

## Top Takeover Defense Changes of 2021

January 2022

Deal Point Data continuously monitors changes to corporate charters and bylaws and other announcements for key governance and takeover defense changes as part of our ESG research. After a unique year in which the Covid-19 pandemic upended several long term trends, 2021 largely reverted back to what we had been observing in recent years - less companies making structural takeover defense changes, lower overall governing document filings and amendments, and less poison pill activity. In this note, we will highlight key observations of Deal Point Data's takeover defense change and disclosure data for S&P 1500 companies in 2021 and attempt to identify some of the factors contributing to the numbers.

### Decline in Governing Document Filings and Changes

S&P 1500 companies made 782 charter and bylaw filings during the year, a 17% decline versus 2020 filing levels. 2020 was an especially busy year for bylaw amendments as the COVID-19 pandemic required many companies to make the necessary changes to facilitate the holding of virtual shareholder meetings. With companies better prepared for year two of the pandemic, the number of S&P 1500 companies making at least one bylaw change during the year declined by 23%. In fact, 2021 represented at least a five-year low in terms of companies making any changes to their bylaws (Deal Point Data began tracking this activity on January 1, 2017). The number of S&P 1500 companies making at least one of any of the 34 key takeover defense change types tracked by Deal Point Data to their charter and bylaws also represented a five-year low. The volume and specific types of governance documents being updated will largely reflect the governance priorities of the day. There will always be a need to make routine and administrative changes to charters and bylaws but when shareholder rights and corporate takeover defenses are at the forefront of concerns by activists, shareholders, and proxy advisory firms, increased changes to charters and bylaws will follow.

Today, much of the focus surrounding corporate governance and the larger ESG agenda are ultimately not issues that would typically be addressed in the corporate charter and bylaws but in corporate governance guidelines, board committee charters, and stand-alone policies. As ESG issues including climate change and sustainability, diversity, equity and inclusion, and human capital management, have taken on increased importance from investors, boards are determining what approach to take in terms of oversight and responsibilities for these matters. This may include the adoption of policies or guidelines administered by the entire board, the creation of a new focused board committee, or being added to the responsibilities of an existing committee, which may include revisions to committee charters to reflect oversight of these matters. Likewise on the governance front where some of the most pressing issues including director overboarding, tenure, and mandatory retirement and term limit policies, which have taken on added importance as companies try to accommodate the addition of new diverse board members, are almost universally addressed in corporate governance guidelines and not bylaws.

### 2021 S&P 1500 Charter and Bylaw Filing Activity

	Filings	Companies	Stockholder Approved	% Approved	2020 Filings	2020 Companies
All Charter Filings	321	208	N/A	N/A	377	199
Change	180	158	113	63%	194	163
Initial (e.g. IPO/Spinoff)	10	10	N/A	N/A	9	6
Restated Only	39	38	N/A	N/A	31	29
Refiling	92	50	N/A	N/A	143	54
All Bylaw Filings	461	341	N/A	N/A	570	432
Change	379	321	16	4%	499	418
Initial (e.g. IPO/Spinoff)	11	11	N/A	N/A	6	6
Restated Only	24	22	N/A	N/A	30	26
Refiling	47	26	N/A	N/A	35	33

Based on filing date. Companies in index on December 31 of each year.

### Defense Changes

Among S&P 1500 companies, almost every one of Deal Point Data's key takeover defense change types declined versus 2020 levels. One outlier was the rate at which companies adopted federal forum provisions ("FFP") which increased by 36%. FFPs require the federal courts be the exclusive forum for the resolution of Securities Act claims. While the adoption of FFPs was a top 10 change for all three groups of companies (i.e., the S&P 500, S&P 400, and S&P 600) in 2020, one noteworthy difference was the rate at which larger companies are now adding FFPs. The number of S&P 500 companies adopting FFPs in 2021 doubled to 25 from 12 in 2020. At the end of 2019, no S&P 500 company had an FFP in place. That number has grown to 39 companies or 7.8% of the index at year end 2021. Other noteworthy changes include the number of S&P 1500 declassifying the board which declined by 60% and companies eliminating supermajority vote requirements which declined by almost one-third.

### S&P 1500 Defense Changes - Largest YoY Change

Defense Change	2021	2020	YoY % Change
Add Federal Forum Provision	61	45	35.6%
Eliminate Supermajority: Charter Amendments	17	21	-19.0%
Eliminate Supermajority: Mergers	6	8	-25.0%
Decrease % Requirement to Call Special Meetings	14	19	-26.3%
Add Shareholder Ability to Call Special Meetings	13	18	-27.8%
Adopt Majority Standard in Director Elections	15	21	-28.6%
Add/Modify Advance Notice Timing	27	40	-32.5%
Eliminate Supermajority: Bylaws Amendments	14	21	-33.3%
Eliminate Supermajority: Director Removal	11	20	-45.0%
Eliminate Cause Requirement to Remove Directors	14	27	-48.1%
Eliminate Classified Board	16	32	-50.0%
Add Shareholder Ability to Amend the Bylaws	4	10	-60.0%

### **Contributing Factors to Less Defense Change Activity**

The shifting focus away from shareholder rights to social and environmental issues (the "ES" of ESG) has certainly contributed to the declining rates of companies shedding takeover defenses but another less obvious factor may also be contributing. The 14a-8 shareholder proposal process has been a key catalyst behind companies enhancing shareholder rights and removing structural takeover defenses for many years. The overall number of takeover defense related shareholder proposals has remained fairly steady in recent years and has actually ticked up over the last two years. However, the companies being targeted, the types of proposals being submitted, and the declining presence of a key group of governance activists, may all be playing a part in less company follow-through on these matters. Shareholder friendly governance practices including proxy access, declassifying boards in favor of annually elected directors and replacing plurality vote standards to elect directors with a majority standard, have been widely adopted by large cap companies but in substantially less numbers at small cap companies. However, proposals related to shareholder rights and defense continue to be submitted on large cap companies by a rate of eight to one (i.e., the S&P 500 versus the S&P 600) and the proportion has actually increased when compared to five years ago. Moreover, the proposals being submitted are frequently requests the company amend an existing right (i.e., a so-called "fix-it" proposal) as opposed to targeting a company lacking a right and requesting one be adopted. These include proposals seeking a reduction in the holding requirement to call a special meeting and tweaks to proxy access provisions. The adopt versus fix-it distinction can be an important factor in terms of shareholder support for the proposal and can ultimately lead to less majority support proposals and decreased pressure on companies to implement it. For example, in the last five years half of the proposals requesting a company adopt proxy access passed with an overall support level of approximately 52%. In the same time period, not one of the 116 proxy access fix-it proposals that were voted on passed and the overall support level drops to 30%. Lastly, the impact individual shareholders like John Chevedden and James McRitchie have had on company's enhancing shareholder rights cannot be overstated but a key group of governance activists that have played a major role over the last three decades in getting companies to eliminate defenses and adopt shareholder friendly provisions have been less vocal on these issues of late. Previous campaigns, which often included 14a-8 proposals, by labor and public pension funds were successful in pushing several modern governance practices including New York City Pension Funds who led the way in getting many companies to adopt proxy access and California Public Employees' Retirement System (CalPERS) which pushed numerous companies to replace plurality vote standard with a majority requirement. Defense related proposals submitted by labor and public pension funds declined to 12 in 2021 from 44 in 2017.

While all the reasons mentioned above may be contributing to decreased levels of companies making changes to increase shareholder rights and remove takeover defenses, what then to explain the lack of companies making changes to bolster their defenses. Perhaps the historically low level of U.S. hostile activity has led companies into a sense of security that the odds of being subject to a hostile offer are very remote. The number of hostile M&A deals in 2021 represented at least an eight year low according to Deal Point Data Mergers. The number of activist campaigns announced in 2020 and 2021 were also below historic levels.

### Defense Related Shareholder Proposals - In Index At Time of Annual Meeting

	2017		2018		2019		2020		2021	
	#	%	#	%	#	%	#	%	#	%
S&P 500 (Large caps)	155	66%	174	70%	123	57%	153	62%	168	67%
Russell 1000 (Large caps)	188	80%	202	82%	156	72%	191	77%	205	82%
S&P 600 (Small caps)	21	9%	14	6%	17	8%	21	8%	20	8%
Russell 2000 (Small caps)	45	19%	34	14%	55	25%	52	21%	42	17%
All Defense Related Proposals	235	100%	247	100%	216	100%	248	100%	251	100%

Proposals appearing in corporate proxy statements or no-action letters at U.S. reporting companies.

### Defense Related Shareholder Proposals - % by Proponent Type

	Individuals	Labor/Pension Fund
2017	70%	19%
2018	80%	7%
2019	68%	17%
2020	71%	8%
2021	82%	5%

### Poison Pills - Specific Purpose, Limited Duration

After a flurry of poison pill adoptions in 2020 in response to the early days of the Covid-19 pandemic and brief stock market crash, activity largely returned to pre-pandemic levels in 2021. The pre-pandemic approach away from long-term "routine" poison pills to limited focus tools to serve a specific purpose during a specific time of need was evident with only a few routine adoptions and no plans adopted with a term of more than three years. Eighty-seven percent of the U.S. based companies adopting a poison pill in 2021 were in response to a specific threat or other specific need including to protect net operating loss carryforwards (i.e., "NOL plans"). Of the traditional plans adopted (i.e., not NOL plans), 75% included a limited duration of one-year or less. All but one of the NOL adoptions had a three-year term. Shareholder ratification of adoptions was almost exclusively limited to NOL plans. Only two companies adopting a traditional plan sought shareholder approval or intentions to seek approval of the plan. The increase in the use of derivative positions in trigger language we witnessed in 2020 continued in 2021. Every U.S. company adopting a traditional plan in 2021 included derivative interests. However, a second trend that emerged with Covid-19 poison pills, the increased use of acting in concert provisions declined substantially in 2021. Acting in concert language seeks to capture additional activity by stockholders beyond what is provided in the traditional definition of "Beneficial Ownership" that would group stockholders together for purposes of aggregating ownership to trigger a company's poison pill (e.g., "to include Persons acting in concert or in parallel"). The decline was not surprising after the Williams Companies, Inc. April 2021 decision in which a Delaware court permanently enjoined its poison pill citing among other reasons, its expansive "acting in concert" provision. Only two U.S. companies adopting a poison pill in 2021 included "acting in concert" language.

### Poison Pill Adoption Impetus

	Adoptions	% of Adoptions
NOL Protective	9	39.1%
Activist Investor/Share Accumulation	6	26.1%
Routine	3	13.0%
NOL and In-Play	2	8.7%
Unfriendly Acquisition Offer	2	8.7%
Other Non-Routine / Temporary Event	1	4.3%

2021 adoptions by U.S. headquartered companies

### 2021 S&P 1500 Top Takeover Defense Change Totals

#### Top Defense Changes - S&P 500

Defense	Total	Stockholder Approved	% Approved	2019 Total	YoY % Change
Add/Modify Advance Notice Disclosure/Eligibility Requirements	31	1	3%	24	22.6%
Add Proxy Access	20	0	0%	26	-30.0%
Add Exclusive Forum Provision	15	1	7%	12	20.0%
Add/Modify Advance Notice Timing	15	2	13%	16	-6.7%
Add Shareholder Ability to Call Special Meetings	13	4	31%	4	69.2%
Decrease % Requirement to Call Special Meetings	13	5	38%	8	38.5%
Add Federal Forum Provision	12	0	0%	0	100.0%
Eliminate Supermajority: Charter Amendments	10	9	90%	11	-10.0%
Eliminate Cause Requirement to Remove Directors	9	6	67%	3	66.7%
Eliminate Supermajority: Bylaws Amendments	7	7	100%	8	-14.3%
	<b>145</b>	<b>35</b>	<b>24%</b>	<b>112</b>	<b>22.8%</b>

#### Top Defense Changes - S&P 400

Defense	Total	Stockholder Approved	% Approved	2019 Total	YoY % Change
Eliminate Classified Board	12	12	100%	5	58.3%
Add Exclusive Forum Provision	9	0	0%	8	11.1%
Add Federal Forum Provision	9	0	0%	8	11.1%
Eliminate Cause Requirement to Remove Directors	8	6	75%	3	62.5%
Eliminate Supermajority: Bylaws Amendments	7	7	100%	5	28.6%
Eliminate Supermajority: Director Removal	7	6	86%	5	28.6%
Add Proxy Access	6	1	17%	20	-233.3%
Add/Modify Advance Notice Disclosure/Eligibility Requirements	6	0	0%	11	-83.3%
Add/Modify Advance Notice Timing	6	0	0%	4	33.3%
Eliminate Supermajority: Charter Amendments	6	6	100%	4	33.3%
	<b>76</b>	<b>38</b>	<b>50%</b>	<b>73</b>	<b>3.9%</b>



### Top Defense Changes - S&P 600

Defense	Total	Stockholder Approved	% Approved	2019 Total	YoY % Change
Add Federal Forum Provision	23	1	4%	0	100.0%
Add/Modify Advance Notice Disclosure/Eligibility Requirements	22	1	5%	20	9.1%
Add/Modify Advance Notice Timing	19	0	0%	14	26.3%
Add Exclusive Forum Provision	17	1	6%	16	5.9%
Eliminate Classified Board	16	16	100%	10	37.5%
Adopt Majority Standard in Director Elections	12	3	25%	18	-50.0%
Eliminate Cause Requirement to Remove Directors	10	7	70%	1	90.0%
Add Proxy Access	9	0	0%	11	-22.2%
Add Shareholder Ability to Amend the Bylaws	8	5	63%	4	50.0%
Eliminate Supermajority: Bylaws Amendments	8	5	63%	9	-12.5%
Eliminate Supermajority: Director Removal	8	6	75%	1	87.5%
	<b>152</b>	<b>45</b>	<b>30%</b>	<b>104</b>	<b>31.6%</b>

Based on effective date of defense change. Companies in index on December 31 of each year.

## About Deal Point Data

Deal Point Data is transforming the way M&A, securities and corporate governance research is done.

Deal Point Data streamlines the process of identifying precedents and analyzing market trends.

Our data-driven applications enable the world's leading law firms and investments banks to save countless hours of manual research while getting answers faster than ever.