

June 2021

2021 Corporate Governance Trends — U.S. Biopharmaceutical Industry

SUMMARY

Corporate governance issues are of critical importance to large investors evaluating investment opportunities. Mega-cap companies in the biopharmaceutical space (>\$75B market cap) have aligned their governance structures to best practices across the S&P 500. Although not far behind mega-cap peers in many respects, large-cap biopharmaceutical companies (\$10B to \$45B market cap) have occasionally lagged in adopting those trends.

Every biopharmaceutical company should adopt a governance model that aligns with its particular characteristics, including its scientific prospects, board composition, investor base, innovation platform, commercialization program and long-term strategic objectives. Although broader industry trends are informative, companies should only evolve and develop their governance practices after engaging in deliberate conversations with directors, investors and other key stakeholders.¹

I. TRENDS IN BOARD COMPOSITION

A. BOARD REFRESHMENT

	Mega-Cap Biopharma Companies	Large-Cap Biopharma Companies
Average Tenure	6.4 years	8 years
Average Number of New Directors Added in the Last 5 Years	6.1	3.4
Percentage with Mandatory Retirement Age	77.8%	22.2%

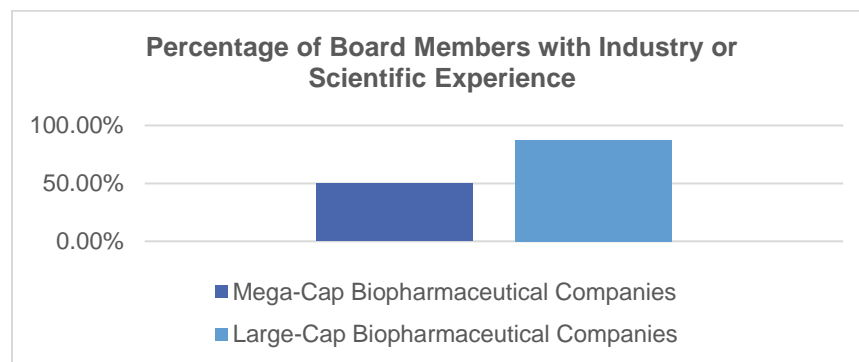
New York Washington, D.C. Los Angeles Palo Alto London Paris Frankfurt Brussels
Tokyo Hong Kong Beijing Melbourne Sydney

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Biopharmaceutical companies have made the issue of board refreshment an object of considerable attention. Boards often look to strike a balance between refreshing the board with diverse perspectives and retaining the institutional, scientific and commercial knowledge provided by longer-tenured directors. Most mega-cap biopharmaceutical companies have attempted to achieve this goal by adding an average of approximately six new directors to their board within the past five years. In most cases, these companies expanded the size of the board to accommodate new members, rather than waiting for members to retire. However, many mega-cap biopharmaceutical companies have also implemented a mandatory retirement age to free up space for new nominees.

In contrast to the mega-cap companies, large-cap biopharmaceutical companies appear to place a greater reliance on the established knowledge of longer-tenured directors. Few of these companies have elected more than three new directors to the board in the past five years. For some large-cap companies, the average director has over 15 years of tenure, demonstrating a continued appreciation for the expertise of existing directors. As compared to their mega-cap peers, large-cap biopharmaceutical companies generally have not implemented mandatory retirement ages. The governance guidelines of large-cap biopharmaceutical companies often state that the board considers mandatory retirement ages arbitrary and not reflective of the value older directors provide. These companies tend to rely on internal board evaluation processes as the primary means of encouraging board refreshment.

B. BOARD EXPERTISE



Directors of biopharmaceutical companies generally have deep industry knowledge or a vital expertise in science, commercialization, or medicine. However, mega-cap biopharmaceutical companies frequently draw upon the expertise of public company CEOs, accountants, lawyers and other experts who do not have significant prior experience in the biopharmaceutical industry or the sciences. As large-cap biopharmaceutical companies look to diversify their boards, they may increasingly turn to the expertise of professionals outside of the industry.

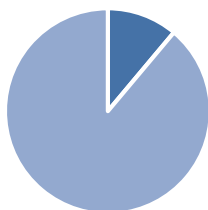
Most mega-cap biopharmaceutical companies have historically provided clearer information in public disclosures about the diverse expertise of their directors. Through the use of graphs, diagrams, and matrices, mega-cap biopharmaceutical companies have increasingly highlighted the specific areas of

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expertise of each director, particularly in the areas of risk management and human capital management. More recently, some large-cap biopharmaceutical companies have begun to leverage similar tools to convey the depth of the directors' expertise to shareholders.

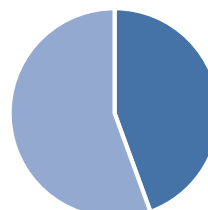
C. CEO/CHAIR STRUCTURE

CEO/Chair Structure Among Mega-Cap Biopharma Companies



■ CEO/Chair Split ■ Combined CEO/Chair

CEO/Chair Structure Among Large-Cap Biopharma Companies

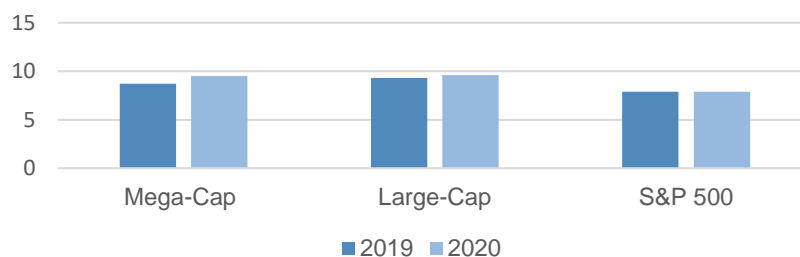


■ CEO/Chair Split ■ Combined CEO/Chair

On average, S&P 500 companies have been gradually separating their CEO and chair positions. According to Spencer Stuart, 60% of all S&P 500 boards were chaired by the CEO in 2010, but now only 45% of these companies have combined CEO/Chairs.² Institutional investors have argued that separating the CEO and Chair positions enables the board to exercise greater objectivity in assessing management's performance. Facing pressure from shareholders, some large-cap biopharmaceutical companies have separated the CEO and Chair roles, but mega-cap biopharmaceutical companies have generally not followed this trend. The vast majority of mega-cap biopharmaceutical companies are still helmed by CEOs who also act as Chairs, but have established lead independent directors, responsible for conducting meetings of board's independent directors and CEO evaluations. Disclosures by these companies generally underscore that the scope of authority granted to the lead independent director ensures that the board has independent leadership.

D. NUMBER OF BOARD MEETINGS

Number of Board Meetings Held by Biopharma Companies



Over the past two years, biopharmaceutical companies have held board meetings with more regularity than the average S&P 500 company. While S&P 500 boards met an average of 7.9 times in 2019³ and 2020⁴,

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biopharmaceutical companies have met an average of at least 8.7 times annually since 2019. In 2020, the average number of board meetings slightly increased among both mega-cap and large-cap biopharmaceutical companies, perhaps reflective of the challenges boards faced in the wake of COVID-19. There was particular variability in the number of board meetings held among large-cap biopharmaceutical companies: some boards met as few as five times, while others met as many as 21 times.⁵ In general, the data was more consistent as to mega-cap biopharmaceutical companies, suggesting that there has been more uniformity in approach among mega-cap biopharmaceutical company boards.

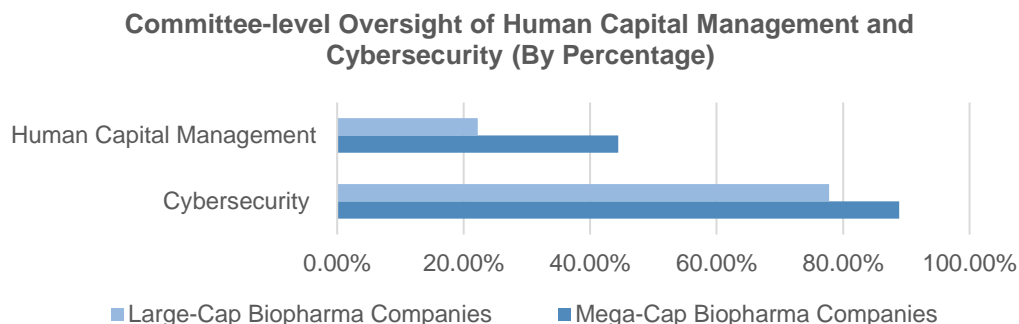
II. TRENDS IN COMMITTEE STRUCTURE

A. NUMBER OF COMMITTEES

	Mega-Cap Biopharma Companies	Large-Cap Biopharma Companies
Average Number of Committees	4.6	4
Percentage with Science & Technology Committees	66.7%	66.7%
Percentage with Committee Chairs that Identify as Racial/Ethnic Minorities	77.8%	33.3%

Although almost all public companies have established at least three board committees (an audit committee, a compensation committee and a nominating committee), many companies have recently increased the number of standing committees to accommodate shareholder demands for more active board oversight. Over the course of the past decade, the S&P 500 have established and maintained an average of roughly 4.2 committees.⁶ Biopharmaceutical companies have generally followed, if not surpassed, this general trend. Mega-cap biopharmaceutical companies have an average of 4.6 standing committees, with majority of these companies having formed at least five board committees. On the other hand, large-cap biopharmaceutical companies have an average of four committees, which skews slightly below the S&P 500 average.⁷ The majority of biopharmaceutical companies with more than three committees have established committees dedicated to the oversight of science, technology, research and product development. Other common committees include those dedicated to public policy, mergers & acquisitions and compliance oversight.

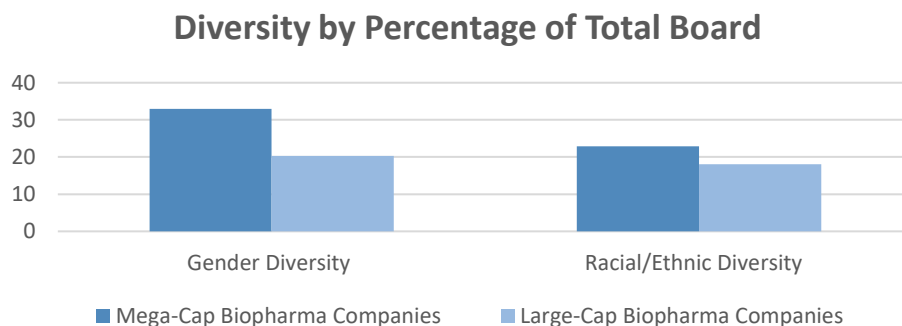
B. COMMITTEE RESPONSIBILITIES



In addition to creating new board committees, biopharmaceutical companies have also amended existing committee charters to enhance committee-level oversight with respect to key areas of shareholder interest. For example, although no biopharmaceutical company has established a committee solely dedicated to evaluating, preventing and responding to cybersecurity risks, nearly all mega-cap and large-cap biopharmaceutical companies have charged their audit or compliance committees with such responsibilities. Similarly, as stakeholders become increasingly attentive to issues such as talent development, corporate culture and employee retention, some biopharmaceutical companies have charged their compensation committees with the oversight of human capital management. While this trend is more pronounced among mega-biopharmaceutical companies (nearly half of which provide for human capital oversight at the committee level), large-cap biopharmaceutical companies may follow suit as shareholder demands in this area expand.

III. TRENDS IN DIVERSITY, EQUITY & INCLUSION

A. BOARD DIVERSITY



The gender composition of most mega-cap biopharmaceutical boards in February 2021 aligned with the S&P 500, where women held 28.8% of board seats.⁸ Several mega-cap pharmaceutical boards have significantly increased the percentage in recent years, with some boards comprised 40% or more of women. Generally, large-cap biopharmaceutical companies have lower percentages of women on their boards as

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compared to mega-cap companies. However, some large-cap biopharmaceutical companies have made strides in terms of board gender diversity, and women account for at least 20% of their boards.

Mega-cap biopharmaceutical companies also tend to have more racially and ethnically diverse directors than large-cap companies. Prior to the 2021 proxy season, all mega-cap biopharmaceutical companies disclosed that they had at least one racially or ethnically diverse director, whereas a notable number of large-cap biopharmaceutical boards did not disclose having any racially or ethnically diverse directors. Moreover, most mega-cap pharmaceutical companies have previously publicly disclosed the racial composition of their boards. Many large-cap pharmaceutical companies, however, have historically refrained from disclosing the racial make-up of their boards.

Additionally, greater overall director diversity among mega-cap biopharmaceutical companies tends to correlate to more opportunities for racial/ethnic minorities to assume leadership positions on boards: 77.8% of mega-cap biopharmaceutical companies have committee chairs that identify as ethnic/racial minorities, but only 33.3% of large-cap biopharmaceutical companies have appointed racial/ethnic minorities to such positions.

We expect both mega-cap and large-cap pharmaceutical companies to prioritize increasing board diversity in the coming year. Some will likely to choose to expand the size of the board to accommodate diverse members, while others will use board refreshment tools to nominate more diverse candidates.

B. FORMAL DIVERSITY POLICIES AND OVERSIGHT

Biopharmaceutical companies are steadily formalizing their commitment to diversity by expressly charging their boards and board committees with overseeing initiatives and policies related to diversity, equity and inclusion. Biopharmaceutical companies which concentrate responsibility for diversity at the committee level tend to grant oversight authority to either the Nominating & Governance Committee or Compensation Committee.

So-called “Rooney Rule” policies are formal diversity policies, often situated in a company’s Corporate Governance Guidelines or Committee Charters, that provide that the board will consider female and minority candidates for all open positions. The majority of mega-cap biopharmaceutical companies (55.6%) have established Rooney Rule policies in recent years. This trend has been slightly less pronounced among large-cap biopharmaceutical companies, 44.5% of which have Rooney Rule policies in place.

C. RELEASE OF EEO-1 DATA

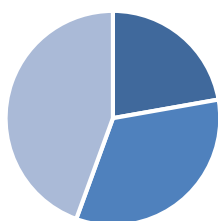
All private sector employers with over 100 employees are required to submit certain demographic workforce data to the U.S. Equal Employment Opportunity Commission in annual EEO-1 filings.⁹ These filings include information regarding the ethnic, racial and gender identity of various categories of employees, such as executive officers, sales workers, administrator support and laborers. Investors and key stakeholders have

increasingly called on public companies to publicly release EEO-1 data as a means of holding companies accountable for their diversity-related goals. Over the past year, several mega-cap biopharmaceutical companies have either released, or committed to releasing, their EEO-1 data. On the other hand, only one large-cap biopharmaceutical company has currently committed to disclosing this information.

IV. TRENDS IN SHAREHOLDER RIGHTS

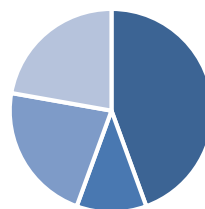
A. SPECIAL MEETING RIGHTS

Special Meeting Rights Among Mega-Cap Biopharma Companies



- No Special Meeting Rights
- 10-20% Holding Requirement
- 20+% Holding Requirement

Special Meeting Rights Among Large-Cap Biopharma Companies



- No Special Meeting Rights
- 10-20% Holding Requirement
- 20-25% Holding Requirement
- 50%+ Holding Requirement

In recent years, several biopharmaceutical companies have amended their governance documents to allow shareholders owning a specified percentage of shares to call special meetings. This trend is slightly more pronounced among mega-cap biopharmaceutical companies, most of which grant some form of special meeting rights to shareholders. There is, however, a great deal of variability in the scope of the right granted. Some mega-cap biopharmaceutical companies only require 10% of shares to call a special meeting, while other mega-cap biopharmaceutical companies set the threshold at 25%. There is similar variability among large-cap biopharmaceutical companies, although some of these companies set the threshold as high as 50.1%, making the ability to call special meetings a less accessible tool for shareholders.

B. WRITTEN CONSENT RIGHTS

A minority of biopharmaceutical companies have granted shareholders the right to act by written consent, allowing investors to act outside the context of a formal shareholder meeting. Notably, some biopharmaceutical companies restrict this right by only allowing shareholders to act by written consent unanimously, which is an illusory right for public company shareholders. Institutional investors tend to be less focused on securing the right to act by written consent if a company provides shareholders with the ability to call special meetings. However, in 2021 some frequent shareholder proponents have renewed their calls for written consent rights on the basis that companies conducted virtual meetings during the COVID-19 pandemic in a manner that inhibited shareholder discourse.

C. PROXY ACCESS

Proxy access rights enable shareholders to include their director nominees on a company's proxy card. Proxy access rights are nearly ubiquitous among mega-cap biopharmaceutical companies, with shareholders generally having the right to nominate at least 20% of the board. Although several large-cap biopharmaceutical companies have followed suit in recent years, less than half of large-cap biopharmaceutical companies currently offer proxy access rights to their shareholders. Only about 40% of S&P 1500 companies, however, currently include proxy access provisions in their Bylaws,¹⁰ suggesting that large-cap biopharmaceutical companies grant proxy access rights with a similar frequency as non-industry peers.

D. SAY ON PAY APPROVAL

As required by Section 14A of the Securities Exchange Act of 1934, all public biopharmaceutical companies provide shareholders with the opportunity to approve the compensation of executive officers, on an advisory basis, by means of an annual "say on pay" vote. According to the Harvard Law School Forum on Corporate Governance, shareholders of the Russell 3000 companies approved "say on pay" proposals at an average rate of 91% in 2020.¹¹ Exceeding this overall average, shareholders of both mega-cap and large-cap biopharmaceutical companies approved executive compensation packages at an average rate of approximately 93%. Only one mega-cap biopharmaceutical company and two large-cap biopharmaceutical companies failed to obtain an approval rating of over 90%, but all such proposals received the requisite votes to pass.

V. TRENDS IN CORPORATE DISCLOSURES

A. CORPORATE SOCIAL RESPONSIBILITY REPORTS

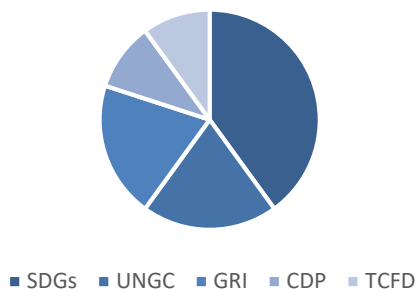
Percentage of Mega-Cap Biopharmaceutical That Release CSR Reports	Percentage of Large-Cap Biopharmaceutical That Release CSR Reports
77.78%	55.56%

Over the course of the past several years, investors have called on public companies to provide more transparent reporting on environmental, social and governance (ESG) metrics. Corporate social responsibility (CSR) reports have become a popular means of responding to such shareholder demands, in part because CSR reports are not subject to the same vigorous regulatory standards as reports filed with the Securities and Exchange Commission. Typically disclosed on company websites, CSR reports provide overviews of assorted ESG-related topics, ranging from energy usage, employee volunteer work and governance policies. Although there is no standardized method of CSR reporting, companies often voluntarily align their CSR reports with third-party standards, such as the United Nations Sustainable

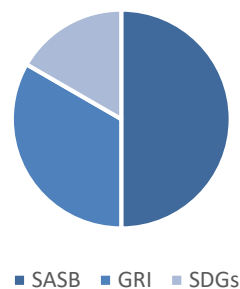
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Development Goals (SDGs) or the Sustainability Accounting Standards Board (SASB) metrics, to more easily compare performance against benchmarks.

Third-Party CSR Reporting Metrics Used by Mega-Cap Biopharma Companies



Third-Party CSR Reporting Metrics Used by Large-Cap Biopharma Companies



Mega-cap biopharmaceutical companies are more likely to release CSR reports than large-cap peers, with approximately 78% of mega-cap companies currently engaging in, or committing to engage in, such reporting, as compared to only 56% of large-cap biopharmaceutical companies. Moreover, the most popular third-party reporting metrics among mega-cap biopharmaceutical companies are the SDGs, whereas large-cap biopharmaceutical companies slightly favor the SASB metrics. Yet, the manner in which CSR reports are constructed differs even among those companies that utilize the same reporting metrics. Although some biopharmaceutical companies will provide only a high-level overview of their performance against select third-party metrics, other biopharmaceutical companies issue lengthy CSR reports that provide additional color to third-party metrics.

B. PAY EQUITY STATISTICS

In CSR reports or annual proxy statements, biopharmaceutical companies sometimes provide a general statement emphasizing their commitment to pay equity across race, ethnicity and gender. Such companies will often further report that they regularly conduct studies that affirm pay equity across these demographics. However, biopharmaceutical companies have generally recommended that shareholders vote against shareholder proposals seeking more detailed statistics regarding pay equity. Moreover, those companies that have conducted formal pay equity studies have rarely released the results. In 2020, one mega-cap biopharmaceutical company discouraged shareholders from voting in favor of a shareholder proposal that would have required the company to report on the “global median gender pay gap, including associated policy, reputational, competitive, and operational risks, and risks related to recruiting and retaining female talent.”¹² While biopharmaceutical companies have generally sidestepped such disclosures, boards should consider how they might respond to similar shareholder proposals in the near future.

CONCLUSION

Mega-cap and large-cap biopharmaceutical companies currently have governance structures that align with S&P 500 trends to varying degrees. Both mega-cap and large-cap biopharmaceutical companies should continue to evaluate best practice corporate governance trends and tailor their governance structures to fit the particular needs of their companies and investors.

* * *

ANNEX A

BIOPHARMACEUTICAL COMPANIES REVIEWED

MEGA-CAP BIOPHARMA COMPANIES

- Abbott Laboratories
- AbbVie
- Amgen
- Bristol-Myers Squibb
- Eli Lilly
- Gilead Sciences
- Johnson & Johnson
- Merck
- Pfizer

LARGE-CAP BIOPHARMA COMPANIES

- Alexion
- Alnylam
- Beigene
- Biogen
- Biomarin
- Catalent
- Horizon Therapeutics
- Novavax
- Seagen

ENDNOTES

- 1 To evaluate current governance trends in the biopharmaceutical industry, we reviewed the recent proxy statements, annual reports and website disclosures of a representative sample of nine mega-cap biopharmaceutical companies and nine large-cap biopharmaceutical companies. A list of the specific companies reviewed is provided in **Annex A** to this alert.
- 2 SPENCER STUART, 2020 U.S. SPENCER STUART BOARD INDEX (2020), <https://www.spencerstuart.com/research-and-insight/us-board-index>
- 3 SPENCER STUART, 2019 U.S. SPENCER STUART BOARD INDEX (2019), https://www.spencerstuart.com/-/media/2019/ssbi-2019/us_board_index_2019.pdf
- 4 SPENCER STUART, 2020 U.S. SPENCER STUART BOARD INDEX (2020), <https://www.spencerstuart.com/research-and-insight/us-board-index>
- 5 One of the large-cap biopharmaceutical companies examined has not disclosed the number of board meetings held in 2020 as of the date of the publication of this alert.
- 6 *Id.*
- 7 *Id.*
- 8 Jeff Green, *Women Gained 22 Seats on S&P 500 Boards in January Surge*, BLOOMBERG (Feb. 23, 2021), <https://www.bloomberg.com/news/articles/2021-02-23/women-gained-22-seats-on-s-p-500-boards-in-january-surge>
- 9 *EEO-1 Data Collection*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (May 5, 2021), <https://www.eeoc.gov/employers/eo-1-data-collection>
- 10 *Takeover Defense Comparison Statistics*, DEAL POINT DATA (May 5, 2021), <https://www.dealpointdata.com/rj?vb=Action.cn&pg=sMain&app=corp>
- 11 Todd Sirras et. al, *2020 Say on Pay & Proxy Results*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Mar. 13, 2021), <https://corpgov.law.harvard.edu/2021/03/13/2020-say-on-pay-proxy-results/>
- 12 See Pfizer Inc., Proxy Statement for 2020 Annual Meeting of Shareholders (Schedule 14A) (Mar. 13, 2020)

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