THE UK AND DUAL-CLASS STOCK-LITE – IS IT REALLY EVEN BETTER THAN THE REAL THING?

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In December 2021, the Financial Conduct Authority (FCA) revised the Listing Rules applicable to companies listed on the London Stock Exchange's (LSE) Main Market to permit the premium-tier listing of companies with specified weighted voting rights shares structures. The revision, broadly based upon the concept of "dual-class stock," was premised on a desire to attract innovative, high-growth firms to the LSE. Founders would now be able to list their firms, sell equity and issue further shares for growth without fully relinquishing voting control. However, the FCA was clearly also concerned that an unconstrained dissociation between voting and cash flow rights could incentivize pernicious behavior on the part of founders. Accordingly, specified weighted voting rights shares structure embodies various conditions that restrain a founder's ability to access the full gamut of advantages that dual-class stock can offer. As a result, specified weighted voting rights shares is more dual-class stock-lite rather than a fully-fledged premium-tier move toward multiple voting rights share structures. Less than two years later, the FCA appears prepared to revisit its approach to dual-class stock. Did the FCA get it wrong with dual-class stock-lite? In this article, each of the conditions attached to the use of specified weighted voting rights shares is scrutinized in the context of whether it appropriately balances the desire of founders for flexibility with public shareholder protection. If the intention was to encourage visionary founders to list their high-growth firms on the LSE, it is understandable that the FCA apparently now has buyer's remorse.

Introduction

The notion of the controlling shareholder in publicly listed companies has been much debated in academia and policy circles for decades.[1] Upon the initial public

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1 *See, e.g.,* Clifford Holderness & Dennis Sheehan, *The Role of Majority Shareholders in Publicly Held Corporations: An Exploratory Analysis*, 20 J. Fin. Econ. 317 (1988); Ronald Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 Harv. L. Rev. 1641 (2006); Jens Dammann, *The Controlling Shareholder's General Duty of Care: A Dogma That Should Be Abandoned*, 2 U. Ill. L. Rev. 479 (2015); Bobby Reddy, *The Fat Controller: Slimming Down the Excesses of Controlling Shareholders in UK Listed Companies*, 38 Oxford J. Legal Stud. 733 (2018); Ronald Gilson & Jeffrey Gordon, *Controlling Controlling Shareholders*, 152 U.Pa. L. Rev. 785 (2003).

offering (IPO) of a company, an existing shareholder with a majority of votes in the company can, assuming relevant free-float requirements are observed,[2] retain a majority of the votes in the company while selling existing stock or issuing new stock to the public. In essence, the original controller retains control notwithstanding the company becoming listed. Of course, the downside to such an approach is that, at IPO, the controller must restrict the level of equity that it sells and the new equity issued for growth. A nuance to the debate on controlling shareholders is the concept of dual-class stock—a controlling shareholder on steroids. With dual-class stock, a controlling shareholder can maintain control upon IPO without holding a majority of the equity by holding shares to which are attached greater voting rights than those issued to the public shareholders. Accordingly, a controller can crystallize its investment in a private company and issue further fresh equity at IPO without relinquishing voting control in the company to public shareholders.

The discourse on dual-class stock took on a new light in the 2000s and 2010s, as the structure was adopted by swathes of US IPOs by founder-led corporations in the tech industry.[3] At one stage dual-class stock was arguably the hottest topic in corporate governance.[4] While the polemic surrounding dual-class stock in the U.S. has not abated, it has perhaps somewhat waned, as the structure has become a mainstay of the U.S. capital markets,[5] and dual-class stock controversies have not (perhaps yet) arisen in vast numbers. However, internationally, dual-class stock has taken on new pertinence, no more so than in the UK. After years of institutional investor protest, in December 2021, in the face of mounting criticism of the London Stock Exchange's (LSE) lack of competitiveness on the global stage,[6] the Financial Conduct Authority (FCA), as the regulator of the exchange, appeared to finally amend the listing rules that apply to LSE Main Market-listed companies (Listing Rules) to permit dual-class stock on the most prestigious segment of the exchange—the premium tier.[7] Or did it?

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2 *E.g.,* in the UK, potential issuers will not be admitted to the LSE's Main Market unless at least 10% of the shares of the company will be in public hands after admission. See the rules promulgated under the Listing Rules, FCA Handbook [hereinafter LRs], LR 5.2.2(G)(2), LR 6.14.2(R)(2), LR 14.2.2(R)(3).

3 Steven Solomon, *Shareholders Vote with Their Dollars to Have Less of a Say*, N.Y. Times (Nov. 4, 2015) https://www.nytimes.com/2015/11/05/business/dealbook/shareholders-vote-with-theirdollars-to-have-less-of-a-say.html; Jill Fisch & Steven Solomon, *The Problems of Sunsets* 99 B. U. L. Rev. 1057, 1068 (2019).

4 *See, e.g.,* John Coffee, *Dual Class Stock: The Shades of Sunset*, CLS Blue Sky Blog (Nov. 19, 2018) https://clsbluesky.law.columbia.edu/2018/11/19/dual-class-stock-the-shades-of-sunset/.

5 Council of Institutional Investors, Dual-Class IPO Snapshot: 2017–2020 Statistics (2020).

6 *See, e.g.,* Simon Foy, *London's Stock Market Fights to Become a Post-Brexit Global Leader,* The Telegraph (Feb. 2, 2021) https://www.telegraph.co.uk/business/2021/02/02/londons-stock-market-fights-become-post-brexit-global-leader/; Peter Harrison, *The City Must Back Sunak's Vision for the Stock Market,* The Sunday Times (Apr. 11, 2021), https://www.thetimes.co.uk/article/the-city-must-back-sunaks-vision-for-the-stock-market-vg69jss8x; Buttonwood, *From A-list to Delist,* Economist 76 (Oct. 19, 2019); Briefing, *Britain's Sluggish Stockmarket*, Economist 18 (Oct. 2, 2021).

7 *See* FCA, *Primary Market Effectiveness Review: Feedback and Final Changes to the Listing Rules* 9-15 (Policy Statement PS21/22, 2021)—the final amendments were implemented into the Listing Rules effective as of December 3, 2021.

Rather aptly, the FCA did not use the "dual-class stock" moniker for its premium-tier version of multiple voting rights shares. Instead, the term "specified weighted voting rights shares structure" (SWVRS structure) was used. A mouthful, perhaps, but distinguishing the regime from dual-class stock avoided any claims of false pretenses—arguably SWVRS structure is no more than "dual-class stock-lite." SWVRS structure can be adopted by companies listing on the premium tier, at the time of listing, but only if certain conditions are implemented. The reasoning underpinning the conditions is the perception that public investors need protection from the excesses that dual-class stock could incentivize. The fear that dual-class stock could be utilized by a founder to control a company primarily for the founder's benefit rather than in the interests of shareholder value clearly permeated the FCA's thinking on SWVRS structure.[8] Some of the relevant conditions mirror requirements apparent in other jurisdictions or which have been commonly adopted voluntarily by U.S. dual-class stock companies. However, some of the conditions go above and beyond the mandatory requirements of other exchanges, and one could challenge whether SWVRS structure accomplishes what it set out to achieve, namely increasing the competitiveness of the LSE and attracting growth firms to the market at earlier stages of their lifecycles.[9]

In this article, the benefits and detriments of dual-class stock are briefly elucidated in the context of why the LSE has become more amenable to multiple voting right shares structures on its flagship segment. After outlining the conditions that the FCA has attached to SWVRS structures, the article assesses each of those conditions in turn from the perspective of what mischiefs they are intended to temper, and whether they impede the overarching policy goal to attract growth companies to the exchange. The article continues by arguing that SWVRS structure will ultimately fail to attract to the LSE the types of companies intended, and that a potential change of tack on dual-class stock recently announced by the FCA may be the sensible course of action.

I. The Benefits and Detriments of Dual-Class Stock

Dual-class stock has a storied history, and its merits and costs have long vexed academic commentators.[10] I, like many others, have extensively discussed the benefits and detriments of dual-class stock in previous work,[11] and it is outside the scope

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8 *See, e.g.,* FCA, *Primary Markets Effectiveness Review* §5.20, §5.50 (Consultation Paper, CP21/21, 2021).

9 HM Treasury, UK Listing Review 19 (2021) [hereinafter Hill Review].

10 *See, e.g.,* Frank Easterbrook & Daniel Fischel, *Voting in Corporate Law* 26 J. Law Econ. 395 (1983); Peter Flocos, *Toward a Liability Rule Approach to the "One Share, One Vote" Controversy: An Epitaph for the SEC's Rule 19c-4?,* 138 U. PA. L. Rev. 1761 (1989–1990); Lucian Bebchuk et al., *Stock Pyramids, Cross-Ownership, and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash-Flow Rights, in* Concentrated Corporate Ownership 301 (Randall Morck ed., 2000).

11 Bobby Reddy, *Finding the British Google: Relaxing the Premium-Tier Prohibition of Dual-Class Stock*, 79 Cambridge L.J. 315, 328-46 (2020) [hereinafter Reddy, *Finding*]; Bobby Reddy, Founders Without Limits: Dual-Class Stock And The Premium Tier Of The London Stock Exchange, Ch. 6 (2021);

of this article to substantively determine whether relaxing the rules on dual-class stock in the UK is holistically beneficial for the market. Instead, the conditions that the FCA has attached to SWVRS structure will be critically scrutinized to evaluate whether they will achieve the goal of attracting innovative, high-growth firms to the LSE. However, at least a brief exposition of the common contentions for and against dual-class stock, grounded in the context of the LSE's current market environment, will give color to how and why the SWVRS regime has developed.

The trials and tribulations of the LSE have provided regular media fodder in recent years.[12] A decade ago, the LSE was considered a contender in the fight for global dominance between exchanges.[13] However, the U.S. exchanges have since left the LSE for dust, and, on some metrics, Paris and Amsterdam have threatened to steal London's crown as the European equity market destination of choice.[14] A consistently greater level of exits from the LSE than companies joining the exchange has resulted in dwindling issuers,[15] and reports that bastions of the LSE have or are considering jumping ship to U.S. exchanges will not help the LSE's cause.[16] The other end of that trend is that since the financial crisis of 2008/2009, the LSE's Main Market has struggled to attract new firms at the levels seen previously.[17] In particular, the LSE's profile for high-growth, especially tech, firms is paltry.[18] Recently, several UK private companies from the tech industry have listed in the U.S. rather than the UK[19]—the numbers may not constitute a flood, but the pattern has started to cause concern, exacerbated by the loss of ARM, a blue-chip UK tech company, to Nasdaq.[20] Additionally, large UK private companies have been disproportionately

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Bobby Reddy, *More Than Meets the Eye: Reassessing the Empirical Evidence on U.S. Dual-Class Stock,* 23 U. Pa. J. Bus. L. 955, 968-73 (2021) [hereinafter Reddy, *More Than Meets the Eye*].

12 *See, e.g., Big Bang to a Whimper*, Economist (Oct. 2, 2021), 9; *How to Revive London's Flagging Stock Market,* Fin. Times (January 8, 2022), 10; Patrick Hosking & Helen Cahill, *London's Calling Falls on Deaf Ears for Firms Looking to List,* The Times (Mar. 4, 2023) https://www.thetimes.co.uk/article/london-s-calling-falls-on-deaf-ears-for-firms-looking-to-list-3v2s3p3qt.

13 Adam Davidson, *London is Eating New York's Lunch,* N.Y. Times Mag. (Feb. 29, 2012), https://www.nytimes.com/2012/03/04/magazine/how-london-surpassed-wall-street.html.

14 Sam Fleming et al., *The EU vs the City of London: A Slow Puncture,* Fin. Times (Jan. 10, 2022), https://www.ft.com/content/f83ddf05-e7a1-4c9b-83ad-e82a54c71afa; Chris Flood, *France Challenges UK for Title of Europe's Biggest Equities Market,* Fin. Times (Nov. 14, 2022), https://www.ft.com/content/db5d516a-4b35-4e85-8b02-4ddd73b48e0b.

15 Brian Cheffins & Bobby Reddy, *Will Listing Rule Reform Deliver Strong Public Markets for the UK,* 86 Modern L. Rev. 176, 208 (2023).

16 Derek Brower et al., *Shell Explored Quitting Europe and Moving to the US,* Fin. Times (Feb. 28, 2023) https://www.ft.com/content/5940c650-ae5d-4465-919c-d3359967e03a; Daniel Thomas et al., *Fears for London Market After SoftBank's Arm and Building Group CRH Opt for New York,* Fin. Times (Mar. 3, 2023), https://www.ft.com/content/da4e8397-ef73-4d21-9062-1542d715d45c; Nikou Asgari, *London Stock Exchange Chief Shrugs Off UK Companies Switching Listings to US,* Fin. Times (Mar. 2, 2023), https://www.ft.com/content/551c8ace-8c5b-44b8-9ea4-cf4521cdd077.

17 Cheffins & Reddy, *supra* note 15, at 208.

18 *See id.,* at 186-87.

19 Reddy, *supra* note 11, at 52. More recently, see Bobby Reddy, *Warning the UK on Special Purpose Acquisition Companies (SPACs): Great for Wall Street But a Nightmare on Main Street,* 22 J. Corp. L. Stud. 1, 7 (2022).

20 Katie Prescott & Helen Cahill, *Arm's US Listing Leads to Calls for Reform of London Stock Market,* The Times (Mar. 4, 2023), https://www.thetimes.co.uk/article/arms-us-listing-leads-to-calls-for-reform-of-

the subject of acquisitions by overseas companies.[21] As those companies, together with their assets and jobs, leak to foreign climes, the UK government and regulators have woken up to the hollowing out of the LSE. A political imperative to cast Brexit in terms of positives rather than negatives has also spurred the government into action, with the LSE having been held up pre-Brexit as a national symbol of pride.[22]

The lack of growth companies on the LSE's Main Market is troubling for those seeking to resuscitate the LSE. London is dominated by mature, income-producing companies from old economy industries such as mining, banking, and energy.[23] The growth-phase companies that have bolstered the returns on U.S. exchanges in recent times are absent from the London market,[24] with those growth-phase returns being the preserve of privileged investors able to invest in private corporations.[25] In that context, UK regulators would have noted the large numbers of U.S. founder-led, high-growth, tech companies listing in the U.S. with dual-class stock,[26] as well as the handful of UK tech companies that took the opportunity to list in the U.S. with such a capital structure.[27] A potential inference was that the prohibition of dual-class stock on the premium tier of the LSE's Main Market was deterring founders from listing their firms on the LSE and, in some cases, contributing to the decision of founders of UK businesses to list in the more dual-class stock-friendly environs of the U.S. exchanges. With dual-class stock, a founder can hold shares to which are attached multiple or "enhanced" voting rights, and issue shares with lower or "inferior" voting rights to the public upon IPO. In that way, the capital structure of the company can be engineered to ensure that the founder retains voting control upon IPO while holding a minority of the equity in the company.

Although there may be a variety of reasons why those growth companies are discouraged from listing on the exchange, one factor that has been raised is the fear that founders of innovative growth companies have of exposing their firms to the

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21 FCA, *Review of the Effectiveness of Primary Markets: The UK Primary Markets Landscape* 26 (Discussion Paper, DP17/2, 2017); Off. Nat'l Stat., *Mergers and Acquisitions Involving UK Companies: July to September 2022,* app. 1, 8 (Dec. 6, 2022), https://www.ons.gov.uk/businessindustryandtrade/changestobusiness/mergersandacquisitions/bulletins/mergersandacquisitionsinvolvingukcompanies/julytoseptember2022; Reddy, *Finding*, *supra* note 11, at 321.

22 *What Brexit will do to the City of London,* The Economist (Oct. 24, 2020), https://www.economist.com/britain/2020/10/24/what-brexit-will-do-to-the-city-of-london; Brian Cheffins & Bobby Reddy, *Law and Stock Market Development in the UK Over Time: an Uneasy Match*, 43 Oxford J. Legal Stud. 725, 751 (2023).

23 Paul Marshall, *London is Becoming the Jurassic Park of Stock Exchanges*, Fin. Times (Dec. 1, 2021) https://www.ft.com/content/847b0335-7835-4b4f-9dc6-39ba944baadc; Mike Tubbs, *The British Software Sector Stars Investors Should Buy Now,* Moneyweek (Oct. 11, 2018) https://moneyweek.com/496376/the-british-software-sector-stars-tech-stocks-to-buy-now/.

24 Cheffins & Reddy, *supra* note 15, at 180; Graeme Wearden, *Can London Stock Market Shake Off Dinosaur Image to Boldly Go?*, The Guardian (Jan. 4, 2022) https://www.theguardian.com/business/2022/jan/04/can-london-stock-market-shake-off-dinosaur-image-to-boldly-go.

25 Merryn Webb, *Private Equity is a Club and the Ordinary Investor is Not Invited*, Fin. Times (Aug. 28, 2020), http://www.ft.com/content/80ff5ee1-cc36-4140-9f25-f60b14b3720c.

26 Reddy, *supra* note 11, at 19; also *see infra* notes 58-59, and accompanying text.

27 *See, e.g.,* the listings of Farfetch and Endava on the NYSE (Reddy, *supra* note 11, at 21).

vicissitudes of the public markets.[28] If a founder lists its firm on an exchange with a capital structure where each share, whether held by the founder or public shareholders, has attached to it a single vote ("one share, one vote"), it will lose voting control of the company unless it retains a majority of the equity. Retaining a majority of the equity often negates the reason for listing in the first place—realizing value in the founder's investment in the company and issuing further shares to raise finance for growth—making such an option impracticable for many founders. Founders of innovative "new economy"[29] companies, so goes the argument, are more likely to possess rare insight with idiosyncratic visions.[30] By their very definition, those visions may not be easily appreciable by others, so if voting control is ceded to the public shareholders, a founder will be concerned that its vision may be curbed by those shareholders, or those shareholders may transfer control to a third-party acquiror, if they are not able to see the long-term benefits of the process and approach that the founder employs. Dual-class stock has been put forward as a solution to such founder dilemmas. The dual-class stock structure gives a founder scope to divest of substantial investment in the company and issue further shares for growth while maintaining voting control, thereby enabling a founder to pursue his or her vision for the business without interference from public shareholders.

The considerations described above led to the government initiating a review into UK listing reforms, known widely as the "Hill Review,"[31] which presaged a number of revisions to the Listing Rules[32] by the FCA. One of those reforms was to permit companies to list on the premium tier with SWVRS structure[33]—a model that takes its inspiration from dual-class stock, with a key intent to attract founders of high-growth companies to the LSE.[34]

When it comes to dual-class stock, though, perhaps the Hill Review and the FCA also took note of the old adage, "too good to be true." Rather than usher in a style of dual-class stock that mimics the U.S. market, SWVRS structure is only permitted on the premium tier if the issuer adheres to various conditions. Those conditions stem from an unease that unconstrained dual-class stock could incentivize founders holding multiple voting rights shares to use their control to cause the company to take actions that benefit them personally to the detriment of shareholder value. The extraction of such "private benefits of control" theoretically becomes more likely at an increasing rate the greater the divergence between voting rights and equity

28 Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision* 125 Yale L.J. 560, 579 (2016).

29 One definition of the "new economy" is the economic structure resulting from the intersection of globalization and information technology. *See in* Matti Pohjola, *The New Economy: Facts, Impacts and Policies,* 14 Info. Econ. & Pol. 133, 134 (2002).

30 *See* Goshen & Hamdani, *supra* note 28, at 577.

31 *Supra* note 9.

32 *See* FCA, *Investor Protection Measures for Special Purpose Acquisition Companies – Changes to the Listing Rules* (Policy Statement, PS21/10, 2021); FCA, *supra* note 7.

33 FCA, *supra* note 7, at 9-15. Other reforms included relaxing the rules around special purpose acquisition companies, reducing the free-float requirements on the Main Market, and increasing the minimum market capitalization for Main Market issuers.

34 *See, e.g.,* Hill Review, *supra* note 9, at 20.

ownership, since the controller becomes increasingly less affected by its shareholder value-impacting actions as its equity ownership decreases.[35]

The extraction of private benefits of control can manifest itself in many ways. For example, a holder of multiple voting rights shares could use his or her voting control to compose a board that will appoint himself or herself as chief executive officer (CEO) of the company, and use such a leadership position to transfer assets and profits out of the firm for his or her personal benefit—often described as "tunneling."[36] At the extreme end, tunneling could amount to fraud,[37] but lesser forms could also be incentivized by dual-class stock structure, such as a propensity for such a CEO to pay himself or herself disproportionately high wages[38] or to give other corporations, in which the same controller has higher equity interests, more favorable terms in related-party transactions with the dual-class stock firm.[39] Private benefit extraction may also be more subtle, with the relevant dual-class stock firm controller causing the company to enter into pet projects purely for personal satisfaction rather than shareholder value,[40] or simply rejecting a takeover, which would otherwise be lucrative to selling stockholders, due to an emotional desire to retain control of the business he or she founded.[41] Of course, the CEO of any company, whether or not dual-class stock, could engage in similar behavior, but dual-class stock encompasses the double-whammy of the public shareholders not being able to remove the relevant CEO from his or her position running the company and that CEO being largely financially insulated from a decline in shareholder value if he or she only holds a sliver of the equity. Although there is a dearth of conclusive evidence that dual-class stock is, on average, harmful to public shareholders,[42] the hostility of UK institutional investors, who have significant influence over regulatory policy in the UK,[43] to dual-class stock led to the UK regulators treading lightly.[44]

The conditions that have been imposed on SWVRS structure aim to restrain the ability of a founder employing the structure to extract extreme private benefits

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35 Lucian Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers* 107 Geo. LJ. 1453, 1473 (2019); Bebchuk et al., *supra* note 10, at 301.

36 Simon Johnson et al., *Tunneling*, 90 Am. Econ. Rev. 22, 22 (2000).

37 Examples of controller fraud were apparent in the early 2000s failures of dual-class stock firms Adelphia and Hollinger International. *See* Reddy, *supra* note 11, at 191.

38 *See id.,* at 190.

39 *See id.,* at 193.

40 *See id.,* at 202.

41 *See id.,* at 204.

42 Reddy, *More Than Meets the Eye*, *supra* note 11, at 1012-16. Reddy, *supra* note 11, at 304-307. In relation to the quality of disclosure by dual-class firms, *see* Dov Solomon et al., *The Quality of Information Provided by Dual-Class Firms*, 57 Am. Bus. LJ. 443 (2020); Rimona Palas & Dov Solomon, *The Quality of Earnings Information in Dual-Class Firms: Persistence and Predictability*, 7 J. L. Fin. & Acct. 127 (2022).

43 John Armour & David Skeel, *Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of U.S. and U.K. Takeover Regulation* 95 Geo. L.J. 1727, 1771 (2007); Luca Enriques et al., *The Basic Governance Structure: Minority Shareholders and Non-shareholder Constituencies*, *in* The Anatomy Of Corporate Law 104 (Reinier Kraakman et al. eds., 2017).

44 Reddy, *supra* note 11, at 75-78*;* Philip Stafford & Attracta Mooney, *Investors Push Back Against UK Listings Overhaul,* Fin. Times (Mar. 3, 2021) https://www.ft.com/content/8ed0d759-c34f-4f3f-a076-6461093da6a2

of control. The conditions restrict the matters on which a controller can exercise disproportionate voting control, only allow SWVRS structure to endure for a finite period, prevent a controller from completely disassociating itself from the harm felt by falls in shareholder value, and restrict who can hold enhanced-voting rights. Those conditions are described further in the next section, along with the tightrope that the regulators have had to navigate.

II. The Conditions Attached to SWVRS Structure

An important point to note is that SWVRS can only be adopted by a firm when it is first admitted to the premium tier.[45] This is an eminently sensible caveat, since it prevents post-IPO "mid-stream" changes in capital structure from one share, one vote to SWVRS, which would be difficult for investors to price-in at the time of IPO.[46] Being able to price-in the risks of any capital structure is a crucial consideration for investors. By investing at a discounted price compared to similar firms with less risky capital structures, the impact on returns if such risks do crystallize will be mitigated. With respect to U.S. dual-class stock firms, such pricing-in may explain why many studies have found that investors in dual-class stock firms do not accrue lower returns as compared to investors in similar one share, one vote firms.[47] However, if a one share, one vote capital structure could be converted into dual-class stock at a later date, it makes it challenging at the time of IPO to price-in the possibility that such a conversion (and the attendant future risks) may subsequently occur. An additional SWVRS requirement is that only one share, one vote shares can be listed on the premium tier, with any enhanced-voting shares within a SWVRS structure having to remain unlisted.[48] Beyond those requirements, SWVRS firms must adhere to four further conditions to be admitted on the premium tier:

1. *Restrictions on the Exercise of Enhanced-Voting Rights*: Enhanced-voting rights can only be exercised on decisions to remove the holder as a director on the board, unless there is a change of control, in which case enhanced-voting rights can be exercised on all matters.[49]
2. *Time-Dependent Sunset*: SWVRS structure can only persist for a period of five years post-admission to the premium tier.[50]

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45 LR 9.2.22AR(2).

46 Similarly, on the NYSE, subject to exceptions, the rights of existing public stockholders cannot be disparately reduced or restricted by the post-IPO implementation of dual-class stock. *See* N.Y. Stock Exch., NYSE Listed Company Manual §313.00 (A), https://nyse.wolterskluwer.cloud/listed-company-manual/09013e2c8503fcb5.

47 Reddy, *More Than Meets the Eye*, *supra* note 11, at 1004-1005.

48 LR 7.2.1AR, Premium Listing Principle 4.

49 LR 9.2.22CR(2).

50 LR 9.2.22AR(3).

3. *Maximum Voting Ratio*: The votes attached to enhanced-voting shares cannot exceed more than twenty times the votes attached to the inferior-voting shares admitted to the premium tier and issued to public shareholders.[51]
4. *Director-Linked Sunset*: Only directors of the company can hold enhanced-voting shares.[52]

The FCA determined that a balance needed to be maintained.[53] On the one hand, there is a need to attract high-growth companies to the LSE, with dual-class stock being identified as one piece of the jigsaw required to attract those firms.[54] It may well be true that many companies will wait until they are more mature, established, and have more resources before listing, but, as the Hill Review noted,[55] the LSE lags behind other markets when it comes to attracting firms that are still within their growth phases. During a ten year period between 2007 and 2017 during which dual-class stock firms were permitted on the U.S. exchanges but not on the LSE's premium tier, "new economy"[56] companies, which are often high-growth firms, constituted only 14% of total LSE market capitalization, compared to 60% and 47% on Nasdaq and the New York Stock Exchange (NYSE), respectively.[57] Although it certainly cannot be concluded that dual-class stock is the sole determinant of that divergence, during that period, the percentage that dual-class stock firms constituted of all tech (again, often growth companies) U.S. IPOs surged,[58] and between 2017 and 2022 that percentage has consistently remained above 35% of tech IPOs, reaching all-time highs of 45.5% and 50% in 2021 and 2022, respectively.[59] Similarly, after Hong Kong relaxed its prohibition on dual-class stock in 2018, a number of high-growth tech companies chose the exchange ostensibly for its new-found openness to dual-class stock,[60] some with astronomical market capitalizations.[61] On the other hand, when

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51 LR 9.2.22CR(2).

52 LR 9.2.22CR(3).

53 In relation to the reasons why the FCA was always unlikely to take the permissive approach to dual-class stock as apparent in the U.S., *see* Bobby Reddy, *Up the Hill and Down Again: Constraining Dual-Class Stock,* 80 Cambridge L.J. 530, 530-31 (2021).

54 See text accompanying *supra* notes 24-32.

55 Hill Review, *supra* note 9, at 19.

56 Pohjola, *supra* note 29, at 134.

57 Hong Kong Exchanges and Clearing, Concept Paper: New Board, 11 (2017).

58 Reddy, *supra* note 11, at 19.

59 Jay Ritter, Initial Public Offerings: Dual Class Structure of IPOs Through 2022 (2023), https://site.warrington.ufl.edu/ritter/files/IPOs-Dual-Class.pdf.

60 In the aftermath of the relaxation, Alibaba, Baidu, and Bilibili, Chinese companies that had previously eschewed the Hong Kong stock exchange in favour of the U.S. to benefit from dual-class stock (or in the case of Alibaba a structure with similar effect but previously prohibited in Hong Kong), "returned home" as secondary listings. Large primary dual-class stock primary listings have also taken place, with Meituan-Dianping and Xiaomi in 2018, and Kuaishou in 2021.

61 Alibaba's secondary listing in Hong Kong was the second largest IPO in the world (by way of proceeds) of 2019, and Xiaomi and Meituan Dianping were within the top-10 global IPOs in 2018. *See* KPMG, Mainland China and Hong Kong – 2019 review: IPOs and other market trends 4 (2020). Baidu and Kuaishou raised $3.1bn and $5.4bn, respectively, on the Hong Kong Stock Exchange. *See* Julia Fioretti, *Baidu Raises $3.1 Billion From Second Listing in Hong Kong*, Bloomberg (Mar. 17, 2021) https://www.bloomberg.com/news/articles/2021-03-17/baidu-is-said-poised-to-raise-3-1-billion-in-hong-kong-offering; Hudson Lockett & Ryan McMorrow, *TikTok rival Kuaishou hits $160bn valuation*

the FCA first proposed a relaxation of the premium-tier rules on dual-class stock, it was faced with significant opposition in certain quarters,[62] especially from the notoriously conservative UK institutional investor community.[63] The FCA therefore sought to allow a relaxation of the dual-class stock prohibition while at the same time limiting the extent to which public shareholders' rights were overridden. However, ultimately, the aim when relaxing any regulatory rules that diminish investor rights is to ensure that the relaxation is not pointless and that it creates some upside. In the next section, it will be discussed, for each of those conditions, whether that fine line was trodden effectively.

III. Assessing The Potential For SWVRS Structure To Attract High-Growth Companies To The LSE

A. Limits on the Exercise of Enhanced-Voting Rights

With a premium-tier SWVRS structure, in the normal course, enhanced-voting rights may only be exercised on resolutions pertaining to the removal of a holder of those rights as a director of the company.[64] Enhanced-voting rights may, however, be exercisable on any shareholder voting matter after a change of control of the company, broadly defined as the acquisition of a majority of the voting rights in the company.[65] Taking the change of control qualification first, the provision acts to give the holder of enhanced-voting shares a *de facto* veto right over a takeover of the company.[66] As soon as a bidder acquires a majority of the voting rights in the company, the enhanced-voting shareholder's rights are "activated," subsequently preventing the acquiror from effectively exercising any control rights over shareholder voting matters. In effect, the acquiror is prevented from securing control, and therefore, much in the same way as traditional dual-class stock, SWVRS acts as a deterrent to any takeover without the acquiescence of the holder of enhanced-voting shares.

As the Hill Review, which instructed the FCA's SWVRS reforms, noted, an opportunistic takeover bid is possibly the biggest threat to a founder's ability to bring its vision to fruition after an IPO.[67] This is particularly the case for high-growth, innovative companies (such as tech-companies), the types of companies the LSE is

as shares surge after IPO, Fin. Times (Feb. 5, 2021) https://www.ft.com/content/05686da9-60f8-4a3a-a5c5-95155bd01ffe.

62 Stafford & Mooney, *supra* note 44.

63 Reddy, *supra* note 53, at 545.

64 LR 9.2.22CR(2).

65 LR 9.2.22DR.

66 In a one share, one vote system, for a company listed on the LSE, shareholders holding voting rights play a decisive role in the success of any takeover bid. If proceeding as a takeover offer, the takeover must be conditional upon the bidder acquiring at least a majority of the target's voting rights. *See* The Panel on Takeovers and Mergers, The Takeover Code, Rule 10 (2023) [hereinafter The Takeover Code]. If proceeding as a scheme of arrangement, subject to Court sanction, shareholders who are a majority in number holding 75% of the votes exercised at a Court Meeting are required to approve the takeover. *See* Companies Act 2006, c. 46, § 899.

67 Hill Review, *supra* note 9, at 20.

seeking to attract, where future products may need to be kept confidential,[68] and where the correlation between the benefits of growth-phase investments in R&D and product-cycles may not be easily observable to public shareholders,[69] leading to the company becoming undervalued. Consequently, the company could become exposed to a predatory takeover bid, subsequent to which the founder could be removed from his or her management position leading the company.[70]

Albeit via a convoluted mechanism, with respect to blocking takeovers, SWVRS provides the same benefits as dual-class stock in the U.S. and other jurisdictions where dual-class stock may be adopted. Dual-class stock insulates founders who are in managerial roles from the market for corporate control[71] and enables them to grow their companies without fear that their visions could be curtailed by a new controller acquiring the company and changing its strategy. On this basis, SWVRS structure should positively influence founder decisions to list on the LSE. However, moving to the second qualification, the FCA's restriction on the exercise of enhanced-voting rights outside of a takeover scenario places SWVRS squarely outside the mainstream approach to dual-class stock on other exchanges. Other than upon takeovers, UK SWVRS only permits the exercise of enhanced-voting rights by a holder of those rights on decisions to remove that holder from the board, while the U.S. and Amsterdam do not impose any mandatory restrictions on the exercise of such rights,[72] and exchanges in Hong Kong, Singapore, Shanghai, and India have implemented more targeted protections where all shares are only treated as one share, one vote on specifically defined decisions.[73]

It is clear that SWVRS enables a holder of enhanced-voting shares to prevent the public shareholders from removing *that* holder from the board, but unlike traditional dual-class stock, the holder cannot prevent public shareholders from removing, and potentially appointing, *other* directors. Accordingly, even if SWVRS structure is adopted, the public shareholders, assuming that they own a majority of the equity, have control over the composition of the board as a whole. It is in the shadow of the power to determine the composition of the board that public shareholders are able to exert pressure on the manner in which a company is managed.[74] For a company incorporated in England and Wales, mandatory legislation provides that directors can be removed from the board with a majority vote of the shareholders,[75] and the constitution of such companies will usually give majority-voting shareholders

68 Adi Grinapell, *Dual-class Stock Structure and Firm Innovation*, 25 Stan. J. Law Bus. & Fin. 40, 62 (2020).

69 Thomas Chemmanur, *Dual Class IPOs: A theoretical analysis,* 38 J. Bank. & Fin. 305, 306 (2012).

70 In relation to the "market for corporate control," *see* Henry Manne, *Mergers and the Market for Corporate Control*, 73 J. Pol. Econ. 110 (1965).

71 *Supra* note 66. In relation to the impact of the market for corporate control on managerial behavior, see Marc Moore & Edward Walker-Arnott, *A Fresh Look at Stock Market Short-termism*, 41 J. Law & Soc. 416, 430, 438 (2014); Natalie Mizik, *The Theory and Practice of Myopic Management*, 47 J. Marketing Res. 594, 594 (2010).

72 Reddy, *supra* note 11, at 88, 113.

73 *Id.*, at 94, 98, 106, 109, 389-90.

74 Reddy, *supra* note 53, at 527.

75 Companies Act 2006, c. 46, §168.

decisive influence on appointments to the board.[76] Since the board determines the strategy of the company and, almost ubiquitously, has the power to hire and fire the management team,[77] the management team is in many respects indirectly beholden to the views and demands of the public shareholders as a group. In particular, even with SWVRS adopted, a founder who is the CEO of the company has no assurances that he or she will not be dismissed from that position by the board if public shareholders are unconvinced by the founder's continued tenure as CEO. Unlike with traditional dual-class stock, the board of an SWVRS firm will be cognizant that public shareholders have the power to remove them from their positions and their decision-making will therefore be influenced by the attitudes of those public shareholders.[78] There are many reasons why companies remain private, and the sheer volume of regulatory and governance rules that apply to public companies may persuade companies to remain private or delay listing. However, even if a firm were willing to observe the regulatory and governance requirements of the LSE, the pressure that public shareholders can exert on boards and therefore indirectly the executive leadership team will be one of the reasons why founders were deterred from listing on the LSE with one share, one vote in the first place.[79] Although similar considerations may also be germane for the CEO of a pre-IPO private corporation which has not itself implemented dual-class stock (since investors, such as venture capitalists, may have insisted on enhanced board appointment or voting rights), the concerns are more pressing once the company becomes publicly listed and voting power shifts to a plethora of dispersed shareholders who may not understand or be as heavily involved in the company as private corporation investors.

By radically restricting the circumstances in which enhanced-voting rights in SWVRS firms can be exercised, the concerns that founders may have regarding listing with one share, one vote will not be entirely tempered. Although SWVRS structure does assuage the concerns of founders that their control over the firm could be supplanted by a hostile takeover, it does not ease anxieties that public shareholders could take it upon themselves to facilitate the removal of a founder from a CEO or other leadership role. One of the points of dual-class stock, for better or worse, is to insulate the controller from the influence of public shareholders. Mark Zuckerberg, as CEO of the U.S. firm Meta, is a case in point that could send shivers down the spines of UK tech-founders contemplating listing without that

76 Under default "Model PLC Articles" (promulgated under The Companies (Model Articles) Regulations 2008, SI 2008/3229 [hereinafter Model PLC Articles]), a modified version of which is usually adopted by public companies, a majority of shareholder votes exercised in favor is required to appoint directors to the board or to reelect at the next annual general meeting any directors previously appointed by the board itself. *See* Model PLC Articles, arts. 20 and 21.

77 *Id.*, art. 3. The board has managerial power under article 3 of the Model PLC Articles.

78 *See, e.g.*, Moore & Walker-Arnott, *supra* note 71, at 430, 438; James Ang & William Megginson, *Restricted Voting Shares, Ownership Structure, and the Market Value of Dual-Class Firms*, 12 J. Fin. Res. 301, 305 (1989).

79 The Hill Review acknowledged, "When founders bring their companies to market, they often seem to be concerned mostly about their vision not being derailed by being removed as a director/CEO." *See* Hill Review, *supra* note 9, at 20.

insulation. Facebook's mediocre share performance in late 2022 was blamed on Zuckerberg chasing a slow-burning virtual reality "Metaverse" strategy in relation to which public shareholders were clearly skeptical.[80] It resulted in criticism from investors and even calls by others for Zuckerberg's head;[81] however, Zuckerberg was largely insulated from those calls as a result of Meta's adoption of dual-class stock. It will not be known for many years who is on the right side of the Metaverse argument, but the founder-valued ability to see that vision through to fruition is a manifestation of dual-class stock.[82]

It is not just power over board composition that public shareholders will procure upon a SWVRS firm IPO, but also veto rights over various actions of the company as prescribed by regulation or legislation. It is outside the scope of this article to outline all the veto rights granted to shareholders of listed companies,[83] but two will be important in the context of founder-led growth-firms. Firstly, under the Listing Rules, large, "Class 1," transactions of premium-listed companies require shareholder preapproval.[84] Class 1 transactions are classified based upon a number of "class tests,"[85] meaning that for a growth-company with only a low current profits profile or with insubstantial assets, most acquisitions could be classified as "Class 1" requiring shareholder approval.[86] Not only could obtaining that shareholder approval prove uncertain if the public shareholders do not understand the long-term sagacity of the acquisition, but the process to obtain that shareholder approval will be time-consuming and, as a public process, could alert competitors to the proposed transaction's existence (and its terms). Although the FCA can authorize the omission of information that could be seriously detrimental to the listed company,[87] it is unlikely that the FCA would permit the company to withhold information pertaining to the basic terms of the transaction, including the identity of the target, on which the public shareholders would be voting. For a company with an acquisitive strategy in a competitive market, the Class 1 transaction regime could severely

80 Nils Pratley, *Mark Zuckerberg's Metaverse is a Joke Not Shared by Investor*s, The Guardian (Nov. 2, 2022), https://www.theguardian.com/business/nils-pratley-on-finance/2022/nov/02/mark-zuckerberg-metaverse-is-a-joke-not-shared-equally-with-investors.

81 Richard Waters & Harriet Agnew, *Meta Shareholders Vent Anger at Zuckerberg's Spending Binge*, Fin. Times (Oct. 31, 2022), https://www.ft.com/content/0f4c676c-56a6-4b5e-850f-ddb78f9feb40; *Annika* Constantino, *Mark Zuckerberg is "Continuing to Derail" Facebook, says Harvard Expert: "He's Really Lost His Way,"* CNBC (Sep. 12, 2022) https://www.cnbc.com/2022/09/12/harvard-expert-mark-zuckerberg-is-continuing-to-derail-facebook.html.

82 *E.g.,* upon IPO, the founders of the U.S. dual-class firm Alphabet (previously Google) stated: "we have set up a corporate structure that will make it harder for outside parties to take over or influence Google. This structure will also make it easier for our management team to follow the long term, innovative approach emphasized earlier." *See* Google Inc., Amendment to Registration Statement (Form S-1) 29 (Aug. 16, 2004).).

83 For a summary, see Reddy, *supra* note 11, at 23 n.41, 25 n.57-58.

84 LR 10.5.1R.

85 A transaction will be designated as "Class 1" if the percentage ratio for any "class test" is 25% or more. *See* LR 10.2.2R. Class tests compare the size of a transaction to the size of the company on the basis of gross assets, profits, consideration, and gross capital tests. *See* LR 10 Annex 1.

86 Notably, in 2016, 68% of U.S. IPOs involved pre-profit companies, including 75% of technology listings and 92% of biotechnology listings (Hong Kong Exchanges and Clearing, *supra* note 57 at 15).

87 LR 13.1.7.

hinder the business strategy of the company, and SWVRS structure will not assuage that concern.[88] At this juncture, it should be noted that the FCA has, as part of potentially radical series of reforms, proposed to abolish the Class 1 shareholder approval requirements,[89] but as of the time of writing, the significant transactions regime remains extant.

Secondly, shareholders of English-incorporated "quoted"[90] companies have triennial binding veto rights over the directors' remuneration policy,[91] being a forward-looking policy that determines how executive and non-executive directors will be paid, and an annual advisory vote over how directors have been paid in the previous financial year.[92] Unlike SWVRS structure, a traditional dual-class stock regime in the UK could alleviate concerns that founders may have over shareholder pressure on their executive pay, and also could remove the ability of public shareholders to use their say-on-pay rights to impose pressure on the founder to take certain actions.[93] Pressure over remuneration is clearly an issue on the minds of the leadership teams of UK firms. Recent media reports have suggested that numerous UK companies are seeking to reincorporate and list or relist in the U.S., part of the rationale being the less stringent say-on-pay requirements in the U.S. (being advisory-only and only, mandatorily, every three years[94]) and the greater openness of U.S. shareholders to higher executive pay.[95] Founders of SWVRS firms will face the same remuneration-related pressures that are vexing existing UK one share, one vote firms.

In conclusion, restrictions on the exercise of enhanced-voting rights are a critical blow to the LSE's aspirations to attract innovative, high-growth companies to the exchange. However, reverting to Zuckerberg, one concern often levied at dual-class stock is that a CEO good for the company in its early years is not necessarily the person best suited for the role later on, and therefore the CEO, with insulation from the public markets, can hang around long past his or her sell-buy date.[96] There

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88 *See, e.g.,* David Smith, *Middle Market Demands a Better Deal from Investors,* The Sunday Times (Ju. 17, 2001).

89 FCA, *Primary Markets Effectiveness Review – Feedback to DP22/2 and the Proposed Equity Listing Rule Reforms* 40-45 (Consultation Paper CP23/10, 2023).

90 A "quoted" company is a company incorporated in England and Wales which has been admitted to the FCA's Official List (which is a prerequisite to being listed on the LSE's Main Market), is listed in an EEA State, or is admitted to dealing on the NYSE or Nasdaq. *See* Companies Act 2006, c. 46, § 385.

91 Companies Act 2006, c. 46, §439A.

92 Companies Act 2006, c. 46, §439.

93 Activist investors may use governance-related issues (including say-on-pay) to exert pressure on directors (Attracta Mooney, *Activists become wolves in sheep's clothing*, Fin. Times (Jul. 21, 2019) https://www.ft.com/content/bf1e6037-bbdd-3465-a0oc-d111e301624e; Jeremy Goldstein, *Shareholder Activism and Executive Compensation,* Harv. L. Sch. F. On Corp. Governance & Fin. Reg. (Jun. 18, 2015) https://corpgov.law.harvard.edu/2015/06/18/shareholder-activism-and-executive-compensation/; Alex Ralph, *Investors revolt over executive pay at De La Rue,* The Times (Jul. 26, 2019) https://www.thetimes.co.uk/article/investors-revolt-over-pay-at-banknote-printer-de-la-rue-6x3r87tws.

94 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §951, 124 Stat. 1899, 1900.

95 Hosking & Cahill, *supra* note 12; Bobby Reddy, Getting in a Bind – Comparing Executive Compensation Regulations in the U.S. and the U.K., NOTRE DAME J.I.C.L. Forthcoming (2024).

96 Lucian Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock,* 103 Virginia L. Rev. 585, 604 (2017).

are no guarantees that Meta's (then Facebook) successful 2012 Zuckerberg-led acquisition of Instagram in the face of a skeptical board will be repeated in the 2020s with Zuckerberg's bet on the Metaverse.[97] That consideration leads us to the next condition attached to SWVRS structure—a post-IPO five-year maximum duration.

B. Five-Year Time-Dependent Sunset

The underlying rationale for the five-year time-dependent sunset is illustrated in Figure 1. For a high-growth, innovative company, the types of companies that SWVRS structure seeks to attract, it is during the company's growth phase when product cycles are long and the long-term business strategy of the company is not clear that the benefits of long-term investment and research and development are not easily observable to the public shareholders.[98] It is during this spell that a founder will be concerned that those without the level of insight required to fully evaluate the vision for the business may undervalue the company, resulting in a weak share price. If such undervaluation occurs at the time of IPO, it may dissuade a founder from listing the company altogether, since the founder will be reticent to leave cash on the table when selling shares. However, if the company is viewed as an attractive prospect at IPO and the sale of shares at that time will not be heavily discounted, SWVRS structure will give the founder further comfort that future post-IPO business and strategic decisions that are misjudged or undervalued by public shareholders, resulting in a decline in share price, will not expose the company to a possible takeover by an acquiror that understands the business better and spies a bargain. As the company matures, product-cycles are completed, and the long-term strategy of the company becomes more evident, though, the likelihood that public shareholders will underprice the company reduces and the need for protection from the takeover market dissipates. At this stage, SWVRS collapses into one share, one vote, since public shareholders should now be able to assess the long-term prospects of the business more effectively, moderating the emergence of an opportunistic takeover. Accordingly, the founder is given a five-year period to pursue his or her vision without fear of a takeover, the thought being that after that period, the long-term benefits to the firm of being insulated from a takeover are outweighed by the costs from the extraction of private benefits of control. Relatedly, a strain of academic study provides some support for the imposition of time-dependent sunsets, evidencing that dual-class stock firms outperform similar one share, one vote firms when younger or early on post-IPO, but then start to lag behind their one share, one vote counterparts over time.[99]

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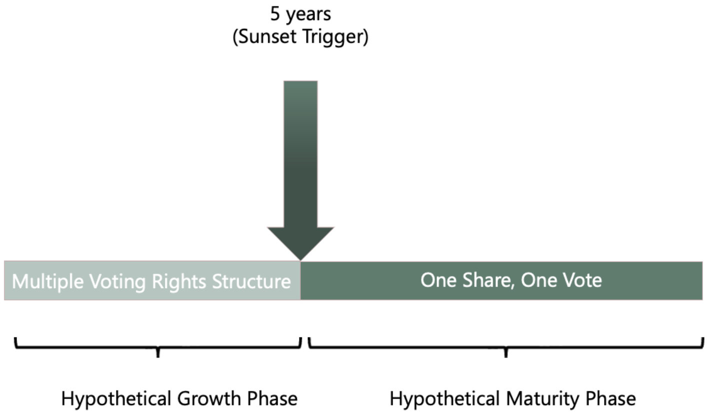
97 CFA Institute, Dual-Class Shares: The Good, The Bad and The Ugly 8 (2018).

98 Goshen & Hamdani, *supra* note 28, at 580; Reddy, *Finding*, *supra* note 11, at 329-330; Scott Kupor, *Sorry CalPERS, Dual Class Shares Are a Founder's Best Friend,* Forbes (May 14, 2013) https://www.forbes.com/sites/ciocentral/2013/05/14/sorry-calpers-dual-class-shares-are-a-founders-best-friend/

99 Martijn Cremers, Beni Lauterbach & Anete Pajuste, *The Life-Cycle of Dual Class Firms* (ECGI, Finance Working Paper No. 550/2018, 2018); Hyunseob Kim & Roni Michaely, *Sticking Around Too Long? Dynamics of the Benefits of Dual-Class Voting* (ECGI, Finance Working Paper No. 590/2019, 2019).

Figure 1: Rationale Behind the Five-Year Time-Dependent Sunset



In abstract terms, the time-dependent sunset seems sound. However, challenges arise when an attempt is made to impose a mandatory sunset period. The time that it will take any given issuer to shift from a growth phase to a maturity phase will vary on a case-by-case basis,[100] as will the period after which the long-term benefits to the firm of dual-class stock structure are outweighed by the extraction of private benefits of control. The age of the firm at IPO, the nature of its industry, the age of the founder, and the level of innovation attached to the company's business will all have a bearing.[101] In earlier work, I have shown that in the U.S., although voluntary adoption of time-dependent sunsets is prevalent, the time periods vary considerably.[102] It is difficult, if not impossible, to determine a period which will garner sufficient protection from the public markets that suits all firms. As for the academic evidence that the firm valuation advantage that dual-class stock firms have over similar one share, one vote firms is reversed over time post-IPO,[103] unsurprisingly those studies do not provide a categorical post-IPO cliff-edge as to when that swing will take place. Again, the timing of such a swing will occur on a case-by-case basis, making it difficult to justify a mandatory one-size-fits-all time-dependent sunset period. In any case, endogeneity bias cannot be ruled out in such studies, since dual-class stock firms may be inherently different from their one share, one vote equivalents, with specific reasons why dual-class stock has been selected for such firms.[104] It is therefore difficult to say that the performance advantages of those firms decline

100 Andrew Winden, *Sunrise, Sunset: An Empirical and Theoretical Assessment of Dual-class Stock Structures*, 3 Colum. Bus. L. Rev. 852, 917 (2018); Marc Moore, *Designing Dual Class Sunsets: The Case for a Transfer-Centered Approach*, Wm. & Mary Bus. L. Rev. 93, 148 (2020); Dorothy Lund, *Nonvoting Shares and Efficient Corporate Governance* 71 Stan. L. Rev. 687, 739 (2019).

101 Fisch & Solomon, *supra* note 3, at 1082.

102 Reddy, *supra* note 53, at 534-35.

103 *Supra* note 99, and accompanying text.

104 For example, high-growth firms may be more likely to choose dual-class stock. *See* Cremers et al., *supra* note 99, at 31; Reddy, *supra* note 11, at 365.

over time simply because they maintain dual-class stock structure (and presumably the original controller from the time of IPO remains in control), rather than as a result of other characteristics.[105]

Even if one were an advocate for a one-size-fits-all time-dependent sunset, taking SWVRS structure specifically, one can question the imposition of such a short sunset period of five years. Five years does not give a growing company much time to mature to a level where the need for multiple voting rights shares dissipates. Even the Council for Institutional Investors in the U.S., which has been traditionally hostile to dual-class stock,[106] has suggested that time-dependent sunsets of seven years could be acceptable.[107] It is felicitous that in the U.S., where many firms have voluntarily adopted time-dependent sunset clauses, sunsets of five years or less are rare.[108] Moreover, numerous examples persist of U.S. dual-class firms that have continued to innovate and create substantial shareholder value many years after five years post-IPO.[109] Of course, a founder could factor in a mandatory time-dependent sunset into their decision as to when to list their firm—the founder could simply wait until the firm is sufficiently mature such that five years is in fact a sufficient period of time over which protection from takeovers is required. However, if founders are inclined to wait longer to list their firms as a result of such a short sunset period of five years, it will undermine the aspirations of an exchange seeking to attract innovative firms at earlier stages of their lifecycles when they are still experiencing significant growth.[110]

The brevity of a mandated five-year sunset should also be evaluated in the context of the narrowness of the circumstances in which enhanced-voting rights can be exercised within the SWVRS regime. The primary benefit of SWVRS for a founder is the ability to block takeovers, within the first five years following an IPO. The presumption therefore is that it is during the first five years following an IPO that takeover protection is required since it is during this period (prior to the company's business maturing and becoming more observable to public shareholders) that public shareholders may have undervalued an innovative company, opening it up to an opportunistic, discounted takeover. However, are formal takeover bids for companies whose IPOs were only within the previous five years commonplace in the UK? If they are not commonplace, it challenges the presumption that a primary concern of founders when they are considering an IPO is that the company will

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105 Additionally, studies that evaluate the performance of dual-class firms based upon Tobin's Q (market value divided by asset replacement value) or similar measures of firm value can be impacted by the market's bias or perception of dual-class firms. *See* Reddy, *More Than Meets the Eye*, *supra* note 11, at 986-87, 1005; Reddy, *supra* note 11, at 279, 365.

106 Danielle Chaim, *The Corporate Governance Cartel,* 27 (Apr. 14, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4324567

107 *Letter from Ash Williams, Chair, et al., Council of Institutional Investors, to Elizabeth King, Chief Regulatory Officer, Intercontinental Exch.* (October 24, 2018), https://www.cii.org/files/issues_and_advocacy/correspondence/2018/20181024%20NYSE%20Petition%20on%20Multiclass%20Sunsets%20FINAL.pdf.

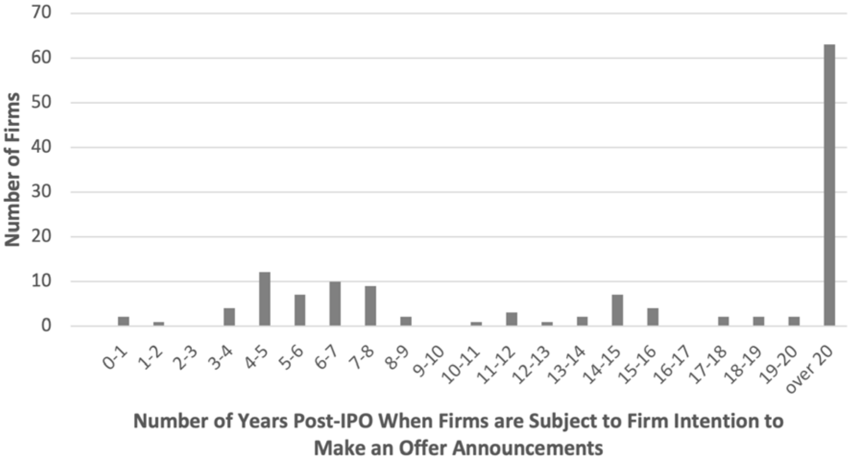
108 Reddy, *supra* note 53, at 534-35.

109 *Id.*, at 535.

110 Hill Review, *supra* note 9, at 19.

be subject to a takeover bid soon after IPO. Indeed, Figure 2, based upon a hand-collection of all 134 announcements by bidders of their intentions to make firm offers[111] for LSE Main Market-listed companies during the five-year period from 2018 to 2022,[112] shows that only a small minority of such firms (approximately 14%) had been listed within the previous five years. The vast majority of firms subject to takeover bids were mature firms listed more than 20 years previously. For firms that had listed more recently, more firms were subject to takeover bids between 5 and 8 years post-IPO (26) than between 0 and 5 years post-IPO (19). Takeover bids ease off after eight years post-IPO until companies are very mature.

Figure 2: Years Post-IPO When Firms are Subject to Takeover Bids Between 2018 and 2022 Inclusive



There are caveats to the deductions that can be extrapolated from the data outlined in Figure 2. If more innovative, high-growth firms were to list on the Main Market, perhaps it could see a shift toward more takeover bids sooner after IPO, since those are the types of companies more likely to be undervalued by the public markets soon after IPO. Additionally, the data in Figure 2 only covers a five-year period, including a period of time during which the global COVID pandemic may have impacted IPO activity. Further study could investigate takeover trends over a longer period of time. That all said, there is nothing to suggest that the period selected is not representative of recent takeover activity in the UK, with

111 Upon a bidder having a firm intention to make an offer for an LSE Main Market-listed company, it must make a public announcement. *See* The Takeover Code, rule 2.7.

112 Announcements of firm intentions to make an offer obtained from *What's Market: Public M&A*, Practical Law (last visited Nov. 28, 2023), https://uk.practicallaw.thomsonreuters.com/Browse/Home/Resources/PublicMA?transitionType=Default&contextData=(sc.Default)&comp=pluk. IPO dates for companies derived from Crunchbase, https://www.crunchbase.com; Alphaspread, https://www.alphaspread.com. The raw data has been deposited with the editors to maintain on file.

mergers and acquisitions activity recovering very quickly after an initial, short post-COVID decline.[113] Furthermore, based simply on Figure 2, a founder of a company considering an IPO on the Main Market may be more concerned about takeover activity that is heavily concentrated more than five years post-IPO. The sparse existing takeover activity directed at recently listed companies is unlikely to be a major factor dissuading listings on the Main Market. Again, *if* a time-dependent sunset has to be implemented, 5 years is too short. A takeover blocker will be small comfort to a founder seeking to list on the exchange, when the relevant protection vanishes just when takeover jeopardy materializes.

In an increasingly global market for IPOs, the SWVRS regime's five-year time-dependent sunset clause should also be compared with other major exchanges where dual-class stock is permitted. With a prescribed maximum period, SWVRS structure is at odds with not only the U.S., where there is no mandated time-dependent sunset, but also Hong Kong, Amsterdam, Singapore, Tokyo, and Shanghai.[114] India and Johannesburg are the only other jurisdictions that, as of the time of writing, mandate time-dependent sunsets. While India does also implement a five-year rule, it is extendable by the public shareholders for a further period of five years.[115] Johannesburg implements a ten year sunset, also extendable by a vote of the public shareholders.[116] With the UK, again, implementing stricter rules on the use of dual-class stock than other exchanges, and in particular with it no longer unusual for UK companies to seek U.S. listings,[117] the SWVRS regime could significantly deter growth firms from choosing the LSE's premium tier over another exchange or simply remaining private.

Persuading founders of growth companies to list in the UK would already be a tough sell even without a time-dependent sunset. Deeper-seated issues persist, including depressed valuations,[118] a lack of growth company analyst coverage,[119] and a

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113 *See Mergers and acquisitions involving UK companies: October to December 2022*, Off. for Nat'l Stat., https://www.ons.gov.uk/businessindustryandtrade/changestobusiness/mergersandacquisitions/bulletins/mergersandacquisitionsinvolvingukcompanies/octobertodecember2022#monthly-mergers-and-acquisitions-ma

114 Reddy, *supra* note 11, at 88, 93, 97, 102, 105, 113.

115 Reddy, *supra* note 11, at 109, 363. It should be noted that where a time-dependent sunset can be extended by public shareholders, doubts have been expressed as to whether public shareholders will base their decisions upon the merits of the continued survival of dual-class stock or upon ideological considerations. *See* Bernard Sharfman, *The Undesirability of Mandatory Time-Based Sunsets in Dual Class Share Structures: A Reply to Bebchuk and Kastiel,* 93 S. Cal. L. Rev. 1, 9 (2019); Reddy, *supra* note 11, at 366; Moore, *supra* note 100, at 155; Fisch & Solomon, *supra* note 3, at 1085.

116 JSE Limited, Listings Requirements, §§ 4.45(a) and 4.45(b).

117 As of December 12, 2022, 108 UK companies were listed on the NYSE or Nasdaq, with 82 of those companies not also having an active trading of shares on the LSE. Author's desktop research using data derived from *Stock Screener*, Stock Analysis, https://stockanalysis.com/stocks/screener/. Also, *see supra* notes 16, 19-20, 27, and accompanying text.

118 Cheffins & Reddy, *supra* note 15, at 207-08.

119 Brian Cheffins & Bobby Reddy, *Murder on the City Express – Who is Killing the London Stock Exchange's Equity Market,* 44 Company Law. 215, 221-22 (2023). Elizabeth Anderson, *British Tech Companies Should List in the US, Nasdaq Boss Says,* The Telegraph (Nov. 17, 2014) https://www.telegraph.co.uk/finance/markets/11234274/British-tech-companies-should-list-in-the-US-NASDAQ-boss-says.html; Briefing, *supra* note 6.

perceived UK institutional investor bias against growth stock.[120] However, mandating such a sunset further exacerbates the lack of competitiveness of the London market. Although others have strongly argued against perpetual dual-class stock,[121] the U.S. experience where time-dependent sunsets have organically become commonplace amongst U.S. dual-class stock firms[122] suggests that market forces would at least have a semblance of influence over the terms adopted by UK SWVRS firms even in the absence of a mandated time-dependent sunset. Of course, without regulatory fiat, there will still be instances of firms that list without such sunsets or with sunsets that are only triggered after stratospherically long periods. However, just because there is no baked-in mechanism to convert multiple voting rights shares into one share, one vote does not mean that a founder of a dual-class stock company will never voluntarily step down from his or her role managing the company on a day-to-day basis,[123] or in the case of SWVRS structure, never sanction a takeover offer for the SWVRS firm. That comportment will likely only be incentivized, though, if the relevant founder has at least some exposure to his or her performance leading the company, which brings us to the core of the next condition—"skin-in-the-game."

C. Maximum Voting Ratio of 20:1

With a maximum voting ratio of 20:1, the votes attached to enhanced-voting shares in a SWVRS structure must not exceed twenty times the votes attached to shares issued to public shareholders.[124] In concept, a voting ratio caps the level of equity of which a holder of multiple voting rights can dispose without relinquishing control. It ensures that a controlling shareholder utilizing dual-class stock must retain at least some "skin-in-the-game" and therefore not completely abrogate financial exposure to the consequences of its actions while managing the company. As the voting ratio gets smaller, the structure progressively realigns dual-class stock with its controlling shareholder one share, one vote roots—the natural conclusion is a 1:1 ratio that requires a controlling shareholder to hold 50% of the equity to retain 50% of the votes.

A 20:1 voting ratio requires a holder of enhanced-voting rights to hold at least 4.8% of the equity to retain 50% of the votes in the company.[125] Although the U.S.

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120 Cheffins & Reddy, *id.*, at 222-25; Andrew Whiffin, *Lex In-depth: Why is the UK Stock Market so Cheap*, Fin. Times (Mar. 6, 2022) https://www.ft.com/content/2b40824f-69c6-4768-b313-a544fc1a00d7; Oliver Shah, *The Income Addiction,* The Sunday Times (Jan. 16, 2022) https://www.thetimes.co.uk/article/dividend-addiction-ftse-shareholders-accused-of-starving-uk-companies-of-cash-to-invest-9h3wkvwxw; Daniel Thomas, *LSE Chief Says London Markets Must Be "Young and Scrappy" to Compete*, Fin. Times (Jan. 13, 2023) https://www.ft.com/content/bfe7f1c2-246a-4191-bf05-fd78178e0044

121 Bebchuk & Kastiel, *supra* note 96.

122 Reddy, *supra* note 53, at 534-35.

123 By way of example, the founders of Alphabet, Sergey Brin and Larry Page, stepped away from day-to-day management activities in 2019 even though they continued to retain majority voting control in the company through dual-class stock. *See* Larry Page & Sergey Brin, *A letter from Larry and Sergey*, Alphabet (Dec. 3, 2019) https://blog.google/inside-google/alphabet/letter-from-larry-and-sergey).

124 LR 9.2.22CR(2).

125 Reddy, *supra* note 53, at 539.

exchanges do not mandate a voting ratio, a UK premium-tier requirement that at least 4.8% of the equity be retained to exercise majority voting control should not be a significant reason for a founder to choose a U.S. listing over a Main Market listing, even involving large market capitalization IPOs. As I showed in an earlier study, as of 2020, the founders of the ten largest U.S. dual-class stock listings since 2000 all voluntarily owned more than 4.8% of the equity in their companies notwithstanding, in some cases, extreme divergences in voting rights between enhanced-voting and inferior-voting shareholders.[126] It would appear that it is common for founders to retain more than a sliver of the equity in their dual-class stock companies, either because they wish to retain a material investment in their companies, or as a means of "virtue signaling" to the market that they do not intend to extract large private benefits of control to the detriment of share value. Additionally, purely from the perspective of ensuring a competitive exchange, the SWVRS maximum voting ratio compares favorably with other jurisdictions, such as Hong Kong, Singapore, Shanghai, and India, where a maximum voting ratio of 10:1, requiring the retention of at least 9.1% of the equity to maintain majority voting control, has become a common standard.[127]

One may question the consistency of a high maximum voting ratio implemented in the SWVRS regime in the face of much more stringent conditions regarding the exercise of voting rights attached to enhanced-voting shares and the time-dependent sunset. However, to an extent it represented a blast of pragmatism by the FCA. If the only real financially meaningful action a holder of enhanced-voting shares can unilaterally take is to block takeovers, the need to ensure that such a founder has sufficient skin-in-the-game is less crucial.[128]

This article has, however, already commented that effectively restricting the exercise of enhanced-voting rights in SWVRS structures to takeover scenarios and imposing a mandatory time-dependent sunset are conditions likely to frustrate the potential for SWVRS structure to attract founders to the LSE's Main Market. If the FCA has included those conditions to mitigate concerns that founders of SWVRS firms could otherwise extract egregious levels of private benefits of control, perhaps a more effective approach, which better aligns with the aspiration to attract more innovative, high-growth firms to the market, would be to relax those conditions but with an increased skin-in-the-game requirement as a *quid pro quo*. Ensuring that the holder of enhanced-voting shares owns significant equity in the company is potentially the most effective constraint on the actions of controlling shareholders that detrimentally impact shareholder value, since such actions will also have a not insignificant impact on the controller's wealth. While a 4.8% requirement as currently

126 *Id.*, at 541. *e.g.*, Snap has employed a capital structure where only non-voting stock is issued to the public shareholders (Snap Inc., Amendment to Registration Statement (Form S-1/A) 8 (Feb. 8, 2017).

127 Reddy, *supra* note 11, at 94, 97, 105, 109, 378. The Johannesburg Stock Exchange has, replicating the LSE, implemented a 20:1 maximum voting ratio for dual-class stock firms, but, unlike the LSE, also requires the holder of enhanced-voting rights to additionally own a 10% economic interest in the firm at IPO (JSE Limited, *supra* note 116, at §§ 4.44(c) and 4.45(c))..

128 FCA, *supra* note 8, at 36.

required is broadly meaningless if founders are in any case likely to voluntarily own more than 4.8% of the equity in their firms no matter the regulatory requirement,[129] a higher threshold would not be so inconsequential. Even though, as discussed above, the founders of the ten largest post-2000 U.S. dual-class listings all voluntarily owned more than 4.8%, there was still substantial divergence between firms as to the level of equity owned, with there being no "market balance point."[130] It would be necessary to maintain, however, that the relevant threshold were not too high so as to also become a factor causing founders to think twice about listing on the LSE.[131]

D. Director-Linked Sunset

With a director-linked sunset in operation, enhanced-voting shares in a SWVRS structure may only be held by directors of the relevant company. The condition correlates with the intention that SWVRS structures should primarily be utilized by individuals seeking to protect their visions for the business of the relevant corporation from less visionary public shareholders.[132] If the holder of those enhanced-voting rights is not intrinsically involved in setting the strategy of the corporation as a member of the board, the "idiosyncratic vision" justification[133] for the adoption of SWVRS falls away. Equally, for a public investor in the SWVRS company, the acceptance of SWVRS structure by the investor is likely premised upon a belief in the vision of the holders of enhanced-voting shares, and faith in the abilities of those persons to see that vision to fruition.[134] If the holder is not a director, a public investor could rightly question why that person is availing itself of the protections offered by SWVRS structure—in such cases, the greater the potential that the structure is being adopted predominantly to expropriate value from public shareholders.[135]

It is unlikely that the imposition of director-linked sunsets will impact the competitiveness of the UK's SWVRS protocol in attracting issuers to the exchange. Hong Kong, Singapore and Shanghai have all similarly implemented mandatory director-linked sunsets with their dual-class stock regimes.[136] Tokyo and India have gone further by requiring that the holders of enhanced-voting shares also be managers or executives in the relevant companies, and therefore must also have day-to-day employment roles.[137] Even though the U.S. exchanges do not mandate director-linked

129 *See supra* note 126, and accompanying text.

130 *Id*.

131 In previous work, I have advocated that the LSE could implement a more permissive form of dual-class stock while employing a requirement that founders of such firms retain at least 15% of the outstanding equity as of the date of IPO, without such a requirement being so onerous as to deter listings. *See* Reddy, *supra* note 11, at 328; Reddy, *supra* note 53, at 540.

132 FCA, *supra* note 8, at 36.

133 *See supra* note 30, and accompanying text.

134 As stated in the Hill Review, *supra* note 9, at 20, "Their vision and their ability to execute that vision is often part of the company's selling point." Also *see* Moore, *supra* note 100, at 142; Reddy, *supra* note 11, at 374.

135 Reddy, *supra* note 11, at 359.

136 *Id.*, at 93, 97, 105, 375.

137 *Id.*, at 375.

sunsets, it is difficult to see that founders seeking to insulate themselves from the takeover market so that they can carve out the time required to realize their visions for their businesses would baulk at a requirement that they be in a role that allows them to do just that. The fact that "death or incapacity" sunsets, which serve a similar role to director-linked sunsets by preventing disproportionate voting rights being held by persons not actively involved in the business, are not uncommon amongst U.S. dual-class stock firms[138] evidences that founders do not see such mechanisms as deadly to their ambitions.

Intriguingly, given the criticisms in this article of the severity of certain other conditions attached to SWVRS structure, an exception included in the SWVRS regime that permits enhanced-voting shares to be held by a beneficiary under the estate of a director upon his or her death[139] (whether or not that beneficiary is a director) cuts against the grain. There is no guarantee that upon the death of the holder of enhanced-voting shares, a family member, for example, will have the same perspicacity, talent, or vision as the original holder.[140] Moreover, at the time of investment, public investors, who had otherwise put their faith in the original holder of disproportionate voting shares to shape the strategy of the company, would not know the identity of that original holder's beneficiaries. Therefore, upon the original holder's death, disproportionate voting control will fall into the hands of a person or persons that the existing public shareholders will not have envisaged would hold control. As discussed above, being able to price-in risk is an important consideration for investors,[141] but if public shareholders cannot discern and control who will hold disproportionate voting rights in the future, it becomes difficult if not impossible to price-in risk, the talents of an unknown controller, or the propensity of that controller to extract private benefits of control. However, these concerns should be taken into account in the context of the five-year time-dependent sunset requirement. Unless a controller is very old at the time of IPO, it would likely be a rare occurrence for there to be a death of an IPO holder of disproportionate voting control within five years of IPO, and to the extent that there is such a death, the beneficiary to whom control is transmitted will likely have somewhat less than five years before SWVRS structure collapses into one share, one vote under the time-dependent sunset clause. In permitting enhanced-voting shares in SWVRS firms to be held by beneficiaries (whether or not directors) upon the death of the original holders, the FCA will have assessed that investors can safely ignore the relevant risk when determining price.

Similarly, on first blush, the lack of a prohibition on the transfer of enhanced-voting rights between directors seems to be somewhat of an oversight. Even though holders of enhanced-voting rights must be directors, the board could appoint a new person as a director and an existing director could then transfer enhanced-

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138 Winden, *supra* note 100, at 875.
139 LR 9.2.22CR(3).
140 Bebchuk & Kastiel, *supra* note 96, at 606; Holderness & Sheehan, *supra* note 1, at 318; Gilson, *supra* note 1, at 1668.
141 *See supra* note 47, and accompanying text.

voting shares to that person, who would now be an eligible holder of such shares. However, the constitutional documents ("articles of association") of most UK public companies require directors to be appointed by either the shareholders or the board. If appointed by the shareholders, clearly the public shareholders would have a say in who could be a potential holder of enhanced-voting shares. For directors appointed by the board (rather than by the shareholders), the "model" articles of association require those directors to retire at the next annual general meeting (AGM),[142] with a shareholder vote being required to reelect them. In such circumstances, again the public shareholders in a SWVRS firm will have control over the appointment of directors to the board and, accordingly, to whom enhanced-voting shares can be transferred. Although, theoretically, there is no reason why a company, particularly a non-UK company, could list with more bespoke appointment provisions disapplying the requirement to retire at the next AGM, it would be a brave company to disapply what is recognized to be a standard-form protection for public shareholders and risk the success of the company's IPO.[143] Therefore, from a practical perspective, if not by strict black-letter rule, the regulations do implicitly encompass transfer protections, as envisaged originally when the regulations were first proposed.[144]

IV. Did The FCA Get It Right?

Having assessed each of the conditions attached to SWVRS structure individually, the question remains as to whether the FCA got the balance between attracting founders of high-growth companies to the LSE and investor protection correct. The director-linked sunset is a limitation that is mandated in several other dual-class stock jurisdictions, and one that is not inconsistent with provisions seen in the U.S. It aligns with the rationale for dual-class stock and the reasons why public shareholders may be amenable, albeit perhaps grudgingly, to entertain a dual-class stock IPO. Additionally, it is not a constraint at which a founder who is adopting dual-class stock for the reasons for which the regulators have relaxed the rules would recoil. The maximum voting ratio is broadly inconsequential in the context of the other SWVRS conditions. A 20:1 voting ratio only requires holders of enhanced-voting rights to hold a nominal level of equity to retain majority voting control. It would certainly not deter founders from choosing the LSE, and even though in isolation one could argue that it gives founders too much leeway to disassociate themselves from the consequences of their actions, the other conditions attached to SWVRS structure are so much more constraining of controllers as to make a voting ratio no more than an afterthought.

142 Model PLC Articles, *supra* note 76, at art. 21.

143 Although the articles of association of a company can be amended after IPO, it would require approval of at least 75% of the votes exercised at a shareholders' meeting to resolve the relevant amendment. *See* Companies Act 2006, ch. 46, §21, §283.

144 The Hill Review and the FCA's own consultation on dual-class stock in fact envisaged more explicit prohibitions on the ability to transfer enhanced-voting shares. *See* Hill Review, *supra* note 9, at 19; FCA, *supra* note 8, at 29.

However, as of the time of writing, no company has adopted SWVRS structure on the premium tier, suggesting that the FCA may have fallen too far on the side of limiting the freedom of founders to insulate themselves from public shareholders. Two of the conditions attached to SWVRS structure are of concern. By limiting the circumstances in which enhanced-voting rights can be exercised, SWVRS is little more than a glorified takeover blocking right. To be sure, the ability to veto a takeover could weigh heavily on a founder's decision to list an innovative, high-growth company, but such a founder, at least of an English-incorporated company, will also be unsettled by the power of the public shareholders to indirectly remove him or her from a day-to-day leadership role through their influence over the composition of the board (which itself has the direct power to terminate the employment of the CEO). Even where a founder is not removed as CEO by the board, if the directors are beholden to the public shareholders, who have the right to remove them, the CEO will have less freedom to pursue his or her vision for the company, since the strategy of the company will be primarily determined by the board aligned with public shareholder concerns. Furthermore, not only does SWVRS mainly only operate as a takeover blocker, but it also can only remain extant for five years post-IPO. Five years does not give a growing, innovative company much time in which to mature to a stage where its business plan and strategy are more easily observable to public shareholders, and even if a founder were amenable to listing with SWVRS structure and a five-year time-dependent sunset clause, it is likely that he or she will wait until the company is at a later stage of its growth-cycle.

Where next for dual-class stock and the premium tier? If the FCA and LSE were hoping for a quick flood of IPOs of founder-led innovative firms where the founders had been previously reticent to list, it has certainly not happened. It should be acknowledged that the period since the introduction of SWVRS to the premium tier has coincided with a general decline in global IPOs,[145] but given that SWVRS structure was the much-feted headline reform of the Hill Review, it should be concerning that not one of the IPOs on the Main Market during that period has adopted SWVRS structure. In comparison, in 2022 and 2023, the U.S. saw dual-class stock IPOs constituting over a fifth and a quarter, respectively, of all IPOs. A further consideration is that perhaps issuers have been hesitant to adopt a new regulatory mechanism and that the market is simply waiting for one firm to take the lead prior to a flood of SWVRS listings. Hesitancy may well be the correct term to employ, but it is more likely due to misgivings over SWVRS terms rather than a nervousness in utilizing a new capital structure. SWVRS structure has, as of the time of writing, been available for over two years, during which the LSE will no doubt have been marketing SWVRS structure and soliciting UK businesses to list many months before the relevant SWVRS reforms became officially effective.

145 In 2022, there were only 42 new admissions on the Main Market (excluding reverse takeovers and global depositary receipt listings), the joint fifth lowest year for new admissions since 1999. Data derived from *Issuers and Instruments Issuers Reports*, London Stock Exch. *https://www.londonstockexchange.com/reports?tab=issuers* (last visited Nov. 23, 2023).

Furthermore, when the FCA reformed the LSE's rules on special-purpose acquisition companies (SPACs) in the summer of 2021,[146] the first SPAC adopting the new rules listed on the market within three months, with four further SPACs listing in 2022 at a time when the global SPAC market was very much waning.[147]

This brings us to a little twist in the tale. When the FCA published its final rules implementing SWVRS structure, it acknowledged that a not immaterial number of respondents to the initial consultation, including this author, had questioned whether the reforms truly allayed the apprehensions of founders that discouraged them from listing their firms.[148] However, the FCA suggested that those firms could, instead, list on the standard tier of the Main Market, which permits more expansive, U.S.-style, dual-class stock IPOs.[149] It is not within the scope of this article to discuss in detail the differences between the standard and premium tiers, aspects that have been discussed at length elsewhere,[150] but that contention by the FCA did not take into account the significant compromises for firms when choosing the standard tier over the premium tier. In particular, standard-tier issuers cannot form part of the FTSE indices, and cannot therefore gain access to passive fund investment and the commensurate increase in liquidity that creates.[151] The U.S. exchanges already have a substantial liquidity advantage over the premium tier,[152] and if traditional dual-class stock structures are restricted to the standard tier, an even greater incongruity in liquidity will simply further deter issuers from choosing the LSE. It is no surprise that the handful of UK firms that have chosen the standard tier in the last three years (including some dual-class stock-style firms) have seen their share prices suffer considerably since listing.[153] In 2022, though, the

146 Bobby Reddy, *Warning the UK on Special Purpose Acquisition Companies (SPACs): Great for Wall Street but a Nightmare on Main Street*, 22 J. Corp. L. Stud. 1, 18 (2023). SPACs are cash-shell companies that list on a market with the sole intention of acquiring another (usually private) operating company by way of reverse takeover, thereby bringing that operating company on to the public markets.

147 *See SPAC tracker*, Practical Law UK, https://uk.practicallaw.thomsonreuters.com/w-031-5255?comp=pluk&originationContext=document&vr=3.0&rs=PLUK1.0&transitionType=DocumentItem&contextData=(sc.Default)&firstPage=true&OWSessionId=6cfddacc1dc746aca6cfded50b609522&skipAnonymous=true

148 FCA, *supra* note 7, at 10.

149 *Id.*, at 11.

150 Reddy, *supra* note 11, at 47-52; Reddy, *supra* note 53, at 519-21; Reddy, *Finding, supra* note 11, at 324-26.

151 Lund, *supra* note 100, at 711; Bernard Sharfman, *A Private Ordering Defense of a Company's Right to Use Dual Class Share Structures in IPOs* 63 Vill. L. Rev. 1, 4 (2018); Scott Hirst & Kobi Kastiel, *Corporate Governance by Index Exclusion,* 99 Boston L. Rev. 1229, 1253–54 (2019).

152 According to NYSE figures, the U.S. has the world's largest liquidity pool, with 19% and 15% of global liquidity executed on the NYSE and Nasdaq, respectively, compared to 9% on the LSE. *See International Listings*, NYSE, https://www.nyse.com/listings/international-listings (last visited Nov. 23, 2023).

153 The firms THG, Deliveroo, Wise, and Oxford Nanopore all listed on the standard tier between 2020 and 2021 with share structures resembling some of the characteristics of dual-class stock. Their share prices, to different extents, all suffered in the period after listing. *See* Oscar Hornstein, *2021 UK Tech IPOs One Year ON: Slashed Valuations, Insolvency and Profit Woes,* UKTN (Dec. 22, 2022) https://www.uktech.news/news/industry-analysis/uk-tech-ipos-2021-year-on-20221222; Opinion, *Profit Warnings: When Bad News Really Matters,* Fin. Times (Jan. 20, 2023) https://www.ft.com/content/05597369-3ce1-45b9-9ef1-54cd3613c0c9; Jessica Newman, *Oxford Nanopore's Share Collapse Hurts IP Group,* The Times (Mar. 9, 2023) https://www.thetimes.co.uk/article/oxford-nanopores-share-collapse-hurts-ip-group-3lvjvps02.

FCA commenced a consultation into unifying the standard and premium tiers.[154] If the proposal were to be implemented, a choice will need to be made between the existing premium-tier SWVRS structure, the more relaxed standard tier-esque dual-class stock regime, or something in-between.

Initially, it seemed that the preference was to retain the SWVRS regime for the unified market.[155] However, only a year later, in 2023, it would appear that the LSE and the FCA are suffering buyer's remorse after the lack of success of the SWVRS reforms and the poor reception that they received.[156] A more recent consultation has suggested that the new unified Main Market could be more permissive to dual-class stock structures.[157] No longer would the exercise of enhanced-voting rights be restricted to change of control scenarios, and in relation to the five-year sunset , after initially suggesting shifting to a ten-year limit, the FCA has now proposed removing the time-dependent sunset in its entirety.[158] Removing the time-dependent sunset would give founders more scope to insulate themselves during company growth phases, and as discussed above, better aligns with the takeover risk period for newly-listed companies.[159] To complete the *volte-face*, no voting ratio is contemplated.[160] Even though, as discussed, "skin-in-the-game" is potentially the most effective constraining mechanism of insidious founder behavior,[161] the FCA has now determined that public shareholders do not require that protection.[162] Scrutiny of the reforms when they are finalized is for another day, but for now, the FCA's remarkable apparent U-turn in sentiment to dual-class stock, within just two years of the SWVRS reforms, evidences a tacit acknowledgment that SWVRS was perhaps misguided. Rather than give SWVRS a slow and painful death, the FCA appears willing to pull off the Elastoplast. If the FCA follows through with its proposal, SWVRS structure may just become a curious historical curiosity on the LSE's dual-class stock journey.

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154 FCA, *Primary Markets Effectiveness Review – Feedback to the Discussion of the Purpose of the Listing Regime and Further Discussion* (Discussion Paper, DP22/2, 2022).

155 *Id.*, at 29.

156 Philip Stafford & Laura Noonan, *Shake-up of Listing Rules Takes Effect* Fin. Times (Dec. 2, 2021); Luca Enriques, *The Hill Review and the Long and Winding Road to Premium-Listed Dual Class Share Companies,* Oxford Bus. L. Blog (May 10, 2021) https://blogs.law.ox.ac.uk/business-law-blog/blog/2021/05/hill-review-and-long-and-winding-road-premium-listed-dual-class-share; Jennifer Payne & Clara M. Pereira, *The Future of the UK IPO, in* Research Handbook on Global Capital Markets Law 77, 93 (Iris H.-Y. Chiu & Ian G. MacNeil eds., 2023); Cheffins & Reddy, *supra* note 15, at 198; Reddy, *supra* note 53, at 545; Reddy, *supra* note 11, at 62-67.

157 FCA, *supra* note 89, at 33-35.

158 *Id.*, at 34; FCA, Primary Markets Effectiveness Review: Feedback to CP23/10 and Detailed Proposals for Listing Rules Reforms, 45 (Consultation Paper CP23/31, 2023).

159 *See* Figure 2.

160 FCA, *supra* note 89, at 34. The FCA has proposed to retain the SWVRS requirement that enhanced-voting shares can generally only be held by directors, but it is proposing to remove the SWVRS ability to transfer enhanced-voting rights to non-director beneficiaries upon death. *See Id.*, at 34.

161 *See* part III.C of this article. "Maximum Voting Ratio of 20:1."

162 FCA, Primary Markets Effectiveness Review: Feedback to DP22/2 and Proposed Equity Listing Rule Reforms, 34 (Consultation Paper CP23/10, 2023).

Conclusion

In 2021, the FCA took the first step in introducing dual-class stock to the premium tier of the LSE. The FCA was, however, in a difficult position. It had to balance the antipathy of UK institutional investors to the concept and an ideological drive to ensure that the premium tier maintains the highest standards of corporate governance, against a general consensus that the LSE was merely a forum for mature, income-producing companies on which innovative, high-growth companies were unwelcome.

In an attempt to maintain that balance, the FCA implemented a form of dual-class stock on the premium tier with conditions attached which made the structure far less permissive for issuers than the regime seen on the U.S. exchanges, and even the moderately constrained regimes seen in the Far East. While certain of the conditions attached, such as the requirement that disproportionate voting rights only be held by directors and a maximum voting ratio between enhanced-voting and inferior-voting shares of 20:1, are fairly benign, offering public shareholders reasonable protections without overly hampering the ability of founders of such firms to protect their visions, others strike at the very heart of why a founder may desire the adoption of dual-class stock when listing their firm in the first place. A condition that enhanced-voting shares may only be exercised upon a change of control of the issuer or in relation to the holder's personal position on the board does not protect a founder from being removed by public shareholders (indirectly) from his or her executive position leading the company as CEO, nor from the strategy of the company being in the hands of a board the composition of which is influenced by the public shareholders. Even though the condition does give a holder of enhanced-voting shares a veto over takeovers, a further condition removes that veto five years after IPO.

The more restrictive conditions have had implications. Although one could say that those conditions make it simpler for public investors to price-in risk when investing in dual-class stock firms by reducing the scope for controllers to extract extreme private benefits of control, it should be noted that investors have seemingly successfully priced-in dual-class stock risk in the U.S. where no such conditions are mandated.[163] There is little evidence that the adoption of such conditions genuinely results in better returns for investors. On the flipside, from a founder's perspective, the conditions result in a capital structure that does not give them the protection from the public markets they desire when listing, especially if their companies are innovative, high-growth firms, and even if such a founder were inclined to test the waters of the premium tier, the presence of a mandatory time-dependent sunset clause would likely cause them to delay listing until the company were more mature, undermining the objective of UK policymakers to attract firms to the LSE at earlier stages of their lifecycles while they are still experiencing significant growth. It is unsurprising that as of the time of writing, no firms have adopted such a structure with those conditions attached on the premium tier.

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163 *See supra* note 47, and accompanying text.

In the end, UK exceptionalism relating to a desire to operate with the highest standards of corporate governance, at least initially, won the day. A half-hearted approach to dual-class stock on the premium tier led not to an opening of the doors to dual-class stock, but, instead, "dual-class stock-lite," which permits issuers to employ a form of multiple voting rights structure but with conditions attached that are overall so severe, and unparalleled by other exchanges that permit dual-class stock, that it is has not moved the needle on attracting founders of new economy companies to the market. While UK exceptionalism in the realm of corporate governance may be valued by the institutional investor community, there is not much point in sticking to that regimen if companies do not want to list on the exchange. If UK companies forego the London markets, UK-focused institutional investors are simply shooting themselves in the foot as the LSE becomes a smaller and smaller pool of shares.

Extraordinarily, the FCA in 2023 appears to have quite suddenly changed its attitude to dual-class stock and, arguably, UK exceptionalism generally. As part of a proposal to merge the standard and premium tiers, the FCA has advocated for a more disclosure-oriented (rather than mandatory rules) approach to the Listing Rules, including a more expansive stance on dual-class stock. If the proposed reforms do see the light of day, the step-change from a regulatory paradigm standpoint that prioritized mandatory investor protection to a contracting paradigm that favors voluntary investor protections by issuers aligned with adequate disclosure to investors will be a seismic shift. In some respects, such a change in philosophy is welcome in the face of a moribund exchange. However, in other respects the FCA may have gone too far, with an aspiration to mirror the U.S. exchanges while potentially underestimating the *ex ante* impact that *ex post* litigation risk in the U.S. can have;[164] a litigation risk not evident in the UK.[165] A fuller assessment of the new approach is for further study, if and when it is adopted. However, with respect to dual-class stock specifically, the fact that the FCA has so quickly suggested abandoning its much hyped late-2021 SWVRS structure in favor of more U.S.-style dual-class stock suggests that the initial experiment into dual-class stock has not satisfied the aims and objectives of policymakers. The FCA has in effect acknowledged that its initial reforms on dual-class stock were ineffective, and at least some loosening of the rules will be required if the LSE is to change its reputation as a dinosaur amongst global stock exchanges.[166] Will opening up on dual-class stock suddenly lead to a plethora of high-growth firms listing on the LSE? Most probably not. Market-oriented factors are holding the LSE back, and the culture of investors on the LSE, who seemingly prioritize income-producing stock over growth stock, will need to change.[167] Attracting UK pension plans, improving analyst coverage of tech stock,

164 Bobby Reddy, *From Dual-Class Shares-Lite to Full Fat: The FCA's Potential About-Turn on Dual-Class Shares*, Oxford Bus. L. Blog (Jun. 20, 2023) https://blogs.law.ox.ac.uk/oblb/blog-post/2023/06/dual-class-shares-lite-full-fat-fcas-potential-about-turn-dual-class-shares

165 Reddy, *supra* note 11, at 349-52.

166 Marshall, *supra* note 23.

167 See *supra* notes 118-120, and accompanying text.

and incentivizing investment in growth companies will all also be crucial.[168] However, even if full fat dual-class stock will not in and of itself cure the LSE's plight, it will be one step on the road.

168 Cheffins & Reddy, *supra* note 119, at 221-225.