

Davis Polk

Corporate Governance
Practices in U.S.
Initial Public Offerings
(Controlled Companies)

July 2018

IPO Governance Survey

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Overview

As a leading IPO adviser to companies and underwriters, we surveyed corporate governance practices in recent U.S.-listed IPOs to identify current market trends. We focused on the top 50 IPOs of “controlled companies” (as defined under NYSE or NASDAQ listing standards) and the top 50 IPOs of non-controlled companies, in each case based on deal size from April 1, 2013 through March 31, 2018.*

Because controlled companies are exempt from certain NYSE and NASDAQ governance requirements, we examined corporate governance practices at these companies separately from those at non-controlled companies. The survey results below focus on controlled companies, whose deal size ranged from \$150.0 million to \$3.4 billion. For our survey focusing on non-controlled companies, [please see here](#).

The Companies

We examined the following 50 controlled companies, spanning 34 industries:

Acushnet Holdings Corp	Keane Group Inc.
ADT Inc	Laureate Education Inc.
Advanced Disposal Services Inc	Liberty Oilfield Services Inc
AdvancePierre Foods Holdings, Inc.	Medpace Inc
Altice USA Inc.	Myovant Sciences Ltd
American Renal Associates Holdings, Inc.	National Vision Holdings, Inc.
Atkore International Group Inc	NCS Multistage Holdings Inc
Cactus Inc	Patheon N.V.
Cadence Bancorp	Playags Inc
Camping World Holdings Inc.	Presidio, Inc.
CarGurus Inc	ProPetro Holding Corp
Carvana Co	Red Rock Resorts Inc
Cotiviti Holdings Inc.	REV Group Inc
Emerald Expositions Events, Inc.	SailPoint Tech Holding Inc
Evoqua Water Technologies Corp	Schneider National Inc
First Hawaiian Bank	SiteOne Landscape Supply Inc
Floor & Decor Holdings Inc	Snap Inc.
Forterra Inc	Sterling Bancorp Inc
Foundation Building Materials, Inc.	Switch, Inc.
Gardner Denver Holdings Inc	U.S. Foods Holding Corp.
Gates Industrial Corp Plc	Valvoline Inc.
Hamilton Lane Inc.	Venator Materials PLC
J Jill Group Inc.	Victory Capital Holdings Inc
Jagged Peak Energy Inc	WideOpenWest Inc
JELD-WEN Holding Inc	WildHorse Resource Development Corporation

* Excludes foreign private issuers, limited partnerships, REITs, trusts and blank check companies

Significant Findings

Comparing our findings in this survey to those in our prior surveys, we found that controlled companies, similar to the non-controlled companies we examined, continued to deploy various takeover defenses in advance of their IPOs, despite the fact that governance advocates (and activist investors) have shown a pronounced dislike for what they view as management-entrenchment devices. For example:

- **78%** of companies adopted a classified board.
- **88%** of companies adopted a plurality vote standard for uncontested director elections.
- **86%** of companies effectively prohibited shareholder action by written consent.
- **84%** of companies had provisions prohibiting shareholders from calling a special meeting.
- **86%** of companies required a supermajority shareholder vote for amending the bylaws.

We also found that the number of controlled companies that adopted exclusive-forum provisions (another governance attribute disfavored by some shareholder advocates) more than tripled over the past several years, from 25% in the 2011 survey to 80% in the 2014 survey to 88% in the 2016 survey and 94% in the 2018 survey.

In addition, while a higher proportion of controlled companies separated the roles of chairman and CEO relative to non-controlled companies (58% of controlled companies versus 52% of non-controlled companies), this separation has been consistent in recent years among all companies, and in the case of controlled companies was 59% in the 2014 survey.

Companies that are closely held at IPO may choose to adopt “springing” provisions, which are only effective once the controlling shareholder owns less than a certain percentage of the outstanding voting stock.

Other key differences we noted in comparing corporate governance practices at controlled companies to those at non-controlled companies were significantly lower levels of board and committee independence at IPO time (unsurprising in light of the exemption for controlled companies from majority board independence and the independence requirements relating to governance/nominating and compensation committees). These differences include:

- The average level of director independence at controlled companies was **48%** versus **73%** at non-controlled companies.
- **44%** of controlled companies had fully independent audit committees at the IPO versus **82%** of non-controlled companies.
- **29%** of controlled companies had fully independent governance/nominating committees at the IPO versus **84%** of non-controlled companies.

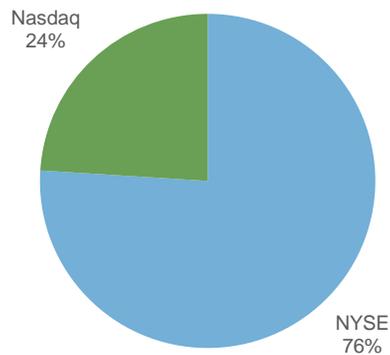
- **35%** of controlled companies had fully independent compensation committees at the IPO versus **82%** of non-controlled companies.
- **24%** of controlled companies had an independent chairman versus **38%** of non-controlled companies.
- **14%** of controlled companies without an independent chairman had a lead director versus **33%** of non-controlled companies.
- **78%** of controlled companies had a classified board versus **90%** of non-controlled companies.
- **76%** of controlled companies were listed on the NYSE versus **38%** of non-controlled companies.

Primary Listing Exchange

Of 50 companies examined:

- **38** companies (76%) listed on the NYSE
- **12** companies (24%) listed on the NASDAQ

Primary Listing Exchange

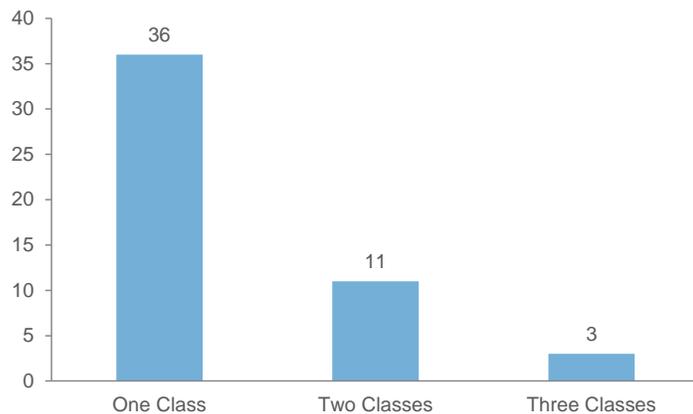


Classes of Outstanding Common Stock

Of 50 companies examined:

- **36** companies (72%) had one class of common stock outstanding
- **11** companies (22%) had two classes of common stock outstanding, **8** (16%) of which had unequal voting rights
- **3** companies (6%) had three of common stock outstanding with unequal voting rights

Classes of Outstanding Common Stock

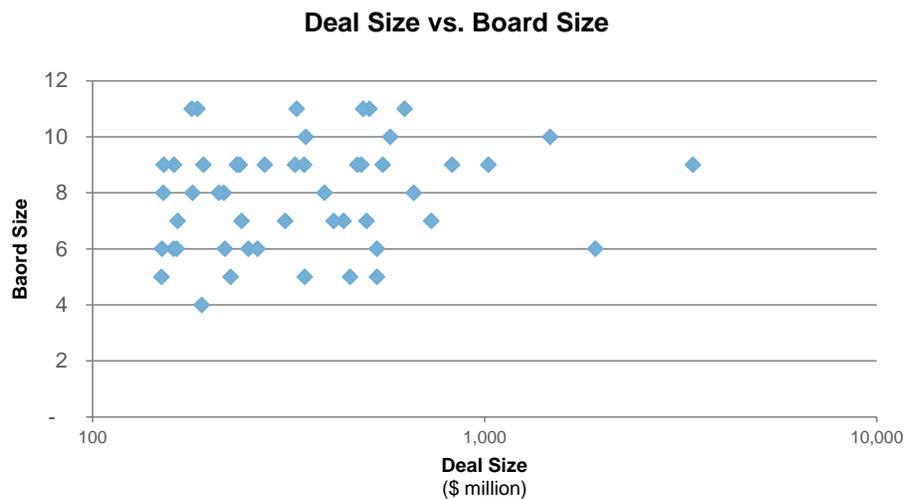


Board Size

Of 50 companies examined:

- The average board size was **8** members
- The median board size was **8** members
- Board size ranged from **4** to **11** members

There was no distinct correlation between deal size and board size.



Level of Board Independence

Of 50 companies examined:

- The average level of director independence was **48%** of the board
- The median level of director independence was **50%** of the board
- The level of director independence ranged from a low of **0%** to a high of **89%**

Controlled companies are exempt from majority of independent directors requirement

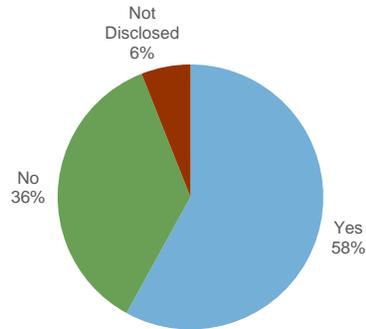
Controlled companies are subject to an exemption from NYSE and NASDAQ standards requiring that the board of a listed company consist of a majority of independent directors within one year of the listing date.

Separation of Chairman and CEO

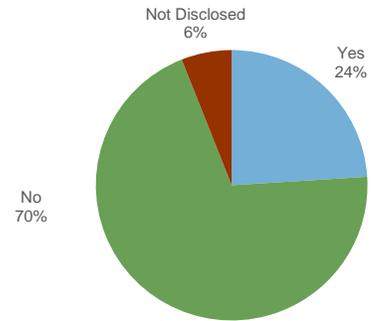
Of 50 companies examined:

- **29** companies (58%) had a separate chairman and CEO
- **12** companies (24%) had an independent chairman

Separation of Chairman & CEO



Independent Chairman

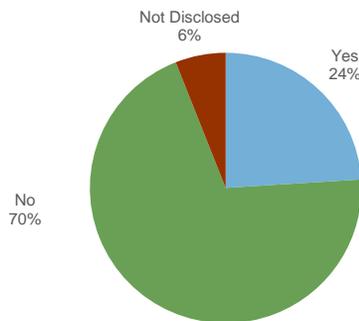


Lead Director

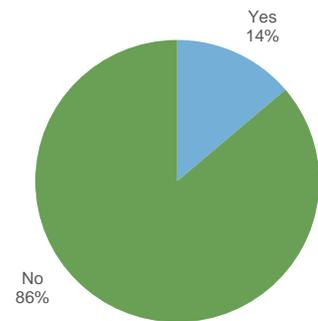
Of 50 companies examined:

- **35** companies (70%) did not have an independent chairman
 - Of these, **5** companies (14%) had a lead director

Independent Chairman



Lead Director



Alternative board leadership structures include separating the Chairman and CEO roles, and appointing an Independent Chairman or Lead Director.

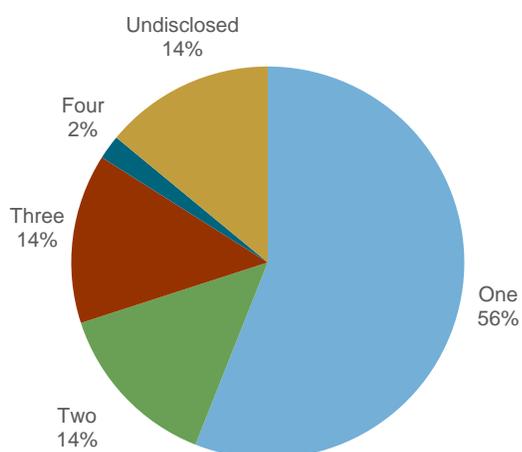
In the interest of **balancing the demands of operating** a corporation with those of leading a corporate board, companies increasingly utilize alternatives to the traditional CEO/Chair leadership model. The benefits of appointing an independent chair or a lead director may include increased efficiency and improved succession planning. An independent chair may assume primary responsibility for board agendas and meetings, and may represent the organization and interact with outside stakeholders. A lead director, often appointed when the CEO and Chair roles are combined, assuages investor concerns about having appropriate independent oversight.

Audit Committee Financial Experts

Of 50 companies examined:

- 28 companies (56%) had one financial expert
- 7 companies (14%) had two financial experts
- 7 companies (14%) had three financial experts
- 1 company (2%) had four financial experts
- 7 companies (14%) did not disclose a financial expert

Number of Audit Committee Financial Experts



Audit committee financial expert

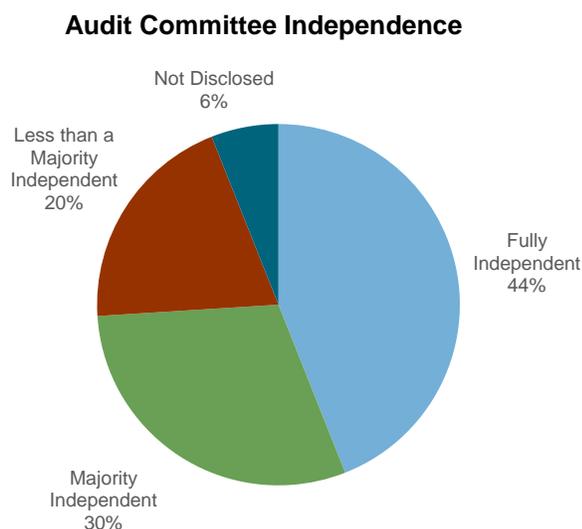
The SEC requires a reporting company to disclose in its annual report (but not in its IPO prospectus) that the board has determined it has at least one audit committee financial expert, or explain why it does not.

An audit committee financial expert is a person who has the following attributes: (1) an understanding of generally accepted accounting principles and financial statements; (2) the ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves; (3) experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the company's financial statements, or experience actively supervising one or more persons engaged in such activities; (4) an understanding of internal control over financial reporting; and (5) an understanding of audit committee functions.

Audit Committee Independence

Of 50 companies examined:

- **22** companies (44%) had a fully independent audit committee
- **15** companies (30%) had a majority independent audit committee
- **10** companies (20%) had a less than a majority independent audit committee
- **3** companies (6%) did not disclose the composition of the compensation committee



Audit committee independence

Under NYSE and NASDAQ rules, an IPO company (including a controlled company) must have at least one independent audit committee member at the time of listing, at least a majority of independent members within 90 days of the effective date of its registration statement and a fully independent committee within one year of the effective date of its registration statement.

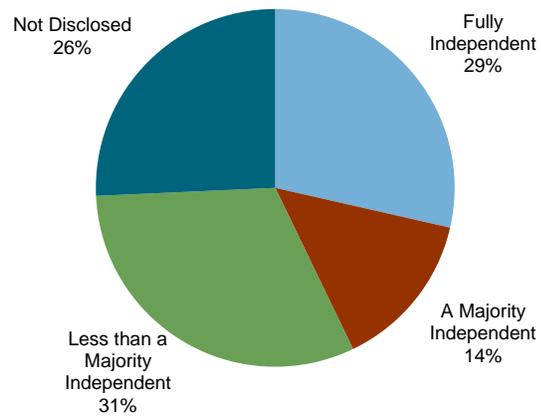
In addition to the NYSE/NASDAQ independence standards applicable to all independent directors, audit committee members are required to meet additional independence tests set forth by the SEC, which provide that a director who serves on the company's audit committee may not (other than in his or her capacity as a member of the audit committee, the board or any other board committee): (1) accept any consulting, advisory or other compensatory fee from the company (excluding fixed, non-contingent payments under a retirement plan for prior service with the listed company); or (2) be an "affiliated person" of the company. In practice, the affiliated-person prohibition means that directors affiliated with large shareholders do not sit on the audit committee even though they may otherwise be deemed independent under stock exchange listing standards.

Governance/Nominating Committee Independence

Of 50 companies examined, **35** had a governance/nominating committee. Of these 35 companies:

- **10** companies (29%) had a fully independent governance/nominating committee
- **5** companies (14%) had a majority independent governance/nominating committee
- **11** companies (31%) had a less than a majority independent governance/nominating committee
- **9** companies (26%) did not have any independent directors on their governance/nominating committee

Governance/Nominating Committee Independence

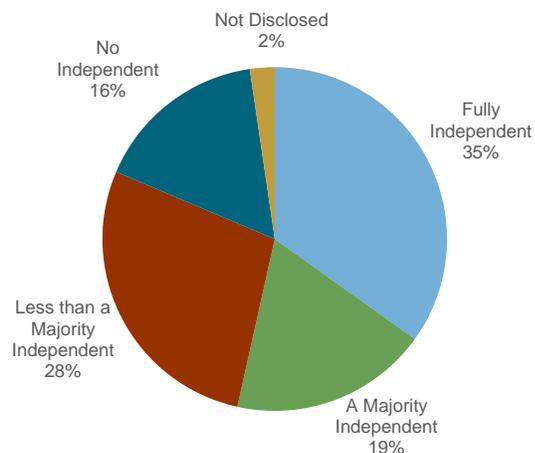


Compensation Committee Independence

Of 50 companies examined, **43** had a compensation committee. Of these 43 companies:

- **15** companies (35%) had a fully independent compensation committee
- **8** companies (19%) had a majority independent compensation committee
- **12** companies (28%) had a less than a majority independent compensation committee
- **7** companies (16%) did not have any independent directors on their compensation committee
- **1** company (2%) did not disclose its independence in the compensation committee

Compensation Committee Independence



Governance/nominating and compensation committee independence

Controlled companies are entitled to an exemption from NYSE and NASDAQ rules requiring that governance/nominating and compensation committees consist of independent directors, although an independent compensation committee is useful for other purposes, including to facilitate exemptions from Section 16 short-swing profit rules.

Additional Board Committees

Of 50 companies examined:

- 9 companies (18%) had additional board committees

The additional committees included executive committees, risk committees and compliance committees, among others.

Shareholder Rights Plan (Poison Pill)

Of 50 companies examined, **none** had adopted a shareholder rights plan (poison pill). As discussed below, so long as a company has blank check preferred stock, a poison pill may be relatively easily adopted at a later time.

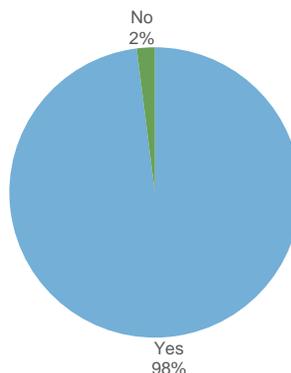
Adoption of a shareholder rights plan (poison pill)

A typical shareholder rights plan, or poison pill, grants the existing shareholders of a company (other than a hostile acquiror) the right to acquire a large number of newly issued shares of the company (and of the acquiror if the target company is not the surviving entity in the transaction) at a significant discount to fair market value, if the acquiror becomes an owner of more than a preset amount (typically 10-20%) of the target company's stock without prior board approval. The board can elect to redeem the poison pill at a trivial amount (e.g., <\$0.01) or deem the rights plan inapplicable to certain acquirors, with the result that any potential acquiror must negotiate with the board (or replace the board through a proxy contest) before it acquires a significant stake. This is because the cost to the potential acquiror of crossing the ownership threshold would be prohibitive if the shareholder rights plan were triggered. **So long as "blank check" stock power is provided as described below, a shareholder rights plan can usually be adopted at a later time rather than at the IPO and, in most cases, shareholder rights plans typically are not adopted at the time of the IPO.**

“Blank Check” Preferred Stock

Of 50 companies examined, **49** were authorized to issue “blank check” preferred stock.*

Authority to Issue “Blank Check” Preferred Stock



* Exception was a non-U.S. incorporated company.

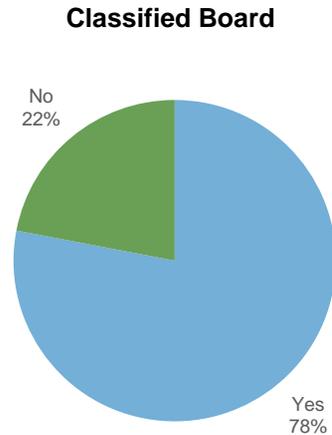
Authority to issue “blank check” preferred stock

A company may include in its authorized and unissued share capital a certain amount of undesignated preferred shares. The board is authorized to issue preferred shares in one or more series and to determine and fix the designations, voting powers, preferences and rights of such shares and any qualifications, limitations or restrictions on such shares. The existence of “blank check” preferred stock may allow the board to issue preferred stock with super voting, special approval, dividend or other rights or preferences on a discriminatory basis without a shareholder vote. This authority is often used as a protective mechanism in the context of a hostile take-over attempt by permitting the adoption of a shareholder rights plan (poison pill) at that time.

Classified Board

Of 50 companies examined:

- **39** companies (78%) had a classified board*
- **11** companies (22%) did not have a classified board



** Of these 39 companies, 2 companies (5%) had a springing staggered board (the board automatically becomes classified upon a significant shareholder or group ceasing to own or control the vote of a specified percentage of outstanding shares)*

Classified board

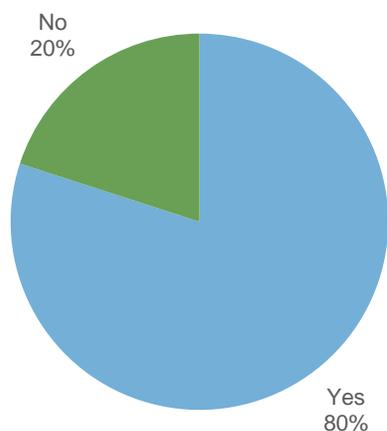
The implementation of a classified board often serves as a protective mechanism in the context of a take-over by ensuring that a potential acquiror cannot simply replace an entire board at one time. Typically, a staggered board is composed of three equally divided classes of directors, with each class elected in successive years. A classified board serves as a complement to the protections afforded by a shareholder rights plan, in that it forces a potential acquiror to conduct a proxy contest at the company's annual shareholder meeting for two consecutive years (time it is not typically willing to wait, leading it to engage with the incumbent board) before it can take over the board and revoke the shareholder rights plan.

Director Removal for Cause Only

Of 50 companies examined:

- **40** companies (80%) allowed removal of a director for cause only*

Director Removal for Cause Only



** These 40 companies included 26 companies (65%) whose provision allowing director removal only for cause was triggered when a significant shareholder or group ceased to own or control the vote of a specified percentage of outstanding shares*

Although under Delaware law, non-classified directors are removable without cause, 2 companies with a non-classified board provided for director removal only for cause

Director removal for cause only

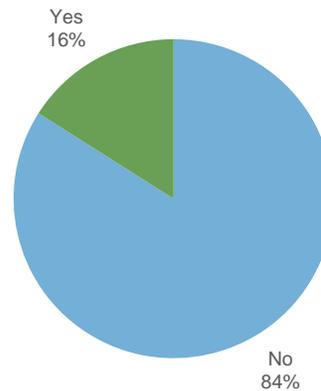
Director removal for cause is an automatic consequence of having a classified board under Delaware law, and is necessary to preserve the extended terms of those directors. Taken together, a classified board structure and a provision allowing director removal for cause only (as supplemented by restrictions on shareholder ability to act by written consent, as discussed below) serve as a protective mechanism in the context of a take-over by forcing a potential acquiror to conduct a proxy contest at the company's annual shareholder meeting for two consecutive years before it can take over the board.

Shareholder Ability to Call Special Meeting

Of 50 companies examined:

- **42** companies (84%) prohibited shareholders from calling a special meeting*
- **8** companies (16%) permitted shareholders to call a special meeting. Of these:
 - **2** company (25%) permitted shareholders comprising at least 5% to call a special meeting
 - **2** companies (25%) permitted shareholders comprising at least 10% to call a special meeting
 - **2** company (25%) permitted shareholders comprising at least 20% to call a special meeting
 - **2** companies (25%) permitted shareholders comprising at least a majority to call a special meeting

Shareholder Ability to Call Special Meeting



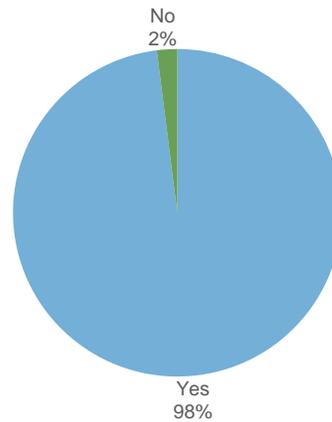
* These 8 companies included 1 company (13%) whose provision prohibiting shareholders from calling a special meeting was triggered when a significant shareholder or group ceased to own or control the vote of a specified percentage of outstanding shares

Advance Notice Bylaws

Of 50 companies examined:

- **49** companies (98%) had bylaws setting forth timing, notice and certain other requirements relating to when and how a shareholder may propose business for shareholder consideration, including the nomination of a director for election*

Advance Notice Bylaws



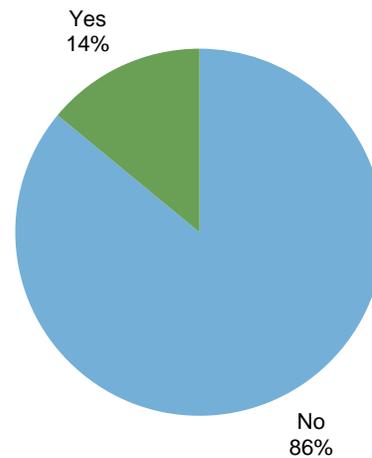
* Exception was a non-U.S. incorporated company.

Shareholder Action by Written Consent

Of 50 companies examined:

- **43** companies (86%) prohibited shareholder action by written consent*
- **7** companies (14%) permitted shareholder action by written consent
 - Of these, **3** companies (43%) required written consent to be unanimous, effectively rendering the right moot

Shareholder Action by Written Consent Permitted



** These 43 companies included 36 companies (84%) whose provision prohibiting shareholder action by written consent was triggered when a significant shareholder or group ceased to own or control the vote of a specified percentage of outstanding shares*

Shareholder voting restrictions

Shareholder voting restrictions serve to limit shareholders from acting without board involvement and can serve to restrict the ability of a potential acquiror from taking control of the company without having to negotiate with the board.

Board Authority to Change Board Size

Of 50 companies examined, **49** companies (98%) permitted the board to change the size of the board.

Board Authority to Fill Vacancies on Board

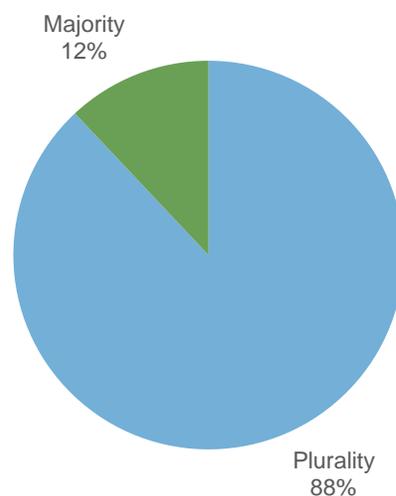
Of 50 companies examined, **48** companies (96%) permitted the board to fill vacancies on the board.

Voting in Uncontested Board Elections

Of 50 companies examined:

- **44** companies (88%) required a plurality standard for board elections
- **6** companies (12%) required a majority standard for board elections*

Standard for Board Elections



** Of these 6 companies, 1 company had a director resignation policy*

Voting standard for director elections under Delaware law

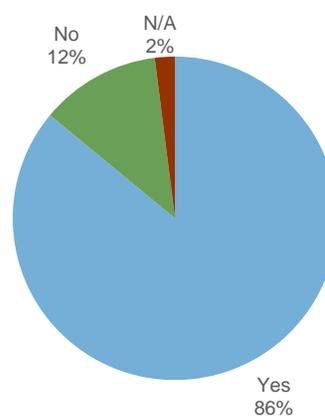
Under Delaware law, in the absence of a different specification in a company's certificate of incorporation or bylaws, directors are elected by a plurality voting system. Under a plurality voting system, the nominees for directorships are elected based on who receives the highest number of affirmative votes cast. Under a majority voting system, a nominee for directorship is elected if he or she receives the affirmative vote of a majority of the total votes cast for and against such nominee.

Supermajority Vote for Amending the Bylaws

Of 50 companies examined:

- **43** companies (86%) required a supermajority shareholder vote for amending the bylaws*
 - Of these, **8** companies (19%) required a vote of 75% or more
- **6** companies (12%) did not require a supermajority shareholder vote for amending the bylaws
- **1** company (2%) was silent as to permitting the shareholders to amend bylaws.

Supermajority Vote for Amending the Bylaws



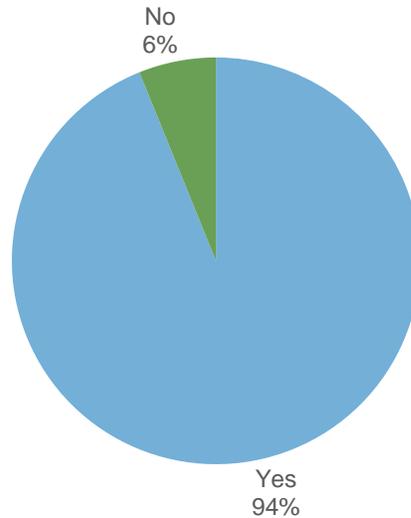
* These 43 companies included 28 companies (65%) whose supermajority vote requirements were triggered when a significant shareholder or group ceased to own or control the vote of a specified percentage of outstanding shares

Exclusive-Forum Provisions

Of 50 companies examined:

- **47** companies (94%) had an exclusive-forum provision. Of these:
 - **40** companies (85%) specified Delaware as the exclusive forum
 - **40** companies (85%) adopted them in their charter, **6** companies (13%) adopted them in their bylaws and **1** company (2%) adopted them in both its charter and its bylaws
- **3** companies (6%) did not have an exclusive-forum provision

Exclusive-Forum Provision

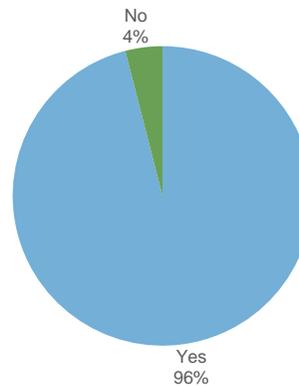


New Equity Compensation Plan

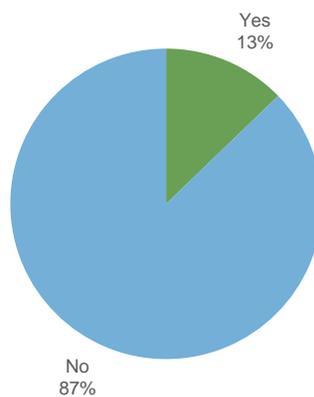
Of 50 companies examined:

- **48** companies (96%) adopted a new equity compensation plan. Of the 48:
 - **6** companies (13%) adopted a new equity compensation plan with an evergreen provision
 - **41** companies (85%) adopted a new equity compensation plan with a clawback provision
 - **1** company (2%) adopted a new equity compensation plan that permitted option/SAR repricing without shareholder approval
 - **None** of the new equity compensation plans included stock ownership/retention requirements
 - **12** companies, however, disclosed separate stock ownership/ retention guidelines or policies

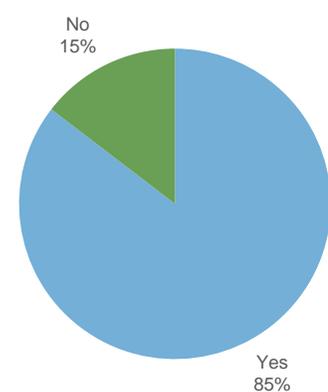
New Equity Compensation Plan (NECP)



NECP with Evergreen Provision



NECP with Clawback Provision



Equity Compensation Awards

Of 50 companies examined:

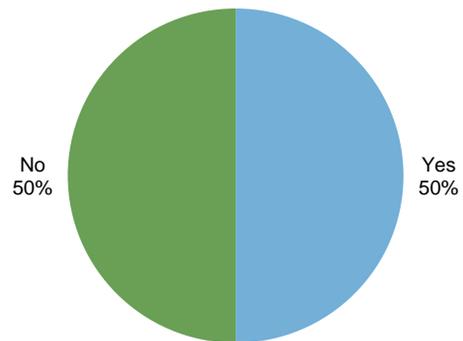
- The number of outstanding equity compensation awards at the time of the IPO, as a percentage of the fully diluted number of common shares post-IPO, ranged from 0% to 15%
- The number of outstanding equity compensation awards at the time of the IPO, combined with the number of shares reserved for issuance under the new equity compensation plan adopted, as a percentage of the fully diluted number of common shares post-IPO, ranged from 0% to 27%
- The number of shares reserved for issuance under the new equity compensation plan adopted, as a percentage of the fully diluted number of common shares post-IPO, ranged from 0% to 18%

Employment and Similar Agreements

Of 50 companies examined:

- **25** companies (50%) adopted one or more new employment or similar agreements with their executives within six months of the IPO
 - **12** were emerging growth companies

Employment or Similar Agreement



Compensation Consultants

Of 50 companies examined:

- **17 companies (34%)** disclosed the use of and named their compensation consultants
 - **None** were emerging growth companies

The specified consultants included:

Aon Hewitt

Deloitte

Frederic W. Cook & Co.

Hay Group

Meridian

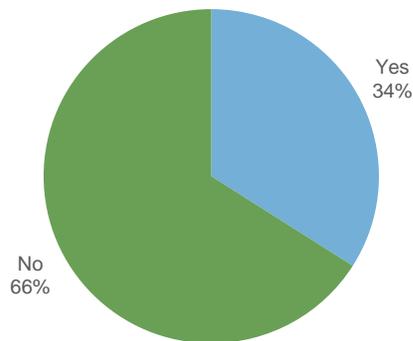
Pay Governance

Pearl Meyer & Partners, LLC

Semler Brossy

Willis Towers Watson

Compensation Consultant Disclosure



Compensation consultants

The SEC requires a listed company to disclose in its proxy statement any role of compensation consultants in determining or recommending the amount or form of executive and director compensation, identifying such consultants, stating whether such consultants are engaged directly by the compensation committee (or persons performing the equivalent functions) or any other person and describing the nature and scope of their assignment and the material elements of the instructions or directions given to the consultants with respect to the performance of their duties under the engagement.

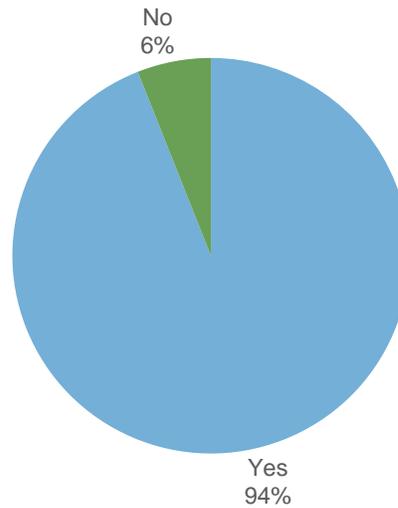
Disclosure of Non-GAAP Financial Measures

Of 50 companies examined:

- **47** companies (94%) disclosed non-GAAP financial measures

Disclosed non-GAAP financial measures included EBITDA, Adjusted EBITDA, Adjusted EBITDAX, Adjusted EBITDA Margin, Adjusted Net Income and Free Cash Flow, among others.

Disclosure of Non-GAAP Financial Measures

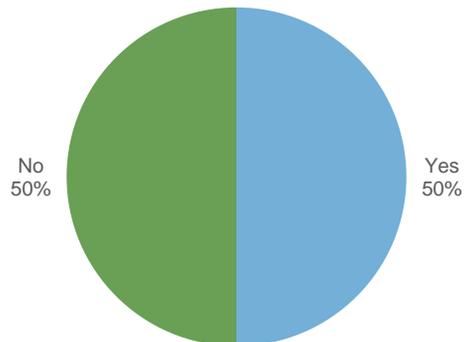


Emerging Growth Companies

Of 50 companies examined, **25** companies (50%) identified themselves as emerging growth companies under the JOBS Act of 2012. Of these:

- **1** company (4%) included one year of audited financial statements in the registration statement, **18** companies (72%) included two years of audited financial statements in the registration statement and **6** companies (24%) included three years of audited financial statements in the registration statement
- **1** company (4%) included one year of selected financial data in the registration statement, **13** companies (52%) included two years of selected financial data in the registration statement, **6** companies (24%) included three years of selected financial data in the registration statement, **1** company (4%) included four years of selected financial data in the registration statement and **4** companies (16%) included five years of selected financial data in the registration statement
- **1** company (4%) included a Compensation Discussion and Analysis in the registration statement
- **6** companies (24%) took advantage of the ability to delay adopting newly applicable public-company accounting policies

Emerging Growth Company



Emerging growth companies under the JOBS Act of 2012

The JOBS Act of 2012 eased the IPO process and subsequent reporting and compliance obligations for “emerging growth companies” and loosened restrictions on research around the IPO of an emerging growth company. Under the JOBS Act, emerging growth companies can take advantage of various reporting and compliance exemptions, including not being required to comply with the auditor attestation requirements of the Sarbanes-Oxley Act, reduced executive compensation disclosure requirements and the ability to delay adoption of new public-company accounting principles.

An emerging growth company is an IPO company that had annual gross revenues of less than \$1 billion during its most recent fiscal year. An emerging growth company retains this status until the earliest of: (1) the last day of the first fiscal year during which its annual revenues reach \$1 billion; (2) the last day of the fiscal year in which the fifth anniversary of its IPO occurs; (3) the date on which the company has, during the previous three-year period, issued more than \$1 billion in non-convertible debt; and (4) the date on which the company becomes a “large accelerated filer” (essentially, a company with \$700 million of public equity float that has been reporting for at least one year).

A company that filed for its IPO as an emerging growth company but subsequently lost this status before the IPO was completed will continue to be treated as an emerging growth company for one year or, if earlier, until completion of its IPO.

Davis Polk's Capital Markets Practice

Davis Polk & Wardwell LLP's capital markets practice provides a full range of services for issuers and underwriters in initial public offerings, follow-on offerings, investment-grade and high-yield debt issuances, and in the design and execution of sophisticated equity derivative products. Davis Polk is also an international IPO adviser that has advised companies, selling shareholders (including private equity and venture capital shareholders) and underwriters in connection with these transactions. Our global capital markets practice has approximately 240 lawyers, including 39 partners in our offices around the world.

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