

Davis Polk

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

June 2016

IPO Governance Survey

Table of Contents

Overview	3
The Companies	3
Significant Findings	4
Primary Listing Exchange	6
Classes of Outstanding Common Stock	6
Board Size	7
Level of Board Independence	7
Separation of Chairman and CEO	8
Lead Director	8
Audit Committee Financial Experts	9
Audit Committee Independence	10
Governance/Nominating Committee Independence	11
Compensation Committee Independence	12
Additional Board Committees	13
Shareholder Rights Plan (Poison Pill)	13
“Blank Check” Preferred Stock	14
Classified Board	15
Director Removal for Cause Only	16
Shareholder Ability to Call Special Meeting	17
Advance Notice Bylaws	18
Shareholder Action by Written Consent	19
Board Authority to Change Board Size	20
Board Authority to Fill Vacancies on Board	20
Voting in Uncontested Board Elections	20
Supermajority Vote for Amending the Bylaws	21
Exclusive-Forum Provisions	22
Compensation Consultants	23
New Equity Compensation Plan	24
Employment and Similar Agreements	25
Equity Compensation Awards	26
Disclosure of Non-GAAP Financial Measures	27
Emerging Growth Companies	28
Davis Polk’s Capital Markets Practice	30

Overview

As an IPO adviser to companies and underwriters, we surveyed corporate governance practices in recent U.S.-listed IPOs to identify current market trends. We focused on the top 50 IPOs of “controlled companies” (as defined under NYSE or NASDAQ listing standards) and the top 50 IPOs of non-controlled companies, in each case based on deal size from November 1, 2013 through March 31, 2016.*

Because controlled companies are exempt from certain NYSE and NASDAQ governance requirements, we examined corporate governance practices at these companies separately from those at non-controlled companies. The survey results below focus on controlled companies, whose deal size ranged from \$198.9 million to \$2.9 billion. For our survey focusing on non-controlled companies, [please see here](#).

The Companies

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

AMC Entertainment Holdings, Inc.	NantKwest, Inc.
Amplify Snack Brands, Inc.	OM Asset Management plc
ARAMARK Holdings Corporation	Party City Holdco Inc.
Axalta Coating Systems Ltd.	Performance Food Group Company
Axovant Sciences Ltd.	Phibro Animal Health Corporation
Black Knight Financial Services, Inc.	Planet Fitness, Inc.
Blue Buffalo Pet Products, Inc.	PRA Health Sciences, Inc.
Catalent, Inc.	Press Ganey Holdings, Inc.
CHC Group Ltd.	Rice Energy Inc.
Civitas Solutions, Inc.	Sabre Corporation
Diplomat Pharmacy, Inc.	Santander Consumer USA Holdings Inc.
Eclipse Resources Corporation	ServiceMaster Global Holdings, Inc.
EP Energy Corporation	Summit Materials, Inc.**
First Data Corporation**	Surgery Partners, Inc.
GoDaddy Inc.**	Synchrony Financial**
Great Western Bancorp, Inc.	TerraForm Global, Inc.
Hilton Worldwide Holdings Inc.**	TerraForm Power, Inc.
Houlihan Lokey, Inc.	The Michaels Companies, Inc.
IMS Health Holdings, Inc.	Transocean Partners LLC
La Quinta Holdings Inc.	TransUnion
Match Group, Inc.	Univar Inc.
Memorial Resource Development Corp.	Vince Holding Corp.
Milacron Holdings Corp.	Virtu Financial, Inc.**
Multi Packaging Solutions International Limited	Vivint Solar, Inc.
	VWR Corporation
	Wayfair Inc.

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

** Davis Polk participated in the IPO

Significant Findings

Comparing our findings in this survey to those in our 2014, 2011 and 2009 surveys, we found that controlled companies, similar to the non-controlled companies we examined, continued to deploy various takeover defenses in advance of their IPOs, despite the fact that governance advocates (and activist investors) have shown a pronounced dislike for what they view as management-entrenchment devices. For example:

- 96% of companies adopted a plurality vote standard for uncontested director elections.
- 84% of companies effectively prohibited shareholder action by written consent.
- 80% of companies had provisions prohibiting shareholders from calling a special meeting.
- 78% of companies required a supermajority shareholder vote for amending the bylaws.
- 76% of companies adopted a classified board.

We also found that the number of controlled companies that adopted exclusive-forum provisions (another governance attribute disfavored by shareholder advocates) more than tripled over the past several years, from 25% in the 2011 survey to 80% in the 2014 survey to 88% in the 2016 survey, in all likelihood reflecting developments in the Delaware General Corporation Law.

In addition, while a higher proportion of controlled companies separated the roles of chairman and CEO relative to non-controlled companies (68% of controlled companies versus 56% of non-controlled companies), this separation has been on the rise in recent years among all companies, and in the case of controlled companies increased from 40% in the 2009 survey.

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

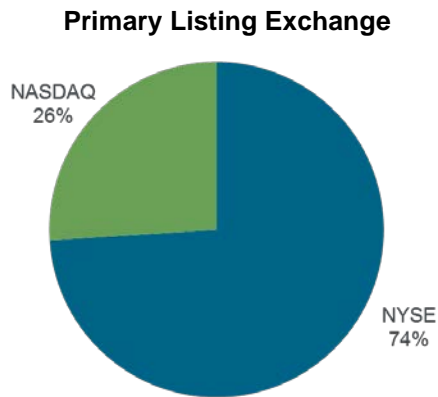
- The average level of director independence at controlled companies was 41% versus 73% at non-controlled companies.
- 36% of controlled companies had fully independent audit committees at the IPO versus 88% of non-controlled companies.
- 18% of controlled companies had fully independent governance/nominating committees at the IPO versus 90% of non-controlled companies.
- 21% of controlled companies had fully independent compensation committees at the IPO versus 88% of non-controlled companies.
- 20% of controlled companies had an independent chairman versus 32% of non-controlled companies.

- 3% of controlled companies without an independent chairman had a lead director versus 44% of non-controlled companies.
- 76% of controlled companies had a classified board versus 90% of non-controlled companies.
- 74% of controlled companies were listed on the NYSE versus 58% of non-controlled companies.

Primary Listing Exchange

Of 50 companies examined:

- **37** companies (74%) listed on the NYSE
- **13** companies (26%) listed on the NASDAQ

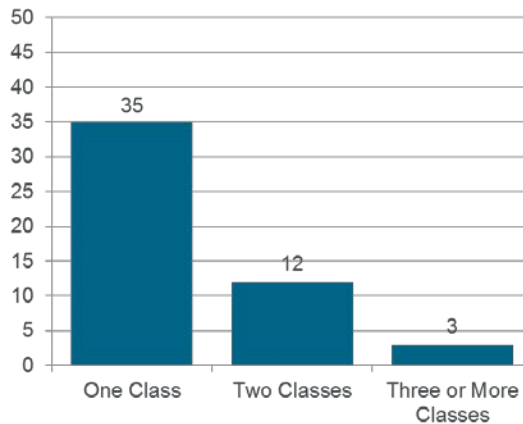


Classes of Outstanding Common Stock

Of 50 companies examined:

- **35** companies (70%) had one class of common stock outstanding
- **12** companies had two classes of common stock outstanding, **9** (18%) of which had unequal voting rights
- **3** companies (6%) had three or more classes of common stock outstanding with unequal voting rights

Classes of Outstanding Common Stock

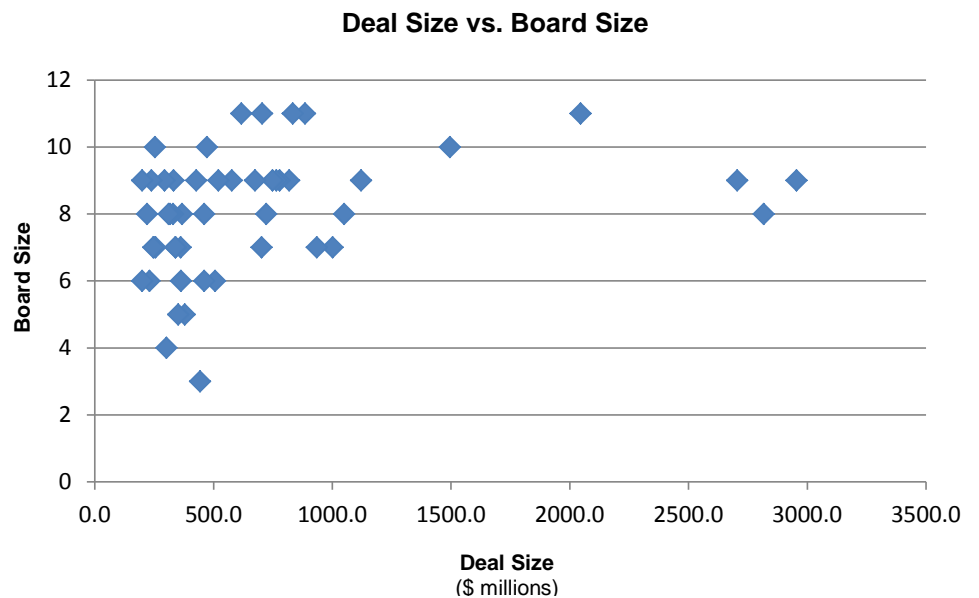


Board Size

Of 50 companies examined:

- The average board size was **8** members
- The median board size was **8** members
- Board size ranged from **3** to **11** members

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



Level of Board Independence

Of 50 companies examined:

- The average level of director independence was **41%** of the board
- The median level of director independence was **35%** of the board
- The level of director independence ranged from a low of **9%** to a high of **91%**

Controlled companies are exempt from majority of independent directors requirement

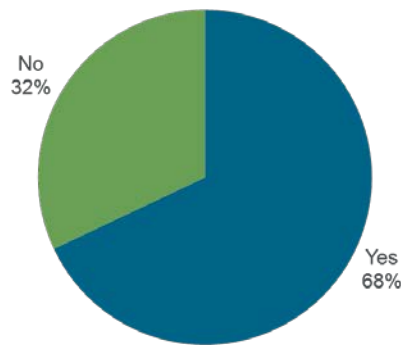
Controlled companies are subject to an exemption from NYSE and NASDAQ standards requiring that the board of a listed company consist of a majority of independent directors within one year of the listing date.

Separation of Chairman and CEO

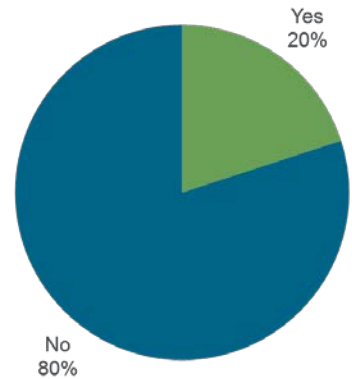
Of 50 companies examined:

- **34** companies (68%) had a separate chairman and CEO
- **10** companies (20%) had an independent chairman

Separation of Chairman & CEO



Independent Chairman

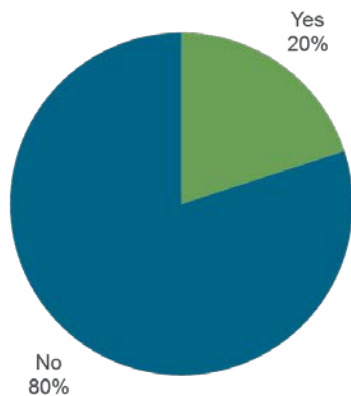


Lead Director

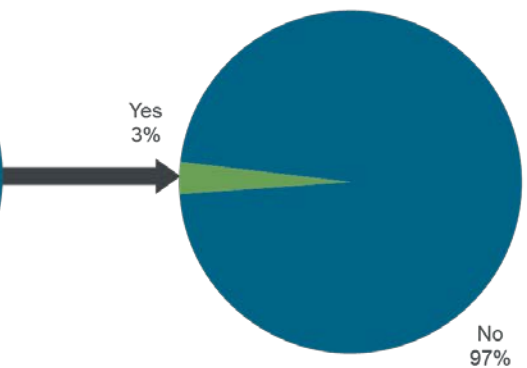
Of 50 companies examined:

- **40** companies (80%) combined the roles of chairman and CEO or otherwise did not have an independent chairman
 - Of these, **1** company (3%) had a lead director

Independent Chairman



Lead Director

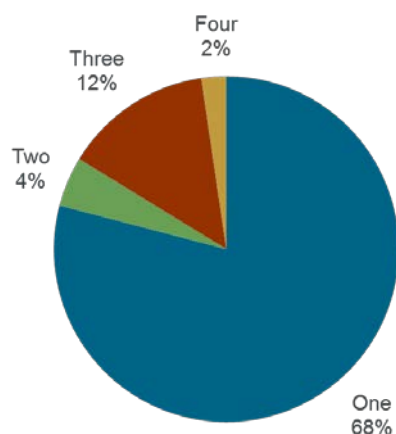


Audit Committee Financial Experts

Of 50 companies examined:

- 34 companies (68%) had one financial expert
- 2 companies (4%) had two financial experts
- 6 companies (12%) had three financial experts
- 1 company (2%) had four financial experts
- 7 companies (14%) did not disclose a financial expert

Number of Audit Committee Financial Experts



Audit committee financial expert

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

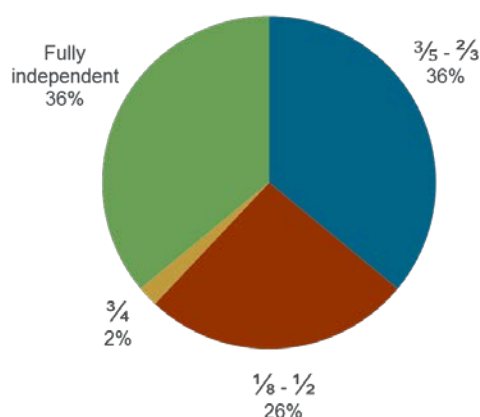
An audit committee financial expert is a person who has the following attributes: (1) an understanding of generally accepted accounting principles and financial statements; (2) the ability to assess the general application of such principles in connection with the accounting for estimates, accruals and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

Audit Committee Independence

Of 50 companies examined:

- 18 companies (36%) had a fully independent audit committee
- 1 company (2%) had a $\frac{3}{4}$ independent audit committee
- 18 companies (36%) had a $\frac{3}{5}$ - $\frac{2}{3}$ independent audit committee
- 13 companies (26%) had a $\frac{1}{8}$ - $\frac{1}{2}$ independent audit committee

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.

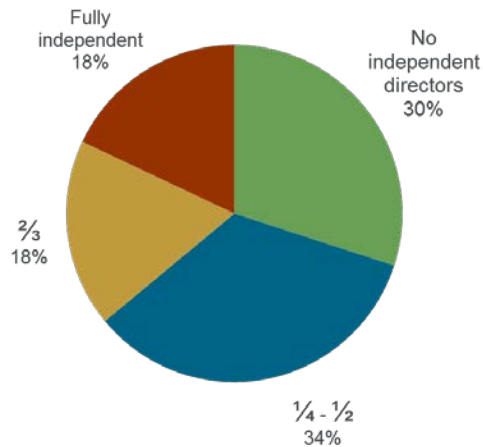
In addition to the NYSE/NASDAQ independence standards applicable to all independent directors, audit committee members are required to meet additional independence tests set forth by the SEC, which provide that a director who serves on the company's audit committee may not (other than in his or her capacity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

Governance/Nominating Committee Independence

Of 50 companies examined, 38 had a governance/nominating committee. Of these 38 companies:

- 7 companies (18%) had a fully independent governance/nominating committee
- 7 companies (18%) had a $\frac{2}{3}$ independent governance/nominating committee
- 13 companies (34%) had a $\frac{1}{4}$ - $\frac{1}{2}$ independent governance/nominating committee
- 11 companies (30%) did not have any independent directors on their governance/nominating committee

Governance/Nominating Committee Independence

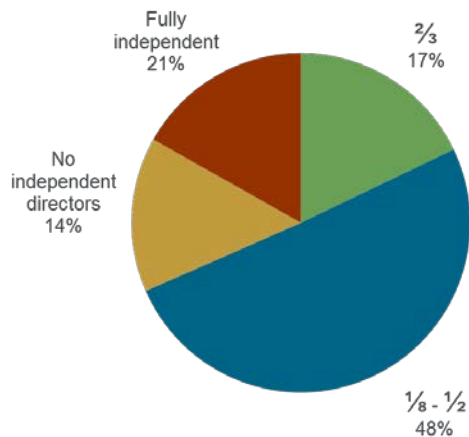


Compensation Committee Independence

Of 50 companies examined, 42 had a compensation committee. Of these 42 companies:

- 9 companies (21%) had a fully independent compensation committee
- 7 companies (17%) had a $\frac{2}{3}$ independent compensation committee
- 20 companies (48%) had a $\frac{1}{8}$ - $\frac{1}{2}$ independent compensation committee
- 6 companies (14%) 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, although an independent compensation committee is useful for other purposes, including to facilitate exemptions from Section 16 short-swing profit rules and to achieve more favorable tax treatment for executive compensation under Section 162 of the Internal Revenue Code.

Additional Board Committees

Of 50 companies examined:

- **16** companies (32%) had additional board committees

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

Shareholder Rights Plan (Poison Pill)

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

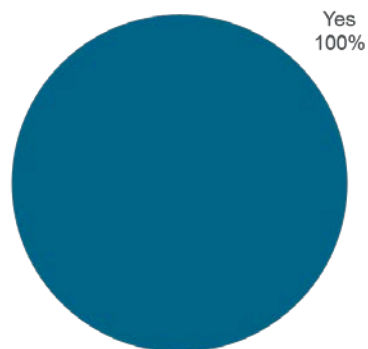
Adoption of a shareholder rights plan (poison pill)

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

Authority to Issue “Blank Check” Preferred Stock



Authority to issue “blank check” preferred stock

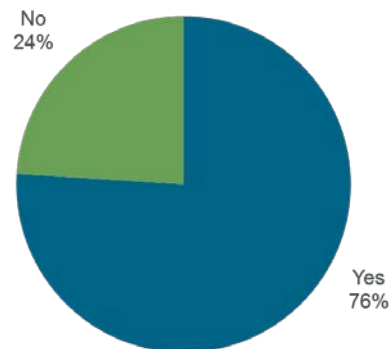
A company may include in its authorized and unissued share capital a certain amount of undesignated preferred shares. The board is authorized to issue preferred shares in one or more series and to determine and fix the designations, voting powers, preferences and rights of such shares and any qualifications,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

Classified Board

Of 50 companies examined:

- **38** companies (76%) had a classified board*
- **12** companies (24%) did not have a classified board

Classified Board



** Of these 38 companies, 2 companies (5%) had a springing staggered board (the board automatically becomes classified upon a significant shareholder or group ceasing to own or control the vote of a specified percentage of outstanding shares)*

Classified board

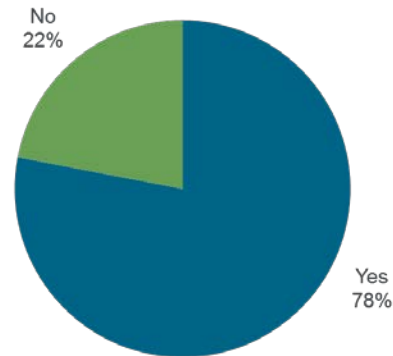
The implementation of a classified board often serves as a protective mechanism in the context of a take-over by ensuring that a potential acquiror cannot simply replace an entire board at one time with a more pliant board. Typically, a staggered board is composed of three equally divided classes of 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 50 companies examined:

- **39** companies (78%) allowed removal of a director for cause only*

Director Removal for Cause Only



** These 39 companies included 29 companies (74%) 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, 1 company with a non-classified board provided for director removal only for cause

Director removal for cause only

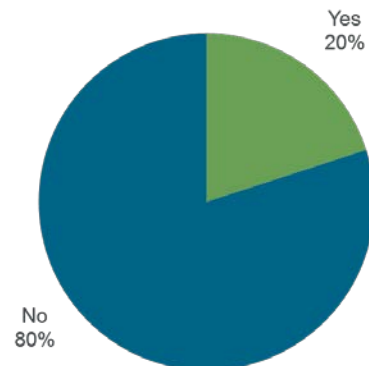
Director removal for cause is an automatic consequence of having a classified board under Delaware law, and is necessary to preserve the extended terms of those directors. Taken together, a classified board structure and a provision allowing director removal for cause only (as supplemented by restrictions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

Shareholder Ability to Call Special Meeting

Of 50 companies examined:

- **40** companies (80%) prohibited shareholders from calling a special meeting*
- **10** companies (20%) permitted shareholders to call a special meeting. Of these:
 - **1** company (10%) permitted shareholders comprising at least 5% to call a special meeting**
 - **3** companies (30%) permitted shareholders comprising at least 10% to call a special meeting**
 - **1** company (10%) permitted shareholders comprising at least 20% to call a special meeting**
 - **5** companies (50%) permitted shareholders comprising at least a majority to call a special meeting

Shareholder Ability to Call Special Meeting



* These 40 companies included 28 companies (70%) 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

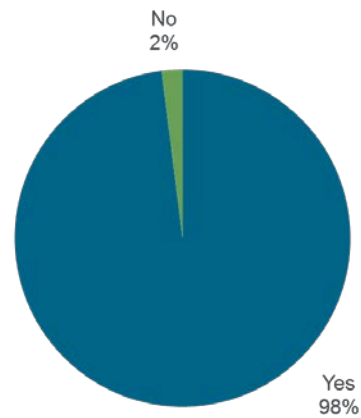
** Organized in a jurisdiction where this is required under local law

Advance Notice Bylaws

Of 50 companies examined:

- **49** 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

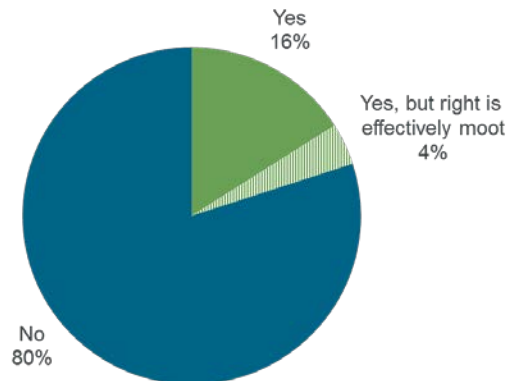


Shareholder Action by Written Consent

Of 50 companies examined:

- **40** companies (80%) prohibited shareholder action by written consent*
- **10** companies (20%) permitted shareholder action by written consent
 - Of these, **2** companies (20%) required written consent to be unanimous, effectively rendering the right moot

Shareholder Action by Written Consent Permitted



* These 40 companies included 36 companies (90%) whose provision prohibiting shareholder action by written consent was triggered when a significant shareholder or group ceased to own or control the vote of a specified percentage of outstanding shares

Shareholder voting restrictions

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

Board Authority to Change Board Size

Of 50 companies examined, **all** permitted the board to change the size of the board.

Board Authority to Fill Vacancies on Board

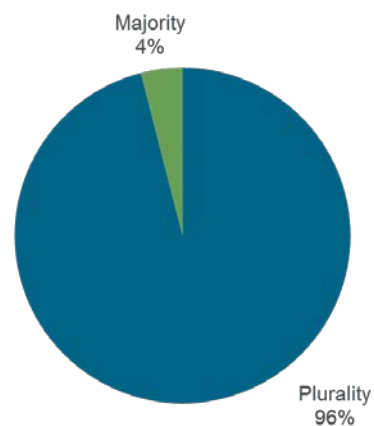
Of 50 companies examined, **all** permitted the board to fill vacancies on the board.

Voting in Uncontested Board Elections

Of 50 companies examined:

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

Standard for Board Elections



* Of these 2 companies, neither had a director resignation policy

Voting standard for director elections under Delaware law

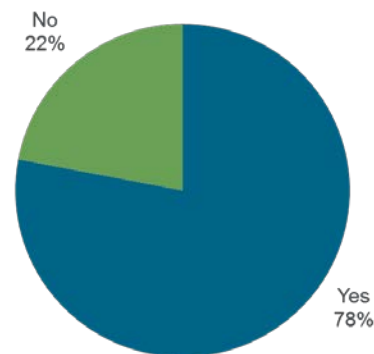
Under Delaware law, in the absence of a different specification in a company's certificate of incorporation or bylaws, directors are elected by a plurality voting system. Under a plurality voting system, the nominees for directorships are elected based on who receives the highest number of affirmative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

Supermajority Vote for Amending the Bylaws

Of 50 companies examined:

- **39** companies (78%) required a supermajority shareholder vote for amending the bylaws*
 - Of these, **16** companies (41%) required a vote of 75% or more
- **11** companies (22%) did not require a supermajority shareholder vote for amending the bylaws

Supermajority Vote for Amending the Bylaws



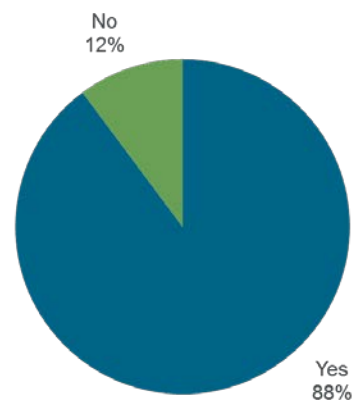
* These 39 companies included 27 companies (69%) whose supermajority vote requirements were triggered when a significant shareholder or group ceased to own or control the vote of a specified percentage of outstanding shares

Exclusive-Forum Provisions

Of 50 companies examined:

- **44** companies (88%) had an exclusive-forum provision. Of these:
 - **42** companies (95%) specified Delaware as the exclusive forum
 - **39** companies (89%) adopted them in their charter, **4** companies (9%) adopted them in their bylaws and **1** company (2%) adopted them in both its charter and its bylaws
- **6** companies (12%) did not have an exclusive-forum provision

Exclusive-Forum Provision



Compensation Consultants

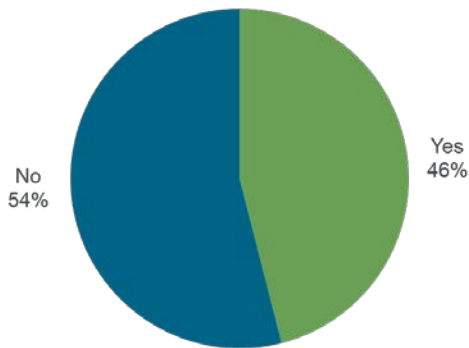
Of 50 companies examined:

- **23** companies (46%) disclosed the use of compensation consultants
 - Of these, **22** companies (96%) specified the consultant used

The specified consultants included:

Alvarez & Marsal	Meridian Compensation Partners, LLC
Compensia, Inc.	Pay Governance LLC
Exequity LLP	Pearl Meyer & Partners, LLC
Frederic W. Cook & Co., Inc.	Semler Brossy Consulting Group LLC
McLagan, an Aon Hewitt company	Towers Watson & Co.

Compensation Consultant Disclosure



Compensation consultants

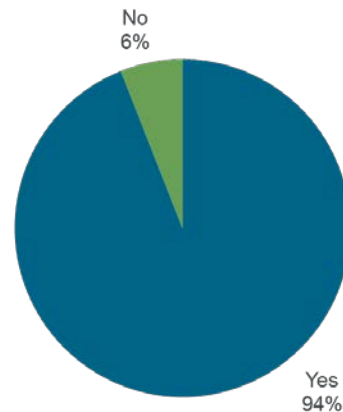
The SEC requires a listed company to disclose in its proxy statement any role of compensation consultants in determining or recommending the amount or form of executive and director compensation, identifying such consultants, stating whether such consultants are engaged directly by the compensation committee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

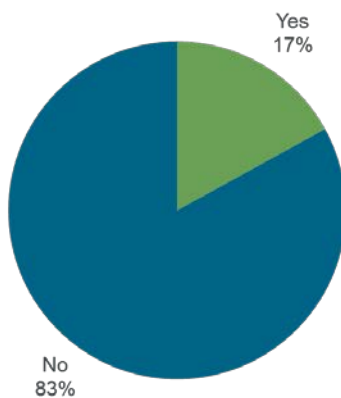
Of 50 companies examined:

- **47** companies (94%) adopted a new equity compensation plan. Of these:
 - **8** companies (17%) adopted a new equity compensation plan with an evergreen provision
 - **39** companies (83%) adopted a new equity compensation plan with a clawback provision
 - **3** companies (6%) adopted a new equity compensation plan that permitted option/SAR repricing without shareholder approval
 - **6** companies (13%) had a stock ownership/retention requirement

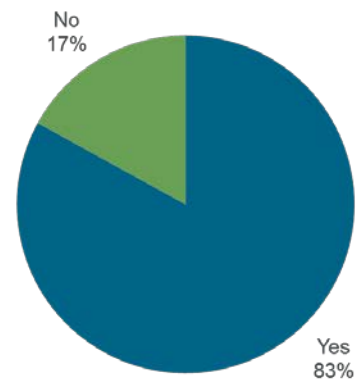
New Equity Compensation Plan (NECP)



NECP with Evergreen Provision



NECP with Clawback Provision

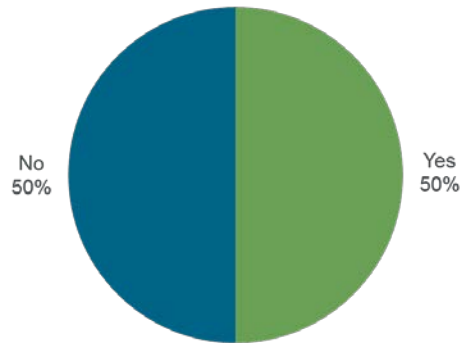


Employment and Similar Agreements

Of 50 companies examined:

- **25** companies (50%) adopted one or more employment or similar agreements

Employment or Similar Agreement



Equity Compensation Awards

Of 50 companies examined:

- The number of outstanding equity compensation awards at the time of the IPO, as a percentage of the fully diluted number of common shares post-IPO, ranged from 0% to 22%
- The number of outstanding equity compensation awards at the time of the IPO, combined with the number of shares reserved for issuance under the new equity compensation plan adopted, as a percentage of the fully diluted number of common shares post-IPO, ranged from 0% to 28%
- The number of shares reserved for issuance under the new equity compensation plan adopted, as a percentage of the fully diluted number of common shares post-IPO, ranged from 0% to 16%

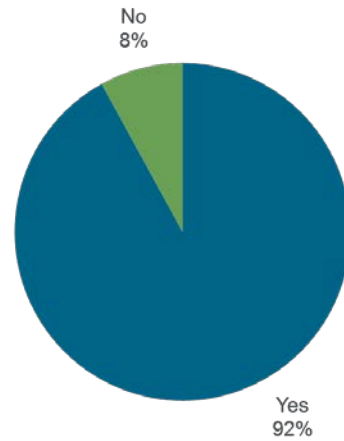
Disclosure of Non-GAAP Financial Measures

Of 50 companies examined:

- **46** companies (92%) disclosed non-GAAP financial measures

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

Disclosure of Non-GAAP Financial Measures

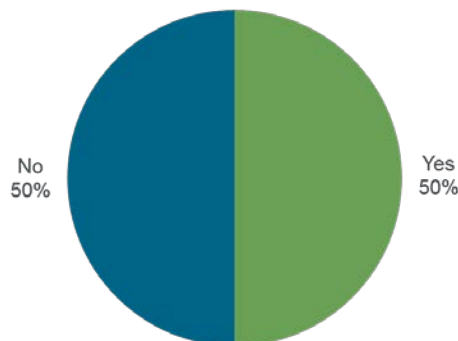


Emerging Growth Companies

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

- **1** company (4%) included less than one year of audited financial statements in the registration statement (due to its recent inception), **13** companies (52%) included two years of audited financial statements in the registration statement and **11** companies (44%) included three years of audited financial statements in the registration statement
- **1** company (4%) included less than one year of selected financial data in the registration statement (due to its recent inception), **9** companies (36%) included two years of selected financial data in the registration statement, **7** companies (28%) included three years of selected financial data in the registration statement, **1** company (4%) included four years of selected financial data in the registration statement and **7** companies (28%) included five years of selected financial data in the registration statement
- **none** included a Compensation Discussion and Analysis in the registration statement
- **4** companies (16%) took advantage of the ability to delay adopting newly applicable public-company accounting policies

Emerging Growth Company



Emerging growth companies under the JOBS Act of 2012

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

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

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

Davis Polk's Capital Markets Practice

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

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