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February 3, 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 JPMorgan Chase & Co. Regarding Underwriting Multiclass Stock on behalf of James McRitchie

Ladies and Gentlemen:

James McRitchie (the "Proponent") is beneficial owner of common stock of JPMorgan Chase & Co. (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 January 11, 2020 (the "Company Letter") sent to the Securities and Exchange Commission (the "SEC") by Brian Breheny ("Company Counsel.") 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. The Proposal is attached as Appendix B to this letter. A copy of this letter is being emailed concurrently to Company Counsel.

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 corporations in a manner harmful to society, and result in systemic reductions in economic productivity and efficiency.

Even though the Company's own policies on behalf of investor-customers disfavor multiclass voting, the Company continues to underwrite such offerings. 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 that completely 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 understanding the request and therefore, the Proposal is not vague within the meaning of Rule 14a-8(i)(3).

ANALYSIS

1. The Proposal is not excludable pursuant to Rule 14a-8(i)(7)

A. Staff Guidance

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.¹ 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

¹ JD Supra, *SEC Staff's Latest Guidance Presents Dilemma for Companies Seeking to Exclude Shareholder Proposals on Environmental and Social Issues* (January 4, 2018) ("In a June 30, 2016 stakeholder meeting, the Staff indicated that significant policy issues are matters of widespread public debate, which include legislative and executive attention and press attention.")

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.

B. The proliferation of multiclass IPOs raises major public controversy and is a significant policy issue

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,² focused on the question and President Calvin Coolidge considered acting on the issue in the 1920s. The key policy concern is that entrenched corporate insiders are significantly less aligned with U.S. and global economic success over the long term than are the typical diversified shareholders that own a majority of publicly traded shares. In addition, multiclass structures 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

² *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/>.

recent years led to concerted efforts by investors to address the issue³ 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.⁴ 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.*⁵

At least one US senator joined in urging action by the exchanges,⁶ clearly articulating 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.*⁷

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.

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.

³ 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; Lucian Bebchuck and Kobi Kastiel, *The Untenable Case for Perpetual Class Stock*, 103 Va. L. Rev. 585, 596 (2017).

⁴ 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.

⁵ 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>

⁶ Letter from Elizabeth Warren, U.S. Senator, to John Carey, Vice President-Legal, NYSE Regulation, Inc. and NYSE Euronext & 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>.

⁷ *Id.*

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.⁸

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.⁹

The three largest index providers began consultations on this question in the Spring of 2017.¹⁰ 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.¹¹

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.¹²

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

⁸ Winden and Baker, *supra* n.3 at 10-11.

⁹ *Id.*

¹⁰ *Id.* at 24.

¹¹ *Id.* at 24-31.

¹² Gompers, Ishii and Metrick, *Incentives vs. Control: An Analysis of U.S. Dual-class Companies* (January 2004), available at <https://www.nber.org/papers/w10240>.

*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.*¹³

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.¹⁴ 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, 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.*¹⁵

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.¹⁶ The same year, 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.*¹⁷

¹³ *Id.* (abstract).

¹⁴ *Id.* at 20.

¹⁵ *Supra*, n.3 at 630; see also Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEORGETOWN L. J. 1453 (2019).

¹⁶ *The Rise of Dual Class Shares: Regulation and Implications* (April 2020) available at <https://www.capmktreg.org/2020/04/08/the-rise-of-dual-class-shares-regulation-and-implications/>

¹⁷ George Schoen and Keith Hallam, *Dual Class Structures in the United States* in *Corporate Governance 2020* (ICLG 2020).

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 the Company to participate in the multiclass stock structure trend—against their own best judgment of what is good for shareholders¹⁸--is a looming threat and implicates a critical policy issue.

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.*¹⁹

That same year, Commissioner Robert Jackson gave a speech titled “Perpetual Dual-Class Stock: The Case against Corporate Royalty,”²⁰ 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

¹⁸ See *Global Proxy Voting Procedures and Guidelines*. J.P. Morgan Asset Management (recommending votes against multiclass share recapitalizations) (updated January 1, 2020), available at https://am.jpmorgan.com/content/dam/jpm-am-aem/asiapacific/regional/en/communications/lux-communication/global_procedures_%20and_guidelines.pdf.

¹⁹ (Emphasis added), available at https://www.sec.gov/news/speech/speech-stein-021318#_ednref45.

²⁰ Available at <https://www.sec.gov/news/speech/perpetual-dual-class-stock-case-against-corporate-royalty>.

*judgment—not just for five years, or 10 years, or even 50 years. Forever.*²¹

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.*²²

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

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

²¹ *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.

²² 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/>.

*affect the entire system of our public markets. The question, then, is what can be done to avoid the inevitable reckoning.*²³

C. 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 its dual class structure, 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.²⁴ 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 (including long-lived and widespread debate and treatment at the highest levels of the SEC) confirms the matter’s transcendence of ordinary business.

D. 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

²³ Rick Fleming, *Dual-Class Shares: A Recipe for Disaster* (October 15, 2019) (emphasis added).

²⁴ 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.”)

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. In contrast, the Proposal does not attempt 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 prescribe any changes to products or services sold, but only an assessment relative to the significant policy issue. Even if the report found significant harm to the economy and its diversified shareholders due to multiclass underwriting, it would not necessarily lead to any change in products or services: for example, it might lead the Company to work with regulators, stock exchanges, index providers and other industry participants to find market mechanisms that address the concerns that drive multiclass listings without creating perpetual control structures. Alternatively, it might lead the Company to require that the multiclass share structures that it underwrites be timebound. Rather than micromanaging outcomes, the Proposal asks only that the policy issue be studied and that the results of that study be shared with the shareholders.

Moreover, underwriting criteria have been the subject of prior proposals that the Staff did not permit exclusion of. For example, 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. The situation here is exactly parallel—the Proposal asks the Company to study one aspect of its underwriting criteria for IPOs.

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.” As the Proposal states, and as the above discussion of the controversy over multiclass lending demonstrates, the question of underwriting multiclass offerings also involve such questions.

Similarly, in *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).

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.

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).

E. 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 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 the broad economic impact of the company's underwriting activities does not make it an excludable ordinary business matter: this is the issue that has been debated for more than a century—is there a risk to society at large in vesting control of large economic entities in a small percentage of their shareholders? 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.

In short, the Proposal is about a significant policy issue because the conduct touched upon—the creation of concentrated corporate control in a minority of shareholders--can have an outside effect on society, even if, from the narrow perspective of the Company, underwriting multiclass share offerings is “just another line of business.” Here, the Proposal directly addresses the long-acknowledged economic impact caused by the promotion of multiclass share offerings.

F. The legislative and regulatory debate are evidence of the significance of multiclass issue, not a reason for exclusion

Given the long history of debate of multiclass shares in this country, and the Staff’s previous decisions not to exclude proposals around a Company’s own multiclass structure, it seems beyond debate that the Proposal addresses a significant policy issue. Only that clarity can explain the highly strained argument that the Proposal should be excluded *because* it has been so highly debated:

The Proposal is unclear on its aims except that its concern with multi-class equity offerings appears to be aimed at society at large, or “shareholders who rely on overall stock market return” and “the economy as a whole.” These concerns have been presented to Congress, regulators, and even the Commission, by advocates who want reform of the capital markets’ approach to multi-class equity offerings. However, to the extent this is a call for reformation of the capital markets, a shareholder proposal is not the appropriate vehicle. The Company merely provides underwriting of multi-class equity offerings among its other diverse product offerings and services, and any significant policy issue raised by the Proposal lacks a clear nexus with the Company.

The statement that the Company “merely provides” the very item that is the heart of a “widespread public debate” glosses over the entire reason for carving out significant policy concerns from the ordinary business exception: to allow shareholders to vote on business

activities that raise public policy concerns. If companies could simply argue that “they are just trying to make a buck” by engaging in the very activity that raises the public policy issue, the exception would be entirely swallowed. Companies that pollute or discriminate or engage in other activities that are the subject of policy-related proposals are “merely” engaging in those activities for the purpose of advancing their business—that is what companies do.

Indeed, widespread controversy and the interest of Congress or the SEC in an issue, provides supporting evidence that a proposal addressing a significant policy issue transcends ordinary business.²⁵ Furthermore, under the shareholder proposal rule, it provides a basis for *non-exclusion*, not for exclusion. The Company Letter has not even attempted to reconcile this “leave it to Congress” position with the ordinary business rule.

In fact, the shareholder proposal process has explicitly been used in areas where legislative and regulatory efforts to address a policy issue had been unsuccessful. 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.²⁶ For each of these examples of private ordering, the shareholder proposal process was a pivotal engine for change, even following prior legislative efforts or action.²⁷

Whether or not further legislative or regulatory action is needed or taken, the Proposal represents an important opportunity for the market to begin to develop better data, analysis and engagement regarding the multiclass offerings and underwriting.

G. 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

²⁵ *Supra*, n.1.

²⁶ 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>. See also Commissioner Hester Peirce, *Keynote Speech: Protecting the Public While Fostering Innovation and Entrepreneurship: First Principles for Effective Regulation*, (Feb. 8, 2019) (“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.’”) (quoting Thomas Lambert, *How to Regulate: A Guide for Policymakers*.)

²⁷ See, e.g., *Business Roundtable and Chamber of Commerce of the United States of America v. Securities and Exchange Commission* 647 F.3d 1144 (D.C. Cir. 2011) (vacating SEC’s proxy access rule); David McBride and Rolin Bissell, *Delaware’s Flexible Approach to Majority Voting for Directors* (“on June 15 and 22, 2005, CII and the California Public Employees Retirement System wrote nearly identical letters requesting that the DGCL be amended to provide majority voting as the default rule for the election of directors.”) available at <https://www.youngconaway.com/content/uploads/2018/06/WallStreetLawyer.pdf>; Matthew Dore, *The Iowa Business Corporation Act’s Staggered Board Requirement For Public Corporations: A Hostile Takeover Of Iowa Corporate Law?*, 60 *DRAKE L. REV.* DISCOURSE 1 (2012) (describing laws in four states that had made staggered boards mandatory for public companies.)

5% of IPOs in 1984, the percentage is now approaching 25%.²⁸ 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 another underwriter 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 YTD.*²⁹

The Company is one of the leading underwriters of IPOs, holding the coveted bookrunner position on 96 IPOs in 2020 valued at over \$13.5 billion.³⁰ 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 general policy for accounts they manage is to vote against multiclass structures:

*Generally, vote against dual-class recapitalizations as they offer an effective way for a firm to thwart hostile takeovers by concentrating voting power in the hands of management or other insiders.*³¹

A competitor'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.”³² Thus, the nexus of this issue to the Company is so tight that both it and its competitors have already taken a position against this structure outside their equity underwriting businesses.

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

The Company's argument that the Proposal is vague confuses the meaning of *vague* (“not clearly expressed”)³³ with the meaning of *general*. It is true that the Proposal does not establish precise measures or exact methodologies for addressing its core request, but it is anything but vague with respect to that request: a report as to how the continuing use of multiclass shares will affect the economy and subsequently diversified shareholders as a class.

²⁸ *Supra*, n.16 at 3.

²⁹ Goldman Sachs, *Weekly Kickstart* at 2 (27 September 2019).

³⁰ See Dealogic, *Investment Banking Scorecard*, <http://graphics.wsj.com/investment-banking-scorecard/>.

³¹ *Supra*, n.18 at 15.

³² *Supra*, n.29 at 2.

³³

Thus, the Proposal provides a clear, step-by-step explanation of the policy issue with which the Proponent is concerned, citing resources that the Company can look to in putting the Proposal into action. It starts by citing an analyst report as to the insulating effect of multiclass shares, as well as two journal articles citing empirical evidence as to the cost to shareholders of multiclass companies. The Proposal then explains how the aperture of inefficiency is widened to all shareholders, citing the work of a Nobel Laureate to help illustrate the difference between the interest of a concentrated shareholder (“maximize the value of [the] company”) and that of 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,³⁴ as to why those diversified shareholders would care about GDP. It further references a prestigious study that concludes the trend toward multiclass offerings is a threat to the larger economy.

It really 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 those of 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.³⁵ 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.³⁶

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,³⁷

³⁴ *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>.

³⁵ 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

³⁶ *Foresight*, Schrodgers, available at <https://www.schrodgers.com/en/sysglobalassets/digital/insights/2019/pdfs/sustainability/sustainex/sustainex-short.pdf>.

³⁷ 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,³⁸ overuse of antibiotics,³⁹ and racial disparity,⁴⁰ all issues that corporate behavior can contribute to or ameliorate. These issues create risks to the entire economy that no investor can hedge against. And, again, the Proposal cites a Nobel Laureate as why concentrated controllers are more likely to ignore these risks.

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 best methodologies to follow. But that does not make the request vague. 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.

The Company argues that the Proposal is vague because it does not prescribe "the calculation method" or "the time frame" that the report should cover. But shareholders voting on the Proposal will recognize that the board and management will have to exercise their business judgment in assembling a report, based on their intimate knowledge of the Company's business and expertise in financial markets. Indeed, prescribing the exact methods would be micromanaging, and had the Proposal included such a level of detail, the Company would have certainly tried to exclude the Proposal on that basis. It should also be noted that the report asks for a "study" on external costs and their effect on shareholders who rely on the market return. That is not a request for specific calculations, although calculation may well play into it. In formulating a report, the Company may well determine that the most useful tactic is to analyze the issue broadly and directionally—as it presumably has already done in its asset management business.

As to that latter point, it must be noted that the Company's reluctance to report to its shareholder-investors is odd, in light of its already-public position on multiclass shares. As noted above, the Company has already made a decision to disfavor such structures in the accounts for which it votes shares in a fiduciary capacity, including the accounts of diversified investors. In other words, it has already determined that the investors it serves as clients are generally better off if they vote against such structures. If it has already made those determinations on behalf of client investors, could it not explain to its own shareholders the effect the Company's continuing support of such structures in its other capacities?

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

³⁸ Heather Boushey, UNBOUND: HOW INEQUALITY CONSTRICTS OUR ECONOMY AND WHAT WE CAN DO ABOUT IT (2019)

³⁹ *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>.

⁴⁰ 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%2BsKbjJBSaTOSdw2DF4xynPwFB8a2jV1FaA3Idy7vY59bOtN2lxVQM%3D>.

there is none. Neither shareholders nor the board or management would be unable to discern how 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: Brian Breheny
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,⁴¹ 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.⁴² 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.⁴³ 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.⁴⁴

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.*⁴⁵

⁴¹ 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").

⁴² See generally Eric Hilt, *Early American Corporations and the State*, in Naomi Lamoreaux and William Novak, *Corporations and American Democracy* (Harvard University Press 2017).

⁴³ See Henry Hansmann and Mariana Pargendler, *The Evolution of Shareholder Voting Rights*, 123 Yale L. J. 948, 952-954 (arguing for consumer rights theory).

⁴⁴ See Hilt, *supra* n.42 at 1; Adolf Berle and Gardiner Means, *The Modern Corporation & Private Property* pp. 125-128 (Transaction Press 2010, originally published in 1932).

⁴⁵ Debates and Proceedings of the Constitutional Convention of the State of Delaware, Vol. 4, pp. 3131-3133 (1896).

Thus, the efficacy of a one-share, one-vote rule was debated at the very beginning of the discussion over the form⁴⁶ of the general incorporation statute that would eventually become the leading corporation law in the U.S.⁴⁷ 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.⁴⁸ By the 1920's, large corporations were varying voting rights in order to separate control of the corporations from their ownership.⁴⁹

As state competition for corporate charters loosened the statutory rule, the policy issue implicated by using multiclass voting structures came to the fore, and there was a “public outcry”.⁵⁰ 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.⁵¹

The American Stock Exchange (then called the New York Curb) followed suit.⁵² 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.

⁴⁶ 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).

⁴⁷ 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/>.

⁴⁸ For the general trend, see Berle and Means, *supra*, n.44 at 71 (“only recently have statutory changes made it possible to issue common stock that has no voting rights.”)

⁴⁹ *Id.* at 71-72.

⁵⁰ *Supra*, n.3 at 596 (“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.”)

⁵¹ 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).

⁵² *Id.*; Berle and Means, *supra* n.44 at 72.

In the 1980s, public companies traded on markets that did not have a rule against unequal voting began to recapitalize with multiclass structures.⁵³ 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-4.⁵⁴

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.⁵⁵ The rule, however, was invalidated as being beyond the authority of the SEC,⁵⁶ but the stock exchanges have nevertheless adopted rules that prohibit already-listed companies from recapitalizing into unequal voting regimes.⁵⁷

⁵³ Flocos, *supra* n.51 at 1762-1763 (1990).

⁵⁴ *Id.* (footnotes omitted).

⁵⁵ *Id.*

⁵⁶ *Business Roundtable v. SEC*, 905 F.2d 406 (D.C. Circuit 1990).

⁵⁷ See Bebhuck and Kastiel, *supra* n.3 at 597.

Appendix II

THE PROPOSAL

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 companies with three classes of stock having 20, 1 and 0 votes, respectively.² As one rival advised investors, the Company's 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 September 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.

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

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), <https://www.jstor.org/stable/26400252?seq=1>

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).