



Via Email

October 2, 2012

Mr. Edward S. Knight
Executive Vice President
General Counsel & Chief Regulatory Officer
NASDAQ OMX Group
805 King Farm Boulevard
Rockville, MD 20850

Dear Mr. Knight:

The Council of Institutional Investors (“Council”) hereby asks you to propose a rule for approval by the United States (“U.S.”) Securities and Exchange Commission under which (1) companies that seek an initial listing on the NASDAQ Stock Market or the BX Venture Market (collectively, “NASDAQ”) will be ineligible for a listing if they have two or more classes of common stock with unequal voting rights,¹ and (2) companies newly listed on NASDAQ in the future will be prohibited from issuing multi-class stock with unequal voting rights subsequent to their initial listing. Of note, the Council is not, at this time, requesting a proposed rule change that would impact currently listed companies with multi-class stock structures.

The Council is a nonprofit, nonpartisan association of pension funds and other employee benefit funds, foundations and endowments with combined assets of over \$3 trillion.² The Council’s mission is to educate its members, policymakers and the public about corporate governance, shareowner rights and related investment issues, and to advocate on members’ behalf.

Council members own and manage equities and bonds that are traded in NASDAQ markets; as investors, they share your view that NASDAQ listing rules are intended, in part, to “maintain the quality of and public confidence in its market . . . and to protect investors and the public interest.”³

¹ Such arrangements are often referred to as “dual-class” stock structures. However, because it is possible for companies to have more than two classes of common stock – and some actually do – we refer to such arrangements here as a “multi-class” stock structure.

² For more information about the Council of Institutional Investors (“Council”), including its members, please visit the Council’s website at <http://www.cii.org/CouncilMembers>.

³ NASDAQ Listing Rules § **5101 Preamble to the Rule 5100 Series** (June 15, 2009), <http://nasdaq.cchwallstreet.com/nasdaqtools/platformviewer.asp?selectednode=chp%5f1%5f1%5f4%5f1&manual=%2fnasdaq%2fmain%2fnasdaq%2dequityrules%2f>; BX Venture Market Listing Rules § **5101 Preamble to the Rule 5100 Series** (May 6, 2011), <http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBTools/PlatformViewer.asp?selectednode=chp%5f1%5f1%5f1%5f7&manual=%2FNASDAQOMXB%2fmain%2Fbx%2Deg%2Drules%2F>.

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As you are probably well aware, there is presently a renewed interest in multi-class stock structures by companies that are going public.⁴ From January 1, 2010 through March 28, 2012, more than 10 percent of all initial public offerings (“IPOs”) in the U.S. were by companies that had a multi-class structure with unequal voting rights.⁵ Many of the founder/chief executive officers of those companies appear to have selected a multi-class stock structure, in part, because they expect to be involved in the business of the company for many years and would prefer to run the business with minimal outside interference.⁶

As major, long-term shareowners, Council members have long believed that multi-class stock structures with unequal voting rights are not in the long-term interest of investors or the markets.⁷ That view is reflected in our membership approved policies, which state:

One Share, One Vote: Each share of common stock should have one vote. Corporations should not have classes of common stock with disparate voting rights.⁸

The importance of one-share, one vote is particularly critical to Council members as heavy users of passive investment strategies. With the average Council member indexing approximately 47 percent of its U.S. stock portfolio and approximately 16 percent of its U.S. bonds,⁹ our members can not simply sell their stock in companies with a multi-class stock structure.¹⁰

⁴ See, e.g., Jeff Green & Ari Levy, Zuckerberg Grip Becomes New Normal in Silicon Valley, Bloomberg 1 (May 7, 2012), <http://www.bloomberg.com/news/2012-05-07/zuckerberg-stock-grip-becomes-new-normal-in-silicon-valley-tech.html> (“[a]t least 10 of last year’s technology initial public offerings included a special class of shares that give the founders more votes than new shareholders”).

⁵ Investor Responsibility Research Center Institute, Controlled Companies in the Standard & Poor’s 1500: A Ten-Year Performance and Risk Review (Oct. 2012), <http://irrcinstitute.org/pdf/FINAL-Controlled-Company-ISS-Report.pdf> [hereafter IRRC Institute Study].

⁶ *Id.*

⁷ Council of Institutional Investors, Shareholder Bill of Rights (Apr. 5, 1989) (on file with Council) (“Each share of common stock, regardless of its class, shall be entitled to vote in proportion to its relative share in the total common stock equity of the corporation.”).

⁸ Council of Institutional Investors, Corporate Governance Policies § 3.3 One Share, One Vote (updated Dec. 21, 2011), [http://www.cii.org/UserFiles/file/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%2012-21-11%20FINAL%20\(2\).pdf](http://www.cii.org/UserFiles/file/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%2012-21-11%20FINAL%20(2).pdf).

⁹ Council of Institutional Investors, Asset Allocation Survey 9 (2011) (on file with Council) (indicating that 46.8% of domestic equity investments were passively managed).

¹⁰ See, e.g., Jeff Green & Ari Levy at 2 (quoting Anne Sheehan director of corporate governance at the California State Teachers’ Retirement System and Council Chair that “[f]unds like CalSTRS often invest passively in the indexes, and when companies like Facebook or Google are added, investors must accept the structure”).

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The basis for the Council's one-share, one vote policy is generally consistent with the purpose of the NASDAQ listing rules. The policy, like the listing rules, is intended, in part, to strengthen the quality of, and investor confidence in, the integrity of the markets.

The basis for our policy is supported by empirical research that demonstrates that multi-class stock structures have questionable benefits to long-term shareowners and "the prevalence of dual-class shares has lead [sic] to decreases in shareowner value and increases in irresponsible behavior by the controlling superior shareowners."¹¹ A study released earlier today by the Investor Responsibility Research Center Institute ("IRRC Institute Study") adds to the ample body of evidence supporting our policy, and underlying our request for a change to the NASDAQ rules. Relevant findings from the IRRC Institute Study include:

- Companies with multi-class stock structures underperform companies with non-controlling single-class structures over three-, five-, and ten-year time periods;¹²
- Companies with multi-class structures have more significant material weaknesses in internal controls than non-controlled companies;¹³ and
- Companies with multi-class structures have more related party transactions than non-controlled companies.¹⁴

Finally, we also note that rules allowing multi-class stock structures are not a universally accepted practice on major global markets. Barring future multi-class stock IPOs would, for example, more closely align NASDAQ rules with those of the London and Hong Kong exchanges.¹⁵

¹¹ State Board of Administration, Dual-Class Shares, Does Management Really Need Such Protection 18, 23 (2010), [http://www.sbafla.com/fsb/portals/Internet/CorpGov/ReportsPublications/Dual%20Class%20Shares%20\(2010\).pdf](http://www.sbafla.com/fsb/portals/Internet/CorpGov/ReportsPublications/Dual%20Class%20Shares%20(2010).pdf).

¹² See IRRC Institute Study *supra* note 5 ("Multishare class companies underperformed non-control companies for all but the shortest time period, completely turning the conventional wisdom on its head.").

¹³ *Id.* ("Within the two most recent years, four (3.7 percent) controlled companies had a material weakness compared to 26 (1.9 percent) of the non-controlled companies.").

¹⁴ *Id.* ("Instances of related-party transactions were observed at a higher rate at controlled companies: 14.8 percent of these firms had engaged in related-party transactions, compared to 7.2 percent of the non-controlled group.").

¹⁵ See, e.g., Steven M. Davidoff, In Manchester United's I.P.O., a Preference for American Rules, N.Y. Times, July 10, 2012, at 1, <http://dealbook.nytimes.com/2012/07/10/in-manchester-uniteds-i-p-o-a-preference-for-u-s-rules/> (indicating that Manchester United filed its initial public offering on the New York Stock Exchange because with two classes of shares with different voting rights it was unable to file on the Hong Kong or London Stock Exchanges).

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We would welcome the opportunity to meet with you and your NASDAQ colleagues in person to discuss this request in more detail. In the meantime, if you have any questions please feel free to contact me at 202.261.7081 or jeff@cii.org.

Respectfully submitted,

A handwritten signature in black ink that reads "Jeff Mahoney". The signature is written in a cursive, flowing style.

Jeff Mahoney
General Counsel

cc: Mr. Michael S. Emen, Senior Vice President, Listing Qualifications Department,
NASDAQ OMX