

Davis Polk

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

October 2009

IPO Governance Survey

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Corporate Governance Practices of U.S. Initial Public Offerings

Overview

As an advisor to underwriters and companies in initial public offerings, we surveyed the corporate governance practices of recent U.S. IPOs to identify current market trends. We focused on the top 50 IPOs of U.S. companies in 2007 and 2008 in terms of deal size of the IPO.* The deal size of the examined IPOs ranged from \$107.9 million to \$17.8 billion.

The Companies

Accuracy Inc.	Infinera Corp
AECOM Technology Corp.	Insulet Corp.**
Aerovironment Inc.	Intrepid Potash, Inc.
American Capital Agency Corp.	Jazz Pharmaceuticals Inc.**
American Water Works Company, Inc.	K12 Inc.**
Animal Health International Inc**	Limelight Networks Inc.
AthenaHealth Inc.	Masimo Corp.
BigBand Networks Inc.	MedAssets Inc.
Bway Holdings Co.	METROPCS Communication Inc.
Cardtronics Inc.	Monotype Imaging**
Cinemark Holdings Inc.	National Cinemedia Inc.
Clean Energy Fuels Corp.	Netezza Corp.
Colfax Corp.	Netsuite Inc.
Concho Resources Inc.	Opnext Inc.
Data Domain Inc.	Rackspace Hosting.
Dolan Media Co.	RHI Entertainment Inc.
Duff & Phelps**	Riskmetrics Group Inc.
DuPont Fabros Technology Inc.	Sandridge Energy Inc.**
Employers Holdings Inc.	Starent Networks Corp.
Energy Recovery**	SuccessFactors Inc.
Grand Canyon Education.	Switch & Data Facilities Company, Inc.
Hatteras Financial Corp	TomoTherapy Inc.
Haynes International.**	Trimas Corp.
HFF Inc.	Ulta Salon Cosmetics & Fragrance Inc.
HHGREG Inc.	Visa Inc.**

We examined the following 50 companies, spanning 42 industries:

* Excludes controlled companies, limited partnerships and blank check companies.

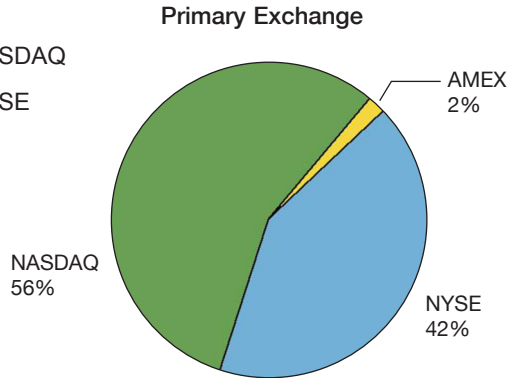
**Davis Polk participated in the IPO.

Corporate Governance Practices of U.S. Initial Public Offerings

Primary Listing Exchange

Of the 50 companies examined:

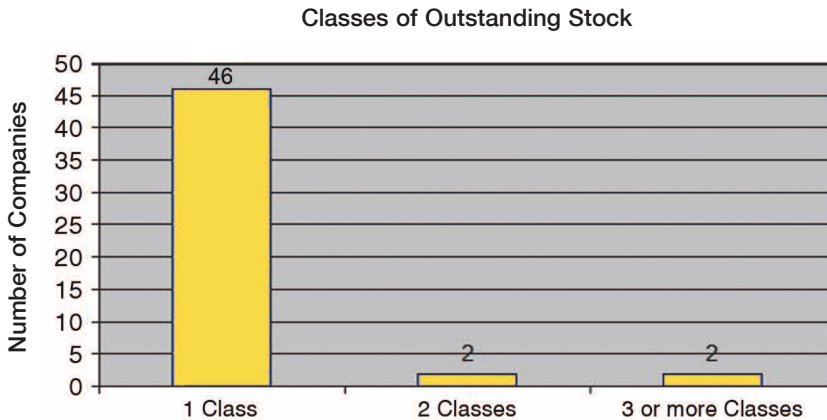
- 28 (56%) companies are listed on NASDAQ
- 21 (42%) companies are listed on NYSE
- 1 (2%) company is listed on AMEX



Classes of Outstanding Stock at IPO

Of the 50 companies examined:

- 46 of the companies (92%) had 1 class of outstanding stock
- 2 of the companies (4%) had 2 classes of outstanding stock
- 2 of the companies (4%) had 3 or more classes of outstanding stock

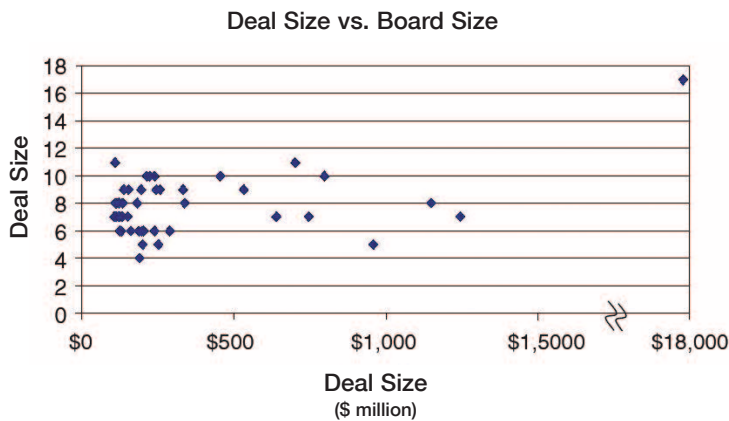


Corporate Governance Practices of U.S. Initial Public Offerings

Board Size at IPO

Of the 50 companies examined:

- The average board size was 7.8
- The median board size was 7
- The board sizes ranged from 4 to 17 members
- There is no distinct correlation between deal size and board size



Level of Board Independence at IPO

Of the 50 companies examined:

- The average level of director independence was 66% of the board
- The median level of director independence was 67% of the board
- The levels of director independence ranged from a low of 20% to a high of 89%

Requirement for director independence at time of IPO

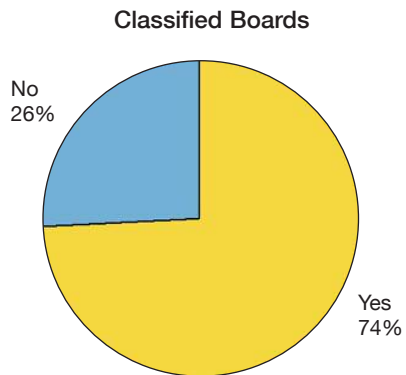
Subject to an exception for “controlled companies,” the NYSE and NASDAQ standards require that the board of directors of an IPO company consist of a majority of independent directors within one year from the date of listing.

Corporate Governance Practices of U.S. Initial Public Offerings

■ Classified Board at IPO

Of the 50 companies examined:

- 37 companies (74%) had classified boards

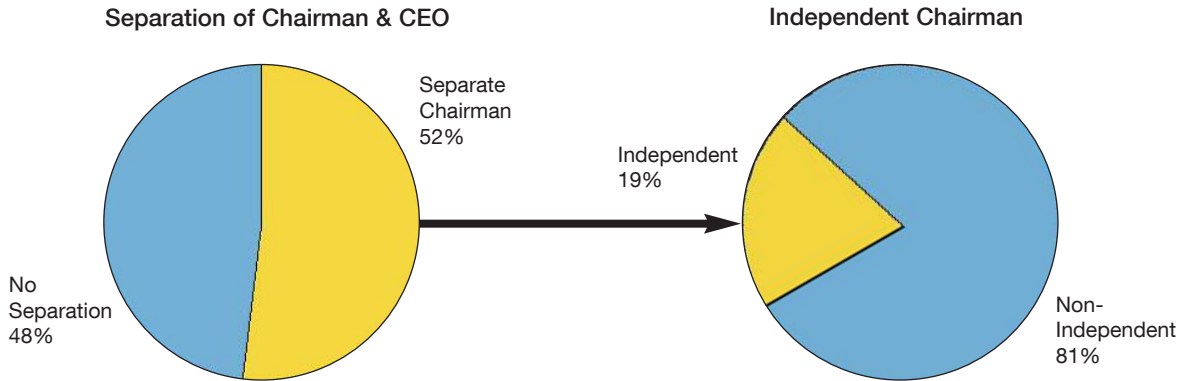


Corporate Governance Practices of U.S. Initial Public Offerings

■ Separation of Chairman & CEO

Of the 50 companies examined:

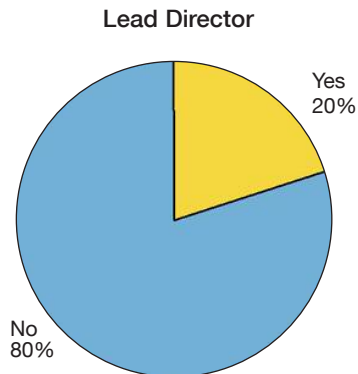
- 26 companies (52%) had a separate chairman and CEO
 - Of those **26** companies with a separate chairman, **5** (19%) had an independent chairman



■ Lead Director

Of the 50 companies examined:

- 10 companies (20%) had a lead director

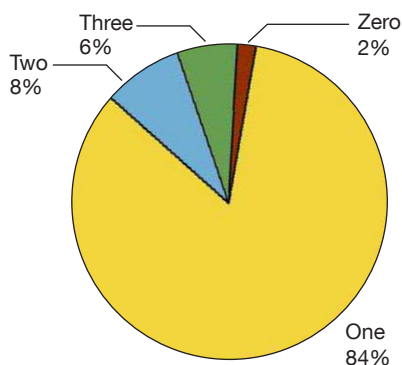


Audit Committee Financial Experts at IPO

Of the 50 companies examined:

- 42 companies (84%) had 1 financial expert
- 4 companies (8%) had 2 financial experts
- 3 companies (6%) had 3 financial experts
- 1 company (2%) had no financial experts

Audit Committee Financial Experts at IPO



Disclosure of an Audit Committee financial expert at IPO

The SEC requires a listed company to disclose in its annual report whether the board of directors has determined that the company has at least one audit committee financial expert serving on its audit committee, or why it does not have one.

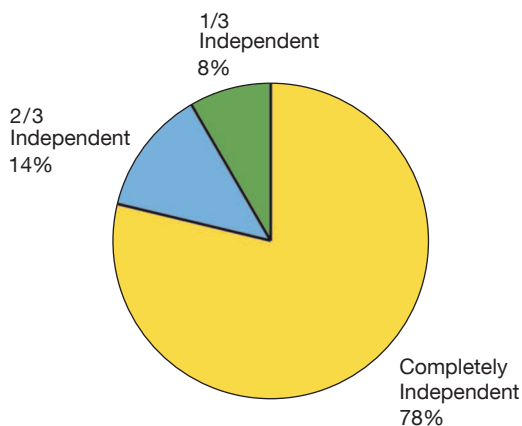
An audit committee financial expert means a person who has the following attributes: (1) an understanding of generally accepted accounting principles and financial statements; (2) the ability to assess the general application of such principles in connection with the accounting for estimates, accruals 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 at IPO

Of the 50 companies examined:

- 39 (78%) companies had a completely independent audit committee at the time of its IPO
- 7 (14%) companies had a 2/3 independent audit committee at the time of its IPO
- 4 (8%) companies had a 1/3 independent audit committee at the time of its IPO

Audit Committee Independence at IPO



Audit Committee independence at time of IPO

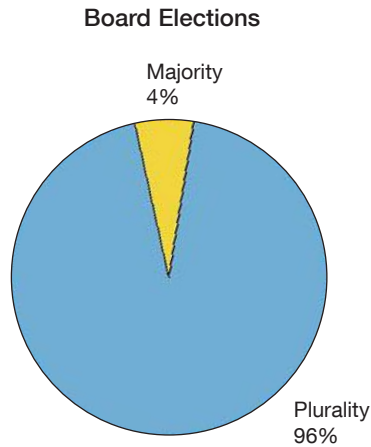
Under NYSE and NASDAQ rules, an IPO company must have at least one independent member of the audit committee at the time of listing, a majority of independent members within 90 days of its registration statement being declared effective and a fully independent audit committee within one year of its registration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

In addition to the NYSE/NASDAQ independence standards applicable to all independent directors, audit committee members are required to meet additional independence requirements set forth by the SEC, which provide that a director who serves on the listed company's audit committee may not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee: (1) accept any consulting, advisory, or other compensatory fee from the listed 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 listed company.

■ Board Elections

Of the 50 companies examined:

- 48 (96%) required a plurality standard for board elections
- 2 (4%) required a majority standard for board elections*



**Of those 2 companies, 1 company has a director resignation policy.*

Voting standard for directors elections under Delaware Law

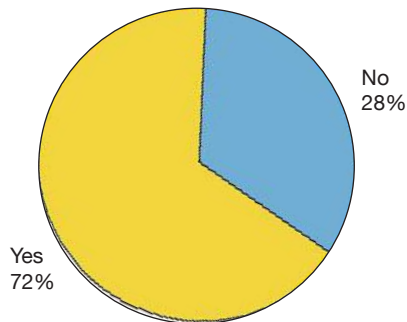
Under Delaware Law, in the absence of a different specification in the certificate of incorporation or bylaws of the company, directors shall be elected by a plurality voting system. Under plurality voting system, the nominees for directorships are elected based on who receives the highest number of 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 Charter & Bylaws

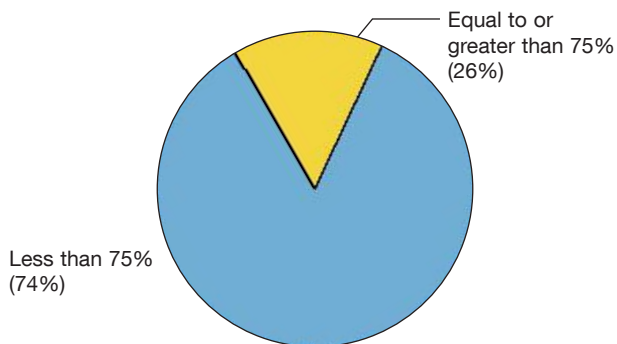
Of the 50 companies examined:

- 36 (72%) companies required a supermajority shareholder vote for amending the charter and/or the bylaws
 - Of the 36 companies that required a supermajority vote, 8 (26%) companies required a vote of at least 75% or greater
- 14 (28%) companies did not require a supermajority shareholder vote for amending the charter and/or the bylaws

Supermajority for Changing the Charter and/or the Bylaws



Supermajority Threshold of Equal or Greater than 75%



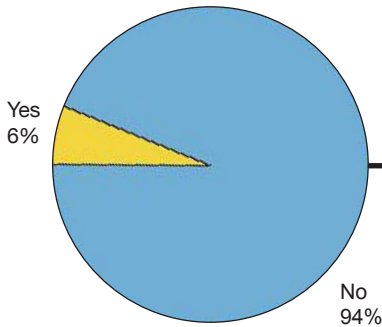
Corporate Governance Practices of U.S. Initial Public Offerings

Poison Pills

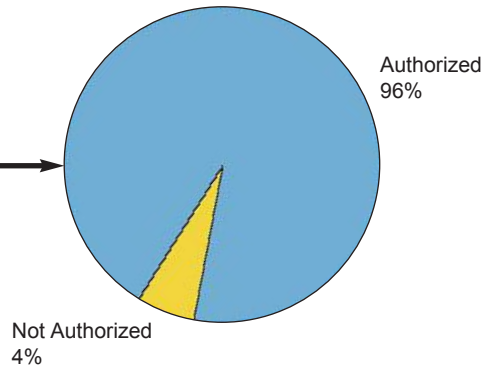
Of the 50 companies examined:

- 3 (6%) companies had shareholders' rights plans and 47 (94%) companies did not
- Of the 47 companies that did not have shareholders' rights plans, 45 (96%) had authority to issue "blank check" preferred stock

Existence of Shareholders' Rights Plan



Authorized to Issue Blank Check Preferred Stock



Authority to issue "Blank Check" preferred stock

A company may include in its authorized and unissued stock a certain amount of undesignated preferred shares. The board of the company is authorized to issue preferred shares in one or more series and to determine and fix the designation, voting power, preference and rights of the shares of each such series and any of its qualifications, limitations or restrictions. The existence of "blank check" preferred stock allows the board to issue preferred stock with super voting, special approval, dividend or other rights or preferences on a discriminatory basis without shareholders vote.

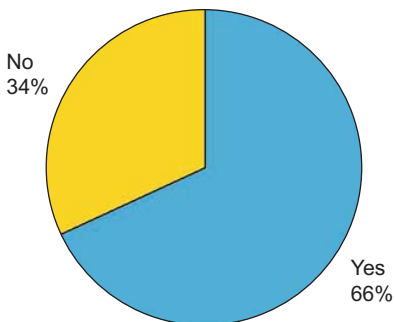
■ Compensation Consultants

Of the 50 companies examined:

- 33 (66%) companies disclosed the use of compensation consultants
 - Of those 33 companies that disclosed using consultants, 30 specified the consultant used
- The specified consultants included:

Axiom Consulting Partners	Fredric W. Cook and Co., Inc	Pearl Meyer & Partners
CCA	Hay Group	Radford Surveys & Consulting
Compensation Strategies Inc.	Hewitt Associates	Strategic Apex Group
Compensia, Inc.	J. Richard & Co	Towers Perrin
Delphi Management Solutions	Longnecker & Associates	Watson Wyatt
DolmatConnell & Partners	Mercer, LLC	The Wilson Group

Compensation Consultants Disclosure



Compensation Consultants

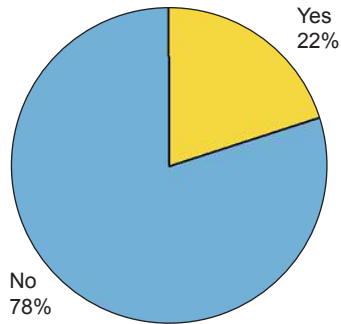
The SEC requires a listed company to disclose in its S-1 and its proxy statement any role of compensation consultants in determining or recommending the amount or form of executive and director compensation, identifying such consultants, stating whether such consultants are engaged directly by the compensation committee (or persons performing the equivalent functions) or any other person, 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.

■ Shareholder Action by Written Consent

Of the 50 companies examined:

- 11 (22%) companies permit shareholder action by written consent
- 39 (78%) companies prohibit shareholder action by written consent

**Permits Shareholder Action
by Written Consent**



Davis Polk's Capital Markets Practice

Davis Polk & Wardwell has one of the world's premier capital markets practices. We provide 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. As counsel of choice for many of the world's leading investment banks and for a broad spectrum of U.S. and non-U.S. issuers, Davis Polk consistently ranks among the top handful of law firms globally in capital markets work.

Davis Polk is a recognized leader advising on global initial public offerings, some of our recent highlights include:

- advising Industrial and Commercial Bank of China (ICBC) on its \$21.9 billion Rule 144A/Regulation S initial public offering of H shares and A shares — this is the largest-ever IPO.
- advising the joint bookrunners and representatives of the underwriters for the initial public offering of Visa — this is the largest U.S. IPO in history and the second-largest IPO ever.
- advising Banco Santander (Brasil) on its \$8 billion initial public offering of units and ADSs — this is the largest-ever initial public offering by a Latin American issuer and the largest IPO so far in 2009.
- advising Metallurgical Corporation of China on its \$5.3 billion Rule 144A/Regulation S initial public offering of H shares and A shares — this is the largest IPO in Hong Kong and the third-largest global IPO so far in 2009.
- advising the joint global coordinators on the €3.85 billion (\$5.44 billion) Rule 144A/Regulation S initial public offering of Criteria CaixaCorp — this was the largest-ever Spanish initial public offering at the time of its completion.
- advising Aozora Bank on its ¥380 billion (US\$3.22 billion) Rule 144A/Regulation S initial public offering — this was the largest IPO by a Japanese issuer in eight years.
- advising the Verisk Analytics on its \$2.15 billion SEC-registered initial public offering of Class A common stock — this is the largest IPO by a U.S. issuer so far in 2009.
- advising Shanda Games on its \$1 billion SEC-registered initial public offering of common shares and ADSs.
- advising the sole global coordinator and sole bookrunner on the \$815 million Regulation S initial public offering of Safaricom by the Government of Kenya — this is the largest-ever equity offering in East Africa.
- advising Artio Global Investors on its \$718 million SEC-registered initial public offering of Class A common stock.

Corporate Governance Practices of U.S. Initial Public Offerings

Our Lawyers

Our global capital markets practice has 235 lawyers, including 46 partners in our offices around the world.

If you have any questions regarding this memorandum, please contact any of the lawyers listed below or your regular Davis Polk contact.

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