

**Davis Polk**

Corporate Governance  
Practices of U.S.  
Initial Public Offerings  
(Including 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 \$136.5 million to \$17.86 billion.

## The Companies

We examined the following 50 companies, spanning **36** industries:

Accuracy Inc.	Intrepid Potash, Inc.
AECOM Technology Corp.	Limelight Networks Inc.
American Capital Agency Corp.	Masimo Corp.
American Water Works Company, Inc.	METROPCS Communication Inc.
BigBand Networks Inc.	MedAssets Inc.
Bway Holdings Co.	MSCI Inc.**
Cinemark Holdings Inc.	National Cinemedia Inc.
Clearwire Corp.	Netsuite Inc.
Colfax Corp.	Opnext Inc.
Concho Resources Inc.	Orbitz Worldwide
Continental Resources Inc.**	Rackspace Hosting
CVR Energy Inc.	RHI Entertainment Inc.
Deltek	Riskmetrics Group Inc.
Dice Holdings**	RSC Holdings Inc.
Dolan Media Co.	Sandridge Energy Inc.**
DuPont Fabros Technology Inc.	Skilled Healthcare Group
Employers Holdings Inc.	Solera Holdings Inc.
EnergySolutions Inc.	Superior Offshore Int'l
FBR Capital Markets	Switch & Data Facilities Company, Inc.
GT Solar International**	Tomotherapy Inc.
Hatteras Financial Corp.	Ulta Salon Cosmetics & Fragrance Inc.
Haynes International**	Verso Paper**
HFF Inc.	Virgin Mobile USA
Infinera Corp.	Visa Inc.**
Interactive Brokers Group Inc.	VMware Inc.

\* Excludes limited partnerships and blank check companies.

\*\*Davis Polk & Wardwell participated in the IPO.

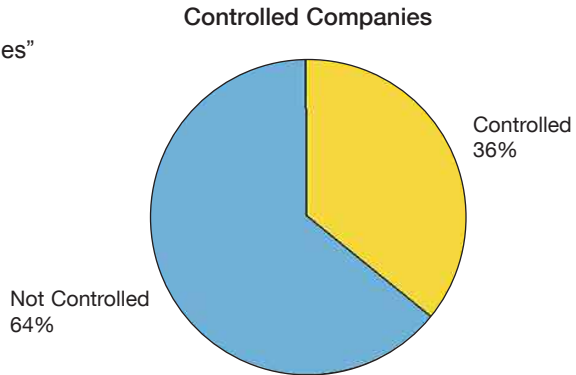
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## Corporate Governance Practices of U.S. Initial Public Offerings

### Controlled Companies

Of the 50 companies examined:

- 18 (36%) are “controlled companies”



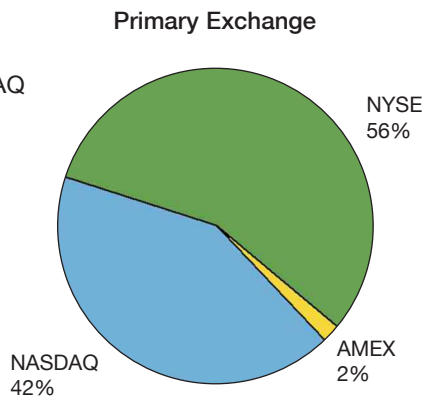
### Controlled Company

NYSE and NASDAQ rules provide that if a majority of the voting power of the listed company is held by an individual, group or another entity, the company is exempt from the NYSE and NASDAQ requirements relating to majority of independent directors, an independent compensation committee, and an independent corporate governance and nominating committee.

### Primary Listing Exchange

Of the 50 companies examined:

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



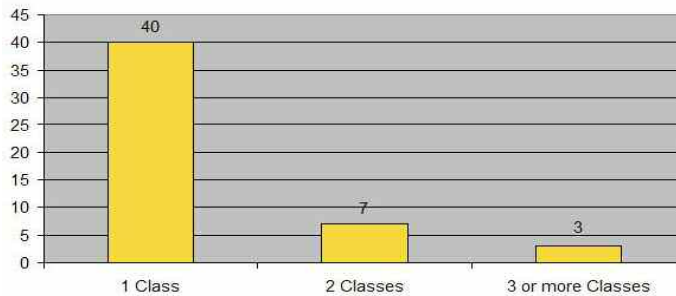
# Corporate Governance Practices of U.S. Initial Public Offerings

## Classes of Outstanding Stock at IPO

Of the 50 companies examined:

- **40** of the companies (80%) had 1 class of outstanding stock
- **7\*** of the companies (14%) had 2 classes of outstanding stock
- **3** of the companies (6%) had 3 or more classes of outstanding stock

Classes of Outstanding Stock



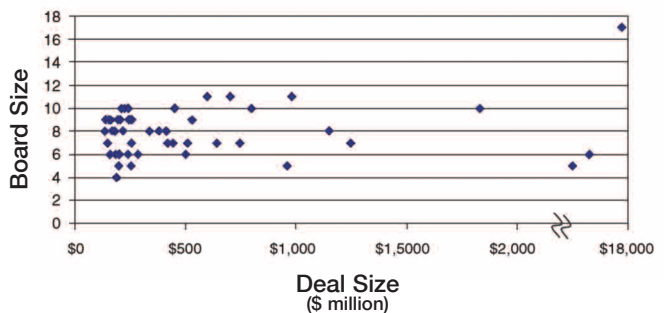
\* Of these 7 companies, 6 (86%) are controlled companies

## Board Size at IPO

Of the 50 companies examined:

- The average board size was **7.9**
- The median board size was **8**
- The board sizes ranged from **4** to **17** members
- There is no distinct correlation between deal size and board size

Deal Size vs. Board Size



### ■ Level of Board Independence at IPO

Of the 50 companies examined:

- The average level of director independence was **56%** of the board
- The median level of director independence was **59%** of the board
- The levels of director independence ranged from a low of **9%** to a high of **89%**

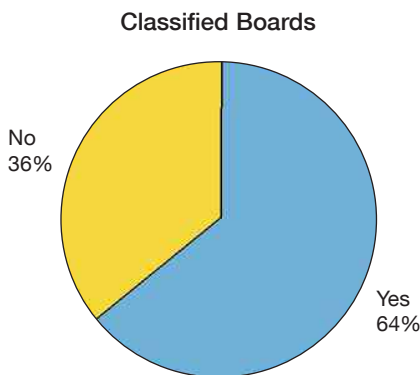
### Requirement for director independence at time of IPO

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.

### ■ Classified Board at IPO

Of the 50 companies examined:

- **32** companies (64%) had classified boards

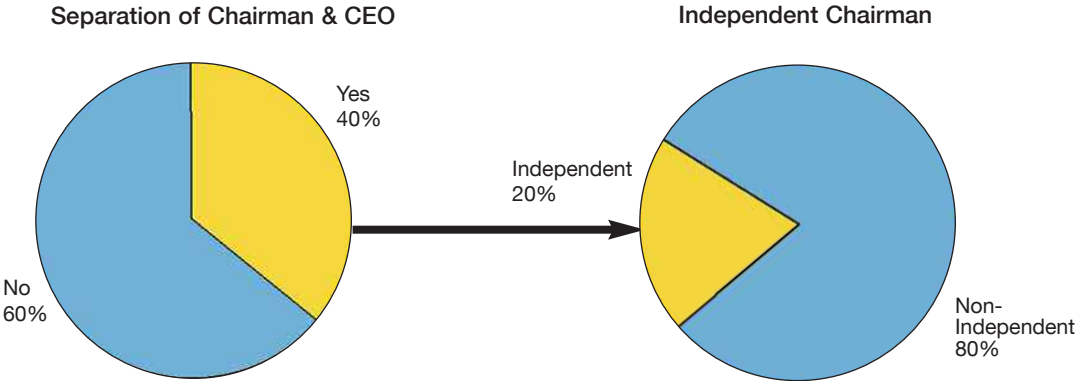


# Corporate Governance Practices of U.S. Initial Public Offerings

## ■ Separation of Chairman & CEO

Of the 50 companies examined:

- 20 companies (40%) had a separate chairman and CEO
  - Of those 20 companies with a separate chairman, 4 (20%) had an independent chairman



## ■ Lead Director

Of the 50 companies examined:

- 7 companies (14%) had a lead director

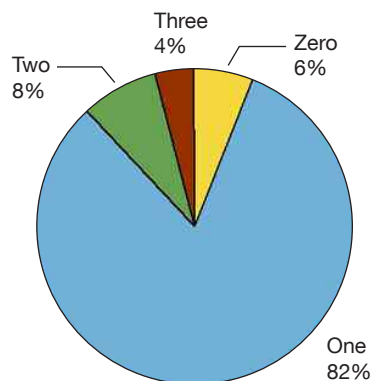


### Audit Committee Financial Experts at IPO

Of the 50 companies examined:

- 41 companies (82%) had 1 financial expert
- 4 companies (8%) had 2 financial experts
- 2 companies (4%) had 3 financial experts
- 3 companies (6%) 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.

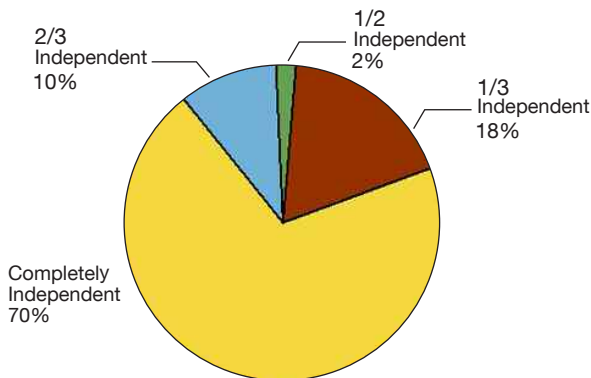


## Audit Committee Independence at IPO

Of the 50 companies examined:

- 35 (70%) companies had a completely independent audit committee at the time of its IPO
- 5 (10%) companies had a 2/3 independent audit committee at the time of its IPO
- 1 (2%) company had a 1/2 independent audit committee at the time of its IPO
- 9\* (18%) companies had a 1/3 independent audit committee at the time of its IPO

Audit Committee Independence at IPO



*\*5 of these 9 companies (56%) are controlled companies*

### Audit Committee independence at time of IPO

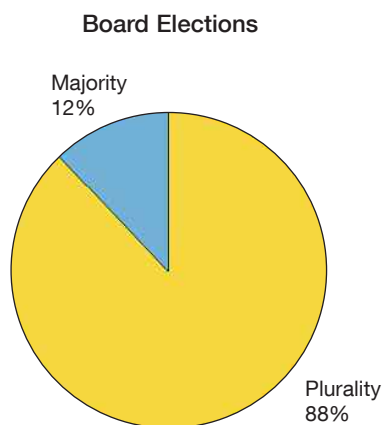
Under NYSE and NASDAQ rules, an IPO company must have at least one independent member of the audit committee at the time of listing, a majority of independent members within 90 days of its registration statement being declared effective and a fully independent audit committee within one year of its registration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

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



*\*Of those 6 companies, 3 companies have a director resignation policy.*

#### **Voting standard for directors elections under Delaware Law**

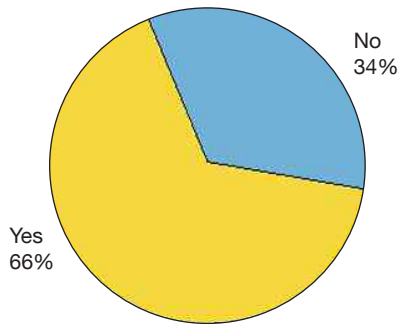
Under Delaware Law, in the absence of a different specification in the certificate of incorporation or bylaws of the company, directors shall be elected by a plurality voting system. Under plurality voting system, the nominees for directorships are elected based on who receives the highest number of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

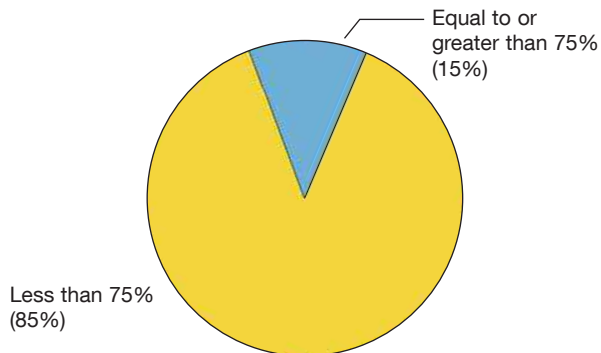
Of the 50 companies examined:

- **33** (66%) companies required a supermajority shareholder vote for amending the charter and/or the bylaws
  - Of the **33** companies that required a supermajority vote, 5 (15%) companies required a vote of at least 75% or greater
- **17** (34%) 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%



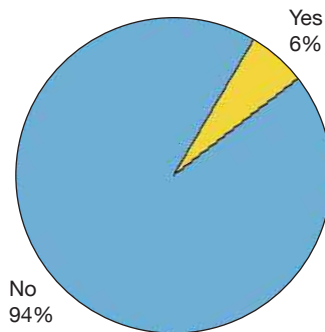
# Corporate Governance Practices of U.S. Initial Public Offerings

## Poison Pills

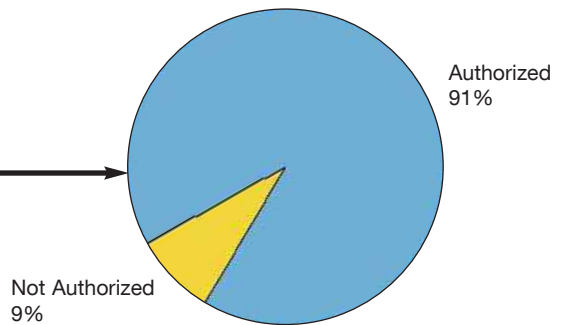
Of the 50 companies examined:

- 3 (6%) companies had shareholders' rights plans and 47 (94%) companies did not
- Of the 47 companies that did not have shareholders' rights plans, 43 (91%) 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 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

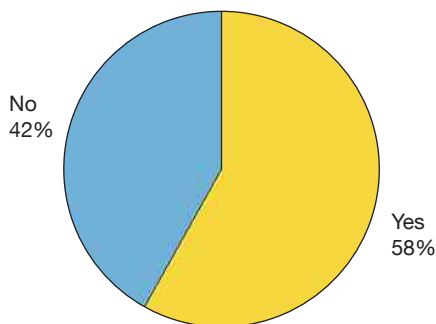
Of the 50 companies examined:

- **29** (58%) companies disclosed the use of compensation consultants
- Of those **29** companies that disclosed using consultants, **26** specified the consultant used

The specified consultants included:

CCA	Hewitt Associates	Strategic Apex Group
Compensation Strategies Inc.	Longnecker & Associates	The Survey Group
Compensia, Inc.	Mercer, LLC	Towers Perrin
Delphi Management Solutions	Mercer Human Resource Consulting	Valere Consulting LLC
Fredric W. Cook and Co., Inc	Pearl Meyer & Partners	Watson Wyatt Worldwide

Compensation Consultants Disclosure



### Compensation Consultants

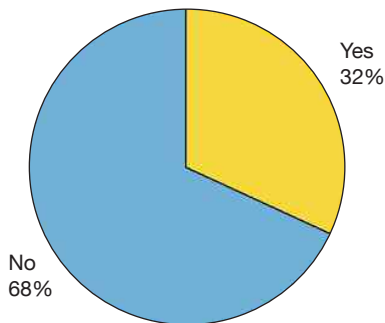
The SEC requires a listed company to disclose in its S-1 and its proxy statement any role of compensation consultants in determining or recommending the amount or form of executive and director compensation, identifying such consultants, stating whether such consultants are engaged directly by the compensation 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:

- **16** (32%) companies permit shareholder action by written consent
- **34** (68%) 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.

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## 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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