

Davis Polk

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

July 2018

IPO Governance Survey

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Overview

As a leading 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 April 1, 2016 through March 31, 2018.*

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 non-controlled companies, whose deal size ranged from \$78.7 million to \$1.1 billion. For our survey focusing on controlled companies, [please see here](#).

The Companies

We examined the following 50 non-controlled companies, spanning 20 industries:

Acacia Communications, Inc.	iRhythm Technologies Inc.
Akcea Therapeutics Inc.	Jounce Therapeutics Inc
Altair Engineering Inc	Menlo Therapeutics Inc
Alteryx Inc.	Merchants Bancorp
Apellis Pharmaceuticals Inc	Metropolitan Bank Holding Corp
AquaVenture Holdings Ltd.	MongoDB, Inc.
Arcus Biosciences Inc	MuleSoft Inc.
Armo Biosciences Inc	Newmark Group Inc
Athene Holding Ltd	Nine Energy Service Inc
Biohaven Pharmaceutical Holding	Nutanix, Inc.
Blue Apron Holdings Inc.	Odonate Therapeutics, Inc.
Bridgewater Bancshares, Inc.	Okta Inc
Byline Bancorp Inc.	PQ Group Holdings Inc.
Cloudera, Inc.	Quantenna Communications, Inc.
Coupa Software Incorporated	Rhythm Pharmaceuticals, Inc.
Deciphera Pharmaceuticals Inc.	Roku, Inc.
Denali Therapeutics Inc	SendGrid Inc
Dropbox Inc	Smart Sand, Inc.
e.l.f. Beauty, Inc.	Solaris Oilfield Infrastructure, Inc.
Extraction Oil & Gas Inc	Solid Biosciences Inc.
ForeScout Technologies Inc.	Stitch Fix Inc
FTS International LLC	Twilio Inc.
G1 Therapeutics	Warrior Met Coal LLC
Homology Medicines Inc	Yext Inc.
Intellia Therapeutics, Inc.	Zscaler Inc

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

Significant Findings

Comparing our findings in this survey to those in our prior surveys, we found continued widespread adoption of various takeover defenses at non-controlled companies in advance of their IPOs, at the same time that seasoned public companies have been abandoning takeover defenses in the face of investor opposition and amid scrutiny by proxy advisory firms.

With respect to nearly all of the defensive measures we examined, our 2018 survey data revealed a similar prevalence of such measures today when compared with our earlier survey periods, namely:

- **90%** of companies adopted a classified board.
- **94%** of companies adopted a plurality vote standard for uncontested director elections.
- **84%** of companies effectively prohibited shareholder action by written consent.
- **84%** of companies had provisions prohibiting shareholders from calling a special meeting.
- **78%** of companies required a supermajority shareholder vote for amending the bylaws.

We also found that the number of companies that adopted exclusive-forum provisions (another governance attribute disfavored by some shareholder advocates) increased sixfold over the past several years, from 14% in the 2011 survey to 57% in the 2014 survey to 84% in the 2016 survey, to 90% in the 2018 survey.

However, there continued to be some deterrence, albeit fairly modest, to the increased focus on corporate governance. Our 2018 survey data reflect a continuing trend toward certain “shareholder-friendly” governance practices, particularly with respect to board and committee independence matters. For example, the average level of director independence was 73% of the board, roughly the same level or higher compared to our previous survey periods. The percentage of companies with fully independent audit, governance/nominating and compensation committees at the time of IPO was at a similar level compared to our previous survey periods – 82% for both audit and compensation committees and 84% for governance/nominating committee.

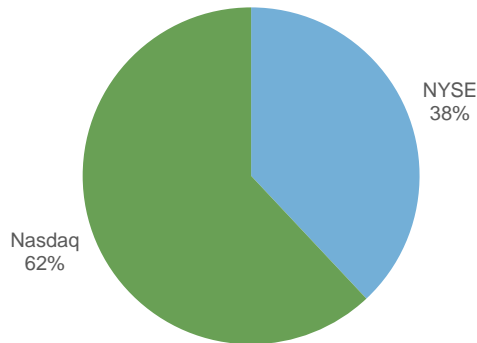
Moreover, while only slightly more than half (52%) of the companies in the 2018 survey separated the roles of chairman and CEO, this separation has been on the rise in recent years, up from 34% in the 2011 survey although flat from 2014. The number of companies with an independent chairman increased to 38% in 2018 from 22% in 2014. And among the companies reviewed that did not have an independent chairman, 33% had a lead director in 2018 as compared to 28% in 2014.

Primary Listing Exchange

Of 50 companies examined:

- **19** companies (38%) listed on the NYSE
- **31** companies (62%) listed on the NASDAQ

Primary Listing Exchange

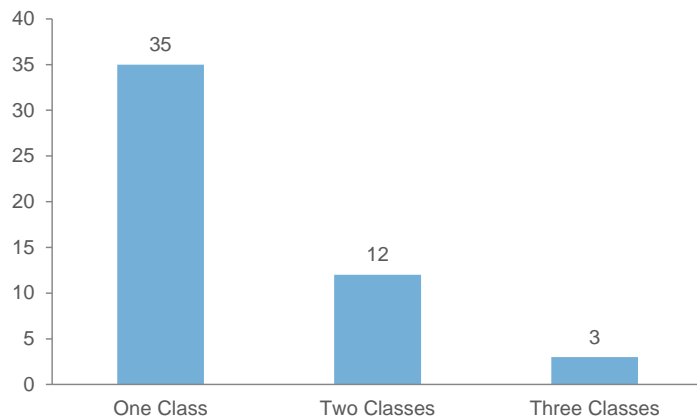


Classes of Outstanding Common Stock

Of 50 companies examined:

- **35** companies (70%) had one class of common stock outstanding
- **12** companies (24%) had two classes of common stock outstanding, **11** (22%) of which had unequal voting rights
- **3** companies (6%) had three classes of common stock outstanding, **2** (4%) of which had unequal voting rights

Classes of Outstanding Common Stock

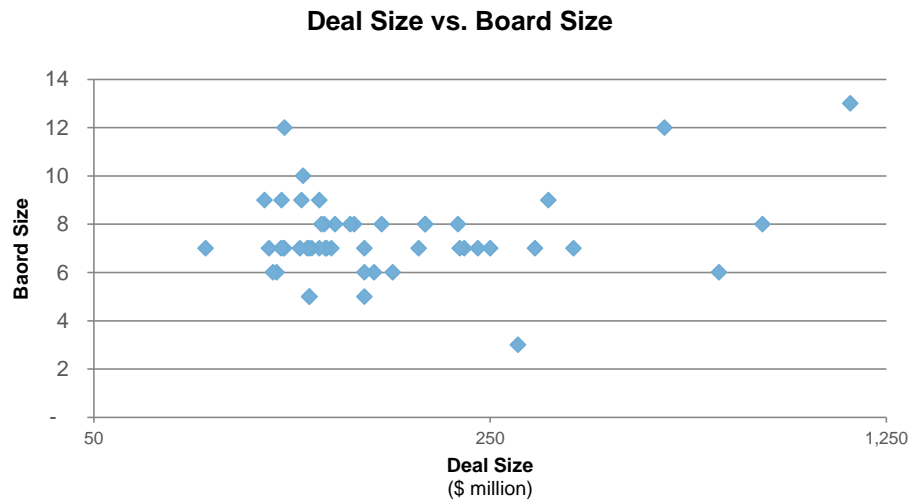


Board Size

Of 50 companies examined:

- The average board size was **7** members
- The median board size was **7** members
- Board size ranged from **3** to **13** 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 **73%** of the board
- The median level of director independence was **75%** of the board
- The level of director independence ranged from a low of **33%** to a high of **92%**

Requirement for director independence at time of IPO

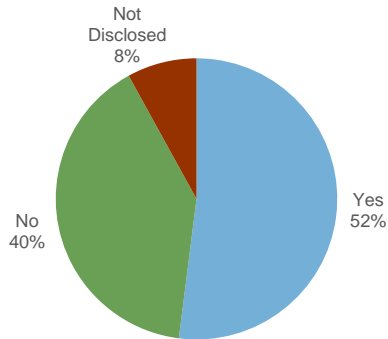
An IPO company must have at least one independent director at the IPO in order to satisfy NYSE and NASDAQ audit committee listing standards. Subject to an exception for controlled companies, NYSE and NASDAQ standards require that the board of a listed company consist of a majority of independent directors within one year of the listing date.

Separation of Chairman and CEO

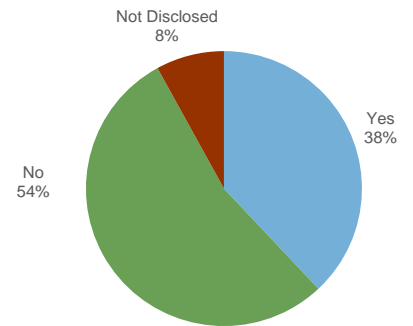
Of 50 companies examined:

- **26** companies (52%) had a separate chairman and CEO
- **19** companies (38%) had an independent chairman

Separation of Chairman & CEO



Independent Chairman

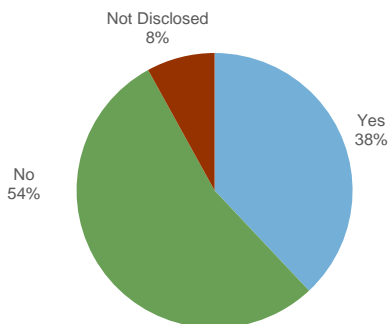


Lead Director

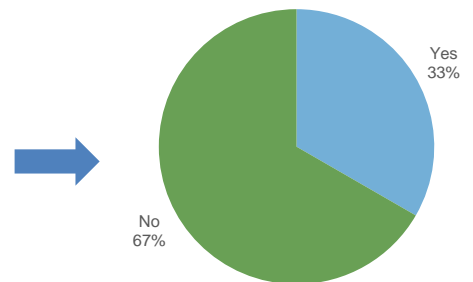
Of 50 companies examined:

- **27** companies (54%) did not have an independent chairman
 - Of these, **9** companies (33%) had a lead director

Independent Chairman



Lead Director



Alternative board leadership structures include separating the Chairman and CEO roles, and appointing an Independent Chairman or Lead Director.

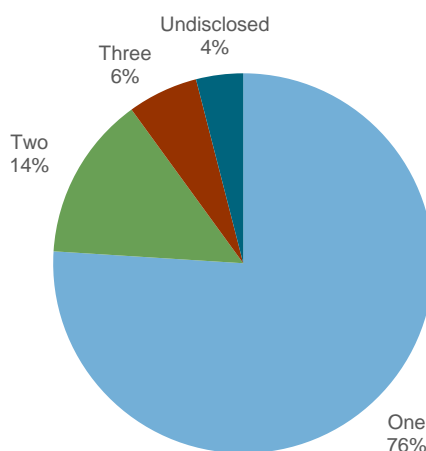
In the interest of **balancing the demands of operating** a corporation with those of leading a corporate board, companies increasingly utilize alternatives to the traditional CEO/Chair leadership model. The benefits of appointing an independent chair or a lead director may include increased efficiency and improved succession planning. An independent chair may assume primary responsibility for board agendas and meetings. A lead director, often appointed when the CEO and Chair roles are combined, assuages investor concerns about having appropriate independent oversight.

Audit Committee Financial Experts

Of 50 companies examined:

- **38** companies (76%) had one financial expert
- **7** companies (14%) had two financial experts
- **3** companies (6%) had three financial experts
- **2** companies (4%) 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.

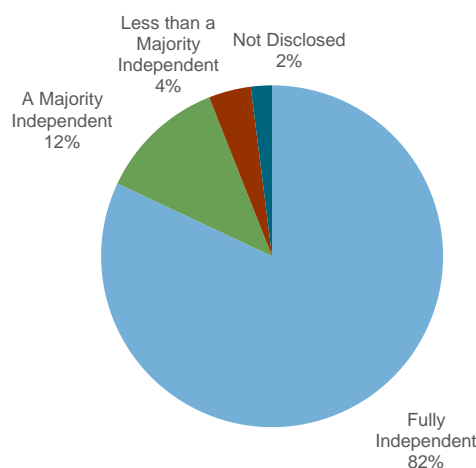
An audit committee financial expert is a person who has the following attributes: (1) an understanding of generally accepted accounting principles and financial statements; (2) the ability to assess the general application of such principles in connection with the accounting for estimates, accruals and 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:

- **41** companies (82%) had a fully independent audit committee
- **6** companies (12%) had a majority independent audit committee
- **2** companies (4%) had a less than a majority independent audit committee
- **1** company (2%) did not disclose the composition of its audit committee

Audit Committee Independence



Audit committee independence

Under NYSE and NASDAQ rules, an IPO 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.

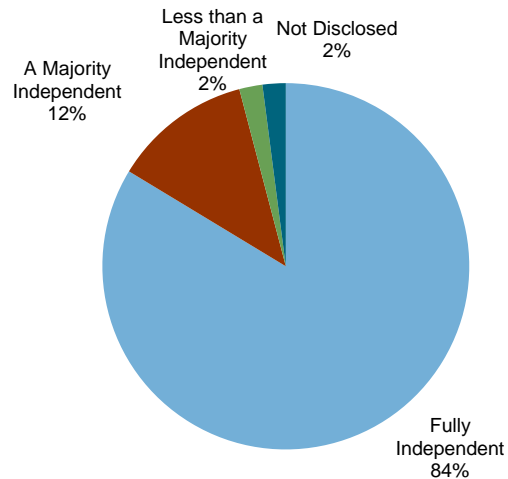
In addition to the NYSE/NASDAQ independence standards applicable to all independent directors, audit committee members are required to meet additional independence tests set forth by the SEC, which provide that a director who serves on the company's audit committee may not (other than in his or her capacity 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, **49** had a governance/nominating committee. Of these 49 companies:

- **41** companies (84%) had a fully independent governance/nominating committee
- **6** companies (12%) had a majority independent governance/ nominating committee
- **1** company (2%) had a less than a majority independent governance/ nominating committee
- **1** company (2%) did not disclose the composition of its governance/nominating committee.

Governance/Nominating Committee Independence

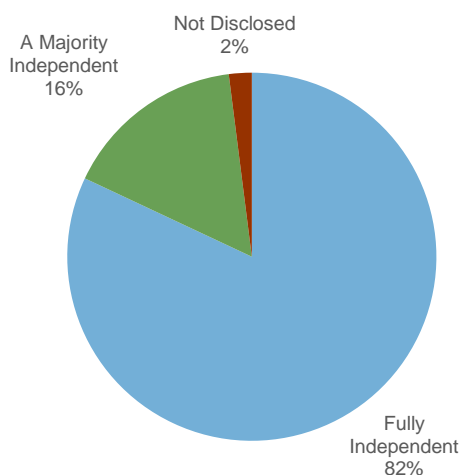


Compensation Committee Independence

Of 50 companies examined:

- **41** companies (82%) had a fully independent compensation committee
- **8** companies (16%) had a majority independent compensation committee
- **1** company (2%) did not disclose the composition of its compensation committee

Compensation Committee Independence



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 adopt a nomination 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 committee members. An independent compensation committee is also useful for purposes other than compliance with the NYSE and NASDAQ rules, including to facilitate an exemption from Section 16 short-swing profit rules.

Additional Board Committees

Of 50 companies examined:

- 5 companies (10%) had additional board committees

The additional committees included risk committees, executive committees, conflict committees, environmental, health & safety committees, and non-management stock option 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 relatively easily adopted at a later time.

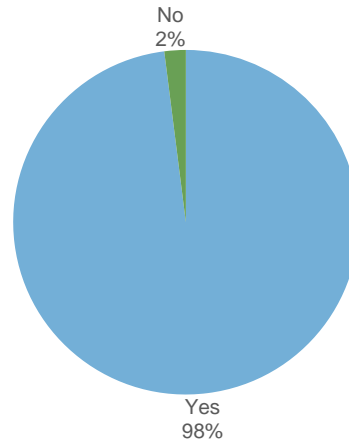
Adoption of a shareholder rights plan (poison pill)

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, **49** were authorized to issue “blank check” preferred stock.

Authority to Issue “Blank Check” Preferred Stock



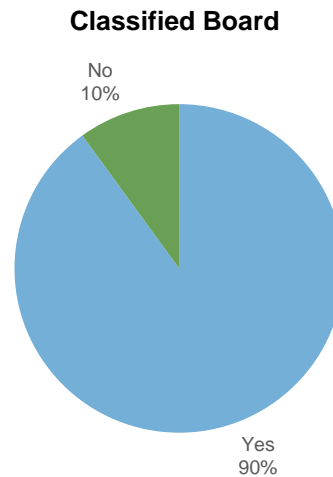
Authority to issue “blank check” preferred stock

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:

- **45** companies (90%) had a classified board
- **5** companies (10%) did not have a classified board



Classified board

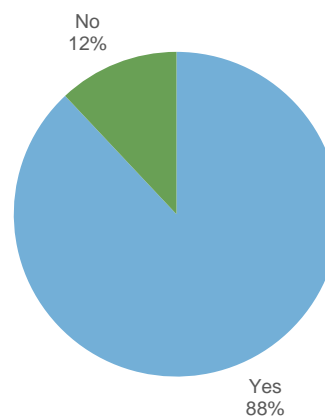
The implementation of a classified board often serves as a protective mechanism in the context of a take-over by ensuring that a potential acquiror cannot simply replace an entire board at one time. Typically, a staggered board is composed of three equally divided classes of directors, with each class elected in successive years. A classified board serves as a complement to the protections afforded by a shareholder rights plan, 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:

- **44** companies (88%) allowed removal of a director for cause only*

Director Removal for Cause Only



** These 44 companies included 1 company (2%) 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*

Director removal for cause only

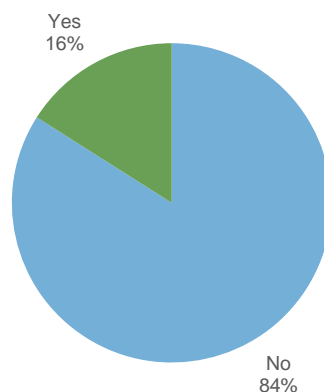
Director removal for cause is an automatic consequence of having a classified board under Delaware law, and is necessary to preserve the extended terms of those directors. Taken together, a classified board structure and a provision allowing director removal for cause only (as supplemented by restrictions 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:

- **42** companies (84%) prohibited shareholders from calling a special meeting*
- **8** companies (16%) permitted shareholders to call a special meeting. Of these:
 - **4** companies (50%) permitted shareholders comprising at least 10% to call a special meeting
 - **3** companies (37%) permitted shareholders comprising at least 30% to call a special meeting
 - **1** company (13%) permitted shareholders comprising at least a majority to call a special meeting

Shareholder Ability to Call Special Meeting



* These 42 companies included 2 companies (5%) whose provision prohibiting shareholders from calling a special meeting was triggered when a significant shareholder or group ceased to own or control the vote of a specified percentage of outstanding shares

Advance Notice Bylaws

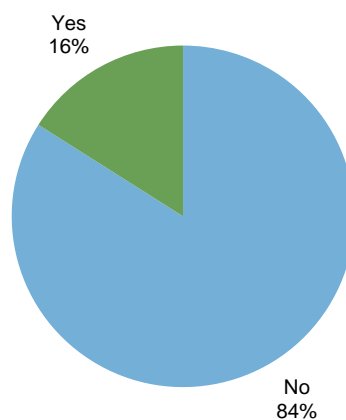
Of 50 companies examined, **all** had bylaws setting forth timing, notice and certain other requirements relating to when and how a shareholder may propose business for shareholder consideration, including the nomination of a director for election.

Shareholder Action by Written Consent

Of 50 companies examined:

- **42** companies (84%) prohibited shareholder action by written consent*
- **8** companies (16%) permitted shareholder action by written consent
 - Of these, **3** companies (38%) required written consent to be unanimous, effectively rendering the right moot

Shareholder Action by Written Consent Permitted



** These 42 companies included 4 companies (10%) 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

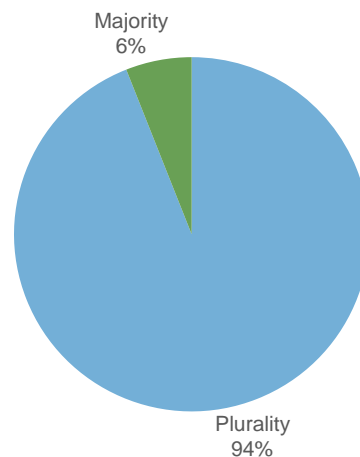
Of 50 companies examined, **all** permitted the board to fill vacancies on the board.

Voting in Uncontested Board Elections

Of 50 companies examined:

- **47** companies (94%) required a plurality standard for board elections
- **3** companies (6%) required a majority standard for board elections*

Standard for Board Elections



** Of these 3 companies requiring majority standard for board elections, none of them have director resignation policy.*

Voting standard for director elections under Delaware law

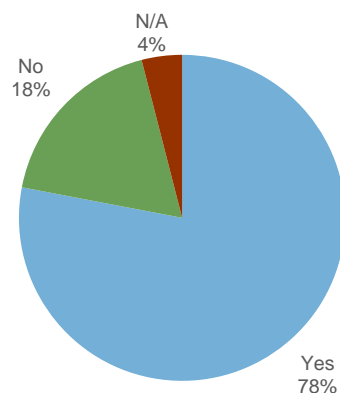
Under Delaware law, in the absence of a different specification in a company's certificate of incorporation or bylaws, directors are elected by a plurality voting system. Under a plurality voting system, the nominees for directorships are elected based on who receives the highest number of affirmative 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, **10** companies (26%) required a vote of 75% or more
- **9** companies (18%) did not require a supermajority shareholder vote for amending the bylaws
- **2** companies (4%) were silent as to permitting the shareholders to amend bylaws.

Supermajority Vote for Amending the Bylaws



** These 39 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*

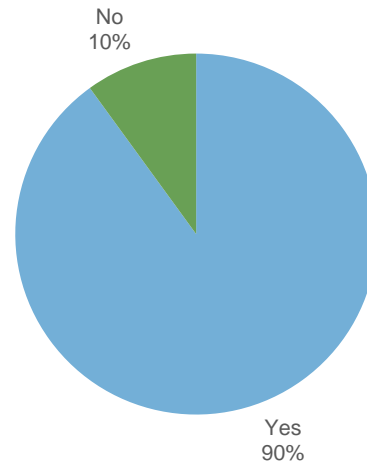
Exclusive-Forum Provisions

Of 50 companies examined:

- **45** companies (90%) had an exclusive-forum provision. Of these:
 - **41** companies (91%) specified Delaware as the exclusive forum
 - **24** companies (53%) adopted them in their charter, **12** companies (27%) adopted them in their bylaws and **9** companies (20%) adopted them in both its charter and its bylaws
- **5** companies (10%) did not have an exclusive-forum provision

Exclusive-Forum Provision

New Excel data to come

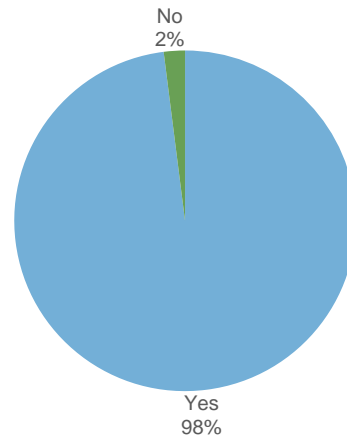


New Equity Compensation Plan

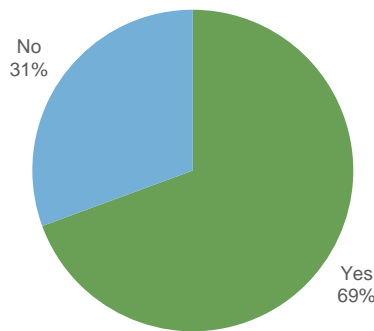
Of 50 companies examined:

- **49** companies (98%) adopted a new equity compensation plan. Of the 49:
 - **34** companies (69%) adopted a new equity compensation plan with an evergreen provision
 - **39** companies (80%) adopted a new equity compensation plan with a clawback provision
 - **6** companies (12%) adopted a new equity compensation plan that permitted option/SAR repricing without shareholder approval
 - **None** of the new equity compensation plans included stock ownership/retention requirements
 - **3** companies, however, disclosed separate stock ownership/retention guidelines or policies

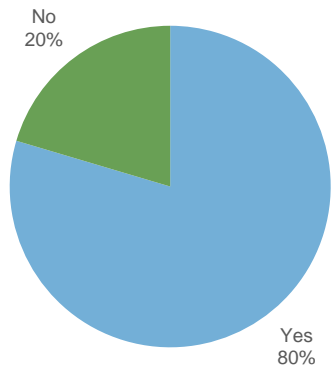
New Equity Compensation Plan (NECP)



NECP with Evergreen Provision



NECP with Clawback Provision



Equity Compensation Awards

Of 50 companies examined:

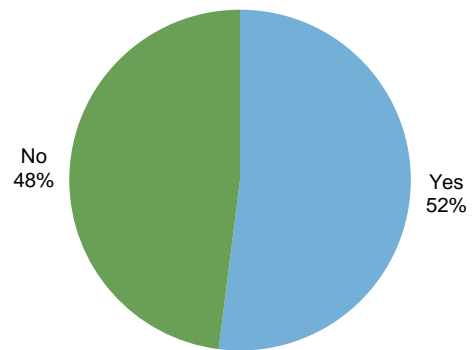
- The number of outstanding equity compensation awards at the time of the IPO, as a percentage of the fully diluted number of common shares post-IPO, ranged from 0% to 24%
- The number of outstanding equity compensation awards at the time of the IPO, combined with the number of shares reserved for issuance under the new equity compensation plan adopted, as a percentage of the fully diluted number of common shares post-IPO, ranged from 5% to 65%
- The number of shares reserved for issuance under the new equity compensation plan adopted, as a percentage of the fully diluted number of common shares post-IPO, ranged from 2% to 64%

Employment and Similar Agreements

Of 50 companies examined:

- **26** companies (52%) adopted one or more new employment or similar agreements with their executives within six months of the IPO
 - **24** were emerging growth companies

Employment or Similar Agreement



Compensation Consultants

Of 50 companies examined:

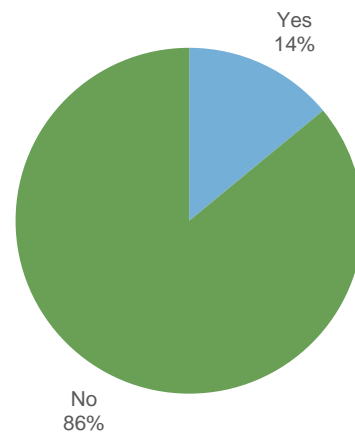
- 7 companies (14%) disclosed the use of and named their compensation consultants
 - 6 were emerging growth companies

The specified consultants included:

Compensation & Benefit Solutions
(currently Alvarez & Marsal)
Compensia, Inc.
Farient Advisors LLC

Fred W. Cook & Co., Inc.
Towers Watson & Company
(currently Willis Towers Watson)

Compensation Consultant Disclosure



Compensation consultants

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

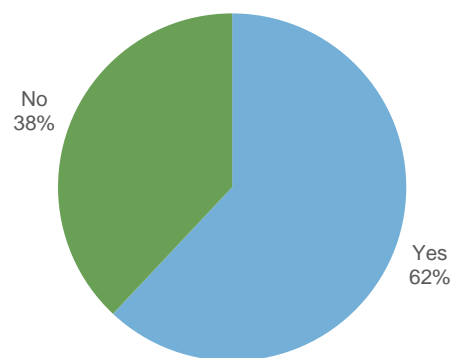
Disclosure of Non-GAAP Financial Measures

Of 50 companies examined:

- **31** companies (62%) disclosed non-GAAP financial measures

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

Disclosure of Non-GAAP Financial Measures

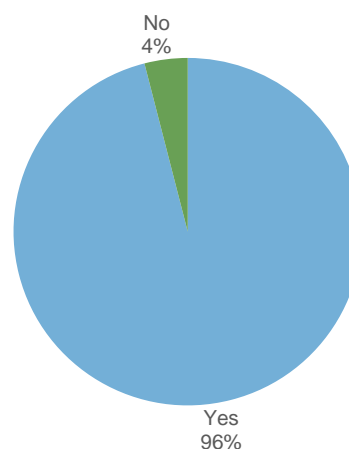


Emerging Growth Companies

Of 50 companies examined, **48** companies (96%) identified themselves as emerging growth companies under the JOBS Act of 2012. Of these:

- **39** companies (81%) included two years of audited financial statements in the registration statement and **9** companies (19%) included three years of audited financial statements in the registration statement
- **28** companies (59%) included two years of selected financial data in the registration statement, **15** companies (31%) 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 **4** companies (8%) included five years of selected financial data in the registration statement
- **None** included a Compensation Discussion and Analysis in the registration statement
- **12** companies (25%) 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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