



Why Dual-Class Stock: A Brief Response to Commissioners Jackson and Stein

Posted by David Berger, Wilson Sonsini Goodrich & Rosati, on Thursday, February 22, 2018

Editor's note: [David Berger](#) is a partner at Wilson Sonsini Goodrich & Rosati. This post is based on a publication by Mr. Berger. Related research from the Program on Corporate Governance includes [The Untenable Case for Perpetual Dual-Class Stock](#) by Lucian Bebchuk and Kobi Kastiel (discussed on the Forum [here](#)).

Two SEC Commissioners—Robert Jackson and Kara Stein—separately visited Silicon Valley last week, and both used the opportunity to sharply criticize the practice among some companies—most notably but not exclusively technology companies—to adopt so-called “perpetual” dual-class stock.¹ In typical dual-class structures, one group of stockholders (typically the founders and other insiders) receive stock with multiple votes per share, while shares purchased by investors in the company’s initial public offering (“IPO”) or thereafter on the open market have just one vote per share.²

The debate over dual-class stock, including perpetual dual-class stock is not new; just last fall two leading academics, Professors Lucian Bebchuk and Kobi Kastiel, published an article calling for a sunset provision on all dual-class stock, using the situation in Viacom in support of their proposal.³ Their position is similar to the one proposed by Commissioner Jackson.⁴

The purpose of this short response is to (1) identify some of the underlying causes that have led companies, including many of our most innovative and dynamic public companies, to adopt dual-class stock and (2) offer some broader solutions that the SEC can consider as it seeks to address some of the perceived problems with dual-class stock. In particular, while Commissioners Jackson and Stein focused on some of the perceived and/or potential problems with dual-class

¹ See Commissioner Robert J. Jackson, Jr., “*Perpetual Dual-Class Stock: The Case Against Corporate Royalty*,” February 15, 2018, available at <https://www.sec.gov/news/speech/perpetual-dual-class-stock-case-against-corporate-royalty>; and Commissioner Kara M. Stein, “*Mutualism: Reimagining the Role of Shareholders in Modern Corporate Governance*,” February 13, 2018, available at <https://www.sec.gov/news/speech/speech-stein-021318>.

² Although the primary focus of Commissioner Jackson’s talk was against “Perpetual dual-class stock,” most technology companies do not have perpetual dual-class stock structures. Ironically, perpetual dual-class stock structures are most common in companies founded by very conservative, supposedly “free-market” entrepreneurs, such as Rupert Murdoch’s News Corp., the Smith family’s Sinclair Broadcast Group, and John Malone’s Liberty Media Group. In March 2017 the Council of Institutional Investors (“CII”) published the most complete list of dual-class companies. See [http://www.cii.org/files/3_17_17_List_of_DC_for_Website\(1\).pdf](http://www.cii.org/files/3_17_17_List_of_DC_for_Website(1).pdf).

³ See Lucian Bebchuk and Kobi Kastiel, “The Case Against Perpetual Dual-Class Stock,” 103 *Virginia L.Rev.* 585, (2017).

⁴ I opposed mandatory sunset provisions for dual-class stock in a post in these pages, arguing that private ordering was a better system of regulation for dual-class stock, and again urging regulators to look at the broader factors leading companies to consider dual-class stock. See David J. Berger, “*Dual-Class Stock and Private Ordering: A System that Works*,” *Harv. Corp. Gov. Blog*, May 24, 2017.

stock, the challenges faced by our corporate republic are far greater than those caused by dual-class stock.

The problem arises as a result of the growing “financialization” of our corporate governance structures since the 1980s, which includes allowing equity capital to become the lone determinant voice of what constitutes “good governance.” These issues have become exasperated by the changing nature of equity capital itself, as the retail investor has largely disappeared and been replaced by a handful of large institutional investors.

The issues with dual-class stock should not be addressed in isolation, but rather as part of a broader review of the issues facing our corporate “republic.” This includes looking at the changing nature of share ownership, the role of the institutional investor (and shareholder activists) and an understanding that about half of all households in the U.S. have no direct or indirect ownership of equities—and thus no say in what constitutes good corporate governance or how corporations should behave—yet are often reliant on these same corporations for everything from employment to retirement, while the corporation is equally dependent on these households for finding qualified employees to consumers for their products. Within this broader context the notion of dual-class stock should be considered, as it really was developed to respond to the changing nature of our corporate republic.

The rest of this response addresses these issues. Part I quickly summarizes the growth and use of dual-class stock today. Part II briefly reviews the changes in our corporate governance regime since the 1980s, including the financialization of corporate governance, the changing role of institutional investors, and how these factors led to the growth of dual-class stock. The essay concludes by offering some suggestions and options for the SEC to consider if it wants to address these issues more broadly.

A full copy of the essay can be found [here](#).