

limiting the scope of the proposal.²²³ Furthermore, commenters requested clarification of the terms "external auditors,"²²⁴ "internal auditors,"²²⁵ "affiliated with,"²²⁶ and "executives."²²⁷ One commenter supported this proposal.²²⁸

With respect to the Nasdaq proposal on the same topic, one commenter suggested limiting the scope of the proposal by excluding from its prohibition partners or employees that provide only a minimal amount of work on the company's audit or who are brought in to assist on technical or industry-specific issues.²²⁹

Definition of Family Member

In general, many commenters criticized the proposed NYSE and Nasdaq definitions of family members for being too broad and impractical to apply.²³⁰ One commenter expressed its preference for NYSE's proposed definition,²³¹ and another commenter stated that NYSE's proposed definition is reasonable.²³²

Look-Back Periods and Their Phase-In

With respect to the look-back periods proposed by the NYSE and Nasdaq to disqualify former employees, auditor personnel, interlocking directors and their families, as applicable, for a specified time, two commenters argued that no look-back periods were necessary.²³³ One of these commenters recommended that Nasdaq clarify that the look-back would apply to any time within the three-year period, not the

entire three-year period.²³⁴ Two commenters²³⁵ approved of NYSE's proposal to phase-in the look-back periods but, along with other commenters,²³⁶ argued that a five-year look-back period would be too long. Some commenters argued that Nasdaq's look-back provisions should be phased-in as in the NYSE's proposal.²³⁷

Affiliates

With respect to how NYSE proposes to define independent directors, two commenters asked, absent other disqualifying factors, if a director that sits on the board of a company's affiliate could be an independent director with respect to that company.²³⁸

Application to Investment Companies

With respect to how Nasdaq proposes to define independent director, one commenter stated that whether a director of an investment company is independent should be determined exclusively under the provisions of section 2(a)(19) of the Investment Company Act.²³⁹

Banks and Banking Transactions

Several commenters stated their concern about the impact of both the NYSE and Nasdaq proposals on small community banks and the disqualification of otherwise independent directors due to ordinary course of business banking transactions.²⁴⁰ These commenters recommended that Nasdaq and NYSE amend their proposals accordingly. However, one of these commenters expressed its support for the NYSE proposal and represented that members of its corporate governance task force (which consists of representatives from both large and small, public and non-public banking organizations) were confident that the majority of directors sitting on the boards of banking organizations impacted by these listing

standards would be able to satisfy the proposed requirements.²⁴¹

Charities

One commenter argued that both companies and the charities they support would benefit from a bright line uniform rule that would apply to all charitable contributions without regard to the market on which a company is traded. The commenter stated its belief that Nasdaq's Business Relationship Provision would be a reasonable standard for assessing the effect of charitable contributions on a director's independence, and expressed its concern that NYSE-listed companies would be more likely to discontinue giving to charities than to expend the time and effort necessary to craft the categorical standards that would be needed under the NYSE proposal.²⁴²

Other Comments on Independence Proposals

Some commenters recommended strengthening the independence standards. For example, two commenters recommended that a former CEO should never be eligible to serve as an independent director.²⁴³ One of these commenters argued that the board should be required to take into account a director's relationship with senior management and other directors in making a determination of independence.²⁴⁴ Another commenter recommended barring investment institutions from having board seats in companies they have investments in.²⁴⁵ Three commenters recommended adding considerations such as ethnic and gender diversity of the board to the discussion of independence.²⁴⁶

With respect to the Nasdaq proposal, one commenter suggested defining "executive officer"—which appear in the Nasdaq Payments Provision, the Nasdaq Family of Executive Officer Provision, and the Nasdaq Business Relationship Provision—as defined in Rule 16a-1(f) of the Exchange Act, to prevent these proposals from disqualifying employees who have no policy-making role at the corporate level.²⁴⁷ The same commenter also recommended clarifying the maning of

²²³ See Aetna NYSE Letter, Exxon NYSE Letter, Wells Fargo NYSE Letter, Morrison Cohen NYSE Letter, and New York State Bar NYSE Letter.

²²⁴ See Mirant NYSE Letter, America's Community Bankers NYSE Letter, and Computer Sciences NYSE Letter.

²²⁵ See America's Community Bankers NYSE Letter.

²²⁶ *Id.*

²²⁷ See Aetna NYSE Letter.

²²⁸ See American Bankers Association NYSE Letter.

²²⁹ See America's Community Bankers Nasdaq Letter.

²³⁰ See Intel Nasdaq Letter, People's Bank Nasdaq Letter, America's Community Bankers Nasdaq Letter, American Bankers Association Nasdaq Letter, Independent Community Bankers Nasdaq Letter, Kreider Nasdaq Letter, Mirant NYSE Letter, American Society of Corporate Secretaries NYSE Letter, America's Community Bankers NYSE Letter, Winston & Strawn NYSE Letter, Computer Sciences NYSE Letter, Aetna NYSE Letter, Exxon NYSE Letter, Wells Fargo NYSE Letter, New York State Bar NYSE Letter, and Rockwell NYSE Letter.

²³¹ See American Bankers Association Nasdaq Letter.

²³² See America's Community Bankers NYSE Letter.

²³³ See America's Community Bankers Nasdaq Letter and Independent Community Bankers Nasdaq Letter.

²³⁴ See America's Community Bankers Nasdaq Letter.

²³⁵ See America's Community Bankers NYSE Letter and American Bankers Association NYSE Letter.

²³⁶ See National Venture NYSE Letter and Independent Community Bankers NYSE Letter.

²³⁷ See American Bankers Association Nasdaq Letter, Committee on Securities Regulation Nasdaq Letter, Whitney Nasdaq Letter, and Independent Community Bankers Nasdaq Letter.

²³⁸ See Cleary NYSE Letter and LeBoeuf NYSE Letter.

²³⁹ See Investment Company Institute Nasdaq Letter.

²⁴⁰ See Independent Community Bankers NYSE Letter, American Bankers Association NYSE Letter, Wachtell NYSE Letter, America's Community Bankers NYSE Letter, Whitney Nasdaq Letter, American Bankers Association Nasdaq Letter, America's Community Bankers Nasdaq Letter, and Independent Community Bankers Nasdaq Letter.

²⁴¹ See American Bankers Association NYSE Letter.

²⁴² See Council on Foundations Nasdaq Letter and Council on Foundations NYSE Letter.

²⁴³ See TIAA-CREF NYSE Letter and Coleman NYSE Letter.

²⁴⁴ See TIAA-CREF NYSE Letter.

²⁴⁵ See Hermann E-mail, Social Investment NYSE Letter, Ethical Funds NYSE Letter, and Calvert NYSE Letter.

²⁴⁶ See Social Investment NYSE Letter, Ethical Funds NYSE Letter, and Calvert NYSE Letter.

²⁴⁷ See Intel Nasdaq Letter.