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Declaration of Non-Independents: A Survey of Non-Independent Directors at S&P 500 Companies

Client Alerts

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Board composition remains a critical issue for public companies as investors and other stakeholders evaluate the skills, qualifications, and background of directors. It is well-known that stock exchange rules generally only require that a company's board contains a majority of independent directors, with the exception of controlled companies. However, after these bare requirements, a board has substantial latitude to select its nominees, including non-independent directors.

As companies consider director succession planning and meeting the expectations of investors and other stakeholders, a possible governance option is the use of non-independent directors, including "management" directors who are employed by the applicable company. Management directors usually have oversight responsibilities via their employee roles and have key risk management functions and specific knowledge to help boards in carrying out their oversight duties. With succession planning being a key governance concern, providing executive chairs and other management members access to the boardroom may allow for smoother transitions, and/or "level up" certain directors for further board service. However, management directors suffer from lack of stock exchange and proxy advisor independence, the inability to serve on key committees and the views of certain market participants that ownership/oversight should be separated from day-to-day management of a company.

In light of these competing considerations, we reviewed the S&P 500 for companies with multiple non-independent directors with the goal of determining:

1. How many companies among the S&P 500 have multiple non-independent directors; and
2. The identity of the non-independent directors, particularly as to the presence of management members on the board.

We have identified 161 S&P 500 companies with multiple non-independent directors as of March 25, 2024 in the survey set and reviewed the proxy statements from each company to categorize the various non-independent directors. We found that nearly one third of S&P 500 companies had more than one non-independent director. From that review, we determined other broad patterns and notable takeaways, summarized below.

Key Survey Results and Takeaways

1. **Companies with exactly two non-independent directors were more common than companies with three or more non-independent directors**. Of the 161 companies we identified with multiple non-independent directors, 102 had only two independent directors while 59 had three or more non-independent directors. As a result, almost 20% of the S&P 500 has two non-independent directors while approximately 12% of the S&P 500 has three or more non-independent directors.

2. **Companies with multiple non-independent directors were split evenly between companies with solely multiple management directors and companies with one management director and one or more non-management non-independent directors**. Approximately half of the 161 companies identified consisted solely of management directors while the other half consisted of one management director and other, non-independent directors.

3. **Management Directors Focus on Leadership and Operational Roles**. The most common combination of management directors was the CEO and executive chairman combination, which comprised 48 out of the 161 companies surveyed, or approximately 30%. After the CEO-executive chairman combination, the CEO-"second in command" combination appeared in 27 of the 161 companies, or approximately 17%. Co-CEOs or co-founders only represented five out of 161 companies, which is not surprising given the reluctance many companies in using the the co-CEO function.

4. **Management Directors in Finance and Other Roles are Rare**. Conversely, only four of the 161 companies had a sitting CFO as a director. Zero chief legal officers were management directors and approximately six companies had other executives on the board. Of the six companies which had other executives on the board, most were specific to the applicable company's core business.

5. **Non-independent directors who were not management directors varied in number and status**. Among the other non-independent directors, there were no specific patterns, but common categories including the following:

   - 20 out of 161 companies had a founder or co-founder on the board.
   - 26 out of 161 companies had a former CEO on the board.
   - 15 out of 161 companies had at least one family member on the board, and six companies had multiple family members on the board.
   - Eight out of 161 companies had stockholder designees or former designees.

- Six out of 161 companies had individuals who were deemed not independent due to related party transaction considerations.

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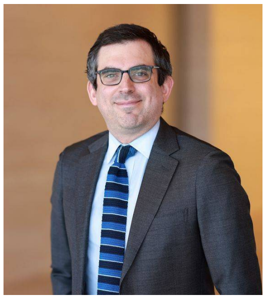

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