

# Corporate governance practices in U.S. initial public offerings

December 2022 | Client update

Our 2022 IPO corporate governance survey reviews governance structures at the time of the IPO for the largest U.S.-listed IPOs of “controlled” and non-“controlled” companies between July 11, 2020 and September 30, 2022. As in our prior surveys, we found that companies continue to adopt anti-takeover defenses in advance of their IPOs, even as post-IPO companies generally face ongoing pressures to adopt more “shareholder friendly” practices.

IPO governance survey

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As an IPO adviser to companies and underwriters, we surveyed corporate governance practices in recent U.S.-listed IPOs to identify current market trends. 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. We focused on the top 50 IPOs of non-controlled companies based on deal size, and 46 IPOs of “controlled companies” (as defined under NYSE or Nasdaq listing standards), from July 11, 2020 through September 30, 2022. \*

## The companies

### Controlled companies

We examined the following 46 controlled companies, spanning 20 industries:

Academy Sports & Outdoors, Inc.	Integral Ad Science Holding Corp.**
Agiliti, Inc.	Jamf Holding Corp.**
agilon health, inc.	Latham Group, Inc.
AppLovin Corporation	Leslie’s, Inc.
Array Technologies, Inc.**	Life Time Group Holdings, Inc.**
Aveanna Healthcare Holdings Inc.**	LifeStance Health Group, Inc.
Corebridge Financial, Inc.	MeridianLink, Inc.
Corsair Gaming, Inc.**	Mister Car Wash, Inc.
Datto Holding Corp.	Oak Street Health, Inc.**
DoubleVerify Holdings, Inc.	Olaplex Holdings, Inc.
Driven Brands Holdings Inc.	Pactiv Evergreen Inc.**
Duck Creek Technologies, Inc.	Paycor HCM, Inc.
Duckhorn Portfolio, Inc.	Privia Health Group, Inc.**
Enact Holdings, Inc.	ProFrac Holding Corp.
EngageSmart, Inc.	Rackspace Technology, Inc.**
EverCommerce Inc.	Snap One Holdings Corp.
Excelerate Energy, Inc.**	Sotera Health Company
First Advantage Corporation**	Sovos Brands, Inc.
Frontier Group Holdings, Inc.**	Sterling Check Corp.
Hayward Holdings, Inc.**	Sun Country Airlines Holdings, Inc.**
HireRight Holdings Corporation	Thoughtworks Holding, Inc.**
InnovAge Holding Corp.	Torrid Holdings Inc.
Instructure Holdings, Inc.	Traeger, Inc.

\* Excludes foreign private issuers, limited partnerships, REITs, trusts and “blank check” companies. While SPAC IPOs are not covered, our experience with de-SPAC transactions is discussed briefly at the end of this survey.

\*\* Davis Polk participated in the IPO.

**Non-controlled companies**

We examined the following 50 non-controlled companies, spanning 14 industries:

Alignment Healthcare, Inc.**	Intapp, Inc.
Allegro MicroSystems, Inc.**	Invivyd, Inc.
AlloVir, Inc.	(formerly Adagio Therapeutics, Inc.)**
Annexon, Inc.	Kinnate Biopharma Inc.
Atea Pharmaceuticals, Inc.**	Krispy Kreme, Inc.**
AvidXchange Holdings, Inc.	Kronos Bio, Inc.
BigCommerce Holdings, Inc.	LegalZoom.com, Inc.
Bright Health Group Inc.	Lyell Immunopharma, Inc.
Caribou Biosciences, Inc.	Monte Rosa Therapeutics, Inc.
Certara, Inc.	ON24, Inc.
Compass, Inc.	Outset Medical, Inc.
Coursera, Inc.**	PMV Pharmaceuticals, Inc.
CS Disco, Inc.	Procore Technologies, Inc.
Cullinan Oncology, Inc.	Remitly Global, Inc.**
(formerly, Cullinan Management, Inc.)	Robinhood Markets, Inc.**
Cytek Biosciences, Inc.	Sana Biotechnology, Inc.
Design Therapeutics, Inc.	Sight Sciences, Inc.**
DigitalOcean Holdings, Inc.	Silverback Therapeutics, Inc.
Dyne Therapeutics, Inc.	Singular Genomics Systems, Inc.
Erasca, Inc.**	Sumo Logic, Inc.**
F45 Training Holdings Inc.	Talis Biomedical Corporation
Flywire Corporation	Udemy, Inc.
FTC Solar, Inc.	Unity Software Inc.
Graphite Bio, Inc.	Upstart Holdings, Inc.
Honest Company, Inc.**	Verve Therapeutics, Inc.
Instil Bio, Inc.	Zymergen Inc.

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

\*\* Davis Polk participated in the IPO.

## Significant findings

As we found in our prior surveys, both controlled and non-controlled companies have continued to adopt takeover defenses in advance of their IPOs, more so than in prior years. At the same time, seasoned public companies generally face ongoing pressures to adopt more “shareholder friendly” practices.

### Controlled companies

For example, of the controlled companies we surveyed:

**96%**

of companies adopted a plurality vote standard for uncontested director elections

**96%**

of companies effectively prohibited shareholder action by written consent

**98%**

of companies had provisions prohibiting shareholders from calling a special meeting

**91%**

of companies required a supermajority shareholder vote for amending the bylaws

**91%**

of companies adopted a classified board

### Non-controlled companies

Of the non-controlled companies we surveyed:

**96%**

of companies adopted a plurality vote standard for uncontested director elections

**100%**

of companies effectively prohibited shareholder action by written consent

**98%**

of companies had provisions prohibiting shareholders from calling a special meeting

**98%**

of companies required a supermajority shareholder vote for amending the bylaws

**98%**

of companies adopted a classified board

The number of both controlled and non-controlled companies that adopted exclusive-forum provisions during the current survey period continued to grow from past survey periods. In the current survey, all of the controlled companies and non-controlled companies adopted exclusive-forum provisions. These included both exclusive-forum provisions addressing claims under the Securities Act of 1933 (the “’33 Act”) and exclusive-forum provisions addressing other claims against the company. This is a slight increase from the 91% and 98% of controlled and non-controlled companies, respectively, that adopted such provisions in our 2020 survey.

The number of controlled and non-controlled companies that adopted stricter provisions for shareholder action also increased. The number of companies that permit shareholders to call a special meeting decreased from 20% to 2% for controlled companies, and from 12% to 2% for non-controlled companies since our 2020 survey. Similarly, there was a slight decrease in controlled companies that permit shareholder action by written consent, from 9% in the 2020 survey to 4%. Of the non-controlled companies surveyed, none permitted shareholder action by written consent, compared to 12% in our 2020 survey.

## Controlled companies vs. non-controlled companies

As was expected due to applicable exemptions for controlled companies from independence requirements, the key differences between controlled and non-controlled companies were primarily in the area of board and board committee independence. The average level of board independence at controlled companies was 59% versus 75% at non-controlled companies. Moreover, the percentage of non-controlled companies with an independent board chair was higher than that of controlled companies (38% of non-controlled versus 28% of controlled companies). The independence of the board committees significantly differed between controlled and non-controlled companies.

These differences include:

**33%**

of controlled companies had fully independent audit committees at the IPO versus **92%** of non-controlled companies

**36%**

of controlled companies had fully independent governance/nominating committees at the IPO versus **90%** of non-controlled companies

**40%**

of controlled companies had fully independent compensation committees at the IPO versus **90%** of non-controlled companies

**28%**

of controlled companies had an independent chairman versus **38%** of non-controlled companies

**18%**

of controlled companies without an independent chairman had a lead director versus **45%** of non-controlled companies

**91%**

of controlled companies had a classified board versus **98%** of non-controlled companies

# Primary listing exchange

## Controlled companies

Of 46 companies examined:

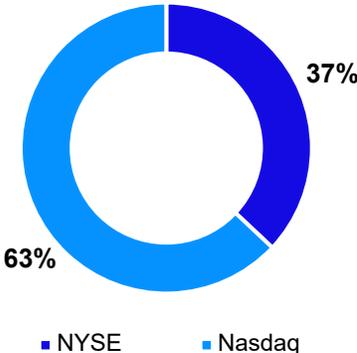
**17 companies**

(37%) listed on the NYSE

**29 companies**

(63%) listed on the Nasdaq

### Primary listing exchange



## Non-controlled companies

Of 50 companies examined:

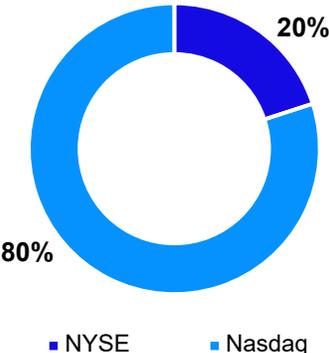
**10 companies**

(20%) listed on the NYSE

**40 companies**

(80%) listed on the Nasdaq

### Primary listing exchange



# Classes of outstanding common stock

## Controlled companies

Of 46 companies examined:

### 41 companies

(89%) had one class of common stock outstanding

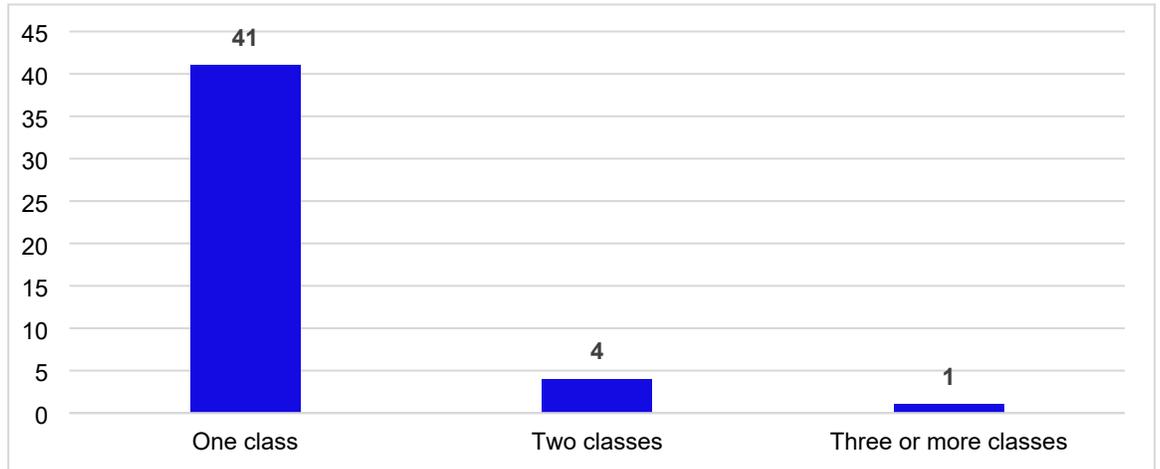
### 4 companies

(9%) had two classes of common stock outstanding, 1 (25%) of which had unequal voting rights

### 1 company

(2%) had three or more classes of common stock outstanding

## Classes of outstanding common stock



## Non-controlled companies

Of 50 companies examined:

### 46 companies

(92%) had one class of common stock outstanding

### 3 companies

had two classes of common stock outstanding, none of which had unequal voting rights

### 1 company

had three or more classes of common stock outstanding, 1 (100%) of which had unequal voting rights

## Classes of outstanding common stock



# Board size

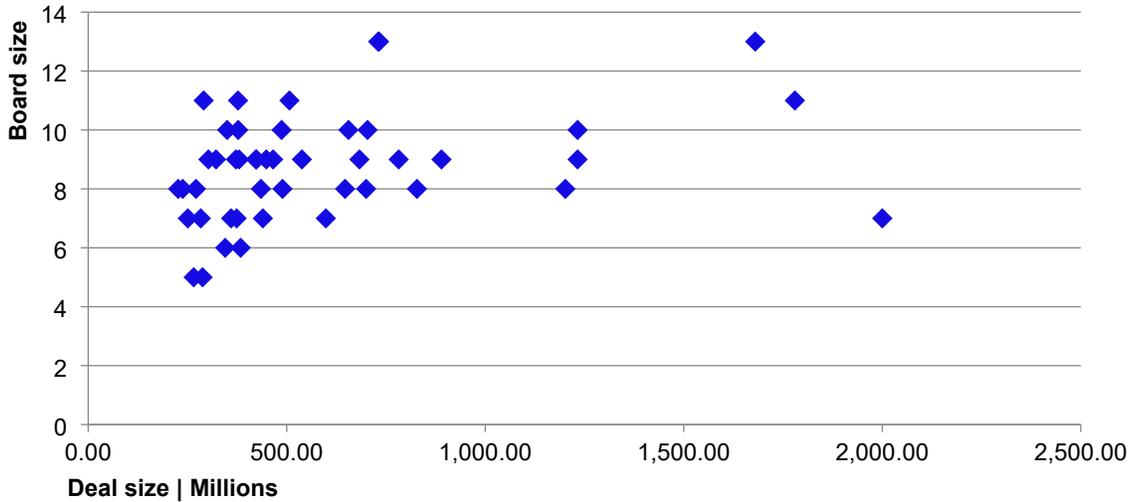
## Controlled companies

Of 46 companies examined:

- The average board size was **9** members
- The median board size was **9** members
- Board size ranged from **5** to **13** members

There was some correlation between deal size and board size.

### Deal size vs. board size



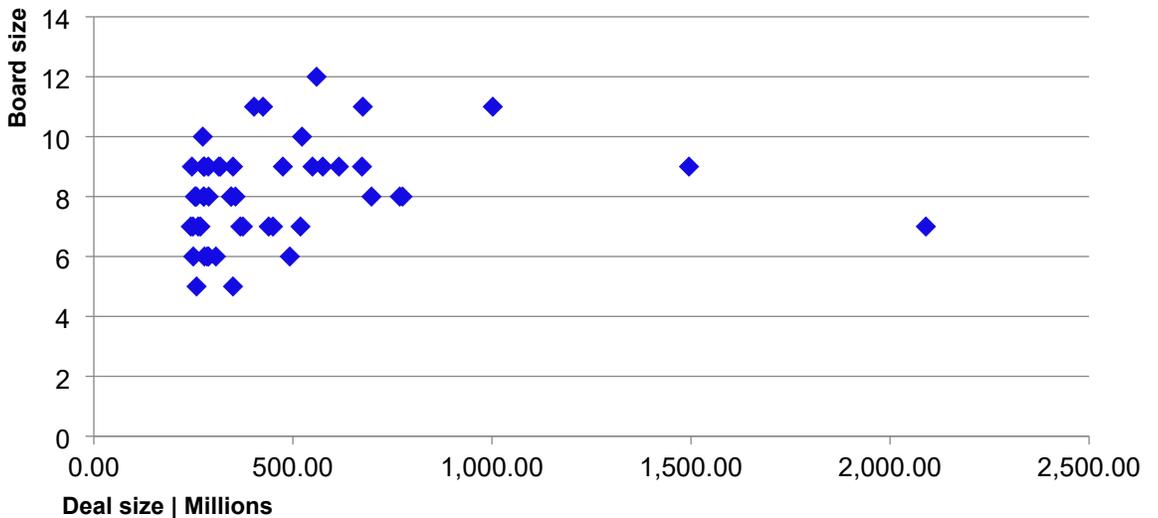
## Non-controlled companies

Of 50 companies examined:

- The average board size was **8** members
- The median board size was **8** members
- Board size ranged from **5** to **12** members

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

### Deal size vs. board size



# Level of board independence

## Controlled companies

Of 46 companies examined:

- The average level of director independence was **59%** of the board.
- The median level of director independence was **59%** of the board.
- The level of director independence ranged from a low of **18%** to a high of **90%**.
- Controlled companies are exempt from majority of independent directors requirement.

## Non-controlled companies

Of 50 companies examined:

- The average level of director independence was **75%** of the board.
- The median level of director independence was **78%** of the board.

The level of director independence ranged from a low of **44%** to a high of **89%**.

## Requirement for director independence at time of IPO

An IPO company must have at least one independent director at the IPO in order to satisfy NYSE and Nasdaq audit committee listing standards. Subject to an exception for controlled companies, NYSE and Nasdaq standards require 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

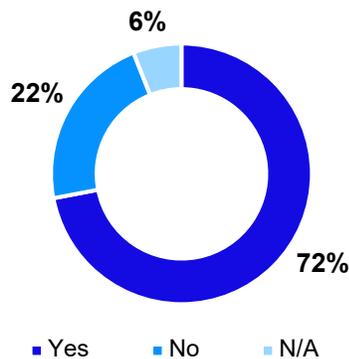
## Controlled companies

Of 46 companies examined:

**33 companies**

(72%) had a separate chairman and CEO

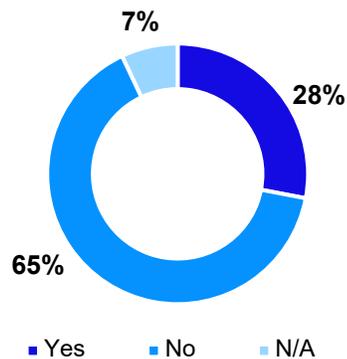
Separation of Chairman & CEO



**13 companies**

(28%) had an independent chairman

Independent Chairman



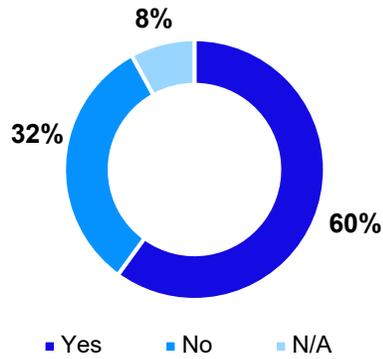
**Non-controlled companies**

Of 50 companies examined:

**30 companies**

(60%) had a separate chairman and CEO

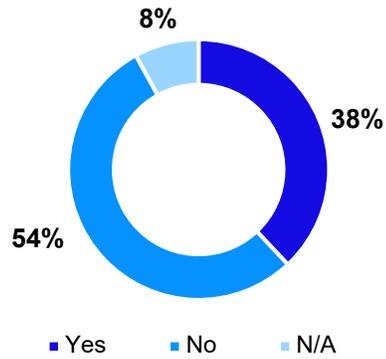
**Separation of Chairman & CEO**



**19 companies**

(38%) had an independent chairman

**Independent Chairman**



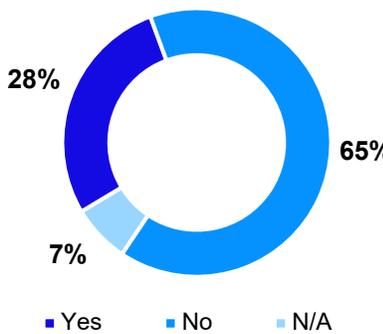
**Lead director**

**Controlled companies**

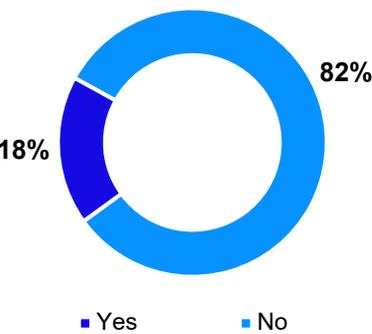
Of 46 companies examined:

- 33 companies (72%) combined the roles of chairman and CEO or otherwise did not have an independent chairman.
  - Of these, 6 companies (18%) had a lead director.

**Independent Chairman**



**Lead Director**



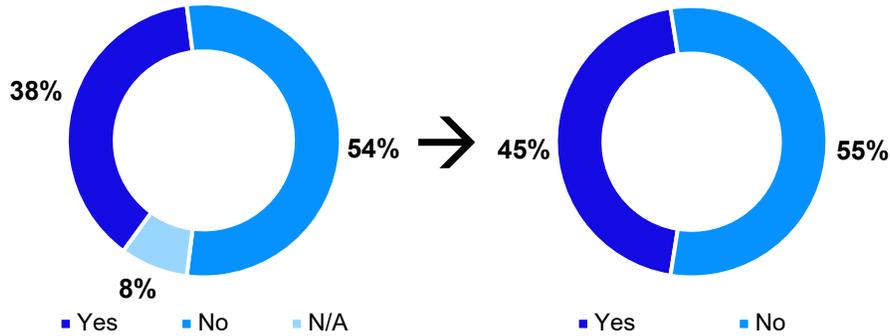
**Non-controlled companies**

Of 50 companies examined:

- 31 companies (62%) combined the roles of chairman and CEO or otherwise did not have an independent chairman.
  - Of these, 14 companies (45%) had a lead director.

**Independent Chairman**

**Lead Director**



**Alternative board leadership structures include combining the chairman and CEO roles, or separating the roles and appointing an independent chairman or lead director to serve with the CEO on the board.**

In the interest of balancing the demands of operating a corporation with those of leading a corporate board, companies utilize alternatives to the traditional combined CEO/chair leadership model. The benefits of appointing an independent chair or a lead director may include increased efficiency and improved succession planning. The main difference between the two is that an independent chair often takes primary responsibility for board agendas and meetings, and may represent the organization as well as interact with outside stakeholders. A lead director, often appointed when the CEO and chair roles are combined, may predominately chair executive sessions or act as a liaison between the other directors and the CEO. However, lead directors may have larger responsibilities in light of the interest of independent board leadership, and the range of duties can vary widely among companies.

# Audit committee financial experts

## Controlled companies

Of 46 companies examined:

**32 companies**

(70%) had one financial expert

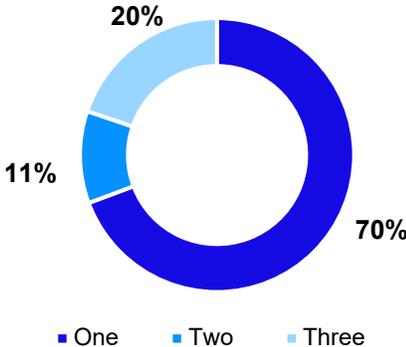
**5 companies**

(11%) had two financial experts

**9 companies**

(20%) had three financial experts

### Number of audit committee financial experts\*



## Non-controlled companies

Of 50 companies examined:

**41 companies**

(82%) had one financial expert

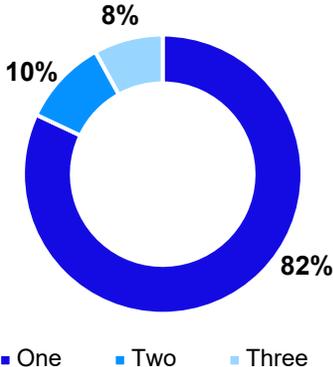
**5 companies**

(10%) had two financial experts

**4 companies**

(8%) had three financial experts

### Number of audit committee financial experts



\* Due to upward rounding, the percentages do not equal 100%.

## 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 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

### Controlled companies

Of 46 companies examined:

**15 companies**

(33%) had a fully independent audit committee at the IPO date

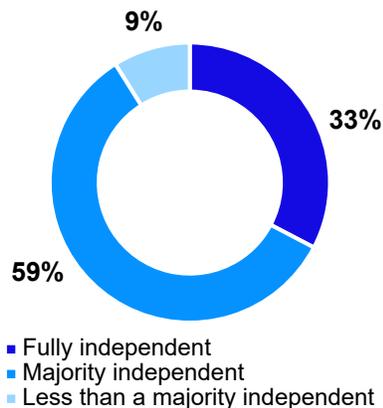
**27 companies**

(59%) had a majority independent audit committee at the IPO date

**4 companies**

(9%) had a less than majority independent audit committee at the IPO date

### Audit Committee Independence\*



\* Due to upward rounding, the percentages do not equal 100%.

## Non-controlled companies

Of 50 companies examined:

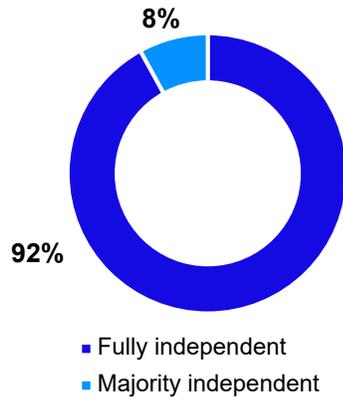
### 46 companies

(92%) had a fully independent audit committee at the IPO date

### 4 companies

(8%) had a majority independent audit committee at the IPO date

#### Audit committee independence



## 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, noncontingent 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 tend not to sit on the audit committee even though they may otherwise be deemed independent under stock exchange listing standards.

# Governance/nominating committee independence

## Controlled companies

Of 46 companies examined, 44 had a governance/nominating committee. \*  
Of these 44 companies:

### 16 companies

(36%) had a fully independent governance/nominating committee at the IPO date

### 8 companies

(18%) had a majority independent governance/nominating committee at the IPO date

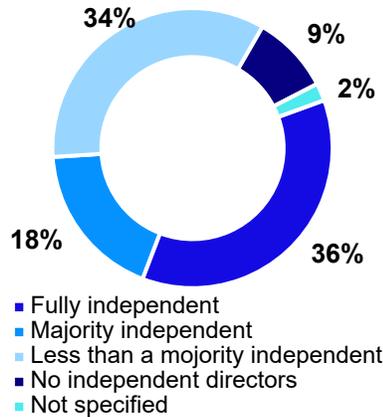
### 15 companies

(34%) had a less than majority independent governance/nominating committee at the IPO date

### 4 companies

(9%) did not have any independent directors on their governance/nominating committee at the IPO date

## Governance/nominating committee independence\*\*



## Non-controlled companies

Of 50 companies examined:

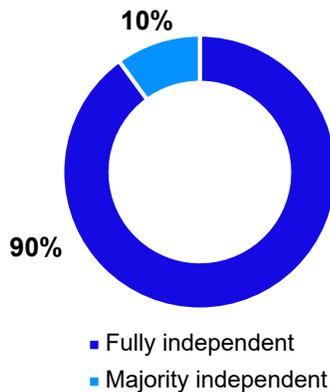
### 45 companies

(90%) had a fully independent governance/nominating committee at the IPO date

### 5 companies

(10%) had a majority independent governance/nominating committee at the IPO date

## Governance/nominating committee independence



\* One company did not disclose the composition of its governance/nominating committee.

\*\* Due to downward rounding, the percentages do not equal 100%.

# Compensation committee independence

## Controlled companies

Of 46 companies examined, 45 had a compensation committee\*. Of those 45 companies:

### 18 companies

(40%) had a fully independent compensation committee at the IPO date

### 9 companies

(20%) had a majority independent compensation committee at the IPO date

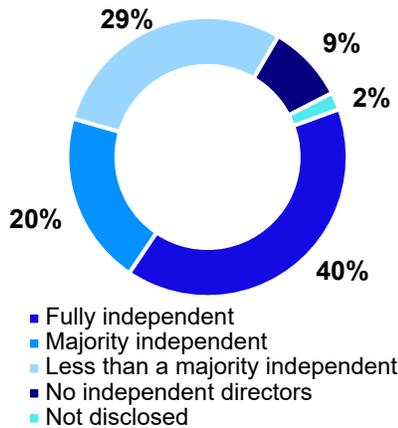
### 13 companies

(29%) had a less than majority independent compensation committee at the IPO date

### 4 companies

(9%) did not have any independent directors on their compensation committee at the IPO date

## Compensation committee independence



## Non-controlled companies

Of 50 companies examined:

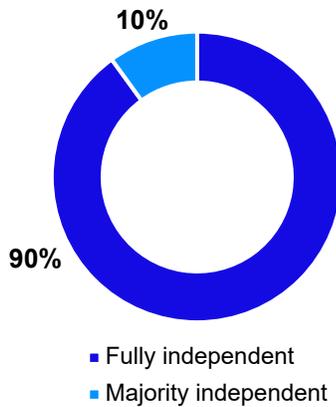
### 45 companies

(90%) had a fully independent compensation committee at the IPO date

### 5 companies

(10%) had a majority independent compensation committee at the IPO date

## Compensation committee independence



\* One company did not disclose the composition of its compensation committee.

## **Governance/nominating and compensation committee independence**

Under NYSE rules, a non-controlled IPO company must have at least one independent member on each of its governance/nominating and compensation committees by the earlier of the date the IPO closes or five business days from the listing date, at least a majority of independent members within 90 days of the listing date, and fully independent governance/nominating and compensation committees within one year of the listing date. Under Nasdaq rules, a non-controlled IPO company must have at least one independent member on each of its governance/nominating and compensation committees at the time of listing, at least a majority of independent members within 90 days of the listing date, and fully independent governance/nominating and compensation committees within one year of the listing date (though the company may also choose not to have a governance/nominating committee and instead rely on a majority of the independent directors to discharge the attendant duties). Under both NYSE and Nasdaq rules, compensation committee independence must be considered under each of the general listing standard independence requirements for directors as well as the additional affiliate and compensatory fee independence considerations applicable to compensation members. Controlled companies are entitled to an exemption from NYSE and fin 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 for certain transactions involving equity compensation.

## **Additional board committees**

### **Controlled companies**

Of 46 companies examined:

#### **13 companies**

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(28%) had additional board committees

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

### **Non-controlled companies**

Of 50 companies examined:

#### **5 companies**

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(10%) had additional board committees

The additional committees included research and development committees and risk committees.

# Shareholder rights plan (poison pill)

## Controlled companies

Of 46 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 able to be adopted at a later time.

## Non-controlled companies

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 able to be adopted at a later time.

### Adoption of a shareholder rights plan (poison pill)

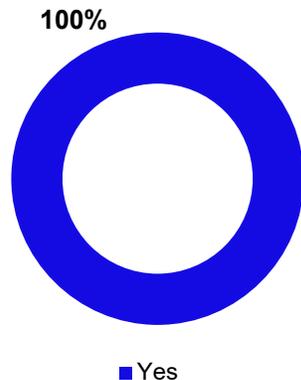
A typical shareholder rights plan, or poison pill, grants the existing shareholders of a company (other than a hostile acquiror) the right to acquire a large number of newly issued shares of the company (and of the acquiror if the target company is not the surviving entity in the transaction) at a significant 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” preferred stock power is provided as described below, a shareholder rights plan can usually be adopted at a later time rather than at the IPO.

## “Blank check” preferred stock

### Controlled companies

Of 46 companies examined, all companies (100%) were authorized to issue “blank check” preferred stock.

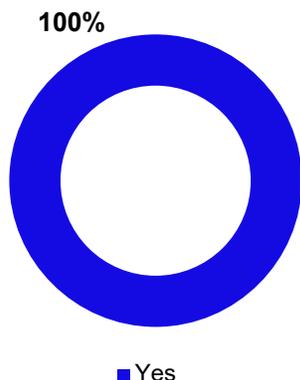
### Authority to issue “blank check” preferred stock



## Non-controlled companies

Of 50 companies examined, **all companies (100%)** were authorized to issue “blank check” preferred stock.

### Authority to issue “blank check” preferred stock



### Authority to issue “blank check” preferred stock

A company may generally 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 this “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 may be able to be used as a protective mechanism in the context of a hostile takeover attempt by permitting the adoption of a shareholder rights plan (poison pill) at that time.

# Classified board

## Controlled companies

Of 46 companies examined:

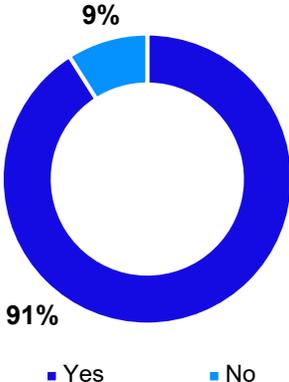
**42 companies**

(91%) had a classified board\*

**4 companies**

(9%) did not have a classified board

### Classified board



## Non-controlled companies

Of 50 companies examined:

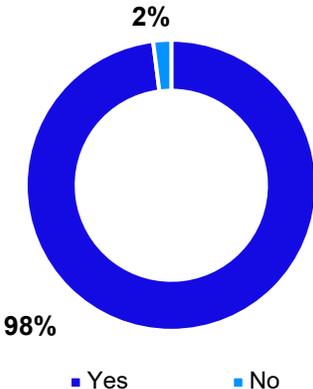
**49 companies**

(98%) had a classified board\*\*

**1 company**

(2%) did not have a classified board

### Classified board



\* Of these 42 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).

\*\* Of these 49 companies, 1 company (2%) 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 takeover by ensuring that an activist or a potential acquiror cannot simply replace an entire board at one time with a more pliant board. It also serves to provide some directors with less scrutiny when all the directors up for election face opposition from proxy advisory firms or shareholders. 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 (as discussed above), in that it forces an activist or 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

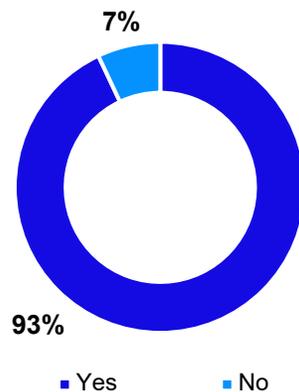
### Controlled companies

Of 46 companies examined:

### 43 companies

(93%) allowed removal of a director for cause only\*

### Director removal for cause only



\* These 43 companies included 37 companies (86%) 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, one company with a non-classified board provided for director removal only for cause.

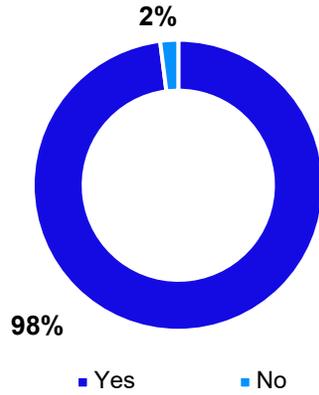
**Non-controlled companies**

Of 50 companies examined:

**49 companies**

(98%) allowed removal of a director for cause only\*

**Director removal for cause only**



**Director removal for cause only**

Director removal for cause is permitted only when a company has a classified board under Delaware law, and it 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 call special meetings or to act by written consent, as discussed below) serve as a protective mechanism in the context of a takeover by forcing an activist or 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

## Controlled companies

Of 46 companies examined:

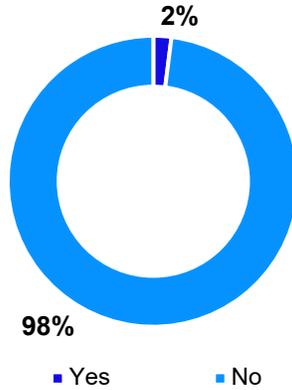
**45 companies**

(98%) prohibited shareholders from calling a special meeting\*

**1 company**

(2%) permitted shareholders to call a special meeting.

### Shareholder ability to call a special meeting



## Non-controlled companies

Of 50 companies examined:

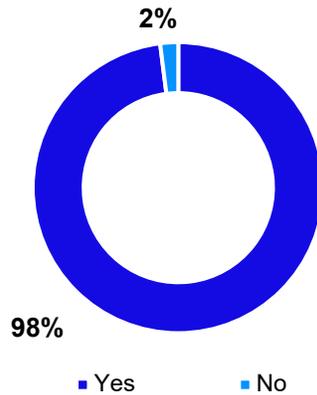
**49 companies**

(98%) prohibited shareholders from calling a special meeting\*\*

**1 company**

(2%) permitted shareholders (comprising at least 25%) to call a special meeting

### Shareholder ability to call a special meeting



\* These 45 companies included 37 companies (82%) 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.

\*\* These 49 companies included 2 companies (4%) 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

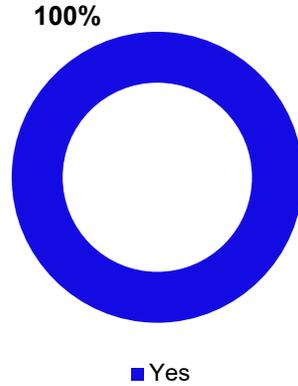
## Controlled companies

Of 46 companies examined:

### 46 companies

All had bylaws setting forth notice and certain other requirements when a shareholder proposes business for shareholder consideration, including the nomination of a director for election.

#### Advance notice bylaws



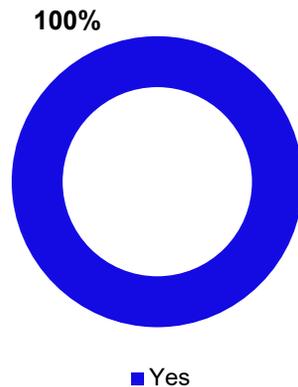
## Non-controlled companies

Of 50 companies examined:

### 50 companies

All had bylaws setting forth notice and certain other requirements when a shareholder proposes business for shareholder consideration, including the nomination of a director for election.

#### Advance notice bylaws



# Shareholder action by written consent

## Controlled companies

Of 46 companies examined:

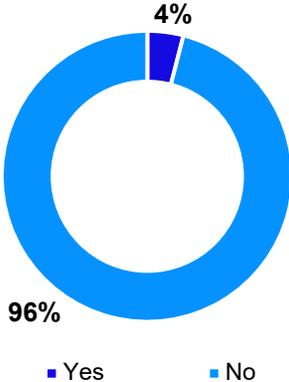
**44 companies**

(96%) prohibited shareholder action by written consent\*

**2 companies**

(4%) permitted shareholder action by written consent

### Shareholder action by written consent permitted



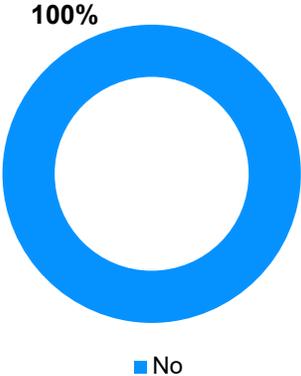
## Non-controlled companies

Of 50 companies examined:

**50 companies**

All prohibited shareholder action by written consent\*\*

### Shareholder action by written consent permitted



\*These 44 companies included 43 companies (98%) 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.

\*\* These 50 companies included 2 companies (4%) 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 an activist or a potential acquiror from taking control of the company without having to negotiate with the board.

## Board authority to change board size

### Controlled companies

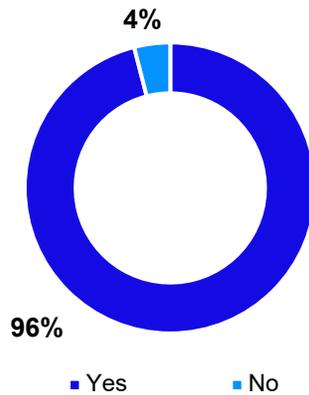
Of 46 companies examined:

#### 44 companies

(96%) permitted the board to change the size of the board

#### 2 companies

(4%) did not permit the board to change the size of the board

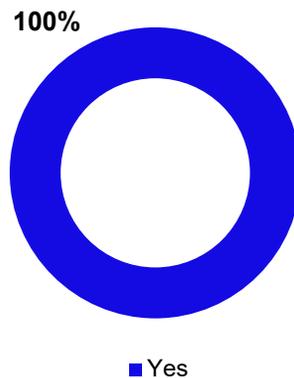


### Non-controlled companies

Of 50 companies examined:

#### 50 companies

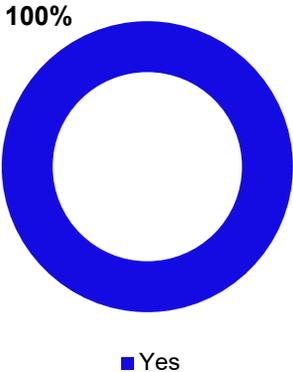
All companies permitted the board to change the size of the board



# Board authority to fill vacancies on the board

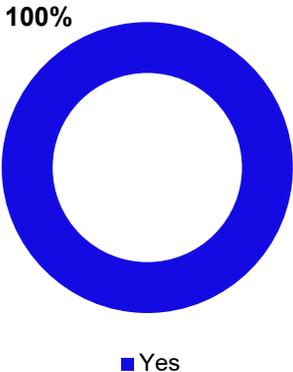
## Controlled companies

Of 46 companies examined, **all** companies (**100%**) required that the board fill vacancies on the board.



## Non-controlled companies

Of 50 companies examined, **all** companies (**100%**) required that the board fill vacancies on the board.



# Voting in uncontested board elections

## Controlled companies

Of 46 companies examined:

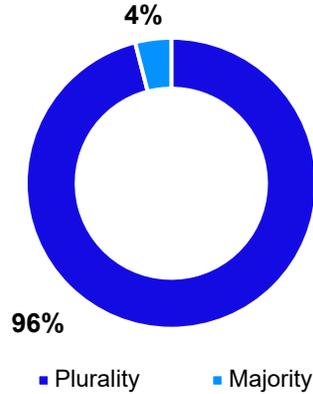
**44 companies**

(96%) had a plurality standard for uncontested board elections

**2 companies**

(4%) had a majority standard for uncontested board elections

### Standard for uncontested board elections



## Non-controlled companies

Of 50 companies examined:

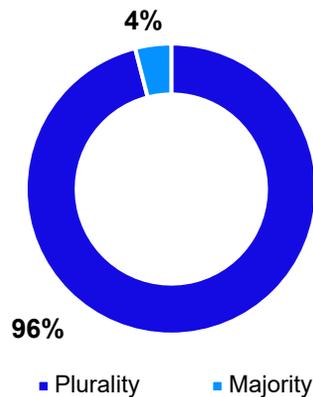
**48 companies**

(96%) had a plurality standard for uncontested board elections

**2 companies**

(4%) had a majority standard for uncontested board elections

### Standard for uncontested board elections



## Voting standard for director elections under Delaware law

Under Delaware law, in the absence of a different provision in a company's certificate of incorporation or bylaws, directors are elected by a plurality vote. Under a plurality voting system, the nominees for director are elected based on who receives the highest number of affirmative votes cast. When the number of directors on the ballot equals the number of open seats (i.e., an uncontested election), all directors would be elected. Under a majority voting system, a nominee for director is elected only if he or she receives the affirmative vote of a majority of the total votes cast for and against such nominee. Incumbent directors retain the ability to hold over on the board in the event of less than majority support, although a company may have a policy requiring such directors to submit their resignation.

## Supermajority vote for amending the bylaws

### Controlled companies

Of 46 companies examined:

#### 42 companies

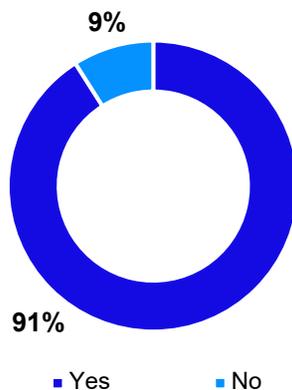
(91%) required a supermajority shareholder vote for amending the bylaws\*

- Of these, 6 companies (14%) required a vote of 75% or more

#### 4 companies

(9%) did not require a supermajority shareholder vote for amending the bylaws

### Supermajority vote for amending the bylaws



\* These 42 companies included 31 companies (74%) 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.

## Non-controlled companies

Of 50 companies examined:

### 49 companies

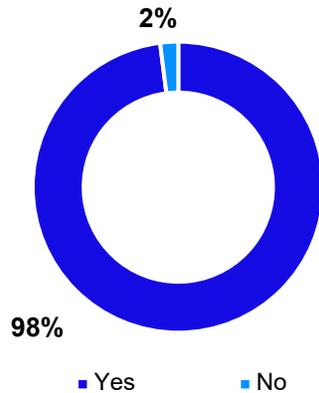
(98%) required a supermajority shareholder vote for amending the bylaws \*

- Of these, 4 companies (8%) required a vote of 75% or more

### 1 company

(2%) did not require a supermajority shareholder vote for amending the bylaws

#### Supermajority vote for amending the bylaws



## Exclusive-forum provisions

### Controlled companies

Of 46 companies examined:

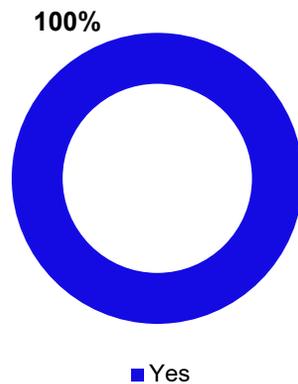
### 46 companies

All had an exclusive-forum provision. Of these:

- All companies (100%) specified the Court of Chancery in Delaware as the exclusive forum for non-'33 Act claims.
- 38 companies (83%) specified federal courts for '33 Act claims.

39 companies (85%) adopted it in their charter, 3 companies (7%) adopted it in their bylaws and 4 companies (9%) adopted it in both their charter and bylaws.

#### Exclusive-forum provision



\* These 49 companies included 1 company (2%) 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.

## Non-controlled companies

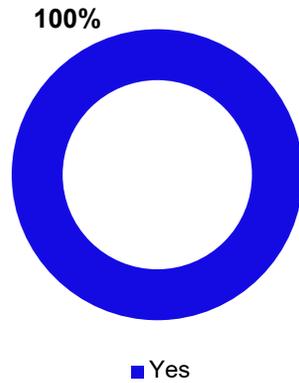
Of 50 companies examined:

### 50 companies

All had an exclusive-forum provision. Of these:

- All companies (100%) specified the Court of Chancery in Delaware as the exclusive forum for non-'33 Act claims.
- 49 companies (98%) specified federal courts for '33 Act claims.
- 33 companies (66%) adopted it in their charter, 10 companies (20%) adopted it in their bylaws and 7 companies (14%) adopted it in both their charter and bylaws.

### Exclusive-forum provision



## Stock ownership/retention requirement

### Controlled companies

Of 46 companies examined:

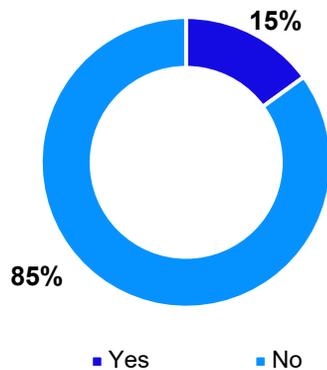
### 7 companies

(15%) disclosed stock ownership/retention guidelines or policies

### 39 companies

(85%) did not disclose stock ownership/retention guidelines or policies

### Stock ownership/retention requirement



## Non-controlled companies

Of 50 companies examined:

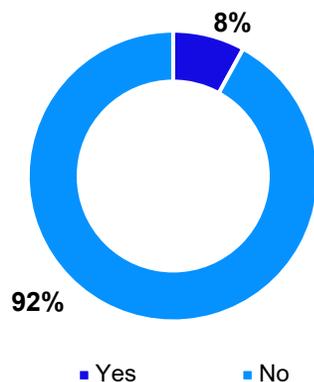
### 4 companies

(8%) disclosed stock ownership/retention guidelines or policies

### 46 companies

(92%) did not disclose stock ownership/retention guidelines or policies

#### Stock ownership/retention requirement



## New equity compensation plan

### Controlled companies

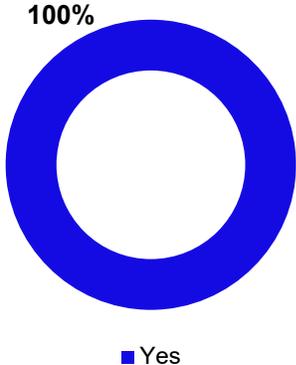
Of 46 companies examined:

### 46 companies

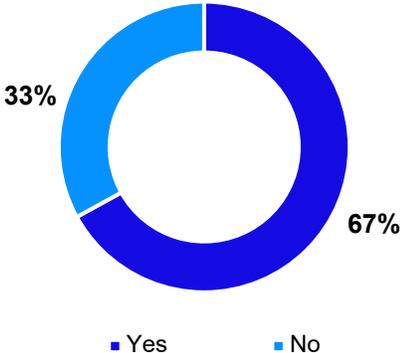
All companies adopted a new equity compensation plan at the time of the IPO. Of these:

- 37 companies (80%) were emerging growth companies
- 31 companies (67%) adopted a new equity compensation plan with an evergreen provision
  - The evergreen percentage ranged from 1% to 5%.
  - 5% was the most common, with 16 companies (52%) using it.
- 45 companies (98%) adopted a new equity compensation plan with a clawback provision
- 44 companies (96%) included a cap on non-employee director compensation in their new equity compensation plan
  - 39 companies (89%) noted that the cap on non-employee director compensation applied to both cash and equity compensation
  - 4 companies (9%) noted that the cap on non-employee director compensation applied only to equity compensation
  - The cap on director compensation ranged from \$500,000 to \$1,000,000, with \$750,000 as the most commonly adopted by companies (25 companies (57%))
  - 14 companies (32%) also provided a slightly higher cap for their non-employee directors' first year of service
- 6 companies (13%) adopted a new equity compensation plan that permitted option/SAR repricing without shareholder approval
- 32 companies (70%) adopted a new equity compensation plan with a liberal share recycling provision

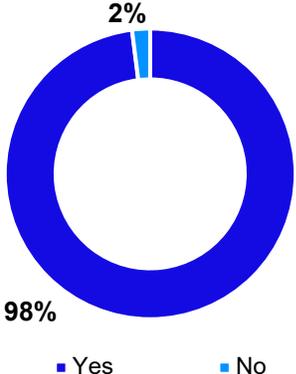
New equity compensation plan (NECP)



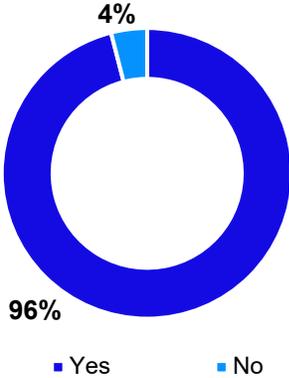
NECP with evergreen provision



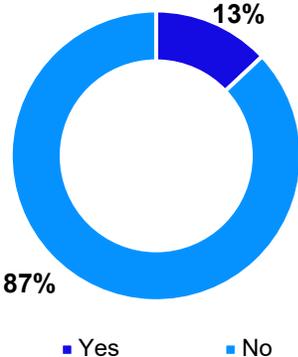
NECP with clawback provision



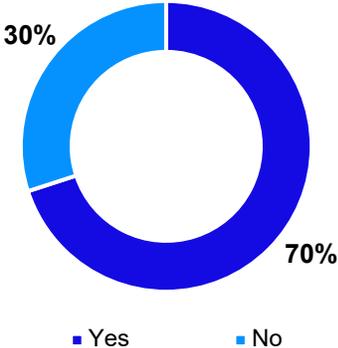
**Cap on non-employee director compensation**



**Option/SAR repricing without shareholder approval**



**Liberal share recycling provision**



## Non-controlled companies

Of 50 companies examined:

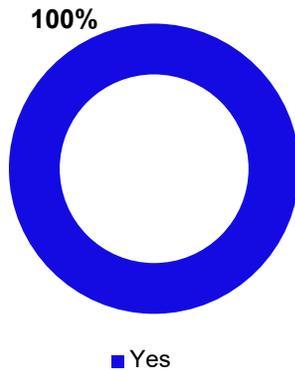
### 50 companies

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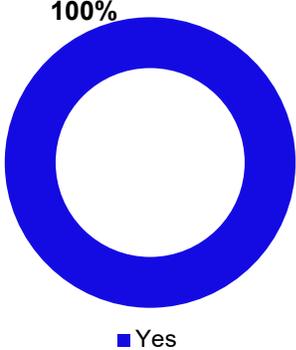
All companies adopted a new equity compensation plan at the time of the IPO. Of these:

- 47 companies (94%) were emerging growth companies
- 50 companies (100%) adopted a new equity compensation plan with an evergreen provision
  - The evergreen percentage ranged from 1% to 5%.
  - 5% was the most common, with 40 companies (80%) using it
- 49 companies (98%) adopted a new equity compensation plan with a clawback provision
- 48 companies (96%) included a cap on non-employee director compensation in their new equity compensation plan
  - 46 companies (92%) noted that the cap on non-employee director compensation applied to both cash and equity compensation
  - 2 companies (4%) noted that the cap on non-employee director compensation applied only to equity compensation
  - The cap on director compensation ranged from \$650,000 to \$1,500,000, with \$750,000 as the most commonly adopted by companies (34 companies (68%))
  - 25 companies (50%) also provided a slightly higher cap for its non-employee directors' first year of service
- 29 companies (58%) adopted a new equity compensation plan that permitted option/SAR repricing without shareholder approval
- 41 companies (82%) adopted a new equity compensation plan with a liberal share recycling provision

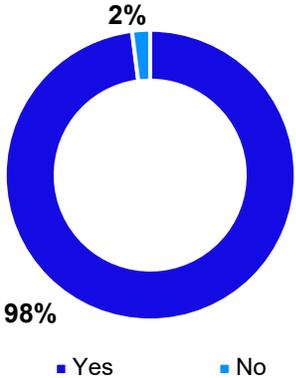
### New equity compensation plan (NECP)



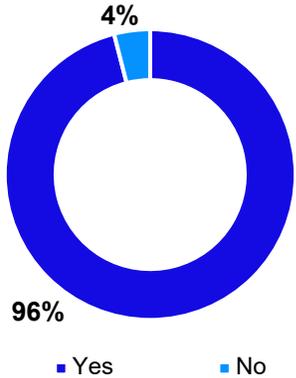
NECP with evergreen provision



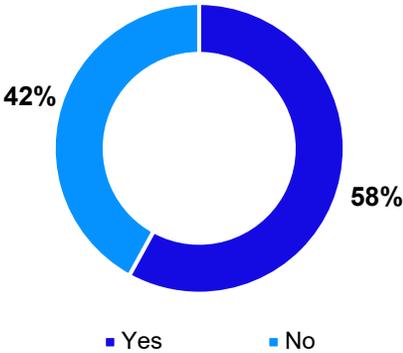
NECP with clawback provision



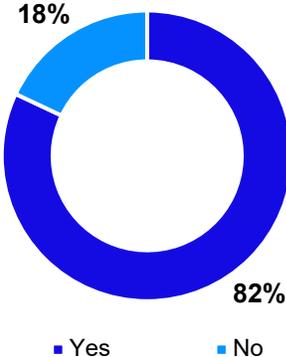
Cap on non-employee director compensation



Option/SAR repricing without shareholder approval



Liberal share recycling provision



# Employee stock purchase plan (ESPP)

## Controlled companies

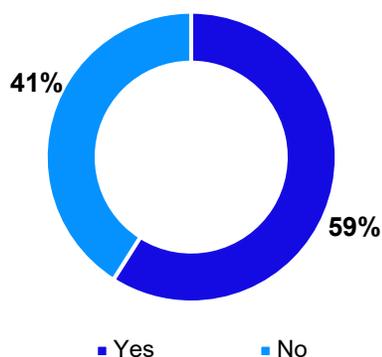
Of 46 companies examined:

### 27 companies

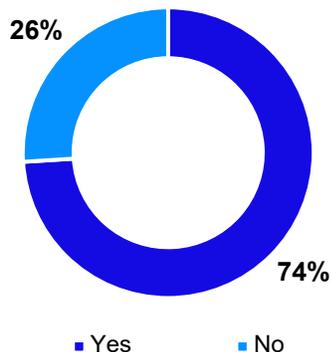
(59%) adopted an employee stock purchase plan at the time of the IPO. Of these:

- 21 companies (78%) were emerging growth companies
- The initial share reserve under the ESPP ranged from 1% to 6.5%
- 20 companies (74%) adopted an ESPP with an evergreen provision
  - The evergreen percentage ranged from 0.5% to 2%, with 1% as the most common (16 companies (59%))

### Employee stock purchase plan (ESPP)



### ESPP with evergreen provision



Non-controlled companies

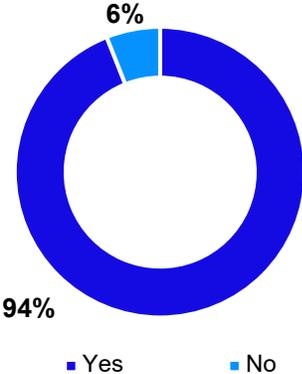
Of 50 companies examined:

47 companies

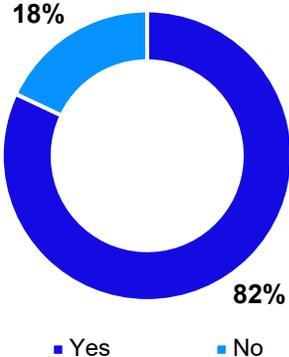
(94%) adopted an employee stock purchase plan at the time of the IPO. Of these:

- 45 companies (96%) were emerging growth companies
- The initial share reserve under the ESPP ranged from 0.4% to 2.3%
- 44 companies (82%) adopted an ESPP with an evergreen provision
  - The evergreen percentage ranged from 0.375% to 1.5%, with 1% as the most common (42 companies (84%))

Employee stock purchase plan (ESPP)



ESPP with evergreen provision



## Equity compensation awards

### Controlled companies

Of 46 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 **0.0%** to **15.1%**.
- 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 **2.0%** to **29.0%**.
- 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 **1.5%** to **19%**.

### Non-controlled companies

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 **0.0%** to **23.4%**.
- 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 **3.5%** to **49.5%**.
- 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 **2.4%** to **31.5%**.

## Employment and similar agreements

### Controlled companies

Of 46 companies examined:

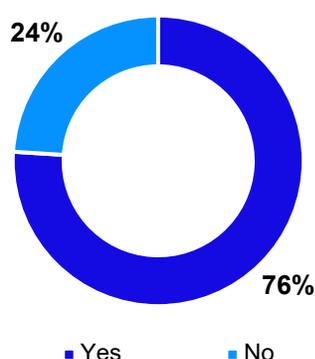
### 35 companies

(76%) adopted one or more employment or similar agreements with their executives within six months of the IPO.

Of these:

- 29 companies (83%) were emerging growth companies

### Employment or similar agreement



Non-controlled companies

Of 50 companies examined:

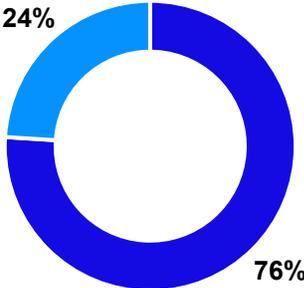
38 companies

(76%) adopted one or more employment or similar agreements with their executives within six months of the IPO.

Of these:

- 35 companies (92%) were emerging growth companies

Employment or similar agreement



■ Yes    ■ No

## 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.

### Controlled companies

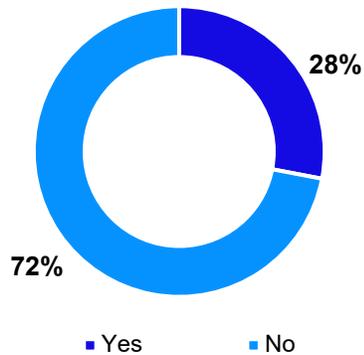
Of 46 companies examined:

### 13 companies

(28%) disclosed the use of compensation consultants. Of these:

- 6 companies (46%) were emerging growth companies
- 9 companies (69%) specified the consultant used
  - The specified consultants include:
    - Aon Hewitt
    - Compensia
    - Korn Ferry
    - Meridian Compensation Partners
    - Pay Governance
    - Pearl Meyer
    - Radford (Aon plc)
    - Semler Brossy Consulting Group
    - Willis Towers Watson

### Compensation consultant disclosure



**Non-controlled companies**

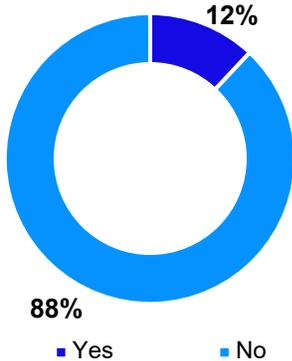
Of 50 companies examined:

**6 companies**

(12%) disclosed the use of compensation consultants. Of these:

- 4 companies (67%) were emerging growth companies
- 5 companies (83%) specified the consultant used
  - The specified consultants include:
    - Radford (Aon plc)
    - Willis Towers Watson
    - Semler Brossy Consulting Group

**Compensation consultant disclosure**



**Disclosure of non-GAAP financial measures**

**Controlled companies**

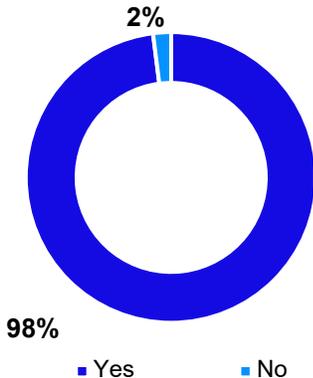
Of 46 companies examined:

**45 companies**

(98%) disclosed non-GAAP financial measures

Disclosed non-GAAP financial measures included EBITDA, adjusted EBITDA, adjusted EBITDA margin, adjusted net income and free cash flow, among others.

**Disclosure of non-GAAP financial measures**



## Non-controlled companies

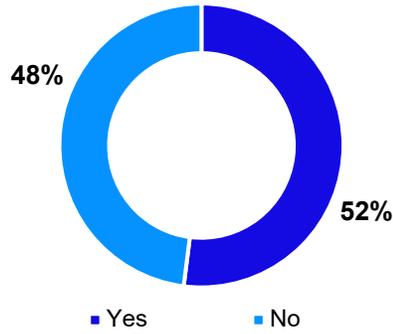
Of 50 companies examined:

### 26 companies

(52%) disclosed non-GAAP financial measures

Disclosed non-GAAP financial measures included EBITDA, adjusted EBITDA, adjusted EBITDA margin, adjusted net income and free cash flow, among others.

#### Disclosure of non-GAAP financial measures



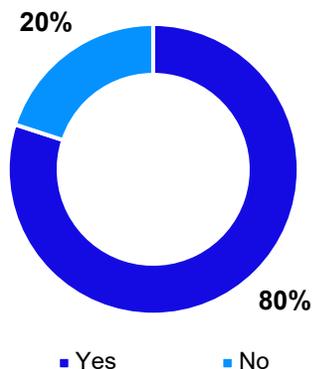
## Emerging growth companies

### Controlled companies

Of 46 companies examined, 37 companies (80%) identified themselves as emerging growth companies under the JOBS Act of 2012. Of these:

- 31 companies (84%) included two years of audited financial statements in the registration statement and 6 companies (16%) included three years of audited financial statements in the registration statement.
- 11 companies (30%) did not provide selected financial data in the registration statement; 11 companies (30%) included two years of selected financial data in the registration statement; 8 companies (22%) included three years of selected financial data in the registration statement; 3 companies (8%) included four years of selected financial data in the registration statement; 3 companies (8%) included five years of selected financial data in the registration statement; and 1 company (3%) included six years of selected financial data in the registration statement.
- None included a compensation discussion and analysis in the registration statement.
- 32 companies (86%) took advantage of the ability to delay adopting newly applicable public-company accounting policies.

#### Emerging growth company

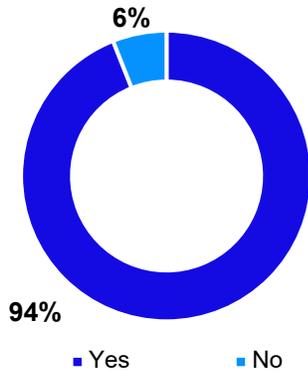


**Non-controlled companies**

Of 50 companies examined, **47 companies (94%)** identified themselves as emerging growth companies under the JOBS Act of 2012. Of these:

- **1 company (2%)** included less than one year of audited financial statements in the registration statement (due to its recent inception); **1 company (2%)** included one year of audited financial statements in the registration statement; **40 companies (85%)** included two years of audited financial statements in the registration statement; and **5 companies (11%)** included three years of audited financial statements in the registration statement.
- **10 companies (21%)** did not provide selected financial data; **1 company (2%)** included less than one year of selected financial data in the registration statement; **18 companies (38%)** included two years of selected financial data in the registration statement; **17 companies (36%)** included three years of selected financial data in the registration statement; and **1 company (2%)** included four years of selected financial data in the registration statement.
- **44 companies (94%)** 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 the adoption of new public-company accounting principles.

An “emerging growth company” is an IPO company that had annual gross revenues of less than \$1.07 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 \$1.07 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 nonconvertible 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.

\* The SEC revised the annual gross revenue cap for a company to qualify as an EGC from \$1.070 billion to \$1.235 billion effective September 20, 2022.

# DavisPolk

## De-SPAC transactions

While this survey does not cover SPAC IPOs, we offer the following observations based on our experience with de-SPAC transactions and related governance approaches:

- Companies going public by way of a de-SPAC transaction are faced with similar governance considerations as traditional IPO companies and generally seek to effect a full set of takeover defenses and, in certain cases, two or more classes of common stock with unequal voting rights
- De-SPACs are less affected by investor marketing considerations that are discussed with underwriters as compared to traditional IPO companies
- In certain cases, de-SPAC governance provisions may be pre-determined in pre-IPO organizational documents, or may be informed by companies' focus on the views of proxy advisory firms, although the view of proxy advisory firms is usually a secondary consideration at most

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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