

**Davis Polk**

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

January 2014

**IPO Governance Survey**

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## Overview

As an IPO adviser to companies and underwriters, we surveyed corporate governance practices in recent U.S. IPOs to identify current market trends. We focused on the top 100 IPOs of U.S. companies based on deal size from September 1, 2011 through October 31, 2013.\* Deal size of the examined IPOs ranged from \$131.5 million to \$16.0 billion.

Of these 100 IPOs, 54 were “controlled companies” as defined under NYSE or NASDAQ listing standards. Because controlled companies are exempt from certain NYSE and NASDAQ governance requirements, we examined corporate governance practices at these companies separately from those at non-controlled companies. The survey results below focus on controlled companies. For our survey focusing on non-controlled companies, please see [here](#).

## The Companies

We examined the following 54 controlled companies, spanning 33 industries:

Allison Transmission Holdings, Inc.	MRC Global Inc.**
Antero Resources Corp.	Norwegian Cruise Line Holdings Ltd.
Athlon Energy Inc.	NRG Yield, Inc.
Benefitfocus, Inc.	Oaktree Capital Group, LLC
Berry Plastics Group, Inc.	PBF Energy Inc.
Blackhawk Network Holdings, Inc.	Pinnacle Foods Inc.
Bloomin’ Brands Inc.	Ply Gem Holdings, Inc.
Boise Cascade Company	Premier, Inc.
Bonanza Creek Energy, Inc.	Quintiles Transnational Holdings Inc.
Bright Horizons Family Solutions Inc.	RE/MAX Holdings, Inc.**
Burlington Stores, Inc.	Realty Holdings Corp.
ClubCorp Holdings, Inc.	Restoration Hardware Holdings, Inc.
CommScope Holding Company, Inc.	Rexnord Corp.**
Coty Inc.**	Roundy’s, Inc.
Diamond Resorts International, Inc.	Sanchez Energy Corp.
Edgen Group Inc.	SeaWorld Entertainment, Inc.
Endurance International Group Holdings, Inc.	Surgical Care Affiliates, Inc.
Envision Healthcare Holdings, Inc.	Taminco Corporation**
Facebook, Inc.	Taylor Morrison Home Corp.
Fairway Group Holdings Corp.	The Container Store Group, Inc.
Five Below, Inc.	The WhiteWave Foods Co.
Forum Energy Technologies, Inc.	Tilly’s, Inc.
HD Supply Holdings, Inc.	Tumi Holdings, Inc.
ING U.S., Inc.**	U.S. Silica Holdings, Inc.**
Laredo Petroleum Holdings, Inc.	West Corp.
Manning & Napier, Inc.	Workday, Inc.
Midstates Petroleum Company, Inc.	Zoetis Inc.**

\* Excludes limited partnerships, REITs, trusts and blank check companies

\*\* Davis Polk participated in the IPO

## Significant Findings

In comparing corporate governance practices at controlled companies to those at non-controlled companies, we noted some key differences, including:

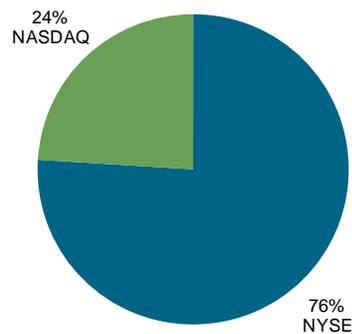
- 76% of controlled companies were listed on the NYSE versus 52% of non-controlled companies.
- The average level of director independence at controlled companies was 41% versus 72% at non-controlled companies.
- 13% of controlled companies without an independent chairman had a lead director versus 28% of non-controlled companies.
- 30% of controlled companies had fully independent audit committees at the IPO versus 83% of non-controlled companies.
- 83% of controlled companies had a classified board versus 70% of non-controlled companies.
- 78% of controlled companies permitted shareholder action by written consent versus 11% of non-controlled companies.
- 80% of controlled companies had an exclusive-forum provision versus 57% of non-controlled companies.

### Primary Listing Exchange

Of 54 companies examined:

- **41** companies (76%) listed on the NYSE
- **13** companies (24%) listed on the NASDAQ

**Primary Listing Exchange**

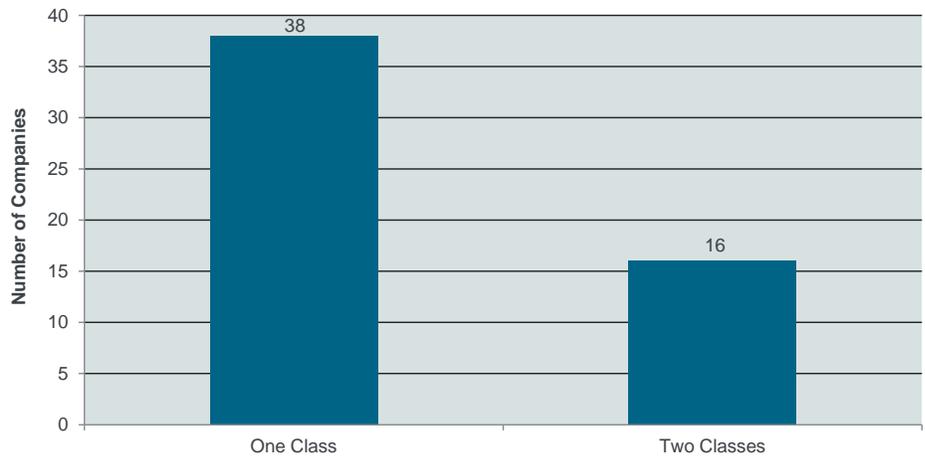


### Classes of Outstanding Common Stock

Of 54 companies examined:

- **38** companies (70%) had one class of common stock outstanding
- **16** companies (30%) had two classes of common stock outstanding, with a "high vote" stock

**Classes of Outstanding Common Stock**



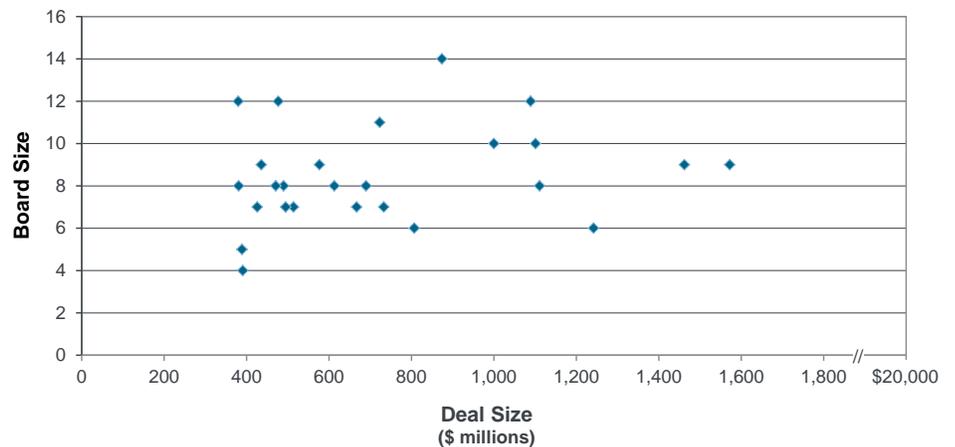
## Board Size

Of 54 companies examined:

- The average board size was **8** members
- The median board size was **8** members
- Board size ranged from **2** to **14** members

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

**Deal Size vs. Board Size**



## Level of Board Independence

Of 54 companies examined:

- The average level of director independence was **41%** of the board
- The median level of director independence was **38%** of the board
- The level of director independence ranged from a low of **8%** to a high of **86%**

### Controlled companies are exempt from majority of independent directors requirement

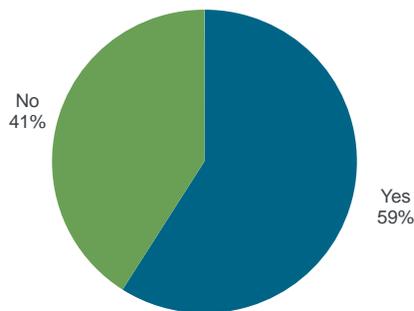
Controlled companies are subject to an exemption from NYSE and NASDAQ standards requiring that the board of a listed company consist of a majority of independent directors within one year of the listing date.

### Separation of Chairman and CEO

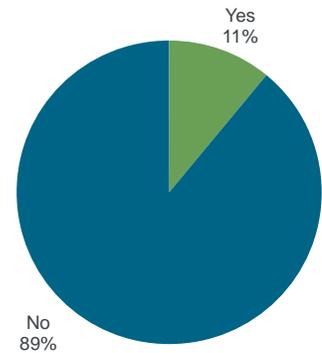
Of 54 companies examined:

- **32** companies (59%) had a separate chairman and CEO\*
- **6** companies (11%) had an independent chairman

**Separation of Chairman & CEO**



**Independent Chairman**



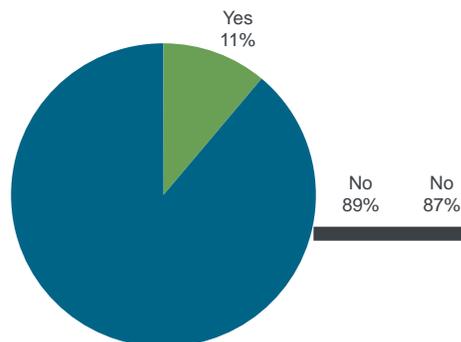
\* Three companies did not have a chairman

### Lead Director

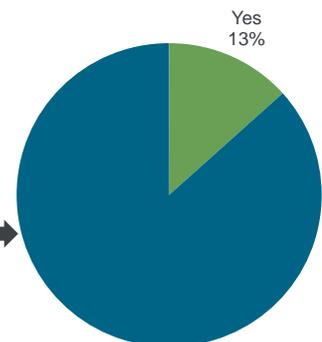
Of 54 companies examined:

- **48** companies (89%) combined the roles of chairman and CEO or otherwise did not have an independent chairman
  - Of these, **6** (13%) had a lead director

**Independent Chairman**



**Lead Director**

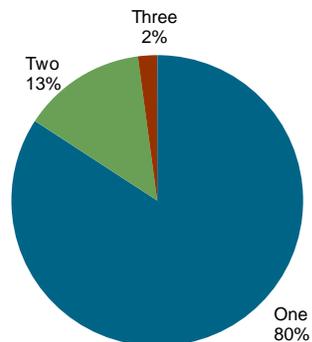


## Audit Committee Financial Experts

Of 54 companies examined:

- 3 companies (6%) did not disclose a financial expert
- 43 companies (80%) had one financial expert
- 7 companies (13%) had two financial experts
- 1 company (2%) had three financial experts

### Number of Audit Committee Financial Experts



### Audit committee financial expert

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

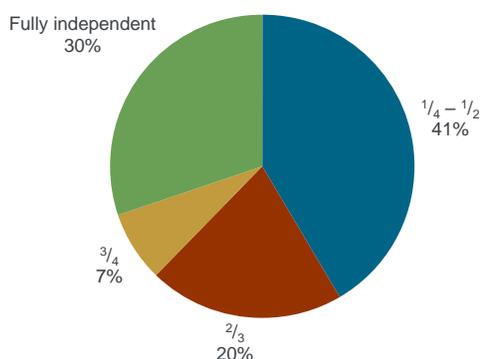
An audit committee financial expert is a person who has the following attributes: (1) an understanding of generally accepted accounting principles and financial statements; (2) the ability to assess the general application of such principles in connection with the accounting for estimates, accruals and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

## Audit Committee Independence

Of 54 companies examined:\*

- 16 companies (30%) had a fully independent audit committee
- 4 companies (7%) had a  $\frac{3}{4}$  independent audit committee
- 11 companies (20%) had a  $\frac{2}{3}$  independent audit committee
- 22 companies (41%) had a  $\frac{1}{4}$  -  $\frac{1}{2}$  independent audit committee

### Audit Committee Independence



\* For one company, the independence of the audit committee was not determinable

### Audit committee independence

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

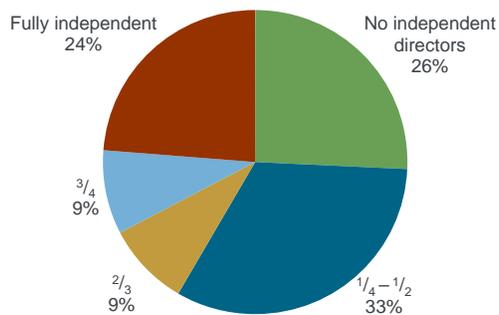
In addition to the NYSE/NASDAQ independence standards applicable to all independent directors, audit committee members are required to meet additional independence tests set forth by the SEC, which provide that a director who serves on the company's audit committee may not (other than in his or her capacity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

### Governance/Nominating Committee Independence

Of 54 companies examined, 46 had a governance/nominating committee. Of these 46 companies:

- **11** companies (24%) had a fully independent governance/nominating committee
- **4** companies (9%) had a  $\frac{3}{4}$  independent governance/nominating committee
- **4** companies (9%) had a  $\frac{2}{3}$  independent governance/nominating committee
- **15** companies (33%) had a  $\frac{1}{4}$  -  $\frac{1}{2}$  independent governance/nominating committee
- **12** companies (26%) did not have any independent directors on their governance/nominating committee

### Governance/Nominating Committee Independence

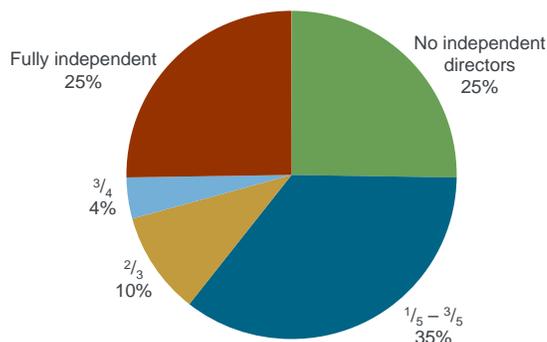


## Compensation Committee Independence

Of 54 companies examined, 51 had a compensation committee. Of these 51 companies:

- 13 companies (25%) had a fully independent compensation committee
- 2 companies (4%) had a  $\frac{3}{4}$  independent compensation committee
- 5 companies (10%) had a  $\frac{2}{3}$  independent compensation committee
- 18 companies (35%) had a  $\frac{1}{5}$  -  $\frac{3}{5}$  independent compensation committee
- 13 companies (25%) did not have any independent directors on their compensation committee

### Compensation Committee Independence



### Governance/nominating and compensation committee independence

Controlled companies are entitled to an exemption from NYSE and NASDAQ rules requiring that governance/nominating and compensation committees consist of independent directors.

## Additional Board Committees

Of 54 companies examined:

- 15 companies (28%) had additional board committees

The additional committees included compliance committees, executive committees, finance committees, environmental, health and safety committees and acquisition committees, among others

## Shareholder Rights Plan (Poison Pill)

Of 54 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" stock power is provided as described below, a shareholder rights plan can usually be adopted at a later time rather than at the IPO and, in most cases, shareholder rights plans typically are not adopted at the time of the IPO.

### **“Blank Check” Preferred Stock**

Of 54 companies examined, **all** were authorized to issue “blank check” preferred stock

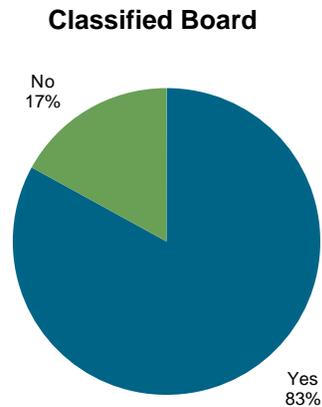
#### **Authority to issue “blank check” preferred stock**

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

## Classified Board

Of 54 companies examined:

- **45** companies (83%) had a classified board\*
- **9** companies (17%) did not have a classified board



*\* Of these 45 companies, 3 companies (7%) had a springing staggered board*

### Classified board

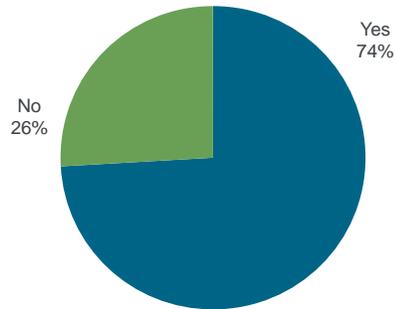
The implementation of a classified board often serves as a protective mechanism in the context of a take-over by ensuring that a potential acquiror cannot simply replace an entire board at one time with a more pliant board. Typically, a staggered board is composed of three equally divided classes of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

## Director Removal for Cause Only

Of 54 companies examined:

- **40** companies (74%) had bylaws that allowed removal of a director for cause only

**Director Removal for Cause Only**



### Director removal for cause only

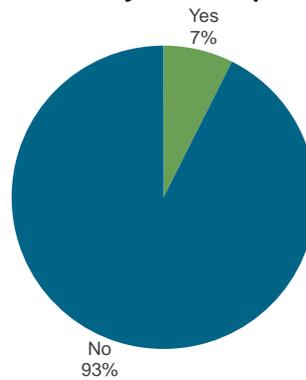
Director removal for cause is an automatic consequence of having a classified board under Delaware law, and is necessary to preserve the extended terms of those directors. Taken together, a classified board structure and a provision allowing director removal for cause only (as supplemented by restrictions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

## Shareholder Ability to Call Special Meeting

Of 54 companies examined:

- **50** companies (93%) had bylaws that prohibited shareholders from calling a special meeting
- **4** companies (7%) had bylaws that permitted shareholders to call a special meeting. Of these:
  - **1** (25%) permitted shareholders comprising at least 10% to call a special meeting
  - **1** (25%) permitted shareholders comprising at least 35% to call a special meeting
  - **2** (50%) permitted shareholders comprising at least a majority to call a special meeting

### Shareholder Ability to Call Special Meeting

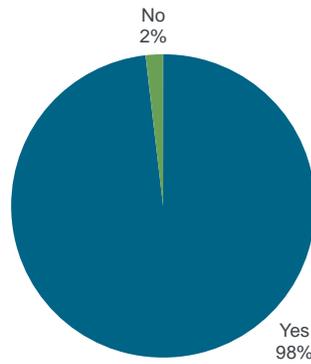


## Advance Notice Bylaws

Of 54 companies examined:

- **53** companies (98%) 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**

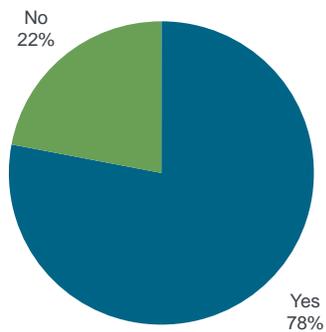


## Shareholder Action by Written Consent

Of 54 companies examined:

- **42** companies (78%) permitted shareholder action by written consent
  - Of these, **39** companies (93%) permitted shareholder action by written consent only so long as a controlling shareholder or group owns a specified percentage of shares
- **12** companies (22%) prohibited shareholder action by written consent

### Shareholder Action by Written Consent Permitted



### Shareholder voting restrictions

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

### Board Authority to Change Board Size

Of 54 companies examined, **all** permitted the board to change the size of the board

### Board Authority to Fill Vacancies on Board

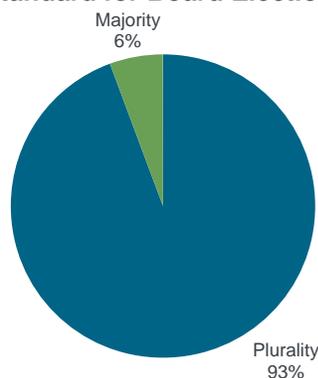
Of 54 companies examined, **all** permitted the board to fill vacancies on the board

### Voting in Uncontested Board Elections

Of 54 companies examined:\*

- **50** companies (93%) required a plurality standard for board elections
- **3** companies (6%) required a majority standard for board elections\*\*

#### Standard for Board Elections



\* One company did not have director elections – the primary shareholder appointed directors

\*\* Of these 3 companies, 1 company (33%) had a director resignation policy

#### Voting standard for director elections under Delaware law

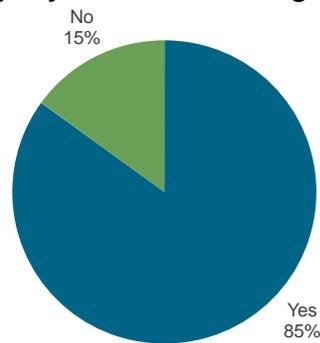
Under Delaware law, in the absence of a different specification in a company's certificate of incorporation or bylaws, directors are elected by a plurality voting system. Under a plurality voting system, the nominees for directorships are elected based on who receives the highest number of affirmative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

## Supermajority Vote for Amending the Bylaws

Of 54 companies examined:

- **46** companies (85%) required a supermajority shareholder vote for amending the bylaws\*
  - Of these, **20** companies (43%) required a vote of 75% or more
- **8** companies (15%) did not require a supermajority shareholder vote for amending the bylaws

### Supermajority Vote for Amending the Bylaws



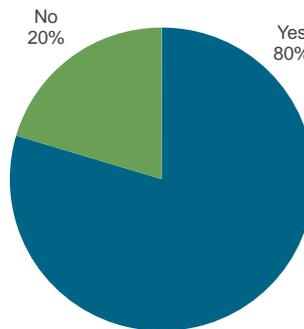
\* These 46 companies included 32 (70%) whose supermajority vote requirements were triggered when a controlling shareholder ceased to hold a certain percentage of shares outstanding

## Exclusive-Forum Provisions

Of 54 companies examined:

- **43** companies (80%) had an exclusive-forum provision. Of these:
  - **42** (98%) specified Delaware as the exclusive forum
  - **41** (95%) adopted them in their charter and **2** (5%) adopted them in their bylaws
- **11** companies (20%) did not have an exclusive-forum provision

**Exclusive-Forum Provision**



## Compensation Consultants

Of 54 companies examined:

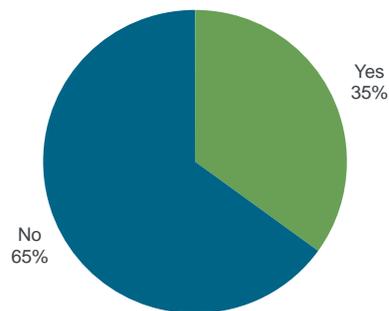
- **19** companies (35%) disclosed the use of and named their compensation consultants

The named consultants included:

Cogent Compensation Partners  
Compensia, Inc.  
Exequity LLP  
Frederic W. Cook & Co.  
Longnecker & Associates  
Mercer, LLC

Meridian Compensation Partners, LLC  
Pearl Meyer & Partners, LLC  
Radford, an Aon Hewitt Company  
Semler Brossy Consulting Group LLC  
Towers Watson

### Compensation Consultant Disclosure



### Compensation consultants

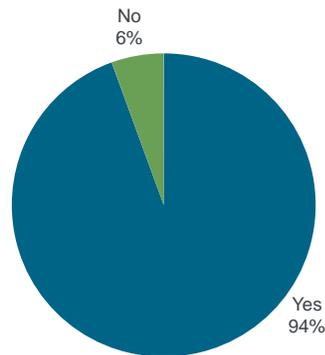
The SEC requires a listed company to disclose in its proxy statement any role of compensation consultants in determining or recommending the amount or form of executive and director compensation, identifying such consultants, stating whether such consultants are engaged directly by the compensation committee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

## New Equity Compensation Plan (NECP)

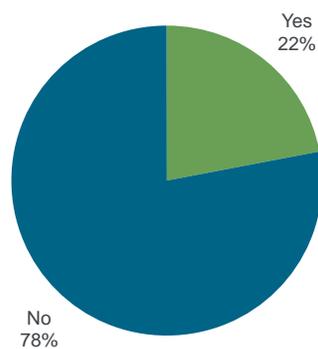
Of 54 companies examined:

- **51** companies (94%) adopted a new equity compensation plan. Of these:
  - **11** companies (22%) adopted a new equity compensation plan with an evergreen provision
  - **32** companies (63%) adopted a new equity compensation plan with a clawback provision
  - **4** companies (8%) adopted a new equity compensation plan that permitted option/SAR repricing without shareholder approval
  - **6** companies (12%) had a stock ownership/retention requirement

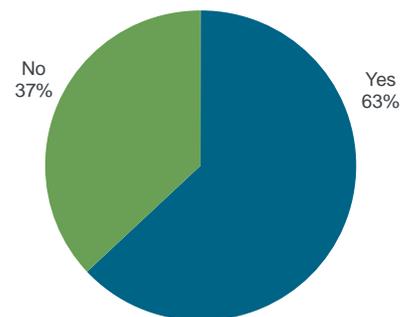
### New Equity Compensation Plan (NECP)



### NECP with Evergreen Provision



### NECP with Clawback Provision

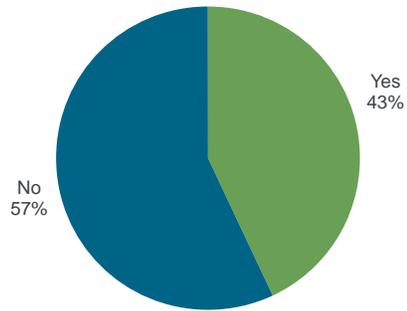


## Employment and Similar Agreements

Of 54 companies examined:

- **23** companies (43%) adopted one or more employment or similar agreements

### Employment or Similar Agreement

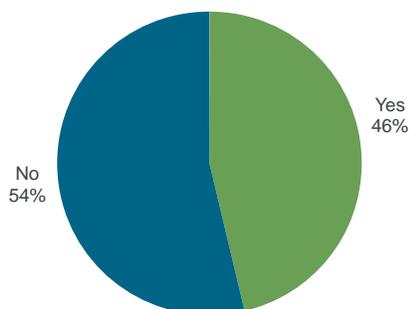


## Equity Compensation Awards

Of 54 companies examined:

- **25** companies (46%) granted equity compensation awards in connection with their IPO
  - Of these, **9** companies (36%) granted restricted stock units, **14** companies (56%) granted options, **5** companies (20%) granted restricted stock and **1** company (4%) granted common stock\*
- The percentage of outstanding equity compensation awards at the time of the IPO, as a percentage of the fully diluted number of common shares post-IPO, ranged from 0% to 27%
- The percentage 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% to 36%
- 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% to 23%

### Equity Compensation Awards



*\* This list is meant to be illustrative and does not reflect all equity compensation awards that were granted*

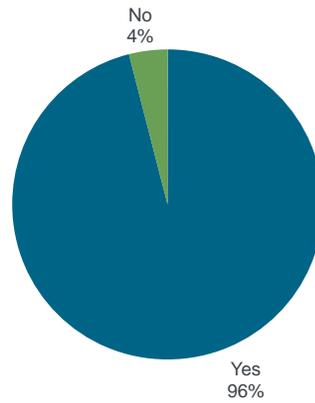
## Disclosure of Non-GAAP Financial Measures

Of 54 companies examined:

- **52** companies (96%) disclosed non-GAAP financial measures

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

### Disclosure of Non-GAAP Financial Measures

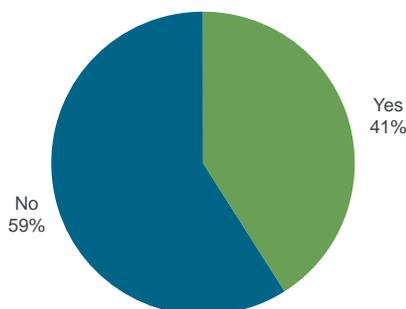


## Emerging Growth Companies

Of 54 companies examined:

- **46** companies had IPOs after the April 5, 2012 enactment of the JOBS Act
- **19** companies (41% of companies with an IPO after April 5, 2012) identified themselves as emerging growth companies under the JOBS Act. Of these:
  - **1** company (5%) included two years of audited financial statements in the registration statement, **17** companies (89%) included three years of audited financial statements in the registration statement and **1** company (5%) included four years of audited financial statements in the registration statement
  - **1** company (5%) included two years of selected financial data in the registration statement, **6** companies (32%) included three years of selected financial data in the registration statement, **2** companies (11%) included four years of selected financial data in the registration statement and **10** companies (53%) included five years of selected financial data in the registration statement
  - **3** companies (16%) included a Compensation Discussion and Analysis in the registration statement
  - **3** companies (16%) took advantage of the ability to delay adopting newly applicable public-company accounting policies\*

### Emerging Growth Company\*\*



\* One company did not clearly indicate in the IPO prospectus whether or not they had elected to delay the application of new public-company accounting principles, even though the JOBS Act requires a company that does not intend to delay the application of these standards to make an irrevocable election in its IPO registration statement. We have excluded this company from this figure.

\*\* Based on 46 companies that had IPOs after April 5, 2012

### **Emerging growth companies under the JOBS Act of 2012**

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

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

## Davis Polk's Capital Markets Practice

Davis Polk & Wardwell LLP's capital markets practice provides a full range of services for issuers and underwriters in initial public offerings, follow-on offerings, investment-grade and high-yield debt issuances, and in the design and execution of sophisticated equity derivative products. Davis Polk is also an international IPO adviser that has advised companies, selling shareholders (including private equity and venture capital shareholders) and underwriters in connection with these transactions. Our global capital markets practice has approximately 275 lawyers, including 45 partners in our offices around the world.

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