policy, Procedures and Guidelines for GSAM Global Proxy Voting (March 2020) available at https://www.gsam.com/content/dam/gsam/pdfs/us/en/miscellaneous/voting_proxy_policy.pdf?sa=n&rd=n

³⁷ *Supra*, n. 34.

vagueness in a clearly written proposal. For instance, the Company Letter asserts that the Proposal fails to define “shareholders who rely on overall stock market return,” as if either the shareholders or board would have difficulty understanding such a self-defining concept. Indeed, not only does the Proposal provide a clear definition—it provides examples in the form of the Company’s three largest shareholders. These are the very type of shareholders that the Company’s research arm has already identified as “institutional investors overwhelmingly prefer[ing] a ‘one share-one vote’ governance structure.”³⁸ Over 70% of its shareholders are in fact institutional shareholders.³⁹

The No-Action Request poses a series of rhetorical questions purporting to show that the Proposal is unclear with respect to “the scope” of the requested study:

For example, does the Proposal require the Company to assume that all of its shareholders “rely on overall stock market return” and assess the “affect” (whether positive, negative, tangible, or otherwise) of “external costs” with respect to the “majority” of them? Or, alternatively, is the Company required to first identify those shareholders who rely on overall market return and then assess the “affect” of “external costs” on the majority of that subset of shareholders?

The answer is obvious within the four corners and logic of the Proposal that no, the Company does not have to assume all of its shareholders are rely on overall stock market return, just as it does not have to assume that every item it discloses is important to every Company shareholder. Nor does the Company have to identify which shareholders rely on overall market return, although, as the Proposal highlights, the top 3 shareholders of the Company are mutual or index funds, as are many others.

But what the Proposal does request is that the Company provide a report on how costs that are external to the Company affect the performance of the diversified portfolios of the owners of the Company.

Thus, there is nothing “vague” or “unexplained;” indeed, the Proposal cites the work of a Nobel Laureate to help illustrate the difference between what matters would interest a concentrated shareholders (“maximize the value of [the] company”) and what different matters would interest a diversified owner (“the joint value of all companies.”) It further cites Warren Buffet, widely regarded as one of the world’s most successful investors,⁴⁰ as to why those diversified shareholders would care about GDP.

Which leads to the next imaginary instance of vagueness asserted in the Company Letter—that it could it is susceptible of “multiple and conflicting interpretations:”

The Proposal could be interpreted as requiring the commissioning of a broad macro-economic report analyzing all impacts, direct and indirect, social, financial, reputational, environmental, and

³⁸ *Id.*

³⁹ See <https://finance.yahoo.com/quote/GS/holders?p=GS>.

⁴⁰ *Forbes* online profile (“Known as the “Oracle of Omaha,” Warren Buffett is one of the most successful investors of all time”) available at <https://www.forbes.com/profile/warren-buffett/?sh=3d8a1a146398>.

otherwise, that the Company’s “underwriting [of] multi-class equity offerings” could conceivably create. Alternatively, the Proposal could be interpreted as narrowly focusing on the actual financial costs incurred by customers that engage the Company to provide the aforementioned underwriting services in connection with a public equity offering (thus relating to the Company’s cost and pricing model for its underwriting services).⁴¹

There is literally nothing in the Proposal that suggests the latter reading. Nor could it be read to require the sort of over-the-top reading suggested in the first sentence. Discussing the diversified beneficial owners of the mutual fund companies that comprise the Company’s three largest shareholders, the Proposal states:

Their beneficial owners are materially harmed by facilitation of governance that may lower GDP, thus reducing equity market values. While the Company may profit by ignoring externalized costs, its diversified shareholders ultimately pay them.

It could not be clearer: the Proposal requests a report on how giving entrepreneurs perpetual power over the governance of public companies (which leads to different perspectives between concentrated controllers with minority economic interests and diversified owners with majority interests) can lead corporations to engage in activities that lower GDP and thus lower the value of the owners of diversified portfolios, like the Company’s three largest shareholders. There is nothing vague or mysterious about this. Economists have done the work that shows the direct relationship between GDP and the cash flows of diversified portfolios.⁴² Nor is the concept of measuring the effect of externalities on GDP unusual. A recent study by a major asset manager was able to discern that 55% of the profits attributed to publicly listed companies globally were countervailed by external costs absorbed by the rest of the economy:

In total, the earnings listed companies generate for shareholders currently total US\$4.1 trillion, which would fall by 55% to US\$1.9 trillion if those social and environmental impacts crystallised as financial costs. One third of companies would become loss-making.⁴³

Those costs do crystalize, as the cash flows, and ultimately, valuations of companies across the economy suffer. Other studies have shown the costs to GDP of climate change,⁴⁴

⁴¹ Page 11 of the No-Action Request includes another long paragraph claiming that the Proposal does not adequately contextualize the term “external costs,” but the two sentences quoted in the text fully answer each question raised in the No-Action Request.

⁴² See *Universal Ownership: Why Environmental Externalities Matter to Institutional Investors*, Appendix IV (demonstrating linear relationship between GDP and a diversified portfolio) available at https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf

⁴³ *Foresight*, Schroders, available at <https://www.schroders.com/en/sysglobalassets/digital/insights/2019/pdfs/sustainability/sustainex/sustainex-short.pdf>.

⁴⁴ , see, e.g., Kahn, M., Mohaddes, K., Ng, R., Hashem Pesaran, M., Raissi, M., and Yang, J., *Long-Term Macroeconomic Effects of Climate Change: A Cross-Country Analysis*, IMF Working Paper (2019) (abstract) (“Our counterfactual analysis suggests that a persistent increase in average global temperature by 0.04°C per year, in the absence of mitigation policies, reduces world real GDP per capita by more than 7 percent by 2100. On the other hand, abiding by the Paris Agreement, thereby limiting the temperature increase to 0.01°C per annum, reduces the loss substantially to about 1 percent.”)

inequality,⁴⁵ overuse of antibiotics,⁴⁶ and racial disparity,⁴⁷ all issues that corporate behavior can contribute to or ameliorate. These issues create risks to the entire economy that no investor can hedge against.

There is no question that compilation of such a report will require discretion and business judgment on the part of the Company because they will have to make decisions as to the level of detail. But that does not make the request vague. The fact is that the Proposal represents a fairly simple request: that the Company undertake to explain relationship among (1) the overall cost of externalities on the economy and diversified shareholders, (2) the conflict of interest that external costs create between concentrated controllers and majority owners, and (3) the Company's role in facilitating such conflicts. Being asked to report on these issues may be uncomfortable for the Company's management, but it there is nothing vague about it.

Finally, it must be noted that the Company's reluctance to report to its shareholder-investors is odd, in light of its already-public positions on multiclass shares. As noted above, in its own report to client-investors, it notes that "institutional investors overwhelmingly prefer a 'one share-one vote' governance structure."

Moreover, as noted above, the Company has made a blanket decision to disfavor such structures in the accounts for which it votes shares in a fiduciary capacity. In other words, it had already determined that the investors it serves as clients (1) dislike and (2) are better off without such structures. If it has already made those determinations, could it not explain to the investors who are its own shareholders the effect on continuing to support such structures in other capacities?

Finally, the Company Letter engages in a disingenuous inquiry as to what external costs should be reported in the report:

For example, they do not specify whether the Proponents intend for the requested report to focus on actual monetary costs, broader, intangible social costs, positive or negative impacts, or a combination thereof. The supporting statements refer repeatedly to "harm" investors will suffer (e.g., by lowered gross domestic product, reduced equity market values), but the relationship between such "harm" and the external costs within the scope of the requested report is fundamentally vague.

There is ample context both within the Proposal and the Company's own analyses of these issues to understand the kind of costs and impacts implied by the Proposal. In the end, the Company's arguments regarding vagueness amount to an attempt to fabricate vagueness where there is none. Neither shareholders nor the board or management would be unable to discern how

⁴⁵ Heather Boushey, [Unbound: How Inequality Constricts Our Economy and What We Can Do about It](#) (2019)

⁴⁶ *Drug-Resistant Infections: A Threat to Our Economic Future* (World Bank 2017) (AMR may decrease global GDP 3% by 2030, and almost 4% by 2050. At an intermediate discount rate, this will amount to economic losses by 2050 with a current value of \$54 trillion) available at <http://documents1.worldbank.org/curated/en/323311493396993758/pdf/final-report.pdf>.

⁴⁷ Dana Peterson and Catherine Mann, *Closing the Racial Inequality Gaps: The Economic Cost of Black Inequality in the U.S.* (2020) (closing racial gaps could lead to \$5 trillion in additional GDP over next five years) available at <https://ir.citi.com/%2FPRxPvgNWu319AU1ajGf%2BsKbjJBJSaTOSdw2DF4xynPwFB8a2jV1FaA3Idy7vY59bOtN2lxVQM%3D>.

to implement the Proposal within the context and meaning provided in the Proposal itself.

CONCLUSION

Based on the foregoing, we believe it is clear that the Company has provided no basis for the conclusion that the Proposal is excludable from the 2021 proxy statement pursuant to Rule 14a-8. As such, we respectfully request that the Staff inform the Company that it is denying the no action letter request. If you have any questions, please contact me at rick@theshareholdercommons.com or 302-593-0917.

Sincerely,

Frederick Alexander

Frederick Alexander

cc: Beverly O'Toole
James McRitchie

Appendix I

The controversial history of unequal voting at US corporations

An examination of the history of unequal voting in the United States demonstrates that underwriting issues of stock for corporations with multiclass voting structures raises a significant policy issue that far transcends the ordinary business of the Company.

The issue of voting has been an issue for almost as long as there have been corporations,⁴⁸ and multiclass voting has been a significant question addressed by policymakers, academics and interested parties in the United States in the nineteenth, twentieth and twenty-first centuries.

At the beginning of the nineteenth century, corporate charters were granted one at a time, by action of the state legislature.⁴⁹ In connection with granting charters, legislatures carefully measured out voting rights, often restricting the voting rights of significant owners and insiders in order to protect small shareholders, consumers, and other stakeholders.⁵⁰ But as the century progressed, states began to create general incorporation statutes that allowed individuals to form corporations simply by filing a complying corporate charter with the Secretary of State.⁵¹

As control of individual corporate voting structures passed out of the hands of legislatures, policymakers debated the proper limits of flexibility for voting. Indeed, in the debates surrounding the adoption of the Constitution of 1897 in Delaware, which included an article authorizing the legislature to create a general incorporation statute within specific limits, the delegates proposed and adopted an amendment to the original proposal in order to mandate the one-share, one vote rule. Delegate Nathan Pratt, who offered the amendment, made this simple argument:

*This is intended to provide simply that those holding a majority of the stock shall control the corporation, and that is the reason I offered it.*⁵²

Thus, efficacy of a one-share, one-vote rule was debated at the very beginning of the

⁴⁸ See, e.g., Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote,"* 56 Cornell L. Rev. 1, 3 (1970) (noting that the "problem of shareholder voting was recognized at the earliest stages of the development of business corporations in England, 400 years ago").

⁴⁹ See generally Eric Hilt, *Early American Corporations and the State*, in Naomi Lamoreaux and William Novak, *Corporations and American Democracy* (Harvard University Press 2017).

⁵⁰ See Henry Hansmann and Mariana Pargendler, *The Evolution of Shareholder Voting Rights*, 123 Yale L. J. 948, 952-954 (arguing for consumer rights theory).

⁵¹ See Hilt, *supra* n. 49 at 1; Adolf Berle and Gardiner Means, *The Modern Corporation & Private Property* pp. 125-128 (Transaction Press 2010, originally published in 1932).

⁵² Debates and Proceedings of the Constitutional Convention of the State of Delaware, Vol. 4, pp. 3131-3133 (1896).

discussion over the form⁵³ of the general incorporation statute that would eventually become the leading corporation law in the U.S.⁵⁴ But the strict rule against varying from one-share, one-vote did not last, as the Delaware Constitution was amended soon thereafter to remove the limitation.⁵⁵ By the 1920's, large corporations were varying voting rights in order to separate control of the corporations from their ownership.⁵⁶

But while states competing for corporate charters may have loosened the statutory rule, the policy issue implicated by using multiclass voting structures came to the fore, and there was a “public outcry”.⁵⁷ This outcry reached the White House itself, as one commentator described the level of public controversy:

*The appeals of Professor William Z. Ripley—a political economist at Harvard who had made the ideal of one share, one vote a personal crusade—led President Calvin Coolidge and the Congress to make “threatening noises” about the emerging dual class capital structures. The Justice Department announced an inquiry into the matter as well, and the entire issue could be read about on the front page of the New York Times. Because of this maelstrom, the New York Stock Exchange (NYSE) announced in January, 1926 that as a general matter, it would no longer list disparate voting common shares. The historic NYSE one share, one vote listing rule remained undisturbed for nearly sixty years.*⁵⁸

The American Stock Exchange (then called the New York Curb) followed suit.⁵⁹ A question of corporate structure that reaches the President and Congress, and that engenders an investigation by the Justice Department and front page newspaper stories is indeed a “maelstrom,” and certainly transcends the ordinary business of any single company.

In the 1980s, public companies traded on markets that did not have a rule against unequal

⁵³ Although Delaware had adopted a general incorporation law in 1875, it was little used, as incorporators continued to seek charters through a legislative process until the 1897 Constitution ended the practice. See Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899* 1 Del. J. Corporate Law 249, 250 (1976).

⁵⁴ See, e.g., Kevin LaCroix, *So Why Should Delaware Corporate Law Predominate?* (2015) (“Over half of the U.S. listed companies are incorporated in Delaware. Nearly two thirds of Fortune 500 companies are organized under the laws of Delaware.”) available at <https://www.dandodiary.com/2015/08/articles/securities-laws/so-why-should-delaware-corporate-law-predominate/>.

⁵⁵ For the general trend, see Berle and Means, *supra*, n. 51 at 71 (“only recently have statutory changes made it possible to issue common stock that has no voting rights.”)

⁵⁶ *Id.* at 71-72.

⁵⁷ Lucian Bebchuck and Kobi Kastiel, *The Untenable Case for Perpetual Class Stock*, 103 Va. L. Rev. 585, 596 (2017) (“This decision came in response to a public outcry, initially inspired by Harvard economist William Ripley, against the issuance of non-voting common stock by several prominent companies, including Dodge Brothers.”)

⁵⁸ Peter Flocos, *Toward a Liability Rule Approach to the “One Share, One Vote” Controversy: An Epitaph for the SEC’s Rule 19c-4*, 138 Univ. Penn. L. Rev. 1761, 1762 (1990) (footnotes omitted).

⁵⁹ *Id.*; Berle and Means, *supra* n. 51 at 72.

voting began to recapitalize with multiclass structures.⁶⁰ This increasing competition among stock exchanges (reminiscent of the early century competition among incorporating jurisdictions) led the NYSE to consider changing its longstanding rule. The intense public reaction belies the Company's claim that unequal voting rights do not create a policy issue sufficient to transcend its ordinary business:

Once again, an economic trend toward dual class recapitalizations emerged. In 1984, the NYSE announced that it was putting a moratorium on enforcement of its longstanding general rule of one share, one vote pending further investigation of the rule. Subsequently, amidst a media fanfare reminiscent of the 1920s, the NYSE's directors in July, 1986 approved a resolution allowing the listing of securities created in a dual class transaction provided that the transaction was approved by a majority of the company's independent directors and publicly held outside shares. Once again, as in the 1920s, threatening noises emanated from Washington. A number of bills, all of them hostile to the Exchange's revisionism, sprang up in Congress soon thereafter. For the second time this century, scholarly commentary critical of the NYSE's actions and calling for restrictions upon dual class capital structures appeared. The Securities and Exchange Commission—a creature of the New Deal era that did not exist during the previous imbroglio over the one share, one vote issue—stepped into the breach in July, 1988 with the promulgation of Rule 19c-4.⁶¹

Thus, the re-emergence of multiclass voting again raised objections from Congress and from academics, and from regulators as well, demonstrating the critical nature of the policy question. The resulting Rule 19c-4 limited adoption of unequal voting structures by listed companies.⁶² The rule, however, was invalidated as being beyond the authority of the SEC,⁶³ but the stock exchanges have nevertheless adopted rules that prohibit already-listed companies from recapitalizing into unequal voting regimes.⁶⁴

⁶⁰ Flocos, *supra* n. 58 at 1762-1763 (1990).

⁶¹ *Id.* (footnotes omitted).

⁶² *Id.*

⁶³ *Business Roundtable v. SEC*, 905 F.2d 406 (D.C. Circuit 1990).

⁶⁴ *See* Bebhuck and Kastiel, *supra* n. 2 at 597.