UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

March 8, 2022

Beverly L. O'Toole
The Goldman Sachs Group, Inc.

Re: The Goldman Sachs Group, Inc. (the "Company")
Incoming letter dated December 22, 2021

Dear Ms. O'Toole:

This letter is in response to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by John C. Harrington for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

The Proposal requests that the board commission and publish a study on the external costs created by the Company's underwriting multi-class equity offerings and the manner in which such costs affect the majority of its shareholders who rely on overall stock market return.

There appears to be some basis for your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, the Proposal relates to, and does not transcend, ordinary business matters. Accordingly, we will not recommend enforcement action to the Commission if the Company omits the Proposal from its proxy materials in reliance on Rule 14a-8(i)(7).

Copies of all of the correspondence on which this response is based will be made available on our website at https://www.sec.gov/corpfin/2021-2022-shareholder-proposals-no-action.

Sincerely,

Rule 14a-8 Review Team

cc: Frederick H. Alexander
The Shareholder Commons

200 West Street | New York, New York 10282
Tel: 212-357-1584 | Fax: 212-428-9103 | e-mail: beverly.otoole@gs.com

Beverly L. O'Toole
Managing Director
Associate General Counsel

Goldman Sachs

December 22, 2021

VIA E-MAIL
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: *The Goldman Sachs Group, Inc.*
Shareholder Proposal of John C. Harrington
Securities Exchange Act of 1934 ("Exchange Act")—Rule 14a-8

Ladies and Gentlemen:

This letter is to inform you that The Goldman Sachs Group, Inc. (the "Company") intends to omit from its proxy statement and form of proxy for its 2022 Annual Meeting of Shareholders (collectively, the "2022 Proxy Materials") a shareholder proposal (the "Proposal") and statements in support thereof received from John C. Harrington (the "Proponent"), represented by The Shareholder Commons (the "Representative").

Pursuant to Rule 14a-8(j), we have:

- filed this letter with the Securities and Exchange Commission (the "Commission") no later than eighty (80) calendar days before the Company intends to file its definitive 2022 Proxy Materials with the Commission; and

- concurrently sent copies of this correspondence to the Proponent.

Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) ("SLB 14D") provide that shareholder proponents are required to send companies a copy of any correspondence that the proponents elect to submit to the Commission or the staff of the Division of Corporation Finance (the "Staff"). Accordingly, we are taking this opportunity to inform the Proponent that if the Proponent elects to submit additional correspondence to the Commission or the Staff with respect to the Proposal, a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Company pursuant to Rule 14a-8(k) and SLB 14D.

THE PROPOSAL

The Proposal states:

> RESOLVED, shareholders request that the board commission and publish a study, at reasonable cost and excluding proprietary information, on the external costs created by the Company's underwriting multi-class equity offerings and the manner in which such costs affect the majority of its shareholders who rely on overall stock market return.

A copy of the Proposal, as well as relevant correspondence with the Proponent, is attached to this letter as Exhibit A.

BASIS FOR EXCLUSION

We hereby respectfully request that the Staff concur in our view that the Proposal may be excluded from the 2022 Proxy Materials pursuant to Rule 14a-8(i)(7) because the Proposal deals with matters relating to the Company's ordinary business operations. As discussed below, the Proposal is nearly identical to the proposal submitted to the Company in 2021 (the "Prior Proposal"), which the Staff concurred was excludable pursuant to Rule 14a-8(i)(7). *See* Exhibit B for a comparison of the Proposal against the Prior Proposal. *See also Goldman Sachs Group, Inc.* (avail. Mar. 9, 2021, *recon. denied* Mar. 19, 2021) ("*Goldman 2021*") (concurring with the exclusion of the Prior Proposal, seeking a study on the external costs created by the Company's underwriting multi-class equity offerings and the manner in which such costs affect the majority of its shareholders who rely on overall stock market return, based on Rule 14a-8(i)(7) as relating to ordinary business).

ANALYSIS

The Proposal May Be Excluded Pursuant To Rule 14a-8(i)(7) Because It Involves Matters Related To The Company's Ordinary Business Operations.

A. Background.

Rule 14a-8(i)(7) permits a company to omit from its proxy materials a shareholder proposal that relates to the company's "ordinary business operations." According to the Commission's release accompanying the 1998 amendments to Rule 14a-8, the term "ordinary business" "refers to matters that are not necessarily 'ordinary' in the common meaning of the word," but instead the term "is rooted in the corporate law concept [of] providing management with flexibility in directing certain core matters involving the company's business and operations." Exchange Act Release No. 40018 (May 21, 1998) (the "1998 Release").

In the 1998 Release, the Commission stated that the underlying policy of the ordinary business exclusion is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting," and identified two central considerations that underlie this policy. As relevant here, one of these considerations was that "[c]ertain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight." Examples of the tasks cited by the Commission include "management of the workforce, such as the hiring, promotion, and termination of employees, *decisions on production quality and quantity*, and the retention of suppliers" (emphasis added). 1998 Release. In the instant case, and as was the case in *Goldman 2021*, the Proposal relates to the Company's decisions and considerations regarding whether or not to offer its underwriting services to customers, and, if so, to which customers, on what terms, and in what context.

Moreover, framing a shareholder proposal in the form of a request for a report or study does not change the nature of the proposal. The Commission has stated that a proposal requesting the dissemination of a report may be excludable under Rule 14a-8(i)(7) if the subject matter of the report is within the ordinary business of the issuer. *See* Exchange Act Release No. 20091 (Aug. 16, 1983); *Johnson Controls, Inc.* (avail. Oct. 26, 1999) ("[Where] the subject matter of the additional disclosure sought in a particular proposal involves a matter of ordinary business . . . it may be excluded under [R]ule 14a-8(i)(7)."); *see also Ford Motor Co.* (avail. Mar. 2, 2004) (concurring with the exclusion of a proposal requesting that the company publish a report about global warming/cooling, where the report was required to include details of indirect environmental consequences of its primary automobile manufacturing business).

Further, although the Staff recently issued new guidance specifically relating to its approach to evaluating certain aspects of the ordinary business exclusion, such guidance does not impact nor negate the arguments made in *Goldman 2021* or herein. *See* Staff Legal Bulletin No. 14L (Nov. 3, 2021) ("SLB 14L"). Although SLB 14L, among other things, reverses prior Staff guidance regarding the company-specific approach to evaluating the significance of a policy issue that is the subject of a shareholder proposal for purposes of the ordinary business exclusion, neither *Goldman 2021* nor this no-action request rely on a company-specific approach to evaluating significance. Rather, only nine months ago the Staff concurred with the Company's argument in *Goldman 2021* that the Prior Proposal related to ordinary business matters, including the products and services that the Company offers, and did not focus on any significant policy issue. The Company makes the very same argument here. Therefore, SLB 14L neither precludes exclusion of the Proposal nor casts doubt on the precedential value of *Goldman 2021*. Just as the Staff determined that the Prior Proposal in *Goldman 2021* was excludable pursuant to Rule 14a-8(i)(7), the nearly identical Proposal is likewise properly excludable.

B. The Proposal May Be Excluded Because Its Subject Matter Relates To The Products And Services That The Company Offers, Including The Company's Customer Relations.

The Proposal is excludable pursuant to Rule 14a-8(i)(7) because it relates to the Company's ordinary business operations, in that it directly relates to the Company's decision to offer underwriting services to its customers, a component of the Company's ordinary business as a leading global investment banking, securities, and investment management firm. The Proposal also relates to the Company's customer relations in so far as the underwriting services at issue are services and offerings routinely provided to the Company's clients and customers.

The Company provides a wide range of financial services to a substantial and diversified client base that includes corporations, financial institutions, governments, and individuals. The Company is an active participant in financial markets around the world, with offices in over 30 countries, and serves clients worldwide. Specifically, the Company engages in various lines of business, such as investment banking, global markets, asset management and consumer & wealth management. The Company's day-to-day business revolves around providing its clients and customers with financial products and services, including the underwriting of public offerings. Here, the Proposal asks for a report relating to "external costs created by the Company's underwriting multi-class equity offerings," and therefore focuses entirely on one of the Company's core products and services.

The Staff has frequently concurred that proposals regarding the provision of banking services and products offered by a financial institution concern matters of ordinary business and thus are excludable under Rule 14a-8(i)(7). In particular, the Staff has consistently permitted exclusion of proposals submitted to financial institutions that relate to the banks' credit policies, loan underwriting, and customer relations. For example, in a series of no-action letters, the Staff concurred with the exclusion under Rule 14a-8(i)(7) of a proposal that requested a board report on the direct deposit advance service offered by a number of financial services companies, under which the banks advanced loans to customers against recurring direct deposits in the customers' checking accounts. In those proposals, the proponents raised concerns with the advance services offered by those institutions, including the social and financial impacts of those services. In each case, the Staff concurred that the proposal was properly excludable pursuant to the ordinary business exclusion, stating, "[i]n this regard, we note that the proposal relates to the products and services offered for sale by the company. Proposals concerning the sale of particular products and services are generally excludable under [R]ule 14a-8(i)(7)." *See Goldman 2021*, *Wells Fargo & Co.* (avail. Jan. 28, 2013, *recon. denied* Mar. 4, 2013), *Fifth Third Bancorp* (avail. Jan. 28, 2013, *recon. denied* Mar. 4, 2013), *Regions Financial Corp.* (avail. Jan. 28, 2013). *See also JPMorgan Chase & Co.* (avail. Mar. 16, 2010) (concurring with the exclusion of a proposal regarding the company's decision to issue refund anticipation loans to customers, noting that "proposals concerning the sale of particular services are generally excludable under Rule 14a-8(i)(7)"); *Bank of America Corp.* (avail. Jan. 6, 2010) (concurring with the exclusion of a proposal requiring the company to stop accepting matricula consular cards as a form of identification, which effectively sought "to limit the banking services the [company could] provide to individuals the [p]roponent believe[d] [we]re illegal immigrants," because the proposal sought to control the company's "customer relations or the sale of particular services"); *Bank of America Corp.* (avail. Feb. 27, 2008) (concurring with the exclusion of a proposal requesting the preparation of a report detailing, in part, the company's policies and practices regarding the issuance of credit cards and lending of mortgage funds to individuals without Social

Security numbers as relating to the company's "credit policies, loan underwriting and customer relations"); *J.P. Morgan Chase & Co.* (avail. Feb. 26, 2007) (concurring with the exclusion of a proposal requesting a report about company policies to safeguard against the provision of financial services to clients that enabled capital flight and resulted in tax avoidance as relating to the "sale of particular services"); *Wells Fargo & Co.* (avail. Feb. 16, 2006) (concurring with the exclusion of a proposal requesting that the company not provide its services to payday lenders as concerning "customer relations"); *Bank of America Corp.* (avail. Mar. 7, 2005) (same); *Banc One Corp.* (avail. Feb. 25, 1993) (concurring with the exclusion of a proposal that requested the corporation adopt procedures that would consider the impact on customers when they were denied credit).

Here, like the precedents discussed above, the Proposal relates to certain costs stemming from the Company's decisions regarding which public offerings to underwrite and therefore squarely relates to the Company's decisions concerning products and services that are offered to its customers. Similar to the proposals regarding direct deposit advance services and overdraft policies and practices, the Proposal seeks a report regarding the Company's provision of a particular service (underwriting services to customers with multi-class equity offerings). Throughout, the Proposal and the supporting statements focus on the Company's underwriting services, including its "facilitat[ion]" of multi-class equity offerings and "lending [of] reputation and expertise." Consistent with *Goldman 2021*, *JPMorgan 2019*, *Bank of America 2019*, and the other precedent cited above, the Proposal is therefore excludable under Rule 14a-8(i)(7) because it focuses on a specific service the Company offers to its customers, and thus relates to the Company's core day-to-day banking business.

Similarly, the Staff has also concurred with the exclusion of a proposal when it relates to potential impacts of a company's operations and activities, including economic costs, on the company's shareholders. For example, in *Ameren Corp.* (avail. Feb. 8, 2018), the proposal requested a report "*estimating shareholder losses* for the continued storage of high-level waste at Callaway 1," including the potential range of shareholder losses over the course of different year ranges into the future (emphasis added). The company argued that the proposal "would focus solely on financial issues – operational and compliance costs and 'shareholder losses'" and not on any significant policy issues to the company, and the Staff concurred with exclusion under Rule 14a-8(i)(7). *See also McDonald's Corp*. (avail. Mar. 22, 2019) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal seeking a report "disclos[ing] the economic risks [the company] faces as a result of campaigns targeting the [c]ompany over concerns about cruelty to chickens," where the company argued that such an assessment of potential economic costs are fundamental aspects of the company's ordinary business operations, and therefore are inappropriate for direct shareholder oversight).

Here, although the Proposal seeks a report on potential external costs to Company shareholders as a result of the Company's underwriting activity, the consequences of the Company's actions on its shareholders are even more tangential than those consequences at issue in *Ameren*. Specifically, the Proposal seeks a report on how costs derived from Company actions ultimately affect "the majority of [Company] shareholders who rely on overall stock market return." Thus, the potential consequences of the Company's actions flow through to Company shareholders not directly via their

ownership interests in the Company, but indirectly, through such shareholders' ownership interests in other companies, funds, and indexes. Remote or otherwise, the Company's evaluation of its operations and activities are central considerations for the Company's management of its ordinary business operations. As in *Ameren*, a proposal focusing on a report of this nature is excludable under Rule 14a-8(i)(7).

Deciding whether or not to offer a particular product or service to customers is a bedrock aspect of the Company's day-to-day operations. Consistent with Staff precedent, including *Goldman 2021*, the Proposal, by focusing on the Company's underwriting activity, addresses issues that are ordinary business matters for the Company and is properly excludable under Rule 14a-8(i)(7).

C. The Proposal Does Not Focus On Any Significant Policy Issue That Transcends The Company's Ordinary Business Operations.

As demonstrated below, and consistent with *Goldman 2021*, the Proposal, like the Prior Proposal, does not focus on a significant social policy issue, which may transcend ordinary business operations, and is not fundamentally a corporate governance proposal, which may render it non-ordinary. Specifically, in *Goldman 2021* the Staff was already asked by the Representative to consider a similar request, including whether there is "a significant policy issue posed by multiclass share structures" and "multiclass equity offerings".[1] and determined that the Prior Proposal was excludable based on the ordinary business exclusion under Rule 14a-8(i)(7). In addition, while proposals submitted to a company relating to elimination of dual class voting structures or requesting other corporate governance measures be taken *at that company* are generally not considered excludable by the Staff under Rule 14a-8(i)(7), that is because they relate to *the underlying company's* corporate governance structure directly, which the Staff has long considered to constitute a non-ordinary matter appropriate for shareholders to vote on. By contrast, proposals, like the Proposal and the Prior Proposal, that speak only of governance issues generally, without taking issue with the subject company's governance practices, are not the kind of traditional corporate governance proposals that the Staff has historically considered to be non-excludable under Rule 14a-8(i)(7).

The well-established precedent set forth above demonstrates that the Proposal squarely addresses ordinary business matters and, therefore, is excludable under Rule 14a-8(i)(7). The 1998 Release distinguishes proposals pertaining to ordinary business matters from those involving "significant social policy issues." *Id*. (citing Exchange Act Release No. 12999 (Nov. 22, 1976)). While "proposals . . . focusing on sufficiently significant social policy issues (*e.g.*, significant discrimination matters) generally would not be considered to be excludable," the Staff has indicated that proposals relating to both ordinary business matters and significant social policy issues may be excludable in their entirety in reliance on Rule 14a-8(i)(7) if they do not "transcend the day-to-day business matters" discussed in the proposals. 1998 Release. In this regard, when assessing proposals

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[1] *See* correspondence from the Representative to the Staff, dated January 22, 2021. *Goldman 2021*.

under Rule 14a-8(i)(7), the Staff considers "both the proposal and the supporting statement as a whole." Staff Legal Bulletin No. 14C, part D.2 (June 28, 2005). Moreover, as Staff precedent has established, merely referencing topics in passing that might raise significant policy issues, but which do not define the scope of actions addressed in a proposal and which have only tangential implications for the issues that constitute the central focus of a proposal, does not transform an otherwise ordinary business proposal into one that transcends ordinary business.

Here, just as in *Goldman 2021*, the Proposal's principal focus is on the offering and sale of specific Company products and services. The Proposal's focus on ordinary business matters is not refuted simply because the supporting statements implicate corporate governance structures of *other public companies*. In this regard, while the Proposal's supporting statements touch upon corporate governance concerns, those concerns are neither addressed in nor central to the underlying ask of the Proposal nor do they relate to the Company's own corporate governance practices or policies. Rather, the Proponent postulates that the Company's act of offering underwriting services to a company that elects to have multiple classes or high-voting stock somehow equates to "facilitating poor governance" broadly, which the Proponent further contends has negative impacts on the economy at large and may impact "diversified shareholders" investing in "overall stock market return." In this regard, it is clear that the Proposal is not focused on corporate governance practices or policies internal to or impacting the Company and its shareholders, but rather on how the offering of a particular service to particular customers may create "external costs" that may have a tangential effect on other stakeholders and may, in the Proponent's view, "threaten[] global GDP." Importantly, the Proposal does not ask the Company to examine or alter its own governance structure or corporate governance policies. Instead, it is squarely focused on requesting a report of "external costs" created by certain Company underwriting activity and a request to analyze how such costs might impact diversified Company shareholders (to the extent such shareholders rely on overall market return). However, concerns regarding how the Company "increases its own financial returns" and "trade-offs between Company profit and global economic health," generally, are insufficient to transform the instant Proposal, otherwise focused on ordinary business operations, into a proposal that focuses on any significant policy issue.

In correspondence predating the Staff's decision in *Goldman 2021*, the Representative submitted its arguments for why the Prior Proposal was not excludable, and yet the Staff concurred with the Company's request to exclude the Prior Proposal. In pertinent part, in concurring with the exclusion of the Prior Proposal, the Staff did not agree with the Representative's argument that multi-class share structures themselves present a significant policy issue that barred relief. Indeed, not all topics rise to the level of a significant policy issue such that no-action relief under Rule 14a-8(i)(7) is precluded. Likewise, here the Proposal's assertions of harm to society and the economy stemming from the financing of companies who utilize such structures are not only a matter of opinion and degree, but also far from the kind of significant policy issues the Staff has designated in the past under its rigorous and scrutinizing approach to analyzing shareholder proposals involving significant policy issues. The Company further notes that it has been only nine months since the Staff considered this same issue and the mere passage of time has not materially altered the underlying

facts and considerations pertinent to the Proposal. The Proposal, like the Prior Proposal and consistent with *Goldman 2021*, is properly excludable as relating to ordinary business matters.

To this end, even if the Proposal were to raise a significant policy issue, the Staff has frequently concurred that a proposal that touches, or may touch, upon significant policy issues is nonetheless excludable if the proposal does not focus on such issues. For example, in *Wells Fargo (Harrington Investments, Inc.)* (avail. Feb. 27, 2019) ("*Wells Fargo*"), the proposal requested that the board commission an independent study and then report to shareholders on "options for the board . . . to amend [the] [c]ompany's governance documents to enhance fiduciary oversight of matters relating to customer service and satisfaction." In spite of language relating to various compliance and governance issues at the company, the Staff concurred with exclusion of the proposal based on the ordinary business exclusion under Rule 14a-8(i)(7). While it is possible that one or more of those issues related to policy issues that transcend ordinary business, the "Resolved" clause focused on customer relations, rendering the proposal excludable under Rule 14a-8(i)(7). As in *Wells Fargo*, it is not enough here for the Proposal to reference "governance" in the abstract and, without further context, the references in the Proposal to corporate governance concerning other public companies do not automatically invoke a significant corporate governance issue, least of all one that transcends ordinary business. *See also Amazon.com, Inc. (Domini Impact Equity Fund and the New York State Common Retirement Fund)* (avail. Mar. 28, 2019) (concurring with the exclusion of a proposal that arguably touched on sustainability concerns where the proposal was broadly worded, encompassed a wide range of issues relating to the company's business and did not focus on any single issue, and where the Staff noted that "the [p]roposal relates generally to 'the community impacts' of the [c]ompany's operations and does not appear to focus on an issue that transcends ordinary business matters").

Here, and consistent with *Goldman 2021*, the Proposal presents an even stronger case for exclusion than *Wells Fargo* as the Proposal does not focus on any significant policy issues. Moreover, the Proposal does not demonstrate how underwriting multi-class equity offerings at other companies equates to a significant social policy issue that should preclude exclusion of the Proposal, particularly in light of the fact that the Company's own equity class structure reflects a single class of Common Stock with one vote per share. In fact, the absence of language in the Proposal expressly criticizing the Company's own corporate governance structure is notable. Further, the kinds of corporate governance proposals the Staff has historically viewed as transcending ordinary business are those where the governance concern raised by the proposal related to the company's governance matters. *See, e.g.*, *MasterCard Inc.* (avail. Apr. 25, 2019) (unable to concur with the exclusion of a proposal requesting the company's board direct its nominating and corporate governance committee to create a standing committee to oversee company responses to human rights developments affecting the company's business, because, in the Staff's view, the proposal "transcends ordinary business matters"); *Paramount Packaging Corp.* (avail. Mar. 11, 1981) (unable to concur with the exclusion of a proposal requesting that the company retain at least one outside consulting firm to analyze the company's structure and make recommendations that could improve operating results, because, in the Staff's view, "a proposal that requests a consideration of the employment of outside consultants to review the [c]ompany's organization and structure involves an important matter of policy and not

the day-to-day operation of the [c]ompany"). Consistent with the Staff's foregoing reasoning, because this Proposal is not seeking any reform or internal review of the Company's own structure, governance or otherwise, it is not the kind of proposal that the Staff has considered non-ordinary. Thus, similar to *Wells Fargo*, the Proposal fails to focus on any issue that might rise to the level of significance that would preclude exclusion.

By way of further example, the Staff has previously concurred with the exclusion of proposals that related to a large financial institution's decisions regarding the products and services offered for sale, despite raising social concerns regarding the impact of those products and services on the institution's customers. *See Bank of America* 2019, *JPMorgan 2019*, and *Goldman 2021*. For example, in *JPMorgan 2019*, the proposal's recitals expressed concern that the overdraft policies at issue disproportionately impacted account holders that were "more financially vulnerable," including those who were "low-income, single, non-white, and renters," as well as "college-age customers and older Americans who rely heavily on Social Security Income." In this regard, the proposal articulated the proponent's concern with the impact that JPMorgan's overdraft policies and practices were having on its customers. Yet, these social impact concerns did not rise to the level of a significant policy issue. Similar to *JPMorgan 2019* and identical to *Goldman 2021*, here, although the Proposal's supporting statements express concern for diversified shareholders, reflect that the Proponent is troubled by "high-vote stock" and believes that class structure "contribut[es] to poor corporate governance that harms investors as a class," such broad social concerns do not rise to the level of a significant policy issue.

Moreover, the Staff's recent decisions regarding the excludability of similarly structured proposals that also sought a report relating to broad external costs make clear that the Staff's analysis focuses on the particular subject matter of the requested report (and the extent to which it may raise a significant policy issue) and not on the impacts of the externalized costs. For example, earlier this year the Staff concurred that three external cost proposals were excludable under Rule 14a-8(i)(7). *See Goldman 2021* (concurring with the exclusion of a proposal which requested a study of external costs associated with underwriting multi-class equity offerings); *Marriott International, Inc.* (avail. Mar. 26, 2021) (concurring with the exclusion of a proposal which requested a study of the external costs created by the company's compensation policy); *CVS Health Corp.* (avail. Mar. 22, 2021, *recon. denied* Mar. 30, 2021) (concurring with the exclusion of a proposal which requested a study of the external public health costs associated with the company's food retail business). In fact, in correspondence submitted in both *CVS* and *Marriott*, the Representative argued that the significant policy issues raised by the proposals in each case were "externalizing costs to stakeholders" and the theory of "shareholder primacy," in the abstract, but the Staff determined the proposals were excludable.[2] Here, the Proposal's subject matter stems from costs associated with underwriting

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[2] By contrast, the Staff was unable to concur with the exclusion of a proposal requesting a report on the external public health costs created by the food and beverage business of a [retailer] and the manner in which such costs affect the vast majority of its shareholders who rely on overall market return. *See PepsiCo, Inc.* (avail Mar. 12,

multi-class equity offerings, which, like in *Goldman 2021*, relates to the Company's ordinary business matters and does not raise a significant policy issue, nor is it focused on the Company's governance structure (which, notably, reflects a single class of Common Stock with one vote per share). The foregoing demonstrates that the Proposal's construct of focusing on external costs and overall stock market returns is not one that automatically transforms an otherwise ordinary business proposal into one suddenly focused on a significant policy issue simply because the Representative believes that the subject matter raised carries widespread economic costs that allegedly impact the economy and diversified shareholders. Rather, the Proposal is excludable, like *Goldman 2021*, *CVS* and *Marriott*, because the subject matter of the Proposal (underwriting multi-class equity offerings) relates to an ordinary business matter.

As discussed above, the Proposal relates to ordinary business matters: the products and services that the Company offers, including its customer relations, by focusing on the Company's offering of underwriting services to customers with multi-class equity offerings. Accordingly, because the Proposal's request is directly related to the Company's ordinary business operations and does not transcend those ordinary business operations, similar to the proposals in the precedents discussed above, the Proposal may be excluded under Rule 14a-8(i)(7).

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2021). The Staff noted that "a proposal related to the external public health costs created by the food and beverage business of a company may raise a significant policy issue that transcends a company's ordinary business operations (see, e.g., PepsiCo, Inc. (Mar, 12, 2021))." *See CVS Health Corp.* (Recon.) (avail. Mar. 30, 2021).

CONCLUSION

Based upon the foregoing analysis, we respectfully request that the Staff concur that it will take no action if the Company excludes the Proposal from its 2022 Proxy Materials.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to Beverly.OToole@gs.com. Should you have any questions or if you would like any additional information regarding the foregoing, please do not hesitate to contact me (212-357-1584; Beverly.OToole@gs.com) or Jamie Greenberg (212-902-0254; Jamie.Greenberg@gs.com). Thank you for your attention to this matter.

Sincerely,

Beverly L. O'Toole

Enclosures

cc: John C. Harrington
Sara Murphy, The Shareholder Commons
Frederick Alexander, The Shareholder Commons

EXHIBIT A

From:	Brianna Harrington
To:	shareholderproposals@ny.email.gs.com
Cc:	John Harrington:; Sanford Lewis; Sara Murphy; Frederick Alexander; Kolkin, Zachary A.
Subject:	Shareholder Proposal at Goldman Sachs
Date:	Thursday, November 18, 2021 5:06:01 PM
Attachments:	OutlookEmoji-1583537596521d14db8e2-dd15-4360-a2ba-0798344cbd2d.png 2022 Goldman Sachs Proposal - FiNAL.pdf xxxx4608_ Letter 11 18 21.PDF GS 2022 File Ltr.PDF
Importance:	High

Good afternoon,

Please find the attached documents regarding a shareholder proposal for inclusion at the Goldman Sachs 2022 Proxy Material. Please confirm receipt of this email and the attached documents. Feel free to contact us with any questions.

Thank you.

Brianna Harrington

Shareholder Advocacy Coordinator

Research Analyst

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Tel: [redacted]

Harrington Investments, Inc.

Toll-free: [redacted]

Fax: [redacted]

http://harringtoninvestments.com

HARRINGTON
INVESTMENTS, INC.

November 18, 2021

John F.W. Rogers,
Secretary to the Board of Directors
The Goldman Sachs Group, Inc.
200 West Street
New York, New York, 10282
Via email at shareholderproposals@gs.com

Dear Mr. Rogers:

I, John C. Harrington, am filing the enclosed proposal at The Goldman Sachs Group, Inc. for the enclosed proposal for inclusion in the 2022 proxy statement, in accordance with Rule 14a-8 of the General Rules and Regulations of the Securities Exchange Act of 1934. I have been a shareholder continuously for over 3 years, since and including November 18, 2018, holding at least $2,000 in market value and will continue to invest in at least the requisite number of shares for proxy resolutions through the annual shareholders' meeting. The verification of ownership by our custodian, a DTC participant, will be sent separately. I, or a representative, will attend the Annual Meeting to present the resolution as required by SEC rules.

We look forward to having productive conversations with the company. Per SEC requirements, I am available to meet with the company via teleconference on November 29 or November 30 at 10 am PT, respectively. Please direct all future correspondence regarding this proposal to me via the information below, and copy our colleagues at The Shareholder Commons, Sara Murphy [redacted] and Frederick (Rick) Alexander [redacted] on all correspondence. They will join the conversation if they are available to speak during the above designated times.

Sincerely,

John C. Harrington

President and CEO

CC: [redacted]

[redacted] FAX [redacted]
WWW. HARRINGTONINVESTMENTS.COM

[Goldman Sachs Group, Inc: Rule 14a-8 Proposal, November XX, 2021]
[This line and any line above it – *Not* for publication.]
ITEM 4*: Report on costs of multi-class equity offerings

***RESOLVED**, shareholders request that the board commission and publish a study, at reasonable cost and excluding proprietary information, on the external costs created by the Company's underwriting multi-class equity offerings and the manner in which such costs affect the majority of its shareholders who rely on overall stock market return.*

Supporting Statement:

Our Company underwrites initial public offerings providing perpetual control to insiders with high-vote stock,[1] contributing to poor governance that harms investors as a class, including companies with three classes of stock having 20, 1, and 0 votes.[2] As the Company advised investors, its most critical stakeholder group, "[u]sing multi-class voting to insulate management from its own shareholders comes at a significant long-term cost."[3]

These structures give unchecked power to insiders, whose concentrated interests are misaligned with the interests of typical diversified shareholders. As a working paper co-authored by a Nobel Laureate notes, "initial entrepreneurs are not well-diversified and so they want to maximize the value of their own company, not the joint value of all companies."[4]

By lending reputation and expertise to marketing governance structures that risk both underperformance and misalignment of corporate control with shareholder interests, the Company jeopardizes the viability of the one share, one vote governance model that creates significant economic wealth for shareholders and society. As a 2020 study noted, "if many similarly-situated *[sic]* companies [accept a higher cost of capital for multi-class shares], then the prevalence of dual class shares might have negative consequences for the economy as a whole."[5]

To the extent our Company is increasing its own financial returns by facilitating multi-class share structures, its own increased profits are coming at a severe cost to the global economy. This is a bad trade for most of the Company's shareholders, who are diversified and thus rely on broad economic growth to achieve their financial objectives. A Company strategy that increases its own financial returns but threatens global GDP is counter to the best interests of most of its shareholders: the potential drag on GDP created by facilitating poor governance will directly reduce their long-term returns.[6]

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[1] See, e.g., https://www.sec.gov/Archives/edgar/data/0001874178/000119312521289903/d157488ds1.htm (Rivian Automotive); https://www.sec.gov/Archives/edgar/data/1559720/000119312520294801/d81668ds1.htm (Airbnb).
[2] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=987488; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2954630
[3] https://www.forbes.com/sites/simonconstable/2019/09/30/goldman-sachs-warning-one-share-one-vote-or-else-the-stocks-shares-will-suffer/?sh=6cb9916e71da
[4] https://ssrn.com/abstract=3680815 or http://dx.doi.org/10.2139/ssrn.3680815
[5] https://www.capmktsreg.org/wp-content/uploads/2020/04/The-Rise-of-Dual-Class-Shares-04.08.20-1.pdf
[6] https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf

Despite this risk, the Company has not disclosed any analysis of the trade-offs between Company profit and global economic health from the perspective of its largely diversified shareholders, whose investment portfolios may be at grave risk from increasing concentrations of power through multi-class share structures.

The requested report will help shareholders determine whether current Company policies serve shareholders' best interests.

Please vote for: Report on costs of multi-class equity offerings – Proposal 4*
[This line and any below are *not* for publication]
[*Number to be assigned by the Company]

EXHIBIT B

[Goldman Sachs Group, Inc: Rule 14a-8 Proposal, November ~~18~~XX, ~~2020~~2021] [This line and any line above it – *Not* for publication.]

ITEM 4* ~~– External Corporate Governance Cost Disclosure~~:
Report on costs of multi-class equity offerings

***RESOLVED**, shareholders* ~~**ask**~~*request that the board commission and* ~~**disclose**~~*publish a study, at reasonable cost and excluding proprietary information, on the external costs created by the Company's underwriting multi-class equity offerings and the manner in which such costs affect the majority of its shareholders who rely on overall stock market return.*

Supporting Statement:

Our Company underwrites initial public offerings providing perpetual control to insiders with high-vote stock,[1] contributing to poor governance that harms investors as a class, including companies with three classes of stock having 20, 1, and 0 votes~~, respectively~~.[2] As the Company advised ~~the~~ investors, its most critical stakeholder group, "[u]sing multi-class voting to insulate management from its own shareholders comes at a significant long-term cost."[3]

~~In addition to risk of poor returns for their own shareholders, these~~These structures give unchecked power to insiders, whose concentrated interests are misaligned with the interests of typical diversified shareholders. As a working paper co-authored by a Nobel Laureate notes, "initial entrepreneurs are not well-diversified and so they want to maximize the value of their own company, not the joint value of all companies."[4]

By lending reputation and expertise to marketing governance structures that risk both underperformance and misalignment of corporate control with shareholder interests, the Company jeopardizes the viability of the one share, one vote governance model that creates significant economic wealth for shareholders and society. As a 2020 study noted, "if many similarly-situated *[sic]* companies [accept a higher cost of capital for multi-class shares], then the prevalence of dual class shares might have negative consequences for the economy as a whole."[5]

~~Understanding this information is essential to~~To the extent our Company is increasing its own financial returns by facilitating multi-class share structures, its own increased profits are coming at a severe cost to the global economy. This is a bad trade for most of the Company's shareholders, who are

[1] See, e.g., https://www.sec.gov/Archives/edgar/data/~~1792789/000119312520292381/d752207~~0001874178/000119312521289903/d157488ds1.htm (~~Door Dash~~Rivian Automotive); https://www.sec.gov/Archives/edgar/data/1559720/000119312520294801/d81668ds1.htm (Airbnb).

[2] ~~See Adams and Ferreira, *One Share-One Vote: The Empirical Evidence*, 12 Rev. of Fin. 51 (2008); Bebchuk and Kastiel, The Untenable Case for Perpetual Dual-Class Stock, 103 Virginia L. Rev. 585, 594 (2017).~~https://papers.ssrn.com/sol3/papers.cfm?abstract_id=987488; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2954630

[3] https://www.forbes.com/sites/simonconstable/2019/09/30/goldman-sachs-warning-one-share-one-vote-or-else-the-stocks-shares-_will-suffer/?sh=6cb9916e71da

[4] ~~Broccardo, Eleonora and Hart, Oliver D. and Zingales, Luigi, *Exit vs. Voice* (August 24, 2020),~~ https://ssrn.com/abstract=3680815 or http://dx.doi.org/10.2139/ssrn.3680815

[5] https://www.capmktsreg.org/wp-content/uploads/2020/04/The-Rise-of-Dual-Class-Shares-04.08.20-1.pdf

almost all broadly diversified. Indeed, as of June 2020, the top three holders of our shares are Vanguard, BlackRock, and State Street—investment managers with indexed or otherwise broadly diversified investors. Their beneficial owners are materially harmed by facilitation of governance that may lower GDP, thus reducing equity market values and thus rely on broad economic growth to achieve their financial objectives. A Company strategy that increases its own financial returns but threatens global GDP is counter to the best interests of most of its shareholders: the potential drag on GDP created by facilitating poor governance will directly reduce their long-term returns.[6] While

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Despite this risk, the Company may profit by ignoring externalized costs, has not disclosed any analysis of the trade-offs between Company profit and global economic health from the perspective of its largely diversified shareholders ultimately pay them, whose investment portfolios may be at grave risk from increasing concentrations of power through multi-class share structures.

The Company's facilitation of poor corporate governance across the economy is a social issue of great importance. A study would requested report will help shareholders determine whether to seek a change in corporate direction, structure, or form in order to better current Company policies serve their shareholders' best interests.

Please vote for: External Corporate Governance Cost Disclosure Report on costs of multi-class equity offerings – Proposal [4*]

[6] See, e.g., https://www.advisorperspectives.com/dshort/updates/2020/11/05/market-cap-to-gdp-an-updated-look-at-the-buffett-valuation-indicator (total market capitalization to GDP "is probably the best single measure of where valuations stand at any given moment") (quoting Warren Buffet) unepfi.org/fileadmin/documents/universal_ownership_full.pdf

Frederick H. Alexander
info@theshareholdercommons.com
+1.302.485.0497

January 10, 2022

Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

RE: *Shareholder proposal of John C. Harrington to the Goldman Sachs Group, Inc. regarding underwriting multi-class stock*

Division of Corporate Finance Staff Members:

John C. Harrington (the "Proponent") is the beneficial owner of common stock of The Goldman Sachs Group, Inc. (the "Company") and has submitted a shareholder proposal (the "Proposal") to the Company. The Proponent has asked me to respond to the letter dated December 22, 2020 ("Company Letter") that Beverly O'Toole sent to the Securities and Exchange Commission (the "SEC"). In that letter, the Company contends that the Proposal may be excluded from the Company's 2022 proxy statement.

For the reasons discussed in this letter, we respectfully contend that the Proposal is not excludable under Rule 14a-8 and must therefore be included in the Company's 2022 proxy materials. A copy of this letter is being emailed concurrently to Beverly O'Toole.

SUMMARY

The Proposal requests a study of the external costs associated with the Company's underwriting of multi-class offerings, i.e., offerings of corporate stock that deviate from the "one-share, one-vote" (OSOV) rule. The Company asserts the proposal is excludable under Rule 14a-8(i)(7) as relating to ordinary business.

The Proposal is not excludable pursuant to Rule 14a-8(i)(7) because it addresses the significant policy issue posed by multi-class share structures. Such structures have been controversial for as long as corporations have existed as commercial structures. They undercut the accountability created by OSOV, create incentives for insiders to manage the company in a manner harmful to society and the environment (and therefore to diversified investors), and lead to systemic reductions in economic productivity and efficiency. In an economy dominated by publicly traded entities, where the actions of

large corporations can generate or ameliorate an opioid crisis, preserve or degrade our environment, and sway the outcome of elections, the question of whether corporate management is accountable to the citizens who own the corporation is a fundamental policy issue, and shareholders should be able to ask for information about a company's activities that threaten such accountability.

The erosion of OSOV is, by itself, a significant policy issue of great concern to investors, and therefore transcends the ordinary business of the Company. Moreover, the Company's decision to continue to underwrite such offerings despite the costs and risks to the broader economy embeds the Proposal within the broader policy issue of whether corporations should continue to optimize their own financial returns when such optimization requires corporate actions that threaten the economy and the diversified investors who rely on the economy.

The Company claims the Staff has already addressed this issue and found that a proposal to report on the true cost of underwriting practices that erode the OSOV principle to optimize an investment bank's financial return is not a significant policy issue and can therefore be excluded as ordinary business. This claim belies a clear record.

It is true the Staff has previously permitted exclusion of two similar proposals under the ordinary business exception. But the Company only cites one of those actions, in which the Staff cited ordinary business in its Rule 14a-8 chart without further explanation. In the second situation involving an almost identical proposal, the Office of the Chief Counsel clarified that the proposal could be excluded because "it was not a significant policy issue **for the Company."** *JPMorgan Chase & Co.* (March 26, 2021) (emphasis added). These last three words make it clear the Staff did not find the OSOV question was not a significant policy issue, but rather the issue did not have sufficient nexus to the Company. Using the same three words, the Staff recently announced it would no longer apply the nexus requirement:

> *Under this realigned approach, proposals that the staff previously viewed as excludable because they did not appear to raise a policy issue of significance **for the company** may no longer be viewed as excludable under Rule 14a-8(i)(7).*[1]

Furthermore, the three precedent no-action responses cited in the Company Letter, each of which addresses the issue of optimizing individual company return with practices that threaten the economy (an issue in which the OSOV question is embedded), clearly demonstrate that the Staff did find a significant policy issue at stake, and only concurred in exclusion when there was insufficient nexus between that issue and the company requesting relief. This shows that the optimization question does present a significant policy issue, and since the nexus requirement has been eliminated, shareholder proposals (including the Proposal) that address the return optimization issue and otherwise meet Rule 14a-8 requirements (including relevance) should not be excluded under the ordinary business exception.

[1] Shareholder Proposals: Staff Legal Bulletin No. 14L (CF) (emphasis added) ("SLB L").

ANALYSIS

The Proposal is as follows:

> *RESOLVED, shareholders request that the board commission and publish a study, at reasonable cost and excluding proprietary information, on the external costs created by the Company's underwriting multi-class equity offerings and the manner in which such costs affect the majority of its shareholders who rely on overall stock market return.*

It asks that the Board prepare a report on the external costs of a portion of its business (underwriting multi-class offerings) and how those costs will affect diversified investors.

1. Background

The Proposal asks for a report on the effect of underwriting multi-class IPOs. That phenomenon is increasing at an alarming rate: More than 20 percent of the companies that listed shares on U.S. exchanges between 2017 and 2019 had a dual-class structure[2] and for 2021, 31.7 percent of IPOs involved dual-class offerings.[3] This is the largest percentage recorded to date.

The Company was the leading underwriter of IPOs in 2021 both globally and in the United States; in those two geographies, it held the coveted book-runner position on 280 and 175 IPOs, valued at $42 billion and $20 billion.[4] The Company's underwriting decisions as a major financial institution have a significant effect on the direction the market takes. Moreover, this is an issue on which the Company has already taken a position in other parts of its investment-banking business. As an asset manager, the Company has already decided to act *against* multi-class voting structures whenever the opportunity arises—the policy for accounts they manage is to vote against <u>all</u> multi-class structures:

> *Vote FOR resolutions that seek to maintain or convert to a one-share, one-vote capital structure. Vote AGAINST requests for the creation or continuation of dual-class capital structures or the creation of new or additional super voting shares.*[5]

The Company's research business also publicly recognizes the problems with multi-class structures, stating, "institutional investors overwhelmingly prefer a 'one share-one vote' governance structure" and that "the debatable benefit of insulating management from its own shareholders comes at a significant long-term cost."[6]

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[2] *The Rise of Dual Class Shares: Regulation and Implications* at 3 (April 2020) available at https://www.capmktsreg.org/2020/04/08/the-rise-of-dual-class-shares-regulation-and-implications/.
[3] Jay R. Ritter, *Initial Public Offerings: Dual Class Structure of IPOs Through 2021*
[4] *See* Dealogic, *Investment Banking Scorecard*, http://graphics.wsj.com/investment-banking-scorecard/
[5] *Policy, Procedures and Guidelines for GSAM Global Proxy Voting* (March 2021) available at https://www.gsam.com/content/dam/gsam/pdfs/us/en/miscellaneous/voting_proxy_policy.pdf?sa=n&rd=n
[6] 29 Goldman Sachs, Weekly Kickstart at 2 (27 September 2019).

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

The Company Letter correctly identifies underwriting as part of the Company's day-to-day business. That is not in dispute. The question is whether the Proposal implicates a significant social policy, in which case it may not be excluded under Rule 14a-8(i)(7), which generally allows exclusion of proposals related to ordinary business. As discussed below, the OSOV issue clearly does, both because the OSOV principle has a long history of public controversy and because it raises a broader question of whether companies should be harming the economy to optimize their own profits.

A. Staff Guidance

The Staff has indicated that a shareholder proposal that might otherwise be excludable as relating to ordinary business under Rule 14a-8(i)(7) is not excludable if it raises significant social policy issues.[7] In explaining ordinary business, the Release noted:

> *Certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. Examples include the management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers. However, proposals relating to such matters but focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.*

Shareholder proposals involve significant social policies if they involve issues that engender widespread debate, media attention, and legislative and regulatory initiatives.[8] However, the Staff had announced a policy of concurring in the exclusion of proposals that raised a significant policy issue if the proposal did not have significant nexus to the company. As noted in the Summary, the Staff recently announced its intention to refocus its analysis of the significant social policy exception on the policy in question, and not the nexus between the policy issue and the company:

> *Going forward, the staff will realign its approach for determining whether a proposal relates to "ordinary business" with the standard the Commission initially articulated in 1976, which provided an exception for certain proposals that raise significant social policy issues, and which the Commission subsequently reaffirmed in the 1998 Release. This exception is essential for preserving shareholders' right to bring important issues*

[7] Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018 (May 21, 1998).

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

> *before other shareholders by means of the company's proxy statement, while also recognizing the board's authority over most day-to-day business matters. For these reasons, staff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal. In making this determination, the staff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.*

SLB L emphasizes that this change means that proposals involving a significant policy issue will no longer be excluded simply because the issue is not significant for the company:

> *Under this realigned approach, proposals that the staff previously viewed as excludable because they did not appear to raise a policy issue of significance* ***for the company*** *may no longer be viewed as excludable under Rule 14a-8(i)(7). For example, proposals squarely raising human capital management issues with a broad societal impact would not be subject to exclusion solely because the proponent did not demonstrate that the human capital management issue was significant to the company.*[9]

B. Significant policy issue: proliferation of multi-class IPOs raises major public controversy

An examination of the history of unequal shareholder voting in the United States demonstrates that underwriting stock issues for corporations with multi-class voting structures raises a significant policy issue that transcends the ordinary business of the Company. More than a century of debate has made it clear that the question of whether the Company should contribute to a practice that makes corporations less accountable to shareholders is a significant policy issue on its own, as well as being part of the larger issue of when companies should continue to maximize their own returns with practices that externalize significant costs.

Whether to mandate OSOV has been a policy issue for almost as long as there have been commercial corporations.[10] Policymakers, academics, and interested parties in the United States in the nineteenth, twentieth, and twenty-first centuries have addressed the significant policy question of multi-class voting.

At the beginning of the nineteenth century, corporate charters were granted one at a time, by action of state legislatures.[11] In connection with granting charters, legislatures carefully measured out voting rights, often restricting the rights of significant owners and insiders to protect small shareholders,

[9] *Supra,* n.1 (emphasis added).
[10] See, e.g., Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote,"* 56 Cornell L. Rev. 1, 3 (1970) (noting that the "problem of shareholder voting was recognized at the earliest stages of the development of business corporations in England, 400 years ago").
[11] *See generally* Eric Hilt, *Early American Corporations and the State, in* Naomi Lamoreaux and William Novak, Corporations and American Democracy (Harvard University Press 2017).

consumers, and other stakeholders.[12] But as the century progressed, states began to create general incorporation statutes that allowed individuals to form corporations simply by filing a complying corporate charter with the Secretary of State.[13]

As control of individual corporate voting structures passed out of the hands of legislatures, policymakers debated the proper voting flexibility limits. Indeed, in the debates surrounding the adoption of the Constitution of 1897 in Delaware, which included an article authorizing the legislature to create a general incorporation statute within specific limits, the delegates proposed and adopted an amendment to the original proposal to mandate an OSOV regime. Delegate Nathan Pratt, who offered the amendment, made this simple argument:

> *This is intended to provide simply that those holding a majority of the stock shall control the corporation, and that is the reason I offered it.*[14]

Thus, efficacy of an OSOV rule was debated at the very beginning of the discussion over the form[15] of the general incorporation statute that would eventually become the leading corporation law in the United States.[16] But the strict rule against varying from OSOV did not last, as the Delaware Constitution was amended soon thereafter to remove the limitation.[17] By the 1920s, large corporations were varying voting rights to separate control of the corporations from their ownership.[18]

But while states competing for corporate charters may have loosened the statutory rule, the policy issue implicated by using multi-class voting structures came to the fore, and there was a "public outcry."[19] This outcry reached the White House itself, as one commentator described the level of public controversy:

> *The appeals of Professor William Z. Ripley—a political economist at Harvard who had made the ideal of one share, one vote a personal crusade—led President Calvin Coolidge and the Congress to make "threatening noises" about the emerging dual class capital structures. The Justice Department announced an inquiry into the matter as well, and the*

[12] *See* Henry Hansmann and Mariana Pargendler, *The Evolution of Shareholder Voting Rights,* 123 Yale L. J. 948, 952-954 (arguing for consumer rights theory).
[13] *See* Hilt, *supra* n. 49 at 1; Adolf Berle and Gardiner Means, The Modern Corporation & Private Property pp. 125-128 (Transaction Press 2010, originally published in 1932).
[14] Debates and Proceedings of the Constitutional Convention of the State of Delaware, Vol. 4, pp. 3131-3133 (1896).
[15] Although Delaware had adopted a general incorporation law in 1875, it was little used, as incorporators continued to seek charters through a legislative process until the 1897 Constitution ended the practice. *See* Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899* 1 Del. J. Corporate Law 249, 250 (1976).
[16] *See, e.g.,* Kevin LaCroix, *So Why Should Delaware Corporate Law Predominate? (*2015) ("Over half of the U.S. listed companies are incorporated in Delaware. Nearly two thirds of Fortune 500 companies are organized under the laws of Delaware.") available at https://www.dandodiary.com/2015/08/articles/securities-laws/so-why-should-delaware-corporate-law-predominate/.
[17] For the general trend, see Berle and Means, *supra,* n. 13 at 71 ("…only recently have statutory changes made it possible to issue common stock that has no voting rights.")
[18] Id. at 71-72.
[19] Lucian Bebchuck and Kobi Kastiel, *The Untenable Case for Perpetual Class Stock,* 103 Va. L. Rev. 585, 596 (2017) ("This decision came in response to a public outcry, initially inspired by Harvard economist William Ripley, against the issuance of non-voting common stock by several prominent companies, including Dodge Brothers.")

> *entire issue could be read about on the front page of the New York Times. Because of this maelstrom, the New York Stock Exchange (NYSE) announced in January, 1926 that as a general matter, it would no longer list disparate voting common shares. The historic NYSE one share, one vote listing rule remained undisturbed for nearly sixty years.*[20]

The American Stock Exchange (then called the New York Curb) followed suit.[21] A question of corporate structure that reaches the President and Congress, and that engenders an investigation by the Justice Department and front-page newspaper stories is indeed a "maelstrom," and certainly transcends the ordinary business of any single company.

In the 1980s, public companies traded on markets that did not have a rule against unequal voting began to recapitalize with multi-class structures.[22] This increasing competition among stock exchanges (reminiscent of the early-century competition among incorporating jurisdictions) led the NYSE to consider changing its longstanding rule. The intense public reaction belies the Company's claim that unequal voting rights do not create a policy issue sufficient to transcend its ordinary business:

> *Once again, an economic trend toward dual class recapitalizations emerged. In 1984, the NYSE announced that it was putting a moratorium on enforcement of its longstanding general rule of one share, one vote pending further investigation of the rule. Subsequently, amidst a media fanfare reminiscent of the 1920s, the NYSE's directors in July, 1986 approved a resolution allowing the listing of securities created in a dual class transaction provided that the transaction was approved by a majority of the company's independent directors and publicly held outside shares. Once again, as in the 1920s, threatening noises emanated from Washington. A number of bills, all of them hostile to the Exchange's revisionism, sprang up in Congress soon thereafter. For the second time this century, scholarly commentary critical of the NYSE's actions and calling for restrictions upon dual class capital structures appeared. The Securities and Exchange Commission--a creature of the New Deal era that did not exist during the previous imbroglio over the one share, one vote issue-stepped into the breach in July, 1988 with the promulgation of Rule 19c-4.*[23]

Thus, the re-emergent threat to OSOV voting again raised objections from Congress and from academics, and from regulators as well, demonstrating the significance of the policy question. The resulting Rule 19c-

[20] Peter Flocos, *Toward a Liability Rule Approach to the "One Share, One Vote" Controversy: An Epitaph for the SEC's Rule 19c-4,*138 Univ. Penn. L. Rev. 1761, 1762 (1990) (footnotes omitted).
[21] Id.: Berle and Means, *supra* n. 13 at 72.
[22] Flocos, *supra* n. 20 at 1762-1763 (1990).
[23] *Id.* (footnotes omitted).

4 limited adoption of unequal voting structures by listed companies.[24] The rule, however, was invalidated for exceeding the authority of the SEC,[25] but the stock exchanges have nevertheless adopted rules that prohibit already-listed companies from recapitalizing into unequal voting regimes.[26] While a firm can effectuate an IPO with a multi-class voting structure, the exchanges currently prohibit conversion into such a structure once listed.

As the use of multi-class structures for IPOs has increased over the last 15 years (principally in the tech sector), experience has borne out the concerns about unaccountability, mismanagement, inefficiency, and self-dealing by insiders who permanently control voting power at the companies. Beginning with Google's issuance of low-vote stock in 2004, an increasing number of IPOs have taken advantage of this opportunity, reaching a crescendo in 2017, when Snap, Inc. offered non-voting shares to the public. Investor concerns based on experience with multi-class companies over recent years led to concerted efforts by investors[27] and a 2018 Council of Institutional Investors (CII)[28] petition to Nasdaq, the NYSE, and the SEC to prohibit such structures and institute a OSOV policy for public companies. CII explained that multi-class voting was in violation of "bedrock" principles:

> *[T]his "founder knows best" approach challenges the bedrock corporate governance principle of "one share, one vote": Providers of capital should have a right to vote in proportion to the size of their ownership. A single class of common stock with equal voting rights makes the board of directors accountable to all of the shareholders—and more likely to respond when management stumbles. Multi-class structures deprive public shareholders of a meaningful voice in how the company is run because the public shareholders lack the votes to influence the board or management.*[29]

At least one U.S. senator joined in urging action by the exchanges,[30] clearly articulating the policy concern as one of the basic rights of American investors:

> *If a company goes to the public markets to raise money, long-term ordinary common stock investors - a category that includes directly or indirectly millions of retirees and workers - should be entitled to certain*

[24] *Id.*
[25] *Business Roundtable v. SEC,* 905 F.2d 406 (D.C. Circuit 1990).
[26] *See* Bebchuck and Kastiel, *supra* n. 2 at 597.
[27] *See generally*, Andrew Winden and Andrew Baker, *Dual Class Exclusion,* Rock Center for Corporate Governance (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3201578; Bebchuck and Kastiel, *supra* n. 19.
[28] The CII is a nonprofit association of institutional investors including asset owners with over $4 trillion in assets under management and asset managers with over $25 trillion in assets under management.
[29] CII press release (October 24, 2018) available at https://www.prnewswire.com/news-releases/investors-petition-nyse-nasdaq-to-curb-listings-of-ipo-dual-class-share-companies-300737019.html
[30] Letter from Elizabeth Warren, U.S. Senator, to John Carey, Vice President-Legal, NYSE Regulation, Inc. and NYSE Euronext & Edward Knight, Executive Vice President and General Counsel, NASDAQ OMX (June 5, 2013), https://www.warren.senate.gov/files/documents/Senator%20Warren%20letter%20to%20NYSE,%20Nasdaq%20-%206-5-2013.pdf.

> *basic rights. One of the most basic of those rights is one-share-one vote.*[31]

Once again, this letter from a U.S. Senator to the leading stock exchanges seeking to protect "[o]ne of the most basic rights" signifies that the underwriting of offerings featuring multi-class structures implicates significant policy questions.

C. Widespread investor opposition to multi-class structures and index modification

Institutional investors have lodged continuing objections to the proliferation of multi-class voting. In addition to CII's efforts, commentators have described asset owners and managers' objections:

> *Leading public pension funds, such as CalPERS and CalSTRS, asset managers, such as Fidelity, State Street, T. Rowe Price and Vanguard, and proxy advisory services, such as Institutional Shareholder Services, have stated their opposition to dual-class structures in their proxy voting guidelines, threatening to vote against the directors of companies that have such structures. In January 2017, the Investor Stewardship Group, a new organization of influential institutional investors and asset managers holding an aggregate of $17 trillion in assets under management, announced its Corporate Governance Principles, which state that shareholders should be entitled to voting rights in proportion to their economic interest, newly public companies should adopt one-share/one-vote structures and directors of existing dual-class companies should phase out their controlling structures.*[32]

Stymied at the regulators, investors sought protection from index providers, arguing that because many investors chose to diversify their holdings by investing in funds or asset pools that followed established indexes, they were forced to buy into governance structures they did not want to own if those corporations were included in indices.[33]

The three largest index providers began consultations on this question in the spring of 2017.[34] The exchanges responded in different manners, with one provider excluding new issuances of multi-class shares, another requiring a minimum public float of all classes of stock, and the third adjusting index weighting according to voting inequality.[35]

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[31] *Id.*
[32] Winden and Baker, *supra* n.27 at 10-11.
[33] *See generally id.*
[34] *Id.* at 24.
[35] *Id.* at 24-31.

D. Research supports policy concerns

A 2004 National Bureau of Economic Research study provided evidence for the validity of these concerns, indicating that insider voting control can lead to management entrenchment that can have a negative impact on firm investment:[36]

> *Dual-class common stock allows for the separation of voting rights and cash flow rights across the different classes of equity. We construct a large sample of dual-class firms in the United States and analyze the relationships of insider's cash flow rights and voting rights with firm value, performance, and investment behavior. We find that relationship of firm value to cash flow rights is positive and concave and the relationship to voting rights is negative and convex. Identical quadratic relationships are found for the respective ownership variables with sales growth, capital expenditures, and the combination of R&D and advertising. Our evidence is consistent with an entrenchment effect of voting control that leads managers to underinvest and an incentive effect of cash flow ownership that induces managers to pursue more aggressive strategies.*[37]

The authors noted that "some firms adopt dual-class structures when their original owners are reluctant to cede control." These firms are less likely to tap the capital markets, typically invest less, grow more slowly, and have lower valuations.[38] Similarly, in a paper published in 2017, "The Untenable Case for Perpetual Dual Class Stock," Lucian A Bebchuk and Kobi Kastiel noted:

> *Our analysis demonstrates that the potential advantages of dual-class structures (such as those resulting from founders' superior leadership skills) tend to recede, and the potential costs tend to rise, as time passes from the IPO. Furthermore, we show that controllers have perverse incentives to retain dual-class structures even when those structures become inefficient over time. Accordingly, even those who believe that dual-class structures are in many cases efficient at the time of the IPO should recognize the substantial risk that their efficiency may decline and disappear over time. Going forward, the debate should focus on the permissibility of finite-term dual-class structures — that is, structures that sunset after a fixed period of time (such as ten or fifteen years) unless their extension is approved by shareholders unaffiliated with the*

[36] Gompers, Ishii and Metrick, *Incentives vs. Control: An Analysis of U.S. Dual-class Companies* (Jan. 2004), available at https://www.nber.org/papers/w10240.
[37] *Id.* (abstract).
[38] *Id.* at 20.

> *controller.*[39]

In 2020, the Committee on Capital Markets Regulation, whose membership includes forty leaders drawn from across the financial sector, including banks, broker-dealers, asset managers, private funds, and insurance companies, issued a report surveying multi-class structures around the world and recommending new disclosure requirements in the United States.[40] An international comparative legal guide published a study addressing the "controversy" and a "reignite[d] . . . debate":

> *For some time, dual-class share structures have been a major source of controversy amongst corporate governance professionals. However, the recent IPO filings of prominent technology companies featuring dual-class share structures have served to reignite the debate.*[41]

This issue is not going away. The increasing trend of IPOs to use these control-preserving devices threatens the viability of our economy. The continued willingness of market leaders such as the Company to participate in the multi-class stock structure trend—against their own best judgment of what is good for shareholders[42]—is a looming threat and implicates a critical policy issue.

E. Commission-Level Discussion

SEC commissioners' focus on multi-class equity offerings provides further proof of the issue's significance. Two SEC commissioners have spoken out against multi-class structures. In a 2018 speech, Commissioner Kara Stein addressed the broad social policy concerns created by dual-class structures:

> *Structures where a minority of insiders lock out the interests and rights of the majority may also have collateral effects on our capital markets. <u>They may be harmful not just for those companies, their shareholders, and their employees, but for the economy as a whole</u>.*[43]

That same year, Commissioner Robert Jackson gave a speech titled "Perpetual Dual-Class Stock: The Case against Corporate Royalty,"[44] in which he criticized not simply multi-class structures, but those without definite endpoints:

> *Many have argued forcefully, however, that one-share, one-vote should be the rule for all public corporations. Whatever the benefits may be of*

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[39] *Supra,* n. 19. See also Bebchuk, Lucian A. and Kastiel, Kobi, The Perils of Small-Minority Controllers (March 1, 2019). Georgetown Law Journal, Vol. 107, 2019, pp.1453-1514, European Corporate Governance Institute (ECGI) - Law Working Paper No. 434/2018, Harvard Law School John M. Olin Center Discussion Paper No. 985, Available at https://ssrn.com/abstract=3128375.

[40] *Supra,* n. 2.

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

[42] *See supra,* n.5 (recommending votes FOR conversion to one-share, one vote structures and AGAINST conversion to or maintenance of multi-class voting structures) available at https://www.gsam.com/content/dam/gsam/pdfs/us/en/miscellaneous/voting_proxy_policy.pdf?sa=n&rd=n.

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

[44] Available at https://www.sec.gov/news/speech/perpetual-dual-class-stock-case-against-corporate-royalty.

> *permitting dual-class in a few well-known cases, these advocates argue, the costs for investors—who are left with no way to hold management's feet to the fire while dual-class is in place—outweigh those benefits.*
>
> *But the question I want to ask today is not whether dual-class ownership is always good or bad. It's whether dual-class structures, once adopted, should last forever. Do Main Street investors in our public markets benefit when corporate insiders maintain outsized control in perpetuity?*
>
> *This is not an academic exercise. You see, nearly half of the companies who went public with dual-class over the last 15 years gave corporate insiders outsized voting rights in perpetuity. Those companies are asking shareholders to trust management's business judgment—not just for five years, or 10 years, or even 50 years.* Forever.[45]

As Commissioner Stein noted, the public policy implications are not limited to effects a multi-class structure has on the financial return of the corporation in question. A Columbia Law School professor explained that our entire economy can be affected by the inherent unaccountability when insiders capture control through such mechanisms:

> *The public/private hinge becomes relevant in addressing these questions. Mismatches between control rights and cash flow rights give rise not only to private agency costs, the focus of much corporate governance theorizing, but what might be called "public" agency costs. <u>These refer to our concerns about unaccountable power in the socio-political realm</u>. A match between cash flow rights and control rights naturally constrains these public agency costs.*[46]

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

> *Today I would like to discuss a troubling trend—the increased use of dual-class shares by companies that seek to go public. …*
>
> *It is true that a few well-known companies have thrived with long-term founders. But less noticeable are the hundreds of public companies that now have entrenched management. A growing body of research suggests that, over the long term, entrenchment of founders produces lower returns for investors. Specifically, companies with dual-class structures tend to underperform companies with dispersed voting power.*

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[45] *Id.* To be clear, the Company underwrites the very type of perpetual control structures that Commissioner Jackson described and about which he asked critical policy questions.

[46] Jeffrey Gordon, *Dual Class Common Stock: An Issue of Public and Private Law*, CLS Blue Sky Blog (January 2, 2019) (emphasis added) available at https://clsbluesky.law.columbia.edu/2019/01/02/dual-class-common-stock-an-issue-of-public-and-private-law/.

> *And there is an even larger danger, from my perspective. Namely, without an appropriate level of accountability to shareholders, it is easy to predict that this trend will not end well. Investors will be hurt, and badly, if we continue down this path. …*
>
> *In my view, what we now have in our public markets is a festering wound that, if left untreated, could metastasize unchecked and affect the entire system of our public markets. The question, then, is what can be done to avoid the inevitable reckoning.*[47]

F. The significant policy issue writ large: externalizing costs to stakeholders

The OSOV question represents a highly contentious and contemporary public policy issue that transcends the Company's ordinary business and is therefore not excludable under Rule 14a-8(i)(7). While the particular issue in question—restraining unchecked power created by high-vote shares—is a significant policy issue on its own, its facilitation by the Company embeds the question within the policy issue raised by business practices that enhance corporate financial returns to shareholders but harm social and environmental systems. Below, we explain how this issue has become a central feature of the policy landscape in the United States and beyond.

i. Corporate Law and Shareholder Primacy

U.S. corporate directors have long focused their efforts on improving their corporations' financial return to their shareholders. While there has been a fierce debate as to whether corporations should in fact be managed for the benefit of only shareholders or a broader group of stakeholders,[48] the concept of shareholder primacy has dominated corporate law. This doctrine eschews consideration of the external costs of business activity unless those costs affect the corporation's own financial return to its shareholders. A series of Delaware court decisions cemented the place of shareholder primacy in the United States.[49]

The most recent of these decisions, eBay Domestic Holdings, Inc. v. Newmark,[50] emphasizes the focus on shareholder wealth maximization, even outside the sale context:

> *Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that. Thus, I cannot accept as valid . . . a corporate policy that specifically, clearly, and admittedly seeks not to maximize the*

[47] Rick Fleming, *Dual-Class Shares: A Recipe for Disaster* (October 15, 2019) (emphasis added).
[48] Frederick Alexander, BENEFIT CORPORATION LAW AND GOVERNANCE: PURSUING PROFIT WITH PURPOSE (2018) at 21-26.
[49] Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 Seattle Univ. L. Rev. 611, 613 (2017) ("Delaware decisional law is arguably particularly unfriendly to for-profit corporate boards that fail to place shareholder financial wealth maximization first in every decision they make.")
[50] 16 A.3d 1 (Del. Ch. 2010).

> *economic value of a for-profit Delaware corporation for the benefit of its stockholders.*[51]

ii. Legislative action on benefit corporations signals significant public policy issue

Delaware's common law commitment to shareholder primacy has led to a reaction regarding the harm that it poses to stakeholders and the public.[52] Legislatures have responded by creating an alternative: beginning in 2010, U.S. jurisdictions began to adopt benefit corporation provisions, which created a corporate form that required directors to consider other stakeholder interests. Legislatures have acted in 39 U.S. jurisdictions, the Canadian province of British Columbia, and the countries of Italy, Colombia, and Ecuador over the last decade to make this new form available. In addition, legislation was introduced in the U.S. Congress in both houses that would have imposed benefit corporation duties on the directors of all billion-dollar companies.[53] The issue even surfaced in the most recent U.S. presidential election, as one candidate decried "the era of shareholder capitalism."[54] In response, critics argued that favoring shareholders was the best recipe for a successful economy:

> *In reality, corporations do enormous social good precisely by seeking to generate returns for shareholders.*[55]

iii. Unwinding shareholder primacy protects shareholders

Benefit corporation statutes expressly allow corporations to account for non-shareholder constituencies, but they can promote shareholder interests as well. Lynn Stout, a leading academic opponent of shareholder primacy, explains that evolving arguments against shareholder primacy do not rely on a zero-sum calculus that protects stakeholders to the detriment of shareholders; instead, she explains that these arguments "focus not on how shareholder primacy hurts stakeholders or society *per* se, but on how shareholder primacy can hurt *shareholders*, both individually and immediately, and collectively and over time."[56]

Thus, because most shareholders are also stakeholders of their corporations, the benefit corporation form allows corporate managers to consider shareholder interests beyond internal financial return:

> *[F]or widely held public corporations, most shareholders are broadly*

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[51] *Id*. at 34-35 (referring to corporate justification for a shareholder rights plan meant to forestall a change in control that might threaten platform users' interests).

[52] *See generally,* Lynn Stout, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS AND THE PUBLIC (2012).

[53] Copies of the legislation are available here: https://www.congress.gov/bill/116th-congress/senate-bill/3215?q=%7B%22search%22%3A%5B%22accountable+capitalism+act%22%5D%7D&s=1&r=1 (Senate) and here: https://www.congress.gov/bill/116th-congress/house-bill/6056?q=%7B%22search%22%3A%5B%22accountable+capitalism+act%22%5D%7D&s=2&r=2 (House)

[54] *Biden says investors 'don't need me,' calls for end of 'era of shareholder capitalism,'* (CNBC) (July 9, 2020), available at https://www.cnbc.com/2020/07/09/biden-says-investors-dont-need-me-calls-for-end-of-era-of-shareholder-capitalism.html.

[55] Andy Pudzer, *Biden's Assault on 'Shareholder Capitalism,* (Wall Street Journal) (August 17, 2020), available at https://www.wsj.com/articles/bidens-assault-on-shareholder-capitalism-11597705153.

[56] *See* n. 52 at 59.

> *diversified investors who are dependent on a stable society and environment to support all of their investments and would be financially injured if some corporations create extra profits by externalizing social and environmental costs.*[57]

This recognition that the interests of diversified shareholders converge with broad social interests when it comes to corporate cost externalization is reflected in the request for an externalities report contained in the Proposal. As detailed in the next subsection, policymakers have begun to incorporate this convergence into the rules that govern investment fiduciaries.

iv. Trust Law

This policy issue has also appeared in recent regulatory and legislative activity relating to trustees for retirement plans and other investment advisors. The Department of Labor recently proposed a Rule that would have made it more difficult for trustees to account for environmental and social costs, but, after receiving over 300 public comments,[58] revised the final rule in a manner that gives trustees the ability to address corporate activity that imposes the type of social costs described in the Proposal when the trustees believed that those costs would affect their diversified portfolios—exactly the type of costs on which the Proposal seeks a report:

> *In addition, Final Rules should also permit stewardship that discourages portfolio companies from engaging in behavior that harms society and the environment, and consequently the value of shareholders' diversified portfolios (For example, plan fiduciaries might vote to encourage all companies to lower their carbon footprint, not because it will necessarily increase return at each and every company, but because it will promote a strong economy and thus increase the return of their diversified portfolio).*[59]

Further evidencing the widespread debate around this issue, those Final Rules were suspended by Executive Order by the President of the United States on Inauguration Day[60] and a new set of Rules

[57] Frederick Alexander, *How to Leverage Benefit Governance*, in Katayun Jaffari and Stephen Pike, ESG IN THE BOARDROOM: A GUIDEBOOK FOR DIRECTORS (American Bar Association, forthcoming).

[58] Comments available at https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91.

[59] Frederick Alexander, *The Final DOL Rules Confirm That Fiduciary Duty Includes 'Beta Activism,'* RESPONSIBLE INVESTOR (December 15, 2020) available at https://www.responsible-investor.com/articles/the-final-dol-rules-confirm-that-fiduciary-duty-includes-beta-activism.

[60] *Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis*, (January 20, 2021), available at https://www.federalregister.gov/documents/2021/01/25/2021-01765/protecting-public-health-and-the-environment-and-restoring-science-to-tackle-the-climate-crisis

Proposed in their place.[61] The Department has received 894 public comments regarding the latest proposal.[62]

Moreover, in 2020, a bill was introduced in the U.S. House of Representatives that included an express finding that plan fiduciaries should consider the costs corporations in their portfolios impose on the financial system:

> *The Congress finds the following:*
>
> *(1) Fiduciaries for retirement plans should…*
>
> *(D) consider the impact of plan investments on the stability and resilience of the financial system; …*[63]

While the bill related to costs to the financial system, rather than public health, it was clearly focused on the same policy concern: costs that a company's profit-seeking activities impose on stakeholders.[64]

iv. The Statement on the Purpose of a Corporation

In addition to the activity noted in the prior section regarding political and legislative activity around the issue of external costs, the business community, including the Company itself, has noted the importance of considering of the interests of stakeholders other than shareholders. Here we quote at length the Statement on the Purpose of a Corporation, released by the Business Roundtable in 2019:

> *Americans deserve an economy that allows each person to succeed through hard work and creativity and to lead a life of meaning and dignity.*
> . . .
>
> *we share a fundamental commitment to all of our stakeholders. We commit to:*
>
> *Delivering value to our customers. We will further the tradition of American companies leading the way in meeting or exceeding customer expectations. . . .*
>
> *Supporting the communities in which we work. We respect the people in our communities and protect the environment by embracing sustainable practices across our businesses. . . .*

[61] Proposed Rule RIN 1210-AC03, 85 FR 57272 (2021).
[62] Comments available at https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC03.
[63] H.R. 8959 (116th): Retirees Sustainable Investment Policies Act of 2020
[64] *See also* Frederick Alexander, Holly Ensign-Barstow, Lenore Palladino, and Andrew Kassoy, *From Shareholder Primacy to Stakeholder Capitalism: A Policy Agenda for Systems Change* (arguing that fiduciary duties of trustees should incorporate external costs of individual companies that harm portfolios).

> *Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country.*[65]

Thus, the Statement, *which the Company itself signed,* demonstrates that the Proposal addresses a critical policy question: should a company prioritize anything beyond its own financial return to shareholders? For the Company, this broad issue clearly encompasses the narrow question of what costs it imposes on the global economy by continuing to support the erosion of OSOV.

The reaction to the Statement's issuance (as well as the number of companies signing) in August 2019 demonstrated the policy significance of addressing external costs. One dubious commentator noted that "For many of the BRT signatories, truly internalizing the meaning of their words would require rethinking their whole business."[66] Others noted the importance of the change, but also that it was meaningless without ending shareholder primacy:

> *Ensuring that our capitalist system is designed to create a shared and durable prosperity for all requires this culture shift. But it also requires corporations, and the investors who own them, to go beyond words and take action to upend the self-defeating doctrine of shareholder primacy.*[67]

Other commentators were worried not that the Statement did not go far enough, but rather that it went too far:

> *Asking corporate managers to focus more on improving society and less on making profits may sound like a good strategy. But it's a blueprint for ineffective and counterproductive public policy on the one hand, and blame-shifting and lack of accountability on the other. This is a truth Milton Friedman recognized nearly five decades ago — and one that all corporate stakeholders ignore today at their peril.*[68]

Another writer agreed, linking the issue to the same essay by Milton Friedman:

> *The issue of which constituency – or "stakeholder" – has the highest priority has long been a classic corporate governance conundrum. Still, the prevailing consensus, as espoused by Milton Friedman in his September 13, 1970 New York Times Magazine article, has been corporate executives work for their owners (i.e., shareholders) and have a responsibility to do what those owners desire, which is to make as much money as (legally)*

[65] Available at https://opportunity.businessroundtable.org/ourcommitment/ (emphasis added).
[66] Andrew Winston, *Is the Business Roundtable Statement Just Empty Rhetoric?* HARVARD BUSINESS REVIEW (August 30, 2019).
[67] Jay Coen-Gilbert, Andrew Kassoy and Bart Houlihan, *Don't Believe the Business Roundtable Until It's CEO's Actions Match Their Words,* FAST COMPANY (August 22, 2019).
[68] Karl Smith *Corporations Can Shun Shareholders, But Not Profits,* BLOOMBERG OPINION (August 27, 2019).

> *possible. That all changed on August 19, 2019.*[69]

Showing the controversy is long-lived, the Friedman essay's 50th anniversary in 2020 set off another round of commentary.[70]

G. *The Proposal concerns a significant policy issue and should not excluded because it implicates products and services*

The Company Letter argues for an exclusion under Rule 14a-8(i)(7) because the Proposal addresses products and services offered to customers. Where the focus of the Proposal is clearly on a significant policy issue, the fact that it may touch on issues related to products and services does not cause it to be excludable. Staff Legal Bulletin 14H, October 22, 2015, made this clear:

> *[T]he Commission has stated that proposals focusing on a significant policy issue are not excludable under the ordinary business exception "because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote." [Release No. 34-40018] Thus,* ***a proposal may transcend a company's ordinary business operations even if the significant policy issue relates to the "nitty-gritty of its core business."*** *[emphasis added]*

The Company letter cites prior Staff decisions where, generally, the proposal focused on products and services and lacked an appropriate relationship to an overriding significant policy issue. Here, in contrast, there is a significant public policy issue at stake: the threat to OSOV, and consequently to the economy, created by the Company's decision to continue to profit by underwriting multi-class offerings.

Lending criteria have been permissible subject matter for shareholder proposals focused on predatory lending, for instance. In *JPMorgan Chase & Co.* (March 4, 2009), a proposal recommended the company issue a report related to its credit-card marketing, lending, collection practices, and the practices' impacts on borrowers. The staff rejected exclusion based on Rule 14a-8(i)(7). The same was found in *Bank of America Corporation* (February 26, 2009) and *Citigroup Inc.* (February 11, 2009). See, also *Conseco, Inc.* (April 5, 2001) (proposal calling for independent committee of outside directors to develop and enforce policies to ensure that Conseco does not engage in predatory lending). See also, *Associates First Capital Corporation* (March 13, 2000), *Cash America International, Inc.* (February 13, 2008); *Bank of America Corporation* (February 23, 2006), and *JPMorgan Chase & Co.* (March 2, 2009). In all these instances, the companies argued for the ordinary business exclusion of proposals addressing predatory lending because the proposals on the companies' lending practices. The staff universally rejected such claims.

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[69] Christopher Carosa *Did Business Roundtable Just Break A Fiduciary Oath?* FiduciaryNews.com. August 27, 2019 available at http://fiduciarynews.com/2019/08/did-business-roundtable-just-break-a-fiduciary-oath/.

[70] See, e.g., *Friedman 50 Years later,* PROMARKET (collecting 27 essays about Friedman's article and its legacy) (Stigler Center for the Study of the Economy and the State).

In *Bank of America Corporation* (March 14, 2011), a proposal asked the board to have its audit committee conduct an independent review of the company's internal controls related to loan modifications, foreclosures, and securitizations, and to report its findings to shareholders. The Staff rejected the ordinary business claim; even though this clearly related to lending practices, the heightened focus on failing controls in the aftermath of the 2008 financial crisis demonstrated this was a valid and significant policy concern for shareholders.

Other significant policy issues have been at the core of proposals addressing lending policies, including proposals that may have led to criteria that changed with whom the company chose to do business, and under what conditions—far more prescriptively than the current proposal. For instance, in *Citicorp* (January 23, 1991) the proposal sought a report on the Company's lending policies in the developing world. The staff noted in rejecting the ordinary business challenge, "[i]n reaching a position, the staff particularly notes that the proposal appears to involve questions of substantial economic importance that go beyond the Company's ordinary business operations."

In short, there is no basis for an assertion that a proposal is excludable simply because it touches upon lending or underwriting criteria. The key question demonstrated by prior Staff decisions is whether the subject matter requiring a focus on lending or investing criteria is related to a significant policy issue. The present proposal is compliant and not excludable under Rule 14a-8(i)(7).

3. The Staff action concurring in the exclusion of prior similar proposals was based on the nexus requirement, which has been eliminated

In *Goldman 2021*, the Staff permitted exclusion of a very similar proposal under Rule 14a-8(i)(7), the ordinary business exclusion. However, at the time that *Goldman 2021* was issued, Staff policy was to concur in the exclusion of a proposal that did not have sufficient nexus to the company, even if the proposal addressed a significant policy issue. Thus, a determination that a proposal could be excluded under clause (i)(7) did not necessarily mean the Staff had determined that the issue raised was not a significant policy issue. Indeed, the Company had argued that the proposal addressed in *Goldman 2021* should be excluded for that very reason, claiming the proposal was too focused on other companies, and not on the Company itself:

> *Rather, the Proponents postulate that the Company's act of offering underwriting services to a company that elects to have multiple classes or high-voting stock somehow equates to the "facilitation of poor corporate governance" broadly, which the Proponents further contend has negative impacts on the economy at large and may impact "diversified shareholders" investing in "overall stock market return." In this regard, it is clear that the Proposal is not focused on corporate governance practices or policies internal to or impacting the Company and its shareholders, but rather on how the offering of a particular service to particular customers may create "external costs" that may have a tangential effect on other stakeholders. Importantly, the Proposal does not ask the Company to examine or alter its own governance structure or corporate governance*

> *policies.*[71]

The Company makes a similar argument with respect to the Proposal this year. However, since the issuance of *Goldman Sachs 2021*, the Staff issued *SLB L*, explaining it would no longer impose the nexus requirement: If a proposal raises a significant policy issue, and it otherwise satisfies Rule 14a-8, it will no longer be excluded because it does not have sufficient nexus to the company:

> *Going forward, the staff will realign its approach for determining whether a proposal relates to "ordinary business" with the standard the Commission initially articulated in 1976, which provided an exception for certain proposals that raise significant social policy issues, and which the Commission subsequently reaffirmed in the 1998 Release. This exception is essential for preserving shareholders' right to bring important issues before other shareholders by means of the company's proxy statement, while also recognizing the board's authority over most day-to-day business matters. For these reasons, staff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal. In making this determination, the staff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.*
>
> *Under this realigned approach, proposals that the staff previously viewed as excludable because they did not appear to raise* ***a policy issue of significance for the company*** *may no longer be viewed as excludable under Rule 14a-8(i)(7). For example, proposals squarely raising human capital management issues with a broad societal impact would not be subject to exclusion solely because the proponent did not demonstrate that the human capital management issue was significant to the company.* (Emphasis added.)

Thus, the argument the Company made last year—that a proposal is too "external" facing--is no longer a viable argument for exclusion under Rule 14a-8(i)(7). While *Goldman 2021* did not specify that it was decided on the basis of nexus, there is a strong indication that it was: A second similar proposal was also made that year, and the SEC also concurred in its exclusion, but was specific in stating that the proposal could be excluded "because it was not a **significant policy issue for the Company."** *JPMorgan Chase & Co. 2021 (emphasis added). SLB L* explicitly establishes that this will no longer be a reason for exclusion. A recent essay on the changes *SLB L* made explains that the exclusion in *JPMorgan Chase & Co. 2021* was precisely the type of exclusion the Staff meant to end, because it was counter to the Rule's purpose:

> *Instead, the Staff exclusion appears to have focused only on the direct*

[71] (Emphasis added) available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/mcritchieyounggoldman030921-14a8.pdf

> *economic importance to JP Morgan, rather than other issues of proper concern to shareholders, namely the systemic impact of the company on its industry, society, and capitalism at large.*[72]

Thus, the Company Letter's reliance on *Goldman 2021* is mistaken.

4. Previous Staff concurrence in exclusion of proposals addressing cost externalization policy issue relied on failure to meet nexus requirement, which has been eliminated

The Company Letter also claims that concurrence in the exclusion of two prior proposals shows the Proposal can be excluded because it relates to "broad external costs," i.e., the broad profit-at-any-cost issue within which the question of underwriting multi-class offerings is embedded. In fact, the three decisions cited in the Company Letter show just the opposite: Of the three external cost proposals, the SEC concurred in exclusion only where it determined the nexus test was not met, showing that a report regarding cost externalization to increase profits does raise a significant policy issue.

The Company Letter cites *Marriott International Inc.* (March 26, 2021), *CVS Health Corp.* (March 22, 2021, *recon. denied* Mar.30, 2021) and *PepsiCo, Inc,* (March 12, 2021). It argues that in the former two situations, the Staff concurred with exclusion of proposals that focused on the issue of profiting by externalizing costs. While the Staff permitted exclusion as ordinary business, it is apparent that, as was the case with *Goldman Sachs 2021* and *JPMorgan Chase 2021,* the Staff was relying on the nexus test, and not on the nature of the proposals themselves. This is clear because in *PepsiCo 2001*, the Staff did not concur with exclusion of a proposal that was nearly identical to the excluded CVS proposal (asking for a study of public health costs associated with the company's food and beverage business). It is apparent that the reason for the different outcome was that the food and beverage business was almost the entire business for PepsiCo, while it played a much smaller role in the CVS business. The Staff made this distinction clear by using the same "to the Company" language as was used in *JPMorgan 2021* and the *SLB L* in explaining why the CVS proposal (but not the PepsiCo proposal) could be excluded:

> *Indeed, a proposal related to the external public health costs created by the food and beverage business of a company may raise a significant policy issue that transcends a company's ordinary business operations (see, e.g., PepsiCo, Inc. (March 12, 2021)). However, in our view, the Proposal does not demonstrate how external public health costs created by the Company's retail food business are* ***sufficiently significant to the Company****, such that they transcend the Company's ordinary business operations and would be appropriate for a shareholder vote.*[73]

Thus, rather than demonstrating that proposals concerning the externalization of costs and the effect of such costs on diversified shareholders are excludable as ordinary business, the instances cited in the

[72] Sanford Lewis, *SEC Resets the Shareholder Proposal Process,* Harvard Law School Forum on Corporate Governance (December 23, 2021).
[73] Available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/youngcvsrecon033021-14a8.pdf.

Company Letter show that such proposals do represent significant policy issues, which will no longer be excluded for lacking sufficient nexus to the company.

CONCLUSION

The Proposal addresses a significant policy issue: the cost of the Company's continuing to underwrite a type of security offering that has been controversial for more than a century and that continues to be subject to vigorous public debate, all to maximize financial returns, even if doing so harms the economy.

The Company's arguments to the contrary rely on a policy the Staff recently disavowed, making it clear there is no basis for the conclusion that the Proposal is excludable from the 2022 proxy statement pursuant to Rule 14a-8. As such, we respectfully request that the Staff inform the Company that it is denying the no-action letter request. If you have any questions, please contact me at rick@theshareholdercommons.com or 302-485-0497.

Sincerely,

Rick Alexander
CEO

cc: Beverley O'Toole
John Harrington

THE PROPOSAL

[Goldman Sachs Group, Inc: Rule 14a-8 Proposal, November 18, 2021]
[This line and any line above it – *Not* for publication.]
ITEM 4*: Report on costs of multi-class equity offerings

RESOLVED, shareholders request that the board commission and publish a study, at reasonable cost and excluding proprietary information, on the external costs created by the Company's underwriting multi-class equity offerings and the manner in which such costs affect the majority of its shareholders who rely on overall stock market return.

Supporting Statement:

Our Company underwrites initial public offerings providing perpetual control to insiders with high-vote stock,[74] contributing to poor governance that harms investors as a class, including companies with three classes of stock having 20, 1, and 0 votes.[75] As the Company advised investors, its most critical stakeholder group, "[u]sing multi-class voting to insulate management from its own shareholders comes at a significant long-term cost."[76]

These structures give unchecked power to insiders, whose concentrated interests are misaligned with the interests of typical diversified shareholders. As a working paper co-authored by a Nobel Laureate notes, "initial entrepreneurs are not well-diversified and so they want to maximize the value of their own company, not the joint value of all companies."[77]

By lending reputation and expertise to marketing governance structures that risk both underperformance and misalignment of corporate control with shareholder interests, the Company jeopardizes the viability of the one share, one vote governance model that creates significant economic wealth for shareholders and society. As a 2020 study noted, "if many similarly-situated *[sic]* companies [accept a higher cost of capital for multi-class shares], then the prevalence of dual class shares might have negative consequences for the economy as a whole."[78]

To the extent our Company is increasing its own financial returns by facilitating multi-class share structures, its own increased profits are coming at a severe cost to the global economy. This is a bad trade for most of the Company's shareholders, who are diversified and thus rely on broad economic growth to achieve their financial objectives. A Company strategy that increases its own financial returns but threatens global GDP is counter to the best interests of most of its shareholders: the potential drag on GDP created by facilitating poor governance will directly reduce their long-term returns.[79]

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[74] See, e.g., https://www.sec.gov/Archives/edgar/data/0001874178/000119312521289903/d157488ds1.htm (Rivian Automotive); https://www.sec.gov/Archives/edgar/data/1559720/000119312520294801/d81668ds1.htm (Airbnb).
[75] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=987488; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2954630
[76] https://www.forbes.com/sites/simonconstable/2019/09/30/goldman-sachs-warning-one-share-one-vote-or-else-the-stocks-shares-will-suffer/?sh=6cb9916e71da
[77] https://ssrn.com/abstract=3680815 or http://dx.doi.org/10.2139/ssrn.3680815
[78] https://www.capmktsreg.org/wp-content/uploads/2020/04/The-Rise-of-Dual-Class-Shares-04.08.20-1.pdf
[79] https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf

Despite this risk, the Company has not disclosed any analysis of the trade-offs between Company profit and global economic health from the perspective of its largely diversified shareholders, whose investment portfolios may be at grave risk from increasing concentrations of power through multi-class share structures.

The requested report will help shareholders determine whether current Company policies serve shareholders' best interests.

Please vote for: Report on costs of multi-class equity offerings – Proposal 4*
[This line and any below are *not* for publication]
[*Number to be assigned by the Company]