

Via E-Mail

January 22, 2019

Brent J. Fields  
Secretary  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-1090

*Re: File Number 10-234*

Dear Mr. Secretary:

I am writing in response to the Securities and Exchange Commission's (SEC or Commission) solicitation of comments on the Long-Term Stock Exchange, Inc. (LTSE) Form 1 application under the Securities Exchange Act of 1934 (Exchange Act), seeking registration as a national securities exchange under Section 6 of the Exchange Act (LTSE Application).<sup>1</sup>

The Council of Institutional Investors (CII) is a nonprofit, nonpartisan association of public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management exceeding \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families. Our associate members include a range of asset managers with more than \$25 trillion in assets under management.<sup>2</sup>

CII supports the LTSE's goal to "reorient companies and investors around long-term thinking."<sup>3</sup> However, we do not support the LTSE Application at this time for at least two reasons: (1) the LTSE Application's proposed "Corporate Governance Requirements"<sup>4</sup> permit newly public companies to have multi-class share structures with unequal voting rights in

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<sup>1</sup> Long-Term Stock Exchange, Inc.; Notice of Filing of Application for Registration as a National Securities Exchange Under Section 6 of the Securities Exchange Act of 1934, Exchange Act Release No. 84,709 (Nov. 30, 2018), <https://www.govinfo.gov/content/pkg/FR-2018-12-06/pdf/2018-26517.pdf>.

<sup>2</sup> For more information about the Council of Institutional Investors ("CII"), including its board and members, please visit CII's website at <http://www.cii.org>.

<sup>3</sup> Hazel Bradford, Uncertain Fate Shadowing Long-Term Exchange, *Pens. & Invs.*, Dec. 10, 2018 (quoting founder and CEO Eric Ries), <https://www.pionline.com/article/20181210/PRINT/181219920/uncertain-fate-shadowing-long-term-exchange>.

<sup>4</sup> See Rule 14.413.01 Voting Rights Policy, Long-Term Stock Exchange, Inc.; Form 1 Application and Exhibits, Exhibit B (Nov. 9, 2018), <https://www.sec.gov/rules/other/2018/long-term-stock-exchange/long-term-stock-exchange-exhibit-b.pdf>.

conflict with our membership approved policies supporting a one share, one vote structure,<sup>5</sup> and LTSE proposes no sunsets on such structures, as we have requested at New York Stock Exchange (NYSE) and the Nasdaq Stock Market (NASDAQ);<sup>6</sup> and (2) the LTSE Application does not include any information about the LTSE's reported plans to update its application to include time-phased voting rights as a core element of its proposed corporate governance listing standards.<sup>7</sup> We, therefore, have insufficient basis for determining whether LTSE's planned voting structure would operate in a manner more favorable to long-term institutional investors than a multi-class share structure with unequal voting rights.<sup>8</sup>

Time-phased voting ("TPV," also known as "tenure voting" or "loyalty shares") was a core element of the proposal for an LTSE listing under the Investors Exchange (IEX). CII generally opposes TPV rights for reasons discussed below. We are unsure how LTSE may modify that element from what it submitted in the IEX proposal, and in theory there could be modifications that would limit tenure voting in a manner that would cause us to reconsider our view.

### **Proposed Voting Rights Policy**

The LTSE Application contains the following provisions in its proposed corporate governance listing standards:

#### Voting Rights Policy

The following Voting Rights Policy is based upon, but more flexible than, former Rule 19c-4 under the Act. Accordingly, the Exchange will permit corporate actions or issuances by the Exchange Companies that would have been permitted under former Rule 19c-4, as well as other actions or issuances that are not inconsistent with this policy. In evaluating such other actions or issuances, the Exchange will consider, among other things, the economics of such actions or issuances and the voting rights being granted. The Exchange's interpretations under the policy will be flexible, recognizing that both the capital markets and the circumstances and needs of the Exchange Companies change over time. The text of the Exchange Voting Rights Policy is as follows:

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<sup>5</sup> Council of Institutional Investors, CII Policies, Investor Expectations for Newly Public Companies (Mar. 2016), [https://www.cii.org/ipo\\_policy](https://www.cii.org/ipo_policy); Council of Institutional Investors, Policies on Corporate Governance § 3.3 **Voting Rights** (updated Oct. 24, 2018), [https://www.cii.org/files/10\\_24\\_18\\_corp\\_gov\\_policies.pdf](https://www.cii.org/files/10_24_18_corp_gov_policies.pdf).

<sup>6</sup> See Council of Institutional Investors, Press Release, Investors Petition NYSE, NASDAQ to Curb Listings of IPO Dual-Class Share Companies 1 (Oct. 24, 2018), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/FINAL%20Dual%20Class%20Petition%20Press%20Release%20Oct%2024,%202018.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/FINAL%20Dual%20Class%20Petition%20Press%20Release%20Oct%2024,%202018.pdf).

<sup>7</sup> Dave Michaels, Silicon Valley's Backers of New Stock Exchange Seek Approval, Wall St. J., Nov. 30, 2018 ("The application doesn't include the company's most unique and controversial feature: giving shareholders more voting power the longer they own the stock . . . an LTSE spokesman, said the company plans to update its application with its time-based voting rules 'relatively soon.'"), <https://www.wsj.com/articles/silicon-valleys-backers-of-new-stock-exchange-seek-approval-1543622128>.

<sup>8</sup> See Paul H. Edelman et al., Will Tenure Voting Give Corporate Managers Lifetime Tenure? Tex. L. Rev. (forthcoming) (indicating that in certain circumstances institutional investors may see tenured voting as an improvement to dual-class share structures), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3107225](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3107225).

### Companies with Dual Class Structures.

The restriction against the issuance of super voting stock is primarily intended to apply to the issuance of a new class of stock, and Companies with existing dual class capital structures would generally be permitted to issue additional shares of the existing super voting stock without conflict with this policy.<sup>9</sup>

We note that the proposed “Voting Rights Policy” is generally consistent with the current listing standards of the NYSE<sup>10</sup> and the NASDAQ.<sup>11</sup> Those standards are the result of a 1994 rule that generally allows multi-class share structures with unequal voting rights if such stock is issued at the initial public offering (IPO) stage.<sup>12</sup>

As indicated, the LTSE Application’s proposed voting rights policy does not include any reference to TPV rights.

### Principle of One-Share, One-Vote

The principle of one-share, one-vote is a foundation of good corporate governance and essential to the equitable treatment of investors, as validated by the vast majority of U.S. companies to IPO in recent years with equal voting rights.<sup>13</sup> CII was founded in 1985 in part on concern that long-term investors in public companies were disadvantaged by voting structures that treated shareholders inequitably. That concern resulted in one of CII’s original,<sup>14</sup> and longest standing, membership approved policies that currently states:

Each share of common stock should have one vote. Corporations should not have classes of common stock with disparate voting rights.<sup>15</sup>

In 2016, in response to a troubling number of companies entering the public markets with multi-class share structures with unequal voting rights and other governance provisions that insulated insiders from shareholder accountability, CII membership approved a policy that states, in part:

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<sup>9</sup> Rule 14.413.01 Voting Rights Policy.

<sup>10</sup> 313.00(A) Voting Rights Policy, NYSE (amended Jul. 11, 2013), [http://wallstreet.cch.com/LCMTTools/PlatformViewer.asp?searched=1&selectednode=chp\\_1\\_4\\_13\\_1&CiRestriction=Rule+AND+19c-4&manual=%2FLCM%2FSections%2Flem-sections%2F](http://wallstreet.cch.com/LCMTTools/PlatformViewer.asp?searched=1&selectednode=chp_1_4_13_1&CiRestriction=Rule+AND+19c-4&manual=%2FLCM%2FSections%2Flem-sections%2F).

<sup>11</sup> IM-5640 Voting Rights Policy, NASDAQ Stock Market (adopted Mar. 12, 2009), [http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?searched=1&selectednode=chp\\_1\\_1\\_4\\_4\\_8\\_3\\_0&CiRestriction=Rule+AND+19c-4&manual=%2Fnasdaq%2FMain%2Fnasdaq-equityrules%2F](http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?searched=1&selectednode=chp_1_1_4_4_8_3_0&CiRestriction=Rule+AND+19c-4&manual=%2Fnasdaq%2FMain%2Fnasdaq-equityrules%2F).

<sup>12</sup> See, e.g., Self-Regulatory Organizations; American Stock Exchange, Inc., National Association of Securities Dealers, Inc., and New York Stock Exchange, Inc.; Order Granting Approval to Rule Changes Relating to the Exchanges' and Association's Rules Regarding Shareholder Voting Rights, Exchange Act Release No. 35,121, 59 Fed. Reg. 42,614 (Dec. 19, 1994) <https://www.govinfo.gov/content/pkg/FR-1994-12-27/html/94-31728.htm>.

<sup>13</sup> Council of Institutional Investors, Dual-Class IPO Snapshot: 2017–2018 Statistics (Oct. 1, 2018), <https://www.cii.org/files/2018Q3%20IPO%20Stats.pdf>.

<sup>14</sup> Council of Institutional Investors, Shareholder Bill of Rights (Apr. 5, 1989) (“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.”) (on file with CII).

<sup>15</sup> § 3.3 Voting Rights.

Upon going public, a company should have a “one share, one vote” structure . . . . CII expects newly public companies without such provisions to commit to their adoption over a reasonably limited period through sunset mechanisms.<sup>16</sup>

Public shareholder voting rights perhaps reached a nadir in 2017 with the IPO of Snap, Inc. (Snap), with zero voting rights for outside shareholders. Several other companies followed debuting with the authority to issue zero-vote shares. In response, CII and many of our asset owner members asked leading providers of equity indexes (FTSE/Russell, MSCI and S&P Dow Jones) to take steps to limit companies with unequal voting structures in certain key indexes.

### **Actions by Equity Index Providers**

Providers of benchmark indexes have stepped into the breach, with varying curbs on multi-class companies in indexes that are used widely by institutional investors. From CII’s perspective, taking action to limit companies with unequal voting rights from key indexes was particularly necessary for U.S.-listed companies owing to the Commission’s weak regulatory authority in this area and what we view as inadequate U.S. stock exchange rules on voting rights. Some CII members, however, noted that index exclusion or underweighting is sub-optimal given the goal of breadth in core equity indexes, and are particularly keen to have regulators (the exchanges on this issue in the U.S. context) step up with appropriate rules. In part, response to those member concerns, in October of last year CII filed petitions with the NYSE<sup>17</sup> and NASDAQ,<sup>18</sup> asking both to limit listings of companies with dual-class share structures.

### **Stock Exchange Petitions**

Our stock exchange petitions ask NYSE and NASDAQ to amend their listing standards to require that, going forward, companies seeking to list that have multiple share classes with differential voting rights include in their governing documents provisions that convert the share structure within seven years of the IPO to one-share, one vote, consistent with our policies.<sup>19</sup> CII’s petitions are generally supported by many institutional investors, including BlackRock, the California State Teachers Retirement System, the California Public Employees’ Retirement System, the State Board of Administration of Florida, and T. Rowe Price.<sup>20</sup>

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<sup>16</sup> Investor Expectations for Newly Public Companies.

<sup>17</sup> Letter from Ash Williams, Chair, CII et al. to Elizabeth King, Chief Regulatory Officer, Intercontinental Exchange Inc. (Oct. 24, 2018), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2018/20181024%20NYSE%20Petition%20on%20Multiclass%20Sunsets%20FINAL.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2018/20181024%20NYSE%20Petition%20on%20Multiclass%20Sunsets%20FINAL.pdf).

<sup>18</sup> Letter from Ash Williams, Chair, CII et al. to John Zecca, Senior Vice President, General Counsel North America and Chief Regulatory Officer, NASDAQ Stock Market (Oct. 24, 2018), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2018/20181024%20NASDAQ%20Petition%20on%20Multiclass%20Sunsets%20FINAL.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2018/20181024%20NASDAQ%20Petition%20on%20Multiclass%20Sunsets%20FINAL.pdf).

<sup>19</sup> Press Release, Investors Petition NYSE, NASDAQ to Curb Listings of IPO Dual-Class Share Companies at 1.

<sup>20</sup> See *id.* at 1-2; Letter from Aeisha Mastagni, Interim Co-Director of Corporate Governance, California State Teachers’ Retirement System to Elizabeth King, Chief Regulatory Officer, Intercontinental Exchange Inc. 1 (Nov. 30, 2018) (“I am writing on behalf of . . . CalSTRS to support . . . CII petition to the NYSE on multi-class common stock structures.”), [https://www.calstrs.com/sites/main/files/file-attachments/2018-11-30\\_sunset\\_multiclass\\_shares\\_nyse.pdf](https://www.calstrs.com/sites/main/files/file-attachments/2018-11-30_sunset_multiclass_shares_nyse.pdf); Letter from Ashbel Williams, Executive Director, State Board of Administration of Florida to John Zecca, Senior Vice President, General Counsel North America and Chief

Generally consistent with our petitions, some multi-class companies in recent years have chosen to mitigate the effects of unequal voting rights by incorporating meaningful sunset provisions. Since 2010, 24 multi-class companies—including recognizable names like Yelp, Fitbit, MuleSoft, and Eventbrite—included time-based sunsets at IPO.<sup>21</sup> So far in 2018, one-third of multi-class IPOs have featured time-based sunsets, up from one-quarter last year.

After going public with time-based sunsets in 2004, 2010, and 2011, respectively, Texas Roadhouse, MaxLinear, and Groupon collapsed their multi-class structures in seamless transitions to one-share, one-vote. Yelp, which included both time-based and dilution sunsets, reverted to one-share, one-vote four years after IPO when the super-voting class fell below 10% of outstanding shares. These companies, while granting disproportionate control to insiders upon going public, sent meaningful signals to public investors that they would have equal voting rights within reasonably limited periods.

Independent boards accountable to owners should be empowered to actively oversee management and make course corrections when appropriate. Disenfranchised public shareholders have no ability to influence management or the board when the company encounters performance challenges, as most do at some point, particularly where management is accountable only to itself and the board that it appoints.

We acknowledge that in recent years, some companies with dynamic leadership and innovative products have attracted capital on public markets despite using multi-class structures. However, the performance record of these companies is decidedly mixed, with some studies finding a substantially lower total shareholder return compared to their one-share, one-vote counterparts after 10 years.<sup>22</sup>

Another study found that even at innovative companies where multi-class structures correlate to a value premium at the time of the IPO, that premium dissipates within six to nine years before turning negative.<sup>23</sup> A final recent study found that multi-class structures correlate with more innovation and value

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Regulatory Officer, NASDAQ Stock Market I (“SBA of Florida is writing to enthusiastically endorse the October 24, 2018, petition from . . . CII to the NASDAQ requesting a listing standard to require a time-based sunset on any new listing of multi-class shares with differential voting rights.”) (on file with CII).

<sup>21</sup> Council of Institutional Investors, Time-Based Sunset Approaches to Dual Class Stock (updated Oct. 11, 2018), <https://www.cii.org/files/10-11-18%20Time-based%20Sunsets.pdf>.

<sup>22</sup> See IIRC Institute et al., Controlled Companies in the Standard & Poor’s 1500: A Ten Year Performance and Risk Review 8 (Oct. 2012) (“Controlled firms with single class capital structures outperformed both non-controlled firms and controlled firms with multiclass structures over the three-year, five-year, and 10-year periods while trailing both over the one-year period.”), <https://www.weinberg.udel.edu/IIRCiResearchDocuments/2015/09/FINAL-Controlled-Company-ISS-Report1.pdf>; Edward Kamonjoh, IIRC Institute et al., Controlled Companies in the Standard & Poor’s 1500: A Follow-Up Report of Performance & Risk 6 (Mar. 2016), <https://www.weinberg.udel.edu/IIRCiResearchDocuments/2016/03/Controlled-Companies-IRRCI-2015-FINAL-3-16-16.pdf>.

<sup>23</sup> Martijn Cremers, et al., The Life-Cycle of Dual Class Firms 1, 40 (Euro. Corp.

Governance Inst. Working Paper Series in Finance, Working Paper No. 550/2018, 2018) (“We also find that the initial dual class valuation premium is temporary, and on average it disappears within 6 to 9 years after the IPO, depending on the proxy for firm value used [and] [t]he declining valuations of dual- versus single-class firms and the eventual average valuation discount may provide tentative support for a mandatory sunset provision for dual class structures, as advocated by Bebchuk and Kastiel (2017)”), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3062895](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062895).

creation in the period shortly after an IPO, but within six to 10 years, the costs of the unequal voting structures outweigh the benefits.<sup>24</sup>

Based on the experience of numerous multi-class companies successfully using sunsets and the results of recent empirical studies, we believe a sunset of seven years or less affords an appropriate period to harness whatever benefits of innovation and control a multi-class structure may provide while mitigating the agency costs it imposes over time. In the long-term, one-share, one-vote with enfranchised public investors is the best structure for sustainable value creation. As SEC Commissioner Robert Jackson said in a February 2018 speech, “If you run a public company in America, you’re supposed to be held accountable for your work—maybe not today, maybe not tomorrow, but someday.”<sup>25</sup>

Public company investors have demonstrated time and again that they will support innovation and investment for the long term, as has been the case for decades at Amazon and many other companies. While establishing accountability to new owners does not always maximize comfort and compensation for management, we believe accountability is important for performance longer term, especially through bumps in the road that every company will experience.

### **Concerns on TPV**

As noted above, we do not know the specifics of what LTSE may propose with reference to TPV rights. If LTSE were to provide a reasonable time-based sunset requirement on its various permitted unequal voting rights structures (seven years or less), with an accountability moment for shareholders to vote on a one-share/one-vote basis on whether to extend for the same term or less, we might not object to that element of the LTSE rules. Still, it may be worth setting forth our general concerns on TPV here.

With TPV in place, ideas for long-term value creation no longer must necessarily have the confidence of the company’s broad ownership base. This can be problematic:

- The structure is likely to disproportionately empower founders/managers who have substantial stakes from IPO, and who sometimes fall victim to myopia or conflicted behavior that can destroy value.
- The structure may disproportionately empower particular long-term institutional investors, who even when independent of management are not always right – they may champion bad/idiosyncratic ideas.
- The structure may disproportionately empower governments with an equity stake, including governments that place long-term value lower on the list of priorities (as we have experienced with this mechanism in France).

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<sup>24</sup> Lindsay Baran et al., Dual Class Share Structure and Innovation (Sept. 10, 2018) (concluding that their findings lend credence to the view that if dual class structures should be allowed at all, they should face rigorous sunset provisions post-initial public offering), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3183517](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3183517).

<sup>25</sup> Commissioner Robert Jackson Jr., Speech, Perpetual Dual-Class Stock: The Case Against Corporate Royalty 3 (Feb. 15, 2018), <https://www.sec.gov/news/speech/perpetual-dual-class-stock-case-against-corporate-royalty>.

Companies with TPV do not necessarily have more long-term owners, but they always have a disconnect between ownership and control. This can result in unintended side-effects. For example, TPV company shares may be discounted by prospective entities that a company may seek to acquire, making it expensive to do acquisitions through use of stock, which can be harmful to a company's growth, depending on the nature of the company and its industry.

Rewarding historical holders does not equate to empowering holders with a long-term investment horizon. TPV is intended to promote decision-making that focuses on long-term outcomes. But the structure penalizes all new investors, including those with a long-term investment horizon, while transferring power to long-term holders of any kind, including those who plan to exit their position in the near-term.

Even if you subscribe to the philosophy of TPV, there is logistical risk to consider:

- The TPV structure can be designed to require holders entitled to extra voting rights to opt in; the extra step means that many retail and overseas long-term holders may continue to vote on a one share, one vote basis, exacerbating the influence of those long-term holders who opt-in (i.e., insiders, sophisticated investors, domestic holders).
- While advances in technology could resolve this concern over the next 10 years, the fact remains that our system for tracking ownership at present is highly complex and not conducive to assigning voting rights according to the beneficial owner's holding period. Some existing TPV companies, accepting this vulnerability, have resorted to an honor system whereby holders specify on the proxy card their voting rights. This raises questions of vote integrity.
- The LTSE framework in the IEX proposal would have required holders to register their shares to gain the super-voting rights. From past experience, many asset managers will be highly reluctant to do that. If only a minority of shares held long-term by independent shareholders take advantage of super-voting rights, the extra power of insiders, who are sure to take advantage of this, will be amplified and extended.

While what LTSE proposes (at least in its IEX filing) has limited precedent in the U.S. market, LTSE provided for no "out" in its IEX application that could sunset the structure. Shareholders of companies listed with this structure may be stuck with it, even if it proves highly dysfunctional in a given case, which is more than plausible. One or more of the handful of U.S. companies that adopted TPV structures in the late 1980s and early 1990s found it difficult to eliminate the structure, even though it became clear to company leaders that it was counter-productive. LTSE at minimum should provide an "accountability moment", with shareholders voting on a one-share, one-vote basis on extension of the structure. The sunset should be no more than seven years, based on academic research on ill-effects of unequal voting structures.

One argument we have heard for TPV voting is that it is better than traditional dual class structures, and much better than the Snap-type structure that offers public holders zero votes. We would concede that this is correct. However, an underlying premise on why this may justify permitting TPV structures is the idea that, going forward, nearly all new public tech companies will IPO with differential voting rights. This speculation is not borne out by the data, at least so far. In 2018, just 15 of 140 IPOs of U.S. based companies on U.S. exchanges were multi-class,

and five of these featured time-based sunsets that will collapse the structures to one-share, one-vote within three to 10 years.<sup>26</sup> By our count, only five of the top 20 U.S. tech company IPOs in 2018 used multi-class structures with no time-based sunsets.<sup>27</sup>

Moreover, it is not clear that the reduced levels of IPOs in most recent years really has much to do with this control issue, as some observers have suggested. More critical factors appear to be the much larger and more vibrant private equity markets, aided by rule changes, particularly in the Jumpstart Our Business Startups (JOBS) Act; a greater number of high-growth companies that have relatively low needs for additional capital; the rise of robust secondary markets to provide sufficient liquidity for employee equity sales; and ample availability of debt at low interest rates (at least until recent months, when interest rates have increased).

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Thank you for consideration of our views. If we can answer any questions or provide additional information with respect to this letter, please do not hesitate to contact me at 202.822.0800 or [jeff@cii.org](mailto:jeff@cii.org).

Sincerely,



Jeffrey P. Mahoney  
General Counsel

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<sup>26</sup> See Dual-Class IPO Snapshot: 2017–2018 Statistics; see also Council of Institutional Investors, Dual-Class Stock (Jan. 2019), [https://www.cii.org/dualclass\\_stock](https://www.cii.org/dualclass_stock).

<sup>27</sup> We exclude special purpose acquisition companies and foreign issuers from this list. In 2018, the top 20 U.S. companies that went public on U.S. exchanges included 12 that did so on a one-share, one-vote basis: SolarWinds, DocuSign, Ceridian, Elastic, Anaplan, Tenable, Upwork, Sonos, Avalara, Arlo Technologies, Zscaler and SurveyMonkey. Companies that had dual class shares with time-based sunsets were Bloom Energy, Smartsheet and EVO Payments. Companies with dual class structures and no time-based sunsets were Dropbox, Greensky, Pivotal Software, Eventbrite and Pluralsight. We exclude special purpose acquisition companies, master limited partnerships and foreign issuers from this list.