

Divergent SEC Staff Decisions on Independent Chair Proposals

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Is there a difference between a shareholder proposal that asks that the Board's chairman be an independent director as defined by the rules of the New York Stock Exchange and who has not previously served as an executive, and one that asks that the chairman be an independent director (by the standard of the New York Stock Exchange), who has not previously served as an executive?

Yes, according to the SEC Chief Counsel's office in its decisions on three recent proposals. The Staff last year declined to permit the exclusion of [GE's proposal](#), and other similar proposals which requested independent chairs by reference to the "standard of the New York Stock Exchange," who were not former executives. The Staff has now, however, concurred with KeyCorp, Chevron and Ashford Hospitality Trust on three proposals that link director independence "as defined by the rules of the New York Stock Exchange." All of the companies had argued that the proposals were vague and misleading under Rule 14a-8(i)(3).

Like GE and other similar proposals that were required to be included in proxy statements last year, the proposal in [KeyCorp](#) also requested that the chairman not have previously served as an executive. The proposals in [Chevron](#) and [Ashford Hospitality Trust](#), which faced a binding bylaw proposal, did not include the prohibition on former executives. Those proponents later attempted to change their proposals to mirror the ones that used the "New York Stock Exchange standard" instead, but the revisions were rejected as being akin to an untimely second proposal.

Unlike the previous year, the Staff went to unusual lengths to explain its position in each of these three no-action letters, noting that the proposals referred to the "rules of the New York Stock Exchange" or the "New York Stock Exchange listing standards" for the definition of an "independent director," but does not provide information about what this definition means, when the definition is a central aspect of the proposal. The Staff pointed to its Legal Bulletin 14G, which indicated that they consider only the information contained in the proposal and supporting statement and decide whether, based on that information, shareholders and the company can determine what actions the proposal seeks. According to the Staff response, because the proposal does not provide information about what the New York Stock Exchange's definition of "independent director" means, they believe shareholders would not be able to determine with any reasonable certainty exactly what actions or measures the proposal requires.

[Verizon](#) faced a proposal that contained a lengthy list of relationships that would disqualify a chair from being deemed independent, without mentioning any stock exchanges. The Staff disagreed with Verizon's claim that the myriad of requirements could be subject to conflicting and confusing interpretations.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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