

Corporate Governance practices in U.S. Initial Public Offerings

September 2020

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Davis Polk

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. 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 46 IPOs of “controlled companies” (as defined under NYSE or NASDAQ listing standards) and 50 IPOs of non-controlled companies, in each case based on deal size, from April 1, 2018 through July 10, 2020.*

The Companies

Controlled Companies

We examined the following 46 controlled companies, spanning 23 industries:

Albertsons Companies, Inc.	Livent Corporation**
AssetMark Financial Holdings, Inc.**	Osmotica Pharmaceuticals plc
AXA Equitable Holdings, Inc.	Palomar Holdings, Inc.
Bank7 Corp.	Parsons Corporation
BJ's Wholesale Club Holdings, Inc.	Ping Identity Holding Corp.
BrightView Holdings, Inc.**	Pivotal Software, Inc.**
BRP Group, Inc.**	PPD, Inc.
Cambium Networks Corporation	Revolve Group, Inc.
Ceridian HCM Holding Inc.	Reynolds Consumer Products Inc.**
Chewy, Inc.**	SciPlay Corporation
Construction Partners Inc.	Shift4 Payments, Inc.
Cushman & Wakefield plc	SiTime Corporation**
Domo, Inc.	SmileDirectClub, Inc.
Dun & Bradstreet Holdings, Inc.	SolarWinds Corporation**
Dynatrace, Inc.	The AZEK Company Inc.
Elanco Animal Health Incorporated	The Lovesac Company
Envista Holdings Corporation	Tilray, Inc.
Everquote, Inc.	Tradeweb Markets Inc.**
Goosehead Insurance, Inc.**	Urovant Sciences Ltd.
GrafTech International Ltd.	Warner Music Group Corp.**
Greenlane Holdings, Inc.	YETI Holdings, Inc.
Grocery Outlet Holding Corp.**	ZoomInfo Technologies Inc.
HBT Financial, Inc.**	
Kura Sushi USA Inc.	

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

** Davis Polk participated in the IPO.

Non-Controlled Companies

We examined the following 50 non-controlled companies, spanning 21 industries:

10X Genomics, Inc.	GreenSky, Inc.
1Life Healthcare, Inc.**	Guardant Health, Inc.
Accolade, Inc.	Lemonade, Inc.
Adaptive Biotechnologies Corporation	Levi Strauss & Co.
Akouos, Inc.	Livongo Health, Inc.
Allogene Therapeutics, Inc.	Lyft, Inc.
Anaplan, Inc.	Medallia Inc.
Avantor, Inc.	Moderna, Inc.
Avidity Biosciences, Inc.	Nkarta, Inc.
BellRing Brands, Inc.	PagerDuty, Inc.
Beyond Meat, Inc.	Peloton Interactive, Inc.
Bill.com Holdings, Inc.	Pluralsight, Inc.
Bloom Energy Corporation**	Repare Therapeutics Inc.
BridgeBio Pharma, Inc.	Revolution Medicines, Inc.**
Brigham Minerals, Inc.	Royalty Pharma plc**
Cloudflare, Inc.	Rubius Therapeutics, Inc.
CrowdStrike Holdings, Inc.**	SelectQuote, Inc.
Datadog, Inc.**	Tenable Holdings, Inc.
DocuSign, Inc.**	The RealReal, Inc.
Elastic N.V.**	Tricida, Inc.
Eventbrite, Inc.	Uber Technologies, Inc.**
EVO Payments, Inc.	U.S. Xpress Enterprises, Inc.
Focus Financial Partners, Inc.**	Vaxcyte, Inc.
Forma Therapeutics Holdings, Inc.	Vroom, Inc.
Gossamer Bio, Inc.	Zoom Video Communications, Inc.

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

** Davis Polk participated in the IPO.

Significant Findings

Comparing the data in this survey to our prior surveys, we found widespread and generally increasing adoption of various takeover defenses at both controlled and non-controlled companies in advance of their IPOs. At the same time, seasoned public companies have been abandoning the same defenses in the face of investor activism, even amid certain opposition to the board from proxy advisory firms at IPO companies' first annual meetings.

Controlled Companies

For example, of the controlled companies we surveyed:

91%

of companies adopted a plurality vote standard for uncontested director elections

91%

of companies effectively prohibited shareholder action by written consent

80%

of companies had provisions prohibiting shareholders from calling a special meeting

70%

of companies required a supermajority shareholder vote for amending the bylaws

70%

of companies adopted a classified board

Non-Controlled Companies

Of the non-controlled companies we surveyed:

92%

of companies adopted a plurality vote standard for uncontested director elections

88%

of companies effectively prohibited shareholder action by written consent

88%

of companies had provisions prohibiting shareholders from calling a special meeting

88%

of companies required a supermajority shareholder vote for amending the bylaws

90%

of companies adopted a classified board

The number of both controlled and non-controlled companies that adopted exclusive forum provisions (another governance attribute disfavored by some shareholder advocates) during the current survey period continued to grow from past survey periods. In the current survey, 91% of controlled companies and 98% of 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 substantial increase from the 14% and 26% of controlled and non-controlled companies, respectively, that adopted such provisions in our 2014 survey.

Controlled Companies vs. Non-Controlled Companies

When we compared the controlled company survey results to those of the non-controlled companies we examined, we found a similar use of takeover defenses prior to their IPO. The key differences between controlled and non-controlled companies were primarily in the area of board and board committee independence, reflecting the exemptions for controlled companies from independence requirements. The average level of board independence at controlled companies was 74% versus 51% at non-controlled companies. Moreover, the percentage of non-controlled companies with an independent board chair was more than double that of controlled companies (25% of non-controlled versus 11% of controlled companies). The independence of the board committees significantly differed between controlled and non-controlled companies.

These differences include:

54%

of controlled companies had fully independent audit committees at the IPO versus **94%** of non-controlled companies

26%

of controlled companies had fully independent governance/nominating committees at the IPO versus **88%** of non-controlled companies

33%

of controlled companies had fully independent compensation committees at the IPO versus **94%** of non-controlled companies

11%

of controlled companies had an independent chairman versus **28%** of non-controlled companies

17%

of controlled companies without an independent chairman had a lead director versus **59%** of non-controlled companies

70%

of controlled companies had a classified board versus **90%** of non-controlled companies

48%

of controlled companies were listed on the NYSE versus **32%** of non-controlled companies

Direct Listings

When we compared the one comparable direct listing during the current survey period (Slack Technologies, Inc.) to the non-controlled companies, we found similar governance provisions. Slack's takeover defenses were identical to the vast majority of non-controlled companies, including a staggered board, prohibitions on shareholder action by written consent, shareholder ability to call a special meeting, the requirement of a supermajority to amend the bylaws and plurality voting for uncontested director elections.

Primary Listing Exchange

Controlled Companies

Of 46 companies examined:

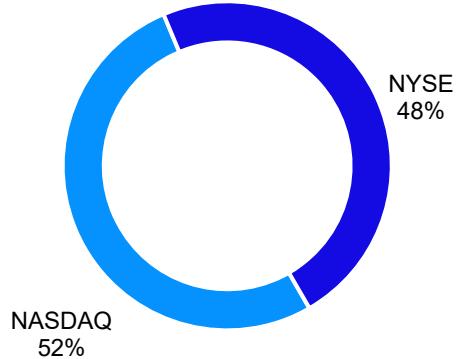
22 companies

(48%) listed on the NYSE

24 companies

(52%) listed on the NASDAQ

Primary Listing Exchange



Non-Controlled Companies

Of 50 companies examined:

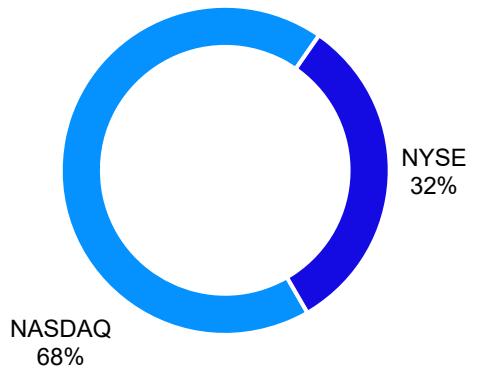
16 companies

(32%) listed on the NYSE

34 companies

(68%) listed on the NASDAQ

Primary Listing Exchange



Classes of Outstanding Common Stock

Controlled Companies

Of 46 companies examined:

27 companies

(59%) had one class of common stock outstanding

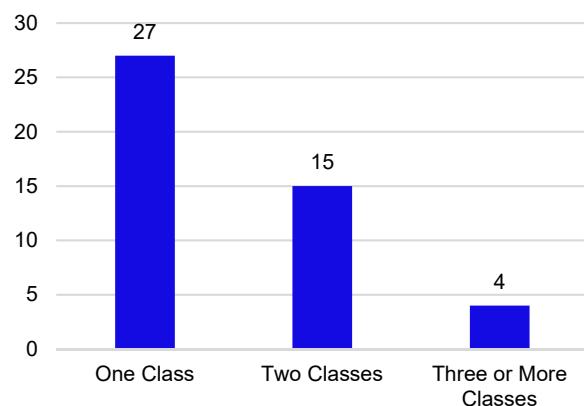
15 companies

had two classes of common stock outstanding, 12 (80%) of which had unequal voting rights

4 companies

had three or more classes of common stock outstanding

Classes of Outstanding Common Stock



Non-Controlled Companies

Of 50 companies examined:

31 companies

(62%) had one class of common stock outstanding

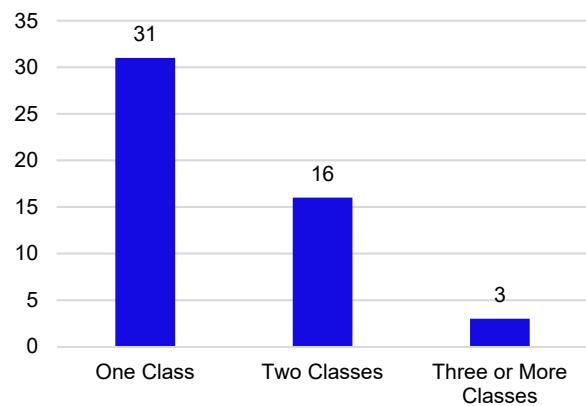
16 companies

had two classes of common stock outstanding, **14 (28%)** of which had unequal voting rights

3 companies

had three or more classes of common stock outstanding, **1 (2%)** of which had unequal voting rights

Classes of Outstanding Common Stock



Board Size

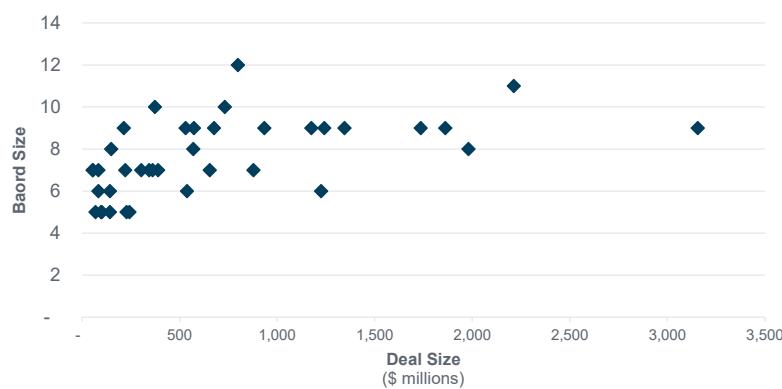
Controlled Companies

Of 46 companies examined:

- The average board size was **8** members
- The median board size was **7** members
- Board size ranged from **4** to **12** members

There was a small correlation between deal size and board size

Deal Size vs. Board Size



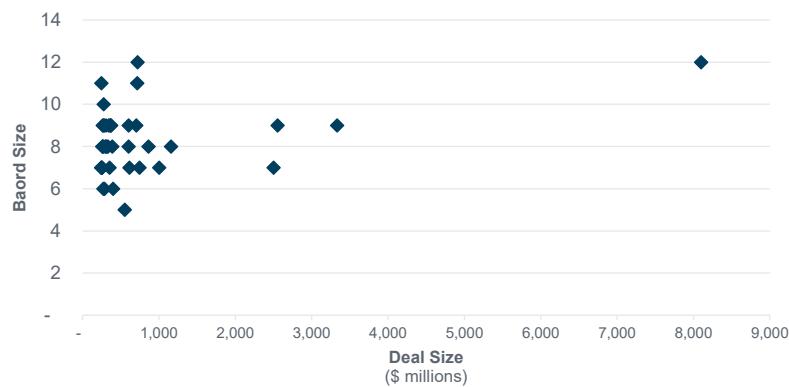
Non-Controlled Companies

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 **51%** of the board
- The median level of director independence was **50%** of the board
- The level of director independence ranged from a low of **11%** 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 **74%** of the board
- The median level of director independence was **75%** of the board
- The level of director independence ranged from a low of **38%** to a high of **90%**

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

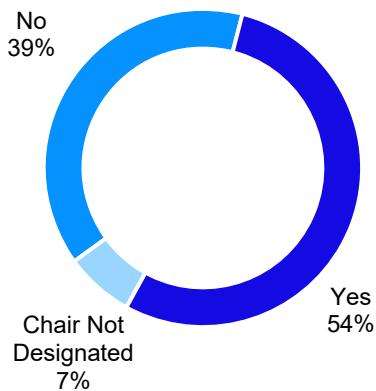
Controlled Companies

Of 46 companies examined:

25 companies

(54%) had a separate chairman and CEO

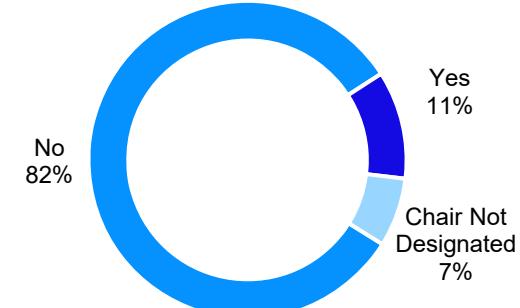
Separation of Chairman & CEO



5 companies

(11%) had an independent chairman

Independent Chairman



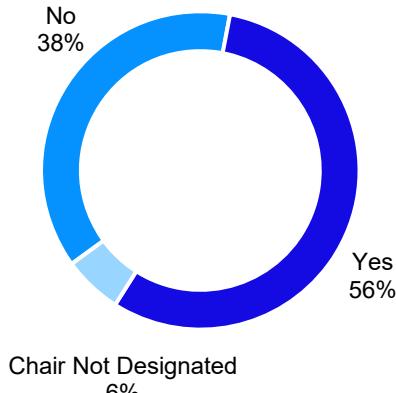
Non-Controlled Companies

Of 50 companies examined:

28 companies

(56%) had a separate chairman and CEO

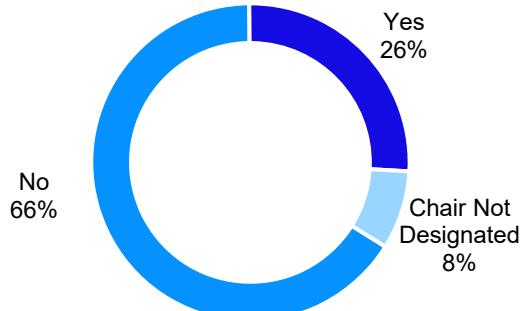
Separation of Chairman & CEO



13 companies

(26%) had an independent chairman

Independent Chairman



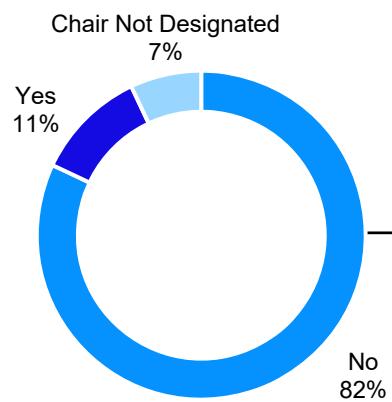
Lead Director

Controlled Companies

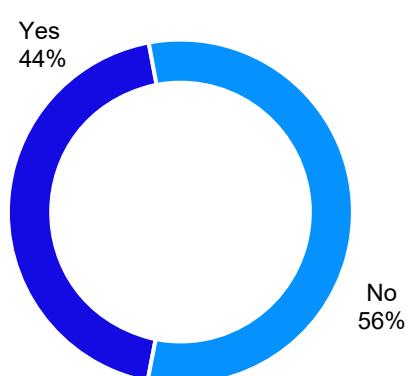
Of 46 companies examined:

- **18** companies (**39%**) combined the roles of chairman and CEO or otherwise did not have an independent chairman
 - Of these, **8** companies (**44%**) had a lead director

Independent Chairman



Lead Director

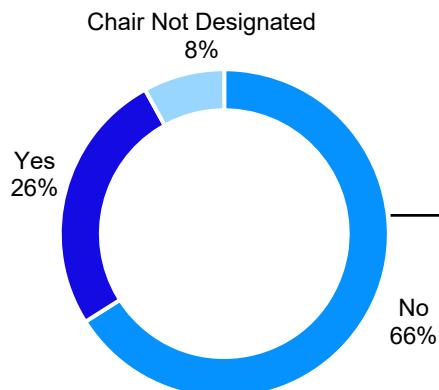


Non-Controlled Companies

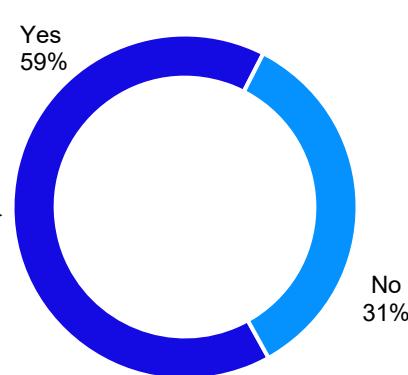
Of 50 companies examined:

- **34** companies (**68%**) combined the roles of chairman and CEO or otherwise did not have an independent chairman
 - Of these, **20** companies (**59%**) had a lead director

Independent Chairman



Lead Director



Alternative board leadership structures include combining the chairman and CEO roles, 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:

24 companies **6 companies** **13 companies**

(52%) had one financial expert

(13%) had two financial experts

(28%) had three financial experts

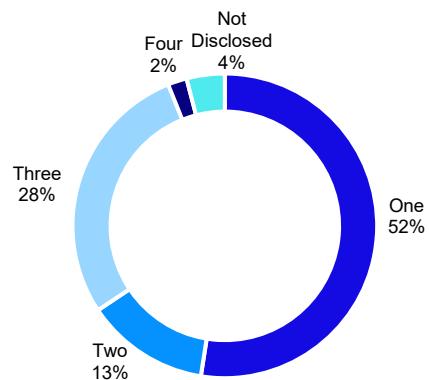
1 company

(2%) had four financial experts

2 companies

(4%) did not disclose a financial expert

Number of Audit Committee Financial Experts

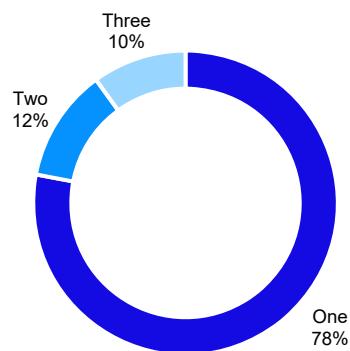


Non-Controlled Companies

Of 50 companies examined:

39 companies **6 companies** **5 companies**
(78%) had one financial expert **(12%)** had two financial experts **(10%)** 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 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:

25 companies

(54%) had a fully independent audit committee at the IPO date

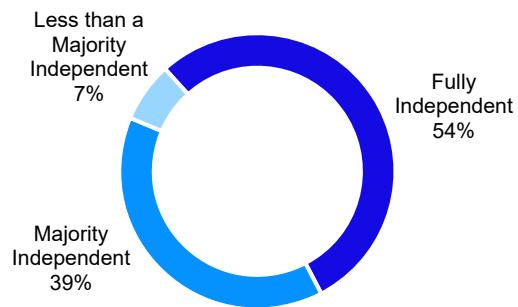
3 companies

(7%) had a less than a majority independent audit committee at the IPO date

18 companies

(39%) had a majority independent audit committee at the IPO date

Audit Committee Independence



Non-Controlled Companies

Of 50 companies examined:

47 companies

(94%) had a fully independent audit committee at the IPO date

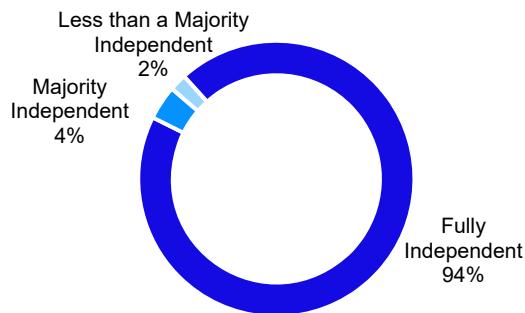
2 companies

(4%) had a majority independent audit committee at the IPO date

1 company

(2%) had a less than 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, 38 had a governance/nominating committee.* Of these 38 companies:

10 companies

(26%) had a fully independent governance/nominating committee at the IPO date

7 companies

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

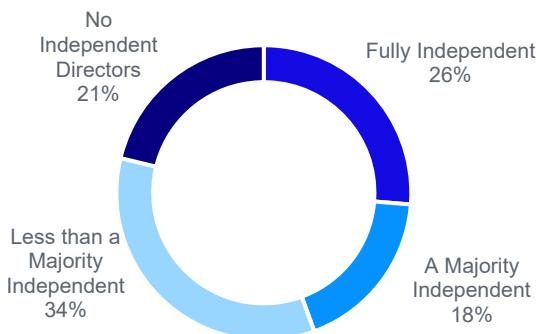
13 companies

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

8 companies

(21%) did not have any independent directors on their governance/nominating committee at the IPO date

Governance/Nominating Committee Independence



* Three of these companies have a combined compensation and governance/nominating committee. The data for the combined committees has been included in our survey results for both the compensation committee and the governance/nominating committee

Non-Controlled Companies

Of 50 companies examined:*

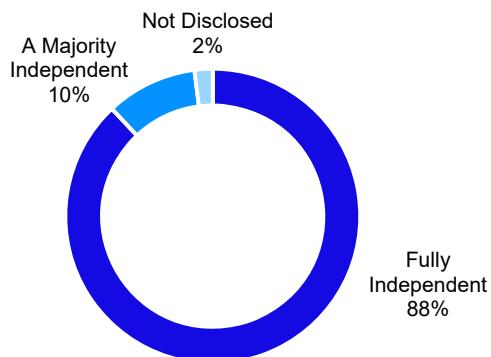
44 companies

(88%) 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 and a second company had a combined compensation and governance/nominating committee. The data for the combined committee has been included in our survey results for both the compensation committee and the governance/nominating committee

Compensation Committee Independence

Controlled Companies

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

15 companies

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

15 companies

(33%) had a less than majority independent compensation committee at the IPO date

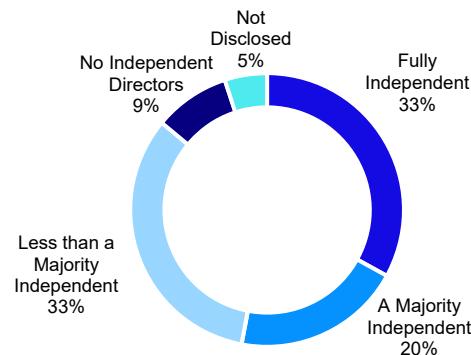
9 companies

(20%) had a 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



* Three of these companies have a combined compensation and governance/nominating committee. The data for the combined committees has been included in our survey results for both the compensation committee and the governance/nominating committee

Non-Controlled Companies

Of 50 companies examined:*

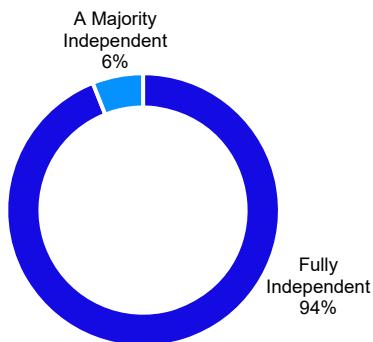
47 companies

(94%) had a fully independent compensation committee at the IPO date

3 companies

(6%) had a majority independent compensation committee at the IPO date

Compensation Committee Independence



* One of these companies had a combined compensation and governance/nominating committee. The data for the combined committee has been included in our survey results for both the compensation committee and the governance/nominating 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 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 for certain transactions involving equity compensation.

Additional Board Committees

Controlled Companies

Of 46 companies examined:

5 companies

(11%) had additional board committees

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

Non-Controlled Companies

Of 50 companies examined:

3 companies

(6%) had additional board committees

The additional committees included a finance committee, a product development committee, and an executive committee, among others

Shareholder Rights Plan (Poison Pill)

Controlled Companies

Of 46 companies examined, **1 company (2%)** 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

* Exception was a non-U.S. incorporated company

Non-Controlled Companies

Of 50 companies examined, **1 company (2%)** 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)

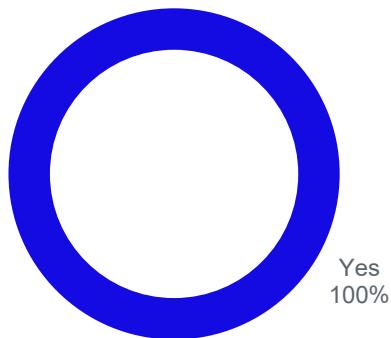
A typical shareholder rights plan, or poison pill, grants the existing shareholders of a company (other than a hostile acquiror) the right to acquire a large number of newly issued shares of the company (and of the acquiror if the target company is not the surviving entity in the transaction) at a significant 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

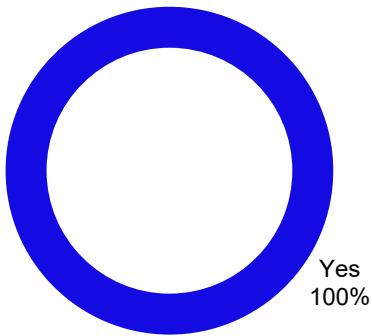
Authority to Issue “Blank Check” Preferred Stock



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:

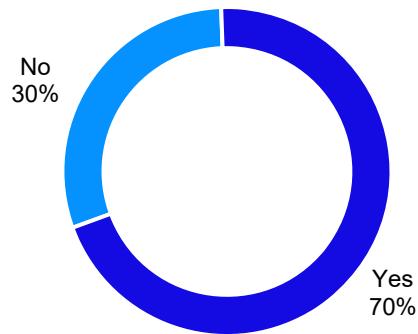
32 companies

(70%) had a classified board*

14 companies

(30%) did not have a classified board

Classified Board



* Of these 32 companies, 2 companies (6%) 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)

Non-Controlled Companies

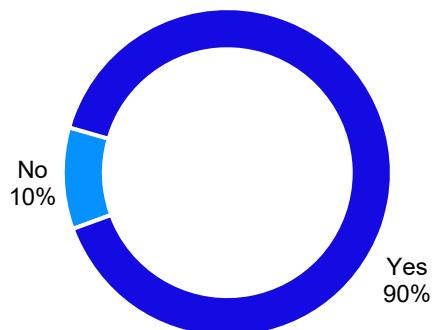
Of 50 companies examined:

45 companies

(90%) had a classified board

5 companies

(10%) did not have a classified board

Classified Board**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 acquirer 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 acquirer 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

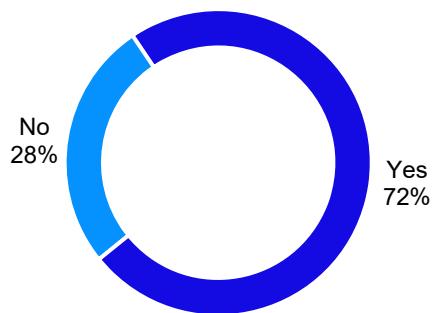
Controlled Companies

Of 46 companies examined:

33 companies

(72%) allowed removal of a director for cause only*

Director Removal for Cause Only



* These 33 companies included 2 companies (7%) 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

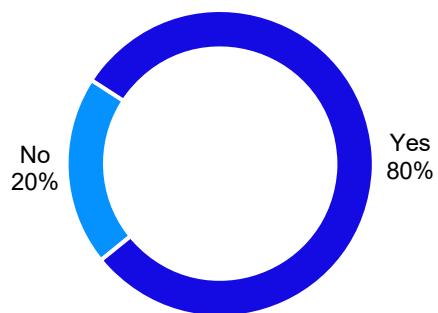
Although under Delaware law non-classified directors are removable without cause, two companies with a non-classified board provided for director removal only for cause

Non-Controlled Companies

Of 50 companies examined:

40 companies

(80%) 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 acquirer 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:

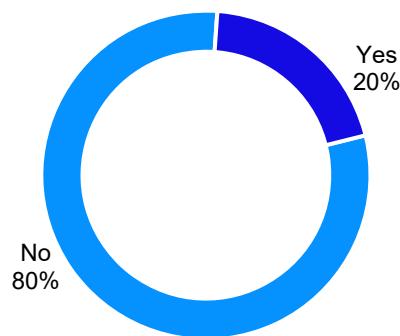
37 companies

(80%) prohibited shareholders from calling a special meeting*

9 companies

(20%) permitted shareholders to call a special meeting. Of these:

- 2 companies (22%) permitted shareholders comprising at least 10% to call a special meeting**
- 2 companies (22%) permitted shareholders comprising at least 20% to call a special meeting
- 3 companies (33%) permitted shareholders comprising at least 25% to call a special meeting***
- 1 company (11%) permitted shareholders comprising at least 30% to call a special meeting
- 1 company (11%) permitted shareholders comprising at least 50% to call a special meeting

Shareholder Ability to Call Special Meeting

* These 37 companies included 22 companies (58%) 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

*** One of these companies is organized in a jurisdiction where this is required under local law

Non-Controlled Companies

Of 50 companies examined:

44 companies

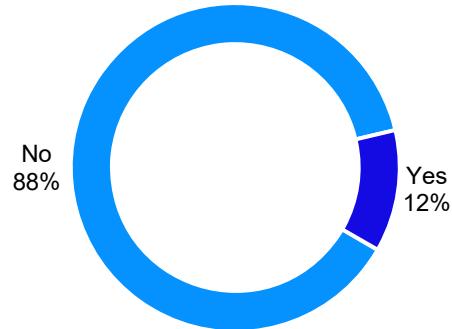
(88%) prohibited shareholders from calling a special meeting*

6 companies

(12%) permitted shareholders to call a special meeting. Of these:

- 5 companies (83%) permitted shareholders comprising at least 5% to call a special meeting**
- 1 company (17%) permitted shareholders comprising at least 30% to call a special meeting

Shareholder Ability to Call Special Meeting



* These 44 companies included 1 company (2%) 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

** 3 of such companies are organized in jurisdictions where this is required under local law

Advance Notice Bylaws

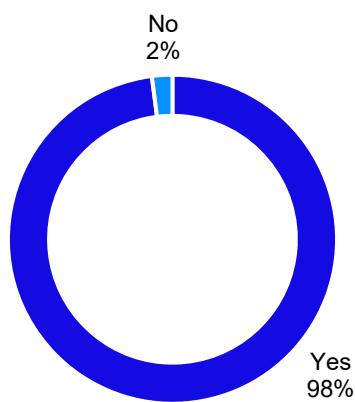
Controlled Companies

Of 46 companies examined:

45 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

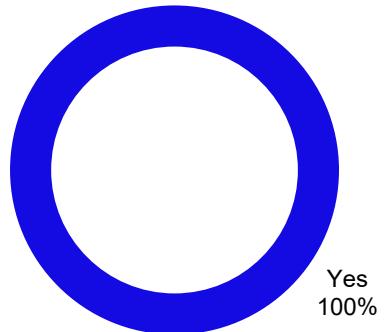


* Exception was a non-U.S. incorporated company

Non-Controlled Companies

Of 50 companies examined, **all** companies (**100%**) 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

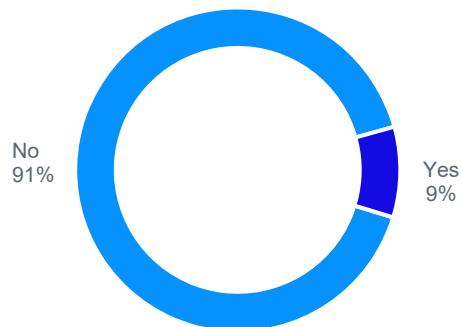
Controlled Companies

Of 46 companies examined:

42 companies 4 companies

(91%) prohibited shareholder action by written consent (9%) permitted shareholder action by written consent*

Shareholder Action by Written Consent Permitted



* These 42 companies included 21 companies (50%) 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.

Non-Controlled Companies

Of 50 companies examined:

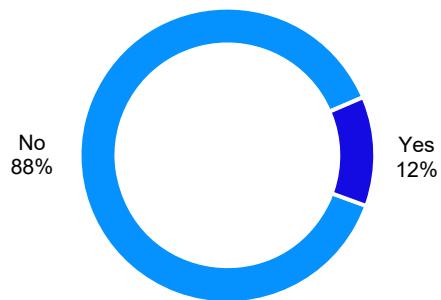
44 companies

(88%) prohibited shareholder action by written consent*

6 companies

(12%) permitted shareholder action by written consent

- Of these, 1 company (17%) required written consent to be unanimous, effectively rendering the right moot

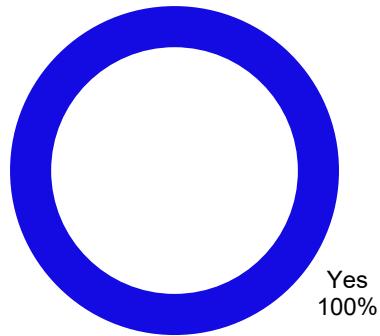
Shareholder Action by Written Consent Permitted***Shareholder voting restrictions***

Shareholder voting restrictions serve to limit shareholders from acting without board involvement and can serve to restrict the ability of 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

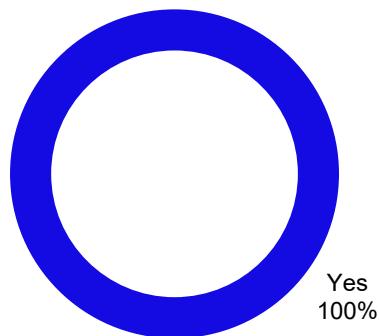
Controlled Companies

Of 46 companies examined, **all** companies (**100%**) permitted the board to change the size of the board



Non-Controlled Companies

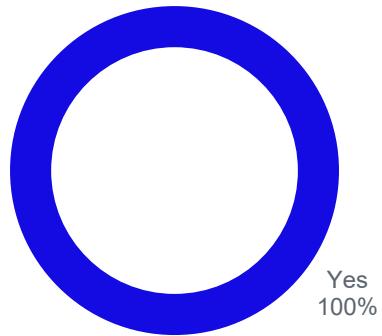
Of 50 companies examined, **all** companies (**100%**) permitted the board to change the size of the board



Board Authority to Fill Vacancies on Board

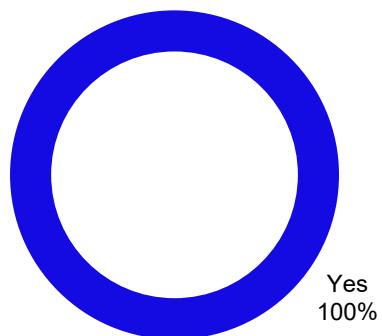
Controlled Companies

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:

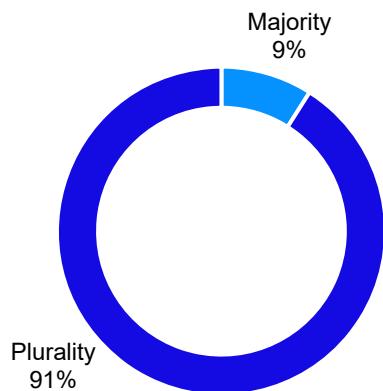
42 companies

(91%) had a plurality standard for uncontested board elections

4 companies

(9%) required a majority standard for uncontested board elections*

Standard for Uncontested Board Elections



* Of these, 2 companies (50%) had a director resignation policy

Non-Controlled Companies

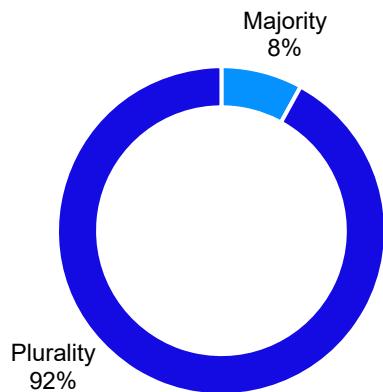
Of 50 companies examined:

46 companies

(92%) had a plurality standard for uncontested board elections

4 companies

(8%) had a majority standard for uncontested board elections*

Standard for Uncontested Board Elections

* Of these, **1 company (25%)** had a director resignation policy

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:

32 companies

(70%) required a supermajority shareholder vote for amending the bylaws*

- Of these, 4 companies (13%) required a vote of 75% or more

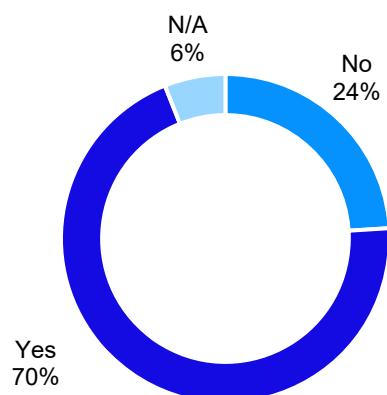
11 companies

(24%) did not require a supermajority shareholder vote for amending the bylaws

3 companies

(6%) were organized in a jurisdiction that does not customarily include bylaws

Supermajority Vote for Amending the Bylaws



* These 32 companies included 22 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

Non-Controlled Companies

Of 50 companies examined:

44 companies

(88%) required a supermajority shareholder vote for amending the bylaws*

- Of these, 2 companies (5%) required a vote of 75% or more

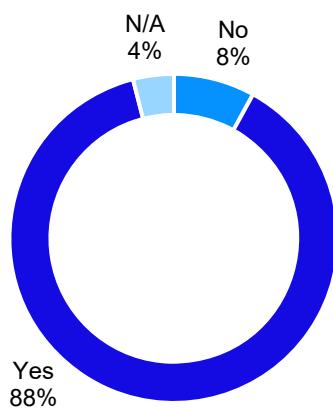
4 companies

(8%) did not require a supermajority shareholder vote for amending the bylaws

2 companies

(4%) were organized in a jurisdiction that does not customarily include bylaws

Supermajority Vote for Amending the Bylaws



* These 44 companies included 2 companies (5%) 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

Controlled Companies

Of 46 companies examined:

42 companies

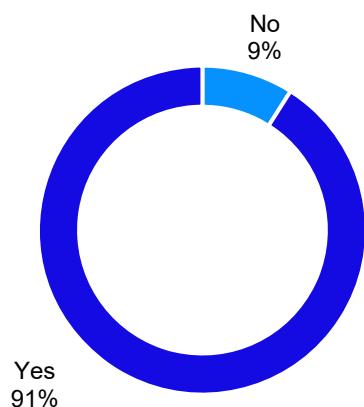
(91%) had an exclusive-forum provision. Of these:

- 37 companies (88%) specified the Court of Chancery in Delaware as the exclusive forum for non-'33 Act claims
- 10 companies (24%) specified federal courts for '33 Act claims
- 25 companies (60%) adopted it in their charter, 9 companies (21%) adopted it in their bylaws and 8 companies (19%) adopted it in both their charter and bylaws

4 companies

(9%) did not have an exclusive-forum provision

Exclusive-Forum Provision



Non-Controlled Companies

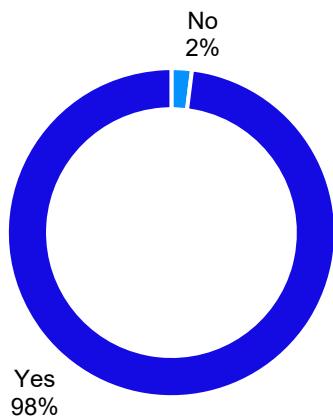
Of 50 companies examined:

49 companies **1 company**

(98%) had an exclusive-forum provision. Of these: (2%) did not have an exclusive-forum provision

- 44 companies (90%) specified the Court of Chancery in Delaware as the exclusive forum for non-'33 Act claims
- 17 companies (35%) specified federal courts for '33 Act claims
- 35 companies (71%) adopted it in their charter, 15 companies (31%) adopted it in their bylaws and 2 companies (4%) adopted it in both their charter and bylaws

Exclusive-Forum Provision



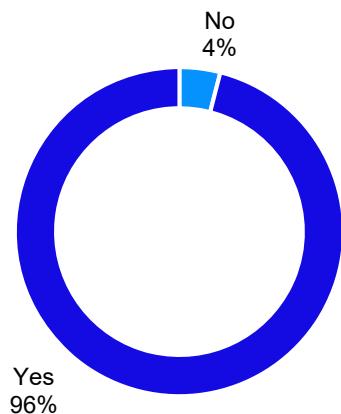
New Equity Compensation Plan***Controlled Companies***

Of 46 companies examined:

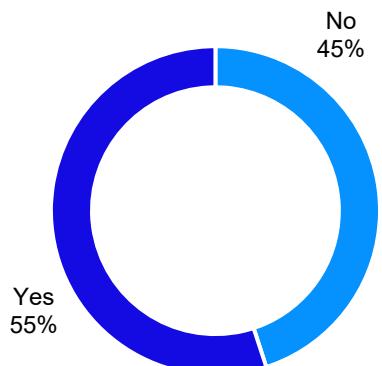
44 companies

(96%) adopted a new equity compensation plan at the time of the IPO. Of these:

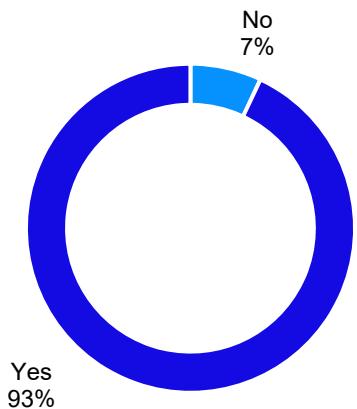
- 29 companies (66%) were emerging growth companies
- 24 companies (55%) adopted a new equity compensation plan with an evergreen provision
- 41 companies (93%) adopted a new equity compensation plan with a clawback provision
- 6 companies (14%) adopted a new equity compensation plan that permitted option/SAR repricing without shareholder approval
- 1 company (2%) had a stock ownership/retention requirement
 - 10 companies (23%), however, disclosed separate stock ownership/retention guidelines or policies

New Equity Compensation Plan (NECP)

NECP with Evergreen Provision



NECP with Clawback Provision



Non-Controlled Companies

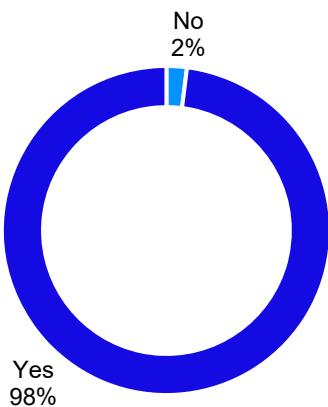
Of 50 companies examined:

49 companies

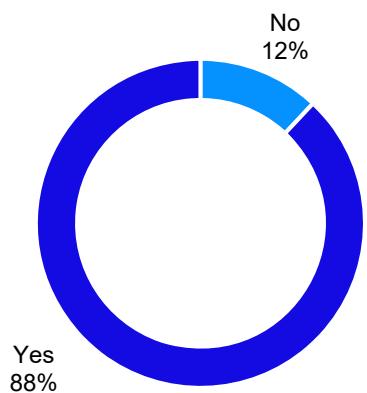
(98%) adopted a new equity compensation plan at the time of the IPO. Of these:

- 44 companies (90%) were emerging growth companies
- 43 companies (88%) adopted a new equity compensation plan with an evergreen provision
- 48 companies (98%) adopted a new equity compensation plan with a clawback provision
- 9 companies (18%) adopted a new equity compensation plan that permitted option/SAR repricing without shareholder approval
- 1 company (2%) had a stock ownership/retention requirement
 - 6 companies (12%), however, disclosed separate stock ownership/retention guidelines or policies

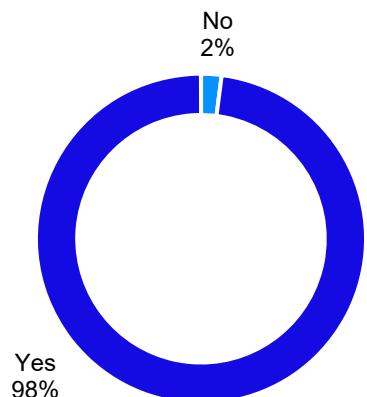
New Equity Compensation Plan (NECP)



NECP with Evergreen Provision



NECP with Clawback 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 **16.2%**
- 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 **0.6%** to **29.6%**
- 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 **0.6%** to **23.5%**

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 **33.8%**
- 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 **5.0%** to **71.8%**
- 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 **2.9%** to **41.3%**

Employment and Similar Agreements

Controlled Companies

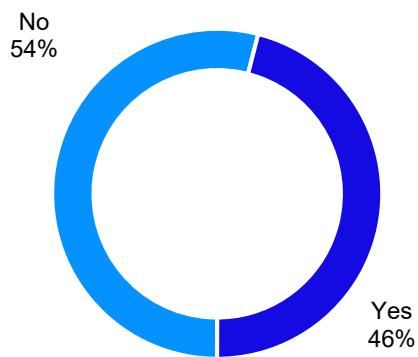
Of 46 companies examined:

21 companies

(46%) adopted one or more employment or similar agreements with their executives within six months of the IPO. Of these:

- 13 companies (62%) were emerging growth companies

Employment or Similar Agreement



Non-Controlled Companies

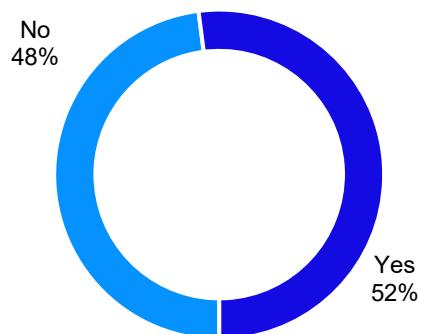
Of 50 companies examined:

26 companies

(52%) adopted one or more employment or similar agreements with their executives within six months of the IPO. Of these:

- 23 companies (88%) were emerging growth companies

Employment or Similar Agreement



Compensation Consultants

Controlled Companies

Of 46 companies examined:

14 companies

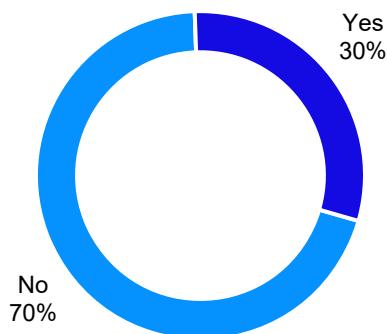
(30%) disclosed the use of compensation consultants. Of these:

- 6 companies (43%) were emerging growth companies
- 10 companies (71%) specified the consultant used
- 6 companies (43%) disclosed that the consultant was retained by the company and 7 companies (50%) disclosed that the consultant was retained by the compensation committee

The specified consultants included:

Compensia	Korn Ferry
Exequity	Pearl Meyer
FW Cook	Willis Towers Watson

Compensation Consultant Disclosure



Non-Controlled Companies

Of 50 companies examined:

15 companies

(30%) disclosed the use of compensation consultants. Of these:

- 11 companies (73%) were emerging growth companies
- 10 companies (67%) specified the consultant used
- 7 companies (47%) disclosed that the consultant was retained by the compensation committee, 2 companies (13%) disclosed that the consultant was retained by the company, 2 companies (13%) disclosed that the consultant was retained by the board of directors and 1 company (7%) disclosed that the consultant was retained by the company's management

The specified consultants included:

Compensia

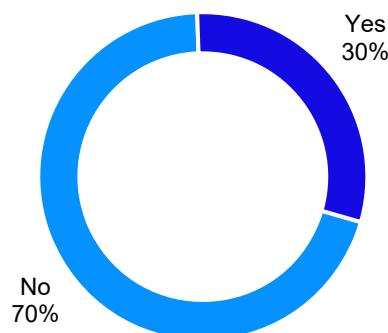
Pay Governance

Exequity

Semler Brossy Consulting Group

FW Cook

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.

Disclosure of Non-GAAP Financial Measures

Controlled Companies

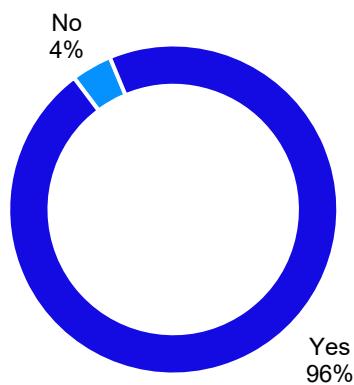
Of 46 companies examined:

44 companies

(96%) 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

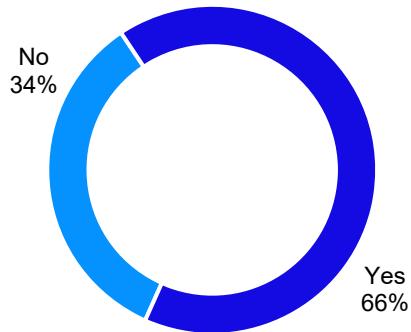
Of 50 companies examined:

33 companies

(66%) disclosed non-GAAP financial measures

Disclosed non-GAAP financial measures included EBITDA, Adjusted EBITDA, Adjusted Gross Margin, Adjusted Net Revenue and Subscription Billings, among others

Disclosure of Non-GAAP Financial Measures



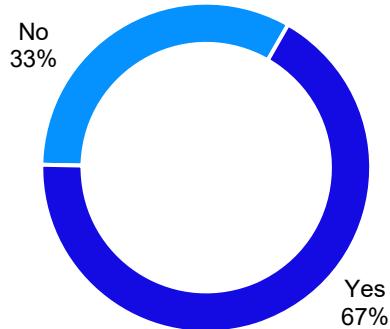
Emerging Growth Companies

Controlled Companies

Of 46 companies examined, **31** companies (**67%**) identified themselves as emerging growth companies under the JOBS Act of 2012. Of these:

- **23** companies (**74%**) included two years of audited financial statements in the registration statement and **8** companies (**26%**) included three years of audited financial statements in the registration statement
- **1** company (**3%**) did not provide selected financial data in the registration statement, **19** companies (**61%**) included two years of selected financial data in the registration statement, **9** companies (**29%**) included three years of selected financial data in the registration statement, and **2** companies (**6%**) included five years of selected financial data in the registration statement
- **1** company (**3%**) voluntarily included a Compensation Discussion and Analysis in the registration statement
- **19** companies (**61%**) took advantage of the ability to delay adopting newly applicable public-company accounting policies

Emerging Growth Company

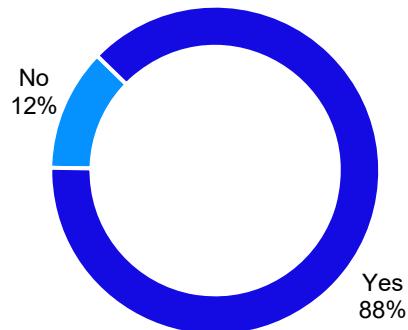


Non-Controlled Companies

Of 50 companies examined, **44** companies (**88%**) 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); **32** companies (**73%**) included two years of audited financial statements in the registration statement; and **11** companies (**25%**) included three years of audited financial statements in the registration statement
- **1** company (**2%**) included less than one year of selected financial data in the registration statement (due to its recent inception); **29** companies (**66%**) included two years of selected financial data in the registration statement; **13** companies (**30%**) included three years of selected financial data in the registration statement; **1** company (**2%**) included four years of selected financial data in the registration statement; and **1** company (**2%**) included five years of selected financial data in the registration statement
- **None** included a Compensation Discussion and Analysis in the registration statement
- **32** companies (**73%**) 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.

Davis Polk

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 113 lawyers, including 21 partners in our offices around the world.

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