

Via Email

May 14, 2020

Reid Steadman  
Managing Director/ESG Product Management  
S&P Dow Jones Indices LLC  
55 Water Street, 44<sup>th</sup> Floor  
New York, NY 10041

***Re: Re-adding Facebook, Inc. (Facebook) to the S&P 500 ESG Index***

Dear Mr. Steadman:

The purpose of this letter is to express our disappointment with the recent decision to restore Facebook to the S&P 500 ESG Index.<sup>1</sup>

The Council of Institutional Investors (CII) is a nonprofit, nonpartisan association of U.S. 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 of approximately \$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, including public pension funds with more than 15 million participants – true “Main Street” investors through their pension funds. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$35 trillion in assets under management.<sup>2</sup>

### **The Principle of One Share, One Vote**

CII believes that at the core of good corporate governance—the “G” in “ESG”—is the principle of one share, one vote.<sup>3</sup> Public companies that have awarded founders with special voting rights through dual class stock with super voting power violate that core principle.

---

<sup>1</sup> See, e.g., Mona Naqvi, Who’s In? Who’s Out? Walmart & Twitter Dropped from the S&P 500 ESG Index, among Other Major Changes, Indexology® Blog (May 6, 2020, 9:04 AM), <https://www.spglobal.com/en/research-insights/articles/who-s-in-who-s-out-walmart-twitter-dropped-from-the-sp-500-esg-index-among-other-major-changes> (listing Facebook as one of the biggest additions to the S&P 500 ESG Index from the 2020 annual rebalance).

<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> See, e.g., Council of Institutional Investors, Corporate Governance Policies, § 3.3 Voting Rights (updated Mar. 10, 2019), [https://www.cii.org/corp\\_gov\\_policies#shareowner\\_rights](https://www.cii.org/corp_gov_policies#shareowner_rights) (“Each share of common stock should have one vote [and] [c]orporations should not have classes of common stock with disparate voting rights.”).

Public companies with dual class voting structures often enable the founders to maintain control over the board of directors for lengthy periods or even into perpetuity, despite having a relatively small financial stake in the firm.<sup>4</sup> When founders control the board, an important source of discipline over the companies' operations are neutralized.<sup>5</sup> As U.S. Securities and Exchange (SEC or Commission) Investor Advocate Rick Fleming explained in a speech last October:

[W]ithout an appropriate level of accountability to shareholders, it is easy to predict that [dual class stock structures] . . . will not end well. Investors will be hurt, and badly . . . .

While it would not be appropriate for me to comment on specific companies, you do not have to look far to see where unchecked corporate control can lead. Things like...

- Self-dealing and treating the company like a personal piggy bank.
- Outsized optimism and over-estimation of the skills needed for long-term success.
- Insular group-think, in which the founder surrounds himself with unqualified yes-men (and yes, all too often it is just men).
- Poor accounting controls.
- A tendency to take the eye off the ball and burn cash by investing in ancillary businesses to satisfy personal whims.
- Declining health or mental capacity of the entrenched founder.
- Abusive working conditions, including discriminatory practices and harassment.<sup>6</sup>

It is of particular concern for CII members and other long-term shareowners that other than through litigation there is no practical ability for shareholders to exercise meaningful oversight of the founder and public company board, even in the face of extended poor performance or changed company circumstances that suggest a different management or long-term strategy.<sup>7</sup> Simply put, dual class stock structures with unequal voting rights prohibit long-term public

---

<sup>4</sup> See, e.g., Examining Private Market Exemptions as a Barrier to IPOs and Retail Investment: Hearing Before the H. Comm. on Fin. Servs., BusCom. on Investor Prot., Entrepreneurship & Capital Mkts., 112<sup>th</sup> Cong. (Sept. 11, 2019) (Written Testimony of Renee M. Jones at 8),

<https://docs.house.gov/meetings/BA/BA16/20190911/109907/HHRG-116-BA16-Wstate-JonesR-20190911.pdf> (“In the founder-friendly model, founders receive shares with super voting power (typically ten votes per share), which enables founders to maintain control over the board of directors, despite having relatively small financial stake in the firm.”).

<sup>5</sup> *Id.* (“When founders control the board, an important source of discipline over . . . operations is neutralized.”).

<sup>6</sup> Rick Fleming, Investor Advocate, Speech at ICGN Miami Conference, Miami, Florida: Dual-Class Shares: A Recipe for Disaster (Oct. 15, 2019), <https://www.sec.gov/news/speech/fleming-dual-class-shares-recipe-disaster>.

<sup>7</sup> See, e.g., Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors to Director Angela Ahrendts et al. Airbnb, Inc. 1 (Sept. 30, 2019), <https://www.cii.org/files/Airbnb.pdf> (“many public company shareholders are skeptical on whether managers holding super-voting rights are held accountable by company boards, even in the face of extended poor performance or changed company circumstances that suggest different management and/or strategy”).

shareowners the ability to provide a disciplining mechanism on founders and the founder's children and grandchildren—a mechanism that is essential to good corporate governance.<sup>8</sup>

### **A Compromise: Time Based Sunsets**

CII believes that a developing market practice offers a logical and reasonable solution to the lack of accountability created by dual class stock public companies: put in place a simple, effective sunset mechanism on dual class voting structures, so that markets do not suffer long-term damage from long-lasting unaccountability.<sup>9</sup> More specifically, we believe that time-based limits requiring dual class voting structures to sunset within a reasonable and specified period (absent renewal by shareowners) will allow companies to address any alleged problem of short-termism without requiring shareholders to entirely surrender the ability to hold the managers of their assets accountable.<sup>10</sup>

In our view, a sunset of no more than seven years offers an appropriate period to harness whatever benefits of innovation and control a dual class voting structure may provide while mitigating the agency costs it incurs over time.<sup>11</sup> And the market has validated this approach.

A limited but increasing number of dual class stock companies are choosing to go public with time-based sunset provisions incorporated into their charters.<sup>12</sup> CII has tracked 33 U.S. companies that went public with simple, time-based sunsets since 2004, including seven from 2019. The sunsets range from three to 20 years. Most dual class stock structures sunset in seven or 10 years with five companies using sunsets of five years or less from 2004-18. The mean sunset in 2018 was 7.0 years, down from 9.5 years in 2017 and 10.3 years in 2016. Six of the companies that have such sunsets converted to one-share, one-vote in smooth processes well understood by the market.<sup>13</sup>

---

<sup>8</sup> See, e.g., Rick Fleming, Investor Advocate, Speech at ICGN Miami Conference, Miami, Florida: Dual-Class Shares: A Recipe for Disaster (“perpetual dual-class share structures require long-term public shareholders to place their faith not only in a founder, but also the founder's children and grandchildren [and] [I]ong after the original visionary is gone, there will still be no disciplining governance mechanism”).

<sup>9</sup> See, e.g., Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Secretary, Securities and Exchange Commission 4 (Oct. 3, 2019), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2019/October%203%202019%20Comment%20Letter.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2019/October%203%202019%20Comment%20Letter.pdf) (“CII believes that a developing market practice offers a logical and reasonable solution to the lack of accountability created by dual class stock public companies: put in place a simple, effective sunset mechanism on dual-class voting structures, so that markets do not suffer long-term damage from long-lasting unaccountability.”).

<sup>10</sup> See, e.g., Letter from Ken Bertsch, Executive Director, Council of Institutional Investors to Hong Kong Exchanges and Clearing Limited 2 (Apr. 23, 2020), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/20200423%20CII%20letter%20to%20HKEX\\_final.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/20200423%20CII%20letter%20to%20HKEX_final.pdf) (“we believe that the mandatory sunset (absent renewal by shareholders) should be no more than seven years”).

<sup>11</sup> See, e.g., Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Secretary, Securities and Exchange Commission at 4 (“A sunset of no more than seven years offers an appropriate period to harness whatever benefits of innovation and control a multi-class voting structure may provide while mitigating the agency costs it incurs over time.”).

<sup>12</sup> See, e.g., Council of Institutional Investors, Companies with Time-Based Sunsets on Dual-Class Stock (updated Aug. 15, 2019), <https://www.cii.org/files/8-15-19%20Time-based%20Sunsets.docx.pdf>.

<sup>13</sup> *Id.*

Time-based sunsets are simple, clear, and not subject to change by the controlling holder. A report by Goldman Sachs agrees that “it’s time for public companies to stop shielding themselves from their shareholders, and a [time-based sunset is] a way to do it.”<sup>14</sup>

In October 2018, CII submitted listing standard petitions to the U.S. stock exchanges proposing requiring newly listed companies that choose dual class voting structures to adopt a sunset that triggers within seven years of an IPO.<sup>15</sup> To date, the exchanges have failed to act on our petitions.

In September 2019, CII submitted petitions to the American Bar Association Corporate Laws Committee<sup>16</sup> and the Corporation Law Section of the Delaware State Bar Association<sup>17</sup> proposing to amend U.S. corporate law to restrict the authority of corporations listed on national securities exchanges to adopt multi-class common stock structures with differential voting rights. The American Bar Association Corporate Laws Committee<sup>18</sup> and the Corporation Law Section of the Delaware State Bar Association, respectively,<sup>19</sup> have declined our requests.

---

<sup>14</sup> Simon Constable, Goldman Sachs Warning: One-Share One Vote Or Else The Stock Will Suffer, Forbes.com, Sept. 30, 2019, <https://www.forbes.com/sites/simonconstable/2019/09/30/goldman-sachs-warning-one-share-one-vote-or-else-the-stocks-shares-will-suffer/#28d08a7c71da> (reporting that “Goldman . . . has a suggestion: [] **A sunset provision on dual-class stock** . . . [p]hasing out high-voting stock after 5-10 years . . . [and] Goldman says it’s time for public companies to stop shielding themselves from their shareholders, and here’s a way to do it”).

<sup>15</sup> See, e.g., Press Release, Council of Institutional Investors, 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%20](https://www.cii.org/files/issues_and_advocacy/correspondence/FINAL%20Dual%20Class%20Petition%20Press%20) (includes links to petitions).

<sup>16</sup> Ken Bertsch, Executive Director, Council of Institutional Investors et al. to Laurie A. Smiley, Esquire, Chair, American Bar Association Corporate Laws Committee 1 (Sept. 13, 2019), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2019/September%2013%202019%20Final%20MBCA%20letter.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2019/September%2013%202019%20Final%20MBCA%20letter.pdf) (“request[ing] that the Model Business Corporation Act . . . be amended by the Corporate Laws Committee . . . to limit the authority of corporations listed on national securities exchanges to adopt multi-class common stock structures with differential voting rights”).

<sup>17</sup> Ken Bertsch, Executive Director, Council of Institutional Investors et al. to Henry E. Gallagher, Jr., Council Chair, Corporation Law Section of the Delaware State Bar Association 1 (Sept. 13, 2019), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2019/September%2013%202019%20Final%20DGLS%20letter.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2019/September%2013%202019%20Final%20DGLS%20letter.pdf) (“request[ing] that the Delaware State Bar Association propose to the Delaware General Assembly that Delaware General Corporation Law . . . be amended to limit the authority of Delaware corporations listed on national securities exchanges to adopt multi-class common stock structures with differential voting rights”).

<sup>18</sup> Letter from Laurie A. Smiley, Chair, Corporate Laws Committee to Ken Bertsch, Executive Director, Council of Institutional Investors et al. 1 (Dec. 13, 2019), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2019/ABA%20Response%20to%20CII%20request%20to%20reform%20MBCA.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2019/ABA%20Response%20to%20CII%20request%20to%20reform%20MBCA.pdf) (“The Committee reviewed and discussed your proposal during its December meetings, and . . . does not believe that amending the Model Act to limit the authority of corporations listed on national securities exchanges to adopt multi-class common voting structures is advisable.”).

<sup>19</sup> Letter from Henry E. Gallagher, Jr., Council Chair, Corporation Laws Committee to Ken Bertsch, Executive Director, Council of Institutional Investors et al. 1 (Jan. 28, 2020) (“The Council has thoroughly discussed and considered your legislative proposal, and has determined not to recommend its adoption.”).

Of note, our petitions have not been directed to the SEC because some believe the Commission may not currently have the statutory authority to require U.S. public companies to adopt time-based sunsets.<sup>20</sup>

### **Facebook’s Dual-Class Stock Structure with No Time-Based Sunset**

As you aware, Facebook has a dual class voting structure with two classes of common stock (Class A common stock with one vote per share and Class B common stock with ten votes per share).<sup>21</sup> As a result of the dual class voting structure, founder Mark Zuckerberg controls 58% of total voting power or a majority of votes of Facebook stock, even though he owns only 14% of the economic value of the company.<sup>22</sup> To date, Facebook management has refused to adopt a time-based sunset of its dual-class structure despite repeated requests from many of its shareholders.<sup>23</sup>

Facebook’s own 10-K describes the risks of its current dual class voting stock structure to long-term shareowners:

Mark Zuckerberg, our founder, Chairman, and CEO, is able to exercise voting rights with respect to a majority of the voting power of our outstanding capital stock and therefore has the ability to control the outcome of matters submitted to our stockholders for approval, including the election of directors and any merger, consolidation, or sale of all or substantially all of our assets. This concentrated control could delay, defer, or prevent a change of control, merger, consolidation, or sale of all or substantially all of our assets that our other stockholders support, or *conversely this concentrated control could result in the consummation of such a transaction that our other stockholders do not support*. This concentrated control could also discourage a potential investor from acquiring our Class A common stock, which has limited voting power relative to the Class B common stock, and might harm the trading price of our Class A common stock. *In addition, Mr. Zuckerberg has the ability to control the management and major strategic*

---

<sup>20</sup> See, e.g., Commissioner Robert J. Jackson Jr., Remarks in San Francisco, California, Perpetual Dual-Class Stock: The Case Against Corporate Royalty n.6 (Feb. 15, 2018), <https://www.sec.gov/news/speech/perpetual-dual-classstock-case-against-corporate-royalty> (noting that in the 1980’s “[t]he SEC, led at the time by Chairman Arthur Levitt, attempted to intervene [to restrict dual class stock through stock exchange listing standards] —but was thwarted by a controversial ruling of the D.C. Circuit[] *Business Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990)).

<sup>21</sup> See, e.g., Facebook, Inc., Proxy Statement (Schedule 14A) 66 (Apr. 10, 2020), <https://www.sec.gov/Archives/edgar/data/1326801/000132680120000037/facebook2020definitiveprox.htm#s52274D53522A577A96815A2BADBB3C72> (Facebook, Inc.’s “dual class capital structure with two classes of common stock (Class A common stock with one vote per share and Class B common stock with ten votes per share) was implemented in 2009”).

<sup>22</sup> *Id.* at 45-46 (information derived from table entitled “SECURITY OWNERSHIP OF CERTAIN BENEFICIAL OWNERS AND MANAGEMENT”).

<sup>23</sup> Shareholder proposals addressing Facebook Inc.’s dual-class structure were raised in connection with each of the last six annual meetings of shareholders. *Id.* at 66. Despite opposition from management and from Mr. Zuckerberg (and presumably other holders of super-voting shares), the proposal has received large and growing support from shareholders, reaching 24.5% in 2019, apparently including a large majority of class A shares outstanding, and an even larger portion of class A shares voted. See Facebook, Inc. (Form 8-K) (June 3, 2019), <https://www.sec.gov/Archives/edgar/data/1326801/000132680119000043/form8-k2019annualmeeting.htm>.

*investments of our company as a result of his position as our CEO and his ability to control the election or replacement of our directors. In the event of his death, the shares of our capital stock that Mr. Zuckerberg owns will be transferred to the persons or entities that he has designated. As a board member and officer, Mr. Zuckerberg owes a fiduciary duty to our stockholders and must act in good faith in a manner he reasonably believes to be in the best interests of our stockholders. As a stockholder, even a controlling stockholder, Mr. Zuckerberg is entitled to vote his shares, and shares over which he has voting control as governed by a voting agreement, in his own interests, which may not always be in the interests of our stockholders generally.*<sup>24</sup>

In commenting on the impact of Facebook’s dual class voting structure to *Yahoo Finance* last fall, JetBlue Chairman Joel Peterson stated:

“I think Facebook needs to install good governance procedures. When you have a founder like Mark Zuckerberg —who is a wonderful guy, nice guy and everything — but he has so much control that they don’t really have good governance at Facebook. The board isn’t going to override Mark,”

. . . .

“I think you really need to say what are the good governance principles, let’s get those set in this company so it’s not an autocratic rule and that way we can restore trust,” . . . .<sup>25</sup>

More recently, Deepa Seetharaman and Emily Glazer of the *Wall Street Journal* indicated that the risks to shareholders posed by Facebook’s dual class voting structure appears to be increasing: “The departure of long-serving directors, along with . . . several longtime lieutenants over the past two years, means [Zuckerberg] . . . is navigating this moment without key advisors who might be able to help him spot potential pitfalls.”<sup>26</sup>

Similarly, earlier this month, Sarah Frier of *Bloomberg* wrote:

Zuckerberg’s . . . is rapidly gaining further control. Facebook’s own board has turned over the majority of its members in the last two years, after some directors disagreed with Zuckerberg about how to solve the company’s problems. The folks at Facebook who most challenged Zuckerberg – the founders of his acquired

---

<sup>24</sup> Facebook, Inc., Annual Report (Form 10-K) 25 (Jan. 30, 2020) (emphasis added).

<sup>25</sup> Brian Sozzi, Mark Zuckerberg 'has so much control' that Facebook doesn't have good corporate governance: expert, Yahoo Fin., Sept. 18, 2019, <https://finance.yahoo.com/news/mark-zuckerberg-has-so-much-control-that-facebook-doesnt-have-good-corporate-governance-183515943.html>.

<sup>26</sup> Deepa Seetharaman & Emily Glazer, Mark Zuckerberg Asserts Control of Facebook, Pushing Aside Dissenters Wall St. J., Apr. 28, 2020, <https://www.wsj.com/articles/mark-zuckerberg-asserts-control-of-facebook-pushing-aside-dissenters-11588106984>.

companies Instagram and WhatsApp, and the head of product who had worked at the company for 13 years – all left in the same period.<sup>27</sup>

### **Facebook Should be Dropped from the S&P 500 ESG Index**

We understand that Facebook was re-added to the ESG Index in connection with the 2020 annual rebalance because of their “S&P DJI ESG Score improvement . . . and an industry reclassification improved its S&P DJI Score performance relative to its industry peers.”<sup>28</sup> However, we also understand that companies like Facebook that may be technically eligible for inclusion in the index are “simply not selected,”<sup>29</sup> for subjective reasons, including when “controversies unfold between annual rebalances.”<sup>30</sup>

We strongly support the decision of S&P to exclude new additions of dual-class stock companies to the S&P 500 Index.<sup>31</sup> It seems odd that the S&P 500 ESG Index is not following the same policy. Voting rights are a key aspect of governance, and underlay accountability of management to shareholders for ESG generally.

S&P’s ESG Product Management has an important role to play as guardians of market integrity and ESG “values.”<sup>32</sup> CII believes you have failed in that role by re-adding Facebook to the S&P 500 ESG Index.

If you have any questions regarding 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

---

<sup>27</sup> Sarah Frier, Fully Charged, Real Solution or Public Relations Stunt?, Bloomberg, May 7, 2020, <https://www.bloomberg.com/news/newsletters/2020-05-07/real-solution-or-public-relations-stunt>.

<sup>28</sup> Mona Naqvi, Indexology® Blog, Who’s In? Who’s Out? Walmart & Twitter Dropped from the S&P 500 ESG Index, among Other Major Changes, S&P Dow Jones Indices.

<sup>29</sup> *Id.*

<sup>30</sup> Reid Steadman et al., The S&P 500® ESG Index: Integrating Environmental, Social, and Governance Values into the Core, S&P Dow Jones Indices 5 (Apr. 2019), <https://www.spglobal.com/media/documents/the-sp-500-esg-index-integrating-esg-values-into-the-core.pdf> (“When controversies unfold between annual rebalances of the S&P 500 ESG Index, SAM reviews these to consider whether a company’s S&P DJI ESG Score should be reduced [and] [t]he S&P DJI Index Committee overseeing the index then determines whether the company should be removed.”).

<sup>31</sup> See, e.g., Council of Institutional Investors, CII Welcomes S&P Dow Jones’ Decision to Ban New Multi-Class Companies from Key Stock Indexes (Aug. 1, 2017), <https://www.cii.org/spdjmultipclassban> (“new companies with share classes that have differential or no voting rights will be barred from inclusion in the S&P 500, S&P MidCap 400 and S&P SmallCap 600.”).

<sup>32</sup> Reid Steadman et al., The S&P 500® ESG Index: Integrating Environmental, Social, and Governance Values into the Core, S&P Dow Jones Indices at 1.