WHY DUAL CLASS STOCK? A RESPONSE TO CII'S PETITION TO NASDAQ FOR MANDATORY SUNSET PROVISIONS

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I would like to thank the Nasdaq listing council for giving me the opportunity to speak on dual class stock, including to respond to the recent proposal by the Council of Institutional Investors ("CII") calling on Nasdaq to require any company going public seeking to list dual class shares on Nasdaq to include a mandatory "sunset" provision on differentials in voting rights.[2] I would particularly like to thank Mr. Arnold Golub, who leads Nasdaq's Listing Qualifications Department, as well as Mr. Bret DiMarco and Ms. Deborah Fuhr, the chair and vice chair, respectively, of Nasdaq's Listing and Hearing Review Council, for inviting me to speak here today.

The topic of dual class stock remains highly controversial. Professor Jack Coffee recently described the divide as "predictably polarized," with those opposed seeing dual class stock as "indefensibly entitling corporate founders (and their progeny) to perpetuate control," while proponents viewing dual class stock as "the only feasible defense against hedge fund activists".[3]

CII asserts that it hopes to bridge this divide by reversing its blanket opposition to dual class listings, and instead asking Nasdaq (and the NYSE) to require any company going public with dual class stock to commit at the time of

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[2] *See* Letter from Ash Williams (CII Chair), Ken Bertsch (CII Executive Director) & Jeff Mahoney (CII General Counsel) to John Zecca (Sr. VP, Gen. Counsel N. Am. & Chief Regulatory Officer of Nasdaq) (Oct. 24, 2018), https://www.cii.org/files/issues_and_advocacy/correspondence/2018/20181024%20NASDAQ%20Petition%20on%20Multiclass%20Sunsets%20FINAL.pdf ("CII Letter").

[3] *See* John C. Coffee, *Dual Class Stock: The Shades of Sunset*, Nov. 19, 2018, http://clsbluesky.law.columbia.edu/2018/11/19/dual-class-stock-the-shades-of-sunset/. Professor Coffee asserts that only he "remains annoyingly objective and independent on these issues." *Id.*

their IPO to convert from a dual class structure to a single class structure after seven years (CII's proposal also would allow the company to extend this period for up to another seven years if such proposal was approved by each class of stockholders voting separately as a class).[4]

While CII's proposal appears to be more moderate than its 2012 demand for a complete ban on dual class stock, the logic supporting its argument has neither changed nor improved. Even more fundamentally, CII's proposal does not address the underlying market or governance issues that have led companies to adopt dual class structures, and I will also briefly address some of these issues today. For this reason, while the specific focus of my talk today responds to CII's recent proposal to NASDAQ I am also going to take this opportunity to discuss the core issue raised by the dual-class debate: who should be entitled to elect the directors of a public company?

The remainder of my talk is divided into three sections.

First, I will briefly discuss some of the governance and market challenges that have led many of the most innovative companies in this country (and indeed across the globe) to adopt dual class stock and other novel governance structures. Part of this may be, as Professor Coffee notes, about activism. But I believe the issues go considerably beyond activism, and instead raise the core issue of who is best positioned to elect the company's directors? This is the critical issue because directors manage the corporation and are responsive to those who have the ability to choose, and remove, them from their position. Yet the changing capital markets

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[4] *See* CII Letter at 4-5.

over the last few decades have led to a current environment where, absent dual class stock, directors are elected by the votes of a small number of institutional investors and potentially an even smaller number of activist hedge funds.

Confronted with this reality it should come as no surprise that some of our most innovative and entrepreneurial leaders, as well as those investors who supported and helped nurture these leaders and companies, seek better ways to elect directors. This desire to have a continued voice in the election of directors as these companies go public has led them to focus on alternative capital structures.

This is particularly true as founders and directors of really innovative companies are often more inclined to focus on broader issues such as corporate purpose and stakeholder interests than the handful of institutional investors and activists who control most public companies today. Indeed, one need only to look at the Founder's Letter in Google's 2004 registration statement to know that the best emerging growth companies have been thinking about corporate purpose for more than a decade before the major index funds made it a "hot topic" for boards to consider as part of the ESG debate. Given this vision and broader purpose, founders and their supporters are naturally reluctant to turn over the director election to a handful of large institutional investors and hedge funds.

Second, I identify some of the many problems with CII's analysis, and in particular show that CII's claim that academic studies unanimously support mandatory sunset provisions for dual class companies is just wrong. Contrary to CII's conclusion, the empirical analysis by both academics and index funds indicate that dual class companies have out-performed their single class peers for at least a

decade. For example, the most recent study by two highly respected scholars who have carefully reviewed all the literature and studies identified by CII concluded that "compulsory sunsets, and time-based sunsets in particular, are an inappropriate response to the potential problems of dual class stock."[5] This evidence alone demonstrates that there is no reason or basis to adopt new regulations, and a policy of private ordering continues to make the most sense on the issue of dual class stock.

More broadly, and even more significantly for policy makers such as Nasdaq, other exchanges and the SEC, recent studies support what I (and many corporate law practitioners) have long recognized: that there is little correlation between so-called "best governance practices" and either corporate performance or corporate governance. As one scholar recently noted, the "reality is governance rankings measure only adherence to 'best practices' and this is something completely different than measuring integrity or business success. On the evidence available to us, best practices are not predictive of these latter virtues."[6] In short, the increasing adherence to so-called "best governance practices" resulting from the growing power of institutional investors and activist funds is not correlated with better corporate governance, more ethical behavior or even better corporate performance. Instead, many of the recent studies purporting to measure "good governance" show little more than adherence to the particular structural steps currently equated with

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[5] Jill E. Fisch & Steven Davidoff Solomon, *The Problem of Sunsets*, at 26, Boston Univ. L. Rev. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3305319.

[6] Bryce C. Tingle, *What is Corporate Governance? Can We Measure It? Can Investment Fiduciaries Rely on it?*, 43 Queens L.J. No.2 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3325499.

"best governance practices"; these studies do not measure whether the company is, in fact, well-governed, much less any correlation between a well-governed corporation and its performance.

Finally, I shall offer some compromise proposals directly to CII and other institutional investors that I believe could better achieve their goals of fostering better governance while also opening up the process for director selection. I do so knowing that my proposals have not been empirically tested, and that some of my proposals may be contrary to long held views by CII and some of its members. At the same time I am confident that there is ample common ground for a discussion with CII, other large institutional investors, corporate directors and other corporate stakeholders about how to create better structures and incentives to encourage corporations to behave in an ethical manner to achieve success for all corporate stakeholders. Further, like CII I believe Nasdaq (and the NYSE) can and should continue to play their historic role as facilitators and contributors to this debate, and it is why I am again especially pleased to be here today.

I. RECENT MARKET DEVELOPMENTS THAT HAVE LED MANY OF OUR MOST INNOVATIVE COMPANIES TO CHOOSE ALTERNATIVE GOVERNANCE STRUCTURES

One of the most vexing questions facing policymakers today is why so many of our most innovative and successful companies have felt the need to adopt dual class structures? One might expect that CII and others seeking to limit the use of dual class stock to ask what motivates so many great young companies in this country (and elsewhere) to reject the views of the "good governance industry" and instead adopt governance structures that are disfavored by this community? I know

that there will be those who say that the driving factor is nothing more than the egos of young founders. Yet in my experience the answer is more complicated, and includes frustration with increased concentration of corporate ownership by large institutional investors and funds, as well as the growing recognition of the importance of corporate purpose and culture in developing great companies.

As an initial matter we must recognize the challenge facing companies preparing to go public when they think about their future selection of directors. What the leaders of these companies see as they prepare the company for the public markets is more than just institutional investors favoring stockholder returns over such issues as corporate purpose and/or stakeholder interests. Rather, as institutional investors have increased in size and declined in number the issue has become who is in the best position to select directors for the corporation? As Harvard Professor John Coates (among others) has recognized, the rise of mutual funds, index funds and globalization has led to an increasingly small number of large institutional investors owning most U.S. stocks.[7] By 2016 institutional investors owned 70% of public shares, and just three money managers held the largest stock position in 88% of the companies in the S&P 500.[8] According to Coates:

> [W]e are rapidly moving to a world in which the bulk of equity capital of large companies with dispersed ownership will be owned by a small number of institutions. Those institutions, in turn, are ultimately controlled by a small number of individuals. For any given portfolio company, the ownership rights—most importantly the right

[7] *See* John C. Coates IV, *The Future of Corporate Governance Part I: The Problem of Twelve*, Sept. 20, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247337.

[8] *See* Hon. Kara M. Stein, Commissioner, S.E.C., *The Markets in 2017: What's At Stake?*, Feb. 24, 2017, https://www.sec.gov/news/speech/stein-sec-speaks-whats-at-stake.html.

> to vote in election of directors—will be controlled by a small number of individuals working for those institutions. It is not an exaggeration to say that even if this mega-trend begins to taper off, the majority of the 1,000 largest U.S. companies will be controlled by a dozen or fewer people over the next ten to twenty years. Companies, particularly many of our most innovative companies going public today, are not ignorant to this reality.[9]

Professor Coates' correctly recognizes that "many of our most innovative companies going public today" see that a future with single class stock means that "a small number of institutions" will effectively get to choose the directors for these companies. The "group think" mentality within these institutions is quite clear; whether over dual class stock, poison pills, other so-called "defensive measures" or broader issues of corporate culture and corporate purpose, there is not significant diversity of thought among the large institutional investors (or activist funds).

Recognizing this reality, entrepreneurial founders (as well as many venture capitalists and others) that helped create and grow these companies are properly skeptical about whether a handful of large institutional investors (and hedge funds) are in the best position to select directors for the company's future. Their concern is further heightened when the corporation is seeking directors with particular expertise and who are focused on the interests of various stakeholders and broader issues such as corporate purpose.

Yet a single class corporate structure means, in effect, that institutional investors and hedge funds will soon have complete control over the election of all directors for the company. Further, these investors tend to have largely similar views, with a primary focus on stockholder primacy. This is often a sub-optimal

[9] *See* Coates, *supra* note 7, at 14.

solution for our most innovative companies and their entrepreneurial leaders. As recognized in a recently released report by the British Academy, the best corporate owner "is not necessarily the creator of the greatest shareholder value but the most enlightened and visionary deliverer of corporate purposes."[10]

Many of these issues can be seen in the response to Larry Fink's 2018 letter to CEOs of large public companies. Fink's letter made corporate purpose a "hot topic" in the corporate governance community as well as with many in the broader business community and academia. Fink's letter urged corporate leaders to focus on issues in addition to stockholder value:

> Society is demanding that companies, both public and private, serve a social purpose. To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate.[11]

Yet for all the perceived novelty of Fink's letter, many of the themes in his letter echo the themes in Google's "Founders' Letter" to its stockholders at the time of Google's 2004 IPO. In this letter, Google's Founders explained that Google's board had decided to adopt a dual class structure because the company wanted to consider broader issues, including what was best for its employees and other stakeholders. As Google's founders explained in their letter to stockholders in advance of the company's IPO:

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[10] The British Academy, *Reforming Business for the 21st Century: A Framework for the Future of the Corporation*, at 20 (2018), https://www.thebritishacademy.ac.uk/sites/default/files/Reforming-Business-for-21st-Century-British-Academy.pdf.

[11] *See* Larry Fink's 2018 Letter to CEOs, *A Sense of Purpose*, https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter.

> In the transition to public ownership, we have set up a corporate structure that will make it harder for outside parties to take over or influence Google. . . .
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> . . . We understand some investors do not favor dual class structures. Some may believe that our dual class structure will give us the ability to take actions that benefit us, but not Google's shareholders as a whole. We have considered this point of view carefully, and we and the board have not made our decision lightly. . . .
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> . . . We believe the stability afforded by the dual class structure will enable us to retain our unique culture and continue to attract and retain talented people who are Google's life blood.[12]

Google thought it needed to have dual class stock at the time of its IPO to retain its unique culture. This culture included, among other things, offering employees the opportunity to take paid company time to work on their own personal projects and having the company invest in research and projects that public investors might not consider "economically efficient." Google (now Alphabet) is able to maintain this focus because (at least in part) of its structure, while other companies considering the transition to listing their stock on the public markets must come to terms with the dominant role of stockholder primacy in both law and policy for public companies.[13] Further, and again despite the sentiments expressed in the Fink Letter (as well as all of the claims by institutional investors that such investors do consider corporate purpose as well as other stakeholders) the practical

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[12] The full text of Google's 2004 Founders' IPO letter can be found here: https://abc.xyz/investor/founders-letters/2004/ipo-letter.html. In the interests of full disclosure, my firm represented Google in connection with its IPO, and we continue to represent Alphabet and many other leading companies that have implemented dual class structures since that time.

[13] *See* Leo E. Strine Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporate Law,* 50 Wake Forest L. Rev. 761, 771-72 (2015).

reality is that so long as stockholders focused on corporate returns elect directors, then directors are going to respond to this constituency by focusing on corporate returns and not other stakeholders.[14]

Google's IPO, and the changing market forces since that time, have led many innovative companies considering going public to recognize that (1) companies with multi-class structures can succeed in the market place while maintaining their own vision of corporate purpose and culture (2) rote compliance with current definitions of "best governance practices", including single class stock structures, does not necessarily equate to better performance or allow a company to satisfy its broader corporate purpose and (3) as a practical matter, the rhetorical claim about "one share/one vote" has the effect of allowing a small group of large institutional investors and hedge funds to further entrench their control over corporate America, at a time when there is little empirical support that this control has benefitted corporations, investors or other stakeholders.

Changes from the status quo, including consideration of mandatory sunset provisions, must start by recognizing this baseline reality. At the same time there appears to be a growing consensus that at least some of the broader goals of large institutional investors are similar to that of entrepreneurial founders, including a common desire to focus on corporate purpose and culture and not just stockholder value. This is an enormously positive development, and hopefully the growing consensus over corporate goals and purpose will allow for an expanded dialogue on

[14] Chief Justice Strine explained this reality in his essay describing the proxy contest over DuPont. *See* Leo E. Strine Jr., *Corporate Power is Corporate Purpose I: Evidence From My Hometown* (U of Penn, Inst. For Law & Econ. Research Paper No. 16-34, Dec. 9, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2906875.

corporate governance, including alternative governance structures.

II. THE EMPIRICAL EVIDENCE DOES NOT SUPPORT MANDATORY SUNSET PROVISIONS FOR DUAL CLASS LISTINGS

CII's letter to Nasdaq claims that "[r]ecent academic evidence suggests" that the "real problems" with dual class stock "develop in the medium to longer term".[15] In fact, the recent evidence demonstrates no such thing. At most, current studies show that dual class companies perform at least as well as single class companies for at least a decade (if not longer) after the company becomes publicly traded. For example, a recent study by MSCI found that issuers with unequal voting rights outperformed the market over a ten year period.[16] Another recent study found that companies with multi-class structures outperformed single class companies for a period of 11 years following the IPO.[17] Another prominent study finds that dual class firms outperform single class companies for at least 7-8 years after their IPOs.[18] Interestingly, while CII cites to these studies in its letter,[19] it makes no effort

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[15] *See* CII Letter at 3. CII's current position is a change from its 2012 view, when it called upon the exchanges to completely ban all dual class listings. *See id.* at 3 & n.6 (citing its earlier letters calling for a complete prohibition on the listing of dual class companies).
[16] *See* Dimitrius Melas, *Putting the Spotlight on Spotify: Why Have Stocks With Unequal Voting Rights Outperformed?*, MSCI Research Blog, Apr. 3, 2018, https://www.msci.com/www/blog-posts/putting-the-spotlight-on/0898078592.
[17] Hyunseob Kim & Roni Michaely, *Sticking Around Too Long? Dynamics of the Benefits of Dual-Class Voting* (ECGI, Finance Working Paper No. 590/2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3145209.
[18] Martijn Cremers, Beni Lauterbach & Anete Pajuste, *The Life–Cycle of Dual Class Firm Valuation*, Dec. 19, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062895.
[19] CII Letter at 4 n.8.

to reconcile the conclusions of these studies with its demand for a mandatory seven year sunset requirement.[20]

Further, while the research methodology used by these academic studies is often used in academic studies, its use to support the policy proposed by CII is far more tenuous. Professors Fisch and Solomon demonstrate the limitations of the research methodology used by all of these studies in their recent paper.[21] As described by Professors Fisch and Solomon, these studies rely on an econometric methodology called "match pair analysis" where a dual class company is "matched" with a supposedly similar non dual class company to compare performance.[22] While frequently used for academic studies, this "comparable company" type of analysis is of questionable use to support a regulatory "one size fits all" policy because, as those familiar with this type of analysis know, the quality and scope of the match is inherently uncertain.

Even more important for the purposes of considering CII's request, most of these studies examined companies that pre-dated the recent wave of emerging growth companies that have adopted dual class stock. For example, while the Kim & Michaely study finds a possible change in the value of the dual class structure after a company is public for 11 years, most of the dual class technology companies that are

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[20] *See also* Yvan Allaire, *The Case for Dual-Class of Shares*, Dec. 20, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3318447 (arguing against mandatory sunset provisions, finding that there is "growing evidence" that dual class companies have "better economic performance" and some companies can have "better integration into the social fabric of host societies [and] less vulnerability to transient shareholders").
[21] *See* Fisch & Solomon, *supra* note 5, at 9-12.
[22] *Id.*

the focus of CII's concern have been public companies for well under 11 years.[23] Indeed Google (now Alphabet), which became the model for technology companies going public with dual class structures, only became a public company in 2004, and its founders are still creating considerable value for its stockholders. The technology and emerging growth companies that have gone public with dual class stock since Google's IPO have been public for a far shorter period of time, and have not been included in most of the studies identified by CII or other critics of dual class stock.

In short, the argument for mandatory sunset provisions (or other restrictions) on dual class structures ultimately rests on ideology and anecdotal stories, not empirical evidence. Supporters of mandatory sunsets like CII believe that stockholders of public companies (*i.e.* institutional investors), not founders (or other stakeholders) should have the right to elect all corporate directors. Advocates of the "one share/one vote" ideology call for greater "stockholder democracy," and point to some dual class companies that allegedly have not performed well, without even attempting to establish any linkage between the business challenges faced by the company and its governance structure.[24]

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[23] *Id.* at 12.

[24] Professor Charles Elson's complaints about Snap and its governance are a good example. *See, e.g.*, Eve Tahmincioglu, *The Pros & Cons of the Dual-Class Stock Structure: Two corporate governance experts battle it out*, Aug. 30, 2018, https://www.directorsandboards.com/news/pros-cons-dual-class-stock-structure-two-corporate-governance-experts-battle-it-out. Elson criticizes Snap's governance structure and business performance, but makes no effort to link one to the other. In fact, as has been widely discussed in the business press, Snap's challenges have arisen from business competition, including new products offered by Facebook, not governance issues. *See, e.g.*, Billy Gallagher, *Copycat: How Facebook Tried To Squash Snapchat*, Wired (Feb. 16, 2018), https://www.wired.com/story/copycat-how-

As demonstrated above, however, the limited empirical evidence to-date demonstrates that dual class companies outperform single class companies for a decade or longer, and even this evidence fails to include many of the new technology companies that have been public for less than a decade.[25] Further, for every anecdote about a dual class company that fails, there are many more about single class companies that fail both as a business and on corporate governance measures. Indeed, the most striking empirical studies these days are those showing that the traditional measures of "good corporate governance" have little relationship to either corporate performance or ethical corporate behavior; rather, all that is measured by corporate governance studies is whether a company meets the current "checklist" of various governance metrics, which again have little to do with performance or ethics.[26]

Thus the empirical evidence demonstrates that this is no time for any "one-size fits all" form of regulation. The evidence continues to show that most companies going public are not choosing dual class stock, and those that are adopting this method are using a variety of different structures and performing as well if not better than their single class peers. Given this reality there is simply no basis to move from a successful system of private ordering to the proposed "one size fits all" form of regulation urged by CII.

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facebook-tried-to-squash-snapchat/. Missing from Professor Elson's criticism of Snap is any linkage between its business performance and its governance structure—a feature lacking from many of the critics of dual class stock.

[25] *See, e.g.*, Melas, *supra* note 16.

[26] *See* Tingle, *supra* note 6.

III. A WAY FORWARD: HOW TO DECIDE WHO SHOULD CONTROL THE CORPORATION?

Ultimately corporations are under the control of the company's board of directors.[27] Thus the real corporate governance debate, including over dual class stock, is who gets to elect the company's directors? CII proposes that at least after a certain period of time all directors should be chosen on a "one share/one vote" basis. As a practical matter, in today's world this ideological choice means that directors for virtually all public companies will be chosen by a handful of institutional investors and hedge funds. The implications of such a policy are significant, and could include significantly reducing the number of companies going public in the U.S. I do not wish to be overly dramatic, but there are several reasons for this view.

First, as described above, the empirical evidence does not support the notion that selection of directors by public stockholders on a one share/one vote basis creates greater economic value. Second, many exchanges across the globe have not adopted rules allowing multi-class companies to go public. Third, successful private companies in the U.S.—whether family controlled, venture-backed or PE-controlled—as well as public companies in many other successful economies continue to thrive with governance structures that differ from one share/one vote.

For example, as noted in a recent article in the Harvard Business Review, most European publicly traded companies require some form of employee participation on boards, and these employees are not necessarily voted on or even

[27] *See, e.g.*, Del. Gen. Corp. L. § 141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . . .").

approved by stockholders.[28] In the U.S., many venture-backed companies have boards that include directors from a wide variety of constituencies, including founders, strategic partners, various stockholder representatives and experts. The success of this governance model, as well as private equity boards, and the on-going focus on corporate purpose, has led to a renewed debate about whether a board dominated by outside, independent directors with little historic ties to management or the company (the so-called "monitoring board") is the best model for public company boards.[29]

While the monitoring board has been the dominating model of public company governance for approximately the last 40 years, given the changing nature of our public markets as well as the broader focus on corporate purpose it is time to re-examine whether this model is still optimal for all public companies. I suggest that there are alternatives to this model, and call upon CII and institutional investors to be open to alternative governance structures that satisfy their broader goals—better long-term performance, higher ethical standards and greater focus on

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[28] Andrea Garnero, *What We Do and Don't Know About Worker Representation on Boards*, Harvard Bus. Rev., Sept. 6, 2018, https://hbr.org/2018/09/what-we-do-and-dont-know-about-worker-representation-on-boards.

[29] *See, e.g.*, Ronald J. Gilson & Jeffrey N. Gordon, *Board 3.0 -- An Introduction*, (Stanford Law & Econ. Olin Working Paper Forthcoming No. 531, Feb. 10, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3332735; Allan C. Hutchinson, *Hurly-Berle-Corporate Governance, Commercial Profits and Democratic Deficits*, 34 Seattle U.L. Rev. 1219, 1223 (2011) (citing studies showing that firms with more independent directors and higher levels of institutional ownership "experienced worse stock returns during the [financial crisis] period."); Roberta S. Karmel, *Is the Independent Director Model Broken?*, at 31-32 (Brooklyn L. School, Legal Studies Paper No. 348, July 29, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2302777 (questioning whether boards comprised largely of "independent directors" selected by institutional investors has worked well; calling for more adding more "inside" or "executive directors" to the board).

corporate purpose—rather than just bind themselves to the ideological stake of "one share/one vote."

If the focus remains on the broader goals rather than on a particular method for electing directors then a number of alternatives become possible for consideration. For example, one alternative that has been the topic of considerable debate has been the use of tenure voting for directors. Under a tenure voting system, stockholders would generally get additional votes depending on how long they have held their stock.[30] This type of system is designed to empower long-term holders—including those institutional investors who claim that they are "locked" into the market and own stock forever—by allowing them to obtain more votes the longer they own a company's stock. There are some potential technological issues with a tenure voting system, including "tracing" the ownership of stock holdings, and a tenure voting structure may also impose limits on stock "lending" which could impact institutional investors and hedge funds that borrow stocks. That said, the general concept of giving a greater voice to long-term investors should be something that institutional investors could find easy to support.

A second concept is to analogize public company boards to private company boards, and provide that stakeholders other than stockholders should have the opportunity to select a certain number of directors. This has already become a popular issue in Washington, with a number of bills supporting the idea that

[30] I have previously written about the history and potential benefits of tenure voting. *See* David J. Berger, Steven Davidoff Solomon & Aaron Benjamin, *Tenure Voting and the U.S. Public Corporation*, 72 Bus. Law 1 (2017).

companies should allow employees to elect a minimum number of directors.[31] In Europe the concept is quite common, as over half of OECD countries and a majority of the countries in the European Union have some type of law guaranteeing workers board representation.[32] In addition to providing that employees could elect some directors, boards could also have some seats set aside for founders, with the stockholders also choosing some directors. In this way stockholders would continue to have significant representation on the board, but there would also be a recognition that a board would benefit from having a wider debate among its various stakeholders on corporate governance issues.

Yet another potential alternative is to have more inside directors. The current board structure of almost all entirely outside directors was a response to the takeover battles of the 1980s and some of the scandals that followed, where both the courts and exchanges created new rules mandating additional independent directors and empowering these directors.[33] Many scholarly commentators have now recognized that the era of independent directors may have gone too far, as

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[31] The most notable example of this is Senator Warren's bill titled the "Accountable Capitalism Act," which would require up to 40% of a company's board seats to be filled by the company's employees. The full text of the bill can be found here: https://www.warren.senate.gov/imo/media/doc/Accountable%20Capitalism%20Act.pdf. Senator Warren has argued forcefully about why companies should not be accountable solely to stockholders. *See, e.g.*, Elizabeth Warren, *Companies Shouldn't be Accountable Only to Shareholders,* Wall Street Journal, Aug. 14, 2018, https://www.wsj.com/articles/companies-shouldnt-be-accountable-only-to-shareholders-1534287687.

[32] *See generally* David J. Berger, *Reconsidering Stockholder Primacy in an Era of Corporate Purpose*, 74 Bus. Law.___ (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3327647 (discussing alternative governance structures).

[33] *See, e.g.*, *Unocal Corp. v. Mesa Petroleum Co*., 493 A.2d 946, 953-54 (Del. 1985) (giving board decisions made by independent directors greater deference).

monitoring boards are often unable to provide the strategic insights and guidance that are necessary for today's companies.[34] Again what is necessary is for an alternative director selection process that allows for non-stockholder constituencies to select directors who may be better able to advise management on strategy and stakeholder concerns, including broader issues of corporate purpose, than a board selected exclusively by a small group of large institutional investors and activists.

IV. CONCLUSION

The purpose of my talk has been to reach beyond the simple debate over dual class stock, to look at how we can improve the governance of our corporations in a way that meets our common goals to create a more successful corporation for all of its stakeholders. An initial step is to back away from the ideological demand of a "one share/one vote" governance system, and really think about what we are trying to achieve. I give CII credit for attempting to do this, including by recognizing that it makes sense for some companies to have dual class stock in the public market.

At the same time, the empirical evidence amply demonstrates that there is no basis to support mandatory sunset provisions of any length. Rather, what we need is an expanded discussion of corporate purpose and the role of who should select directors, and as we engage in that discussion we can then figure out the best ways to elect directors to meet the corporation's purpose.

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[34] *See, e.g.*, Gilson & Gordon, *supra* note 29; Karmel, *supra* note 29.