



DIVISION OF
CORPORATION FINANCE

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

April 22, 2024

Ning Chiu
Davis Polk & Wardwell LLP

Re: Kyndryl Holdings, Inc. (the "Company")
Incoming letter dated March 13, 2024

Dear Ning Chiu:

This letter is in response to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by Kenneth Steiner for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

The Proposal asks the Company to take all the steps necessary to reorganize the board of directors in order that each director stands for election at each annual meeting.

There appears to be some basis for your view that the Company may exclude the Proposal under Rule 14a-8(i)(10). In this regard, we note that the Company has already amended its governing documents to phase in a declassification of the board and annual election of directors. Accordingly, we will not recommend enforcement action to the Commission if the Company omits the Proposal from its proxy materials in reliance on Rule 14a-8(i)(10).

Copies of all of the correspondence on which this response is based will be made available on our website at <https://www.sec.gov/corpfin/2023-2024-shareholder-proposals-no-action>.

Sincerely,

Rule 14a-8 Review Team

cc: John Chevedden

March 13, 2024

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Ladies and Gentlemen:

On behalf of Kyndryl Holdings, Inc., a Delaware corporation (the “**Company**”), and in accordance with Rule 14a-8(j) under the Securities Exchange Act of 1934, as amended (the “**Exchange Act**”), we are filing this letter with respect to the shareholder proposal (the “**Proposal**”) submitted by Kenneth Steiner (the “**Proponent**”) for inclusion in the proxy materials the Company intends to distribute in connection with its 2024 Annual Meeting of Stockholders (the “**2024 Proxy Materials**”). The Proposal is attached hereto as Exhibit A.

We hereby request confirmation that the Staff of the Division of Corporation Finance (the “**Staff**”) will not recommend any enforcement action if, in reliance on Rule 14a-8, the Company omits the Proposal from the 2024 Proxy Materials.

In accordance with relevant Staff guidance, we are submitting this letter and its attachments to the Staff through the Staff’s online Shareholder Proposal Form. In accordance with Rule 14a-8(j), we are simultaneously sending a copy of this letter and its attachments to the Proponent as notice of the Company’s intent to omit the Proposal from the 2024 Proxy Materials. This letter constitutes the Company’s statement of the reasons it deems the omission of the Proposal to be proper. We have been advised by the Company as to the factual matters set forth herein.

THE PROPOSAL

The Proposal states:

RESOLVED, shareholders ask that our Company take all the steps necessary to reorganize the Board of Directors in order that each director stands for election at each annual meeting.

REASON FOR EXCLUSION OF THE PROPOSAL

The Company believes that the Proposal may be properly omitted from the 2024 Proxy Materials pursuant to Rule 14a-8(i)(10) because the Company has already substantially implemented the Proposal.

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The Proposal May Be Excluded under Rule 14a-8(i)(10) Because the Company Has Substantially Implemented the Proposal.

1. Rule 14a-8(i)(10) Background.

Rule 14a-8(i)(10) permits a company to exclude a shareholder proposal if the company has already “substantially implemented” the proposal. The Staff has stated that the purpose of the predecessor provision to Rule 14a-8(i)(10) was “to avoid the possibility of shareholders having to consider matters which have already been favorably acted upon by management.” *Exchange Act Release No. 12598* (July 7, 1976). The Staff later stated that a formalistic application of the rule requiring full implementation “defeated [the rule’s] purpose,” and then adopted a revised interpretation of the rule to permit the omission of proposals that had been “*substantially* implemented.” (emphasis added) *Exchange Act Release No. 20091* (Aug. 16, 1983) and *Exchange Act Release No. 40018*, at n.30 (May 21, 1998).

The Staff has noted that “a determination that the company has substantially implemented the proposal depends upon whether [the company’s] particular policies, practices and procedures compare favorably with the guidelines of the proposal.” *Texaco, Inc.* (avail. Mar. 28, 1991). The Staff has consistently taken the position that a proposal has been “substantially implemented” and may be excluded under Rule 14a-8(i)(10) when a company can demonstrate that it has already taken actions to address the underlying concerns and essential objectives of the proposal. See, e.g., *Best Buy Co., Inc.* (avail. April 22, 2022); *Eli Lilly and Co.* (avail. Jan. 8, 2018); *Korn/Ferry International* (avail. July 6, 2017); *NETGEAR, Inc.* (avail. Mar. 31, 2015); *Pfizer, Inc.* (avail. Jan. 11, 2013, recon. Mar. 1, 2013); *Exelon, Inc.* (avail. Feb. 26, 2010); *Hewlett-Packard Co.* (avail. Dec. 11, 2007).

The text of the Proposal makes clear that the Proposal’s essential objective is to remove the classified board structure contained in the Company’s Amended and Restated Certificate of Incorporation (the “**Charter**”). The Staff has concurred that actions by boards of directors to declassify their structures substantially implements a shareholder declassification proposal. See, e.g., *Ryder System, Inc.* (avail. Feb. 11, 2015) (concurring with the exclusion of a shareholder declassification proposal where shareholders had already approved a declassification amendment, to be implemented over a three-year period). The Staff has also consistently concurred in excluding similar proposals where boards of directors have recommended and submitted amendments to their certificates of incorporation for shareholder approval at the next meeting. See, e.g., *Zoetis Inc.* (avail. March 30, 2022); *Marathon Petroleum Corporation* (avail. Feb. 26, 2021); *Hecla Mining Company* (avail. Mar. 1, 2019); *Eli Lilly and Company* (avail. Feb. 22, 2019); *Costco Wholesale Corp.* (avail. Nov. 16, 2018); *PPG Industries, Inc.* (avail. Jan. 23, 2018); *AbbVie Inc.* (avail. Dec. 22, 2016); *St. Jude Medical, Inc.* (avail. Feb. 3, 2015); *LaSalle Hotel Properties* (avail. Feb. 27, 2014); *AmerisourceBergen Corporation* (avail. Nov. 15, 2010); *Textron Inc.* (avail. Jan. 21, 2010); *Del Monte Foods Company* (avail. June 3, 2009); *Visteon Corp.* (avail. Feb. 15, 2007). This is the case even though the shareholder proposals either suggested or required a one-year implementation period to move to annual elections, while the company proposed to adopt phased-in implementation to declassify its board structure over a three-year period, in order to permit directors to serve out their terms.

2. Actions By the Company Have Substantially Implemented the Proposal.

The Company has already taken the necessary steps to declassify its board structure to move to annual election of directors, as evidenced by their existing governance documents. Section 5.2 of the Company’s Charter, attached hereto as Exhibit B, provides that all directors elected at or after the 2025 Annual Meeting of Stockholders shall be elected on an annual basis. The Charter further provides that each director elected at the 2022, 2023 or 2024 Annual Meeting of Stockholders shall hold office for a three-year term. This means that effective as of the conclusion of the 2027 Annual Meeting of Stockholders, the declassification will *automatically* have been implemented and the Board will no longer be classified. At the 2027 Annual

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Meeting of Stockholders and each annual meeting thereafter, all directors will be elected to hold office for a term expiring at the next annual meeting following their election. This result is consistent with the precedents noted above where companies had shareholders approve an amendment to their governing documents in the year they received the shareholder proposals, and then began the declassification process at the next annual meeting of stockholders.

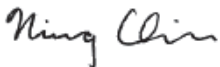
The Proposal requests that the Company take the steps necessary to implement annual director elections, and allows the option to phase in the Proposal. The first paragraph of the supporting statement states: "Although our management can adopt this proposal topic in one-year and one-year implementation is a best practice, this proposal allows the option to phase it in." This course of action is precisely what the Company's Charter already requires, in terms of having a phase-in approach to declassify the Company's board. As a result, we believe that in fact we have fully implemented the essential objective of the Proposal, which is to have the board of directors be annually elected. As noted above, the Staff has consistently concurred in the exclusion of declassification proposals where a company's board acts to phase in annual elections over a period of years, even where the proposal suggested or required declassification within one year. The case for exclusion of the Proposal here is even stronger, as the Company's Charter already implements the declassification requested by the Proposal, as was the case in *Ryder System, Inc.*

Because the Company has already taken the steps necessary to declassify the Board as evidenced by the Company's existing Charter, and because the earliest time the Proposal can properly be implemented coincides exactly with the Company's timetable for phasing in the declassification, the Company has substantially implemented the Proposal. Accordingly, the Company believes that it has satisfied the essential objective of the Proposal and the Proposal is moot. As such, pursuant to Rule 14a-8(i)(10), we respectfully request that the Staff concur in our view that the Proposal may be excluded from the 2024 Proxy Materials.

CONCLUSION

For the reasons set forth above, the Company believes that the Proposal may be excluded from its 2024 Proxy Materials pursuant to Rule 14a-8(i)(10).

Respectfully yours,



Ning Chiu

Attachment

cc w/ att: Evan Barth, Kyndryl Holdings, Inc.
John Chevedden, representative of the Proponent

Proposal

Proposal 4 – Elect Each Director Annually

RESOLVED, shareholders ask that our Company take all the steps necessary to reorganize the Board of Directors in order that each director stands for election at each annual meeting.

Although our management can adopt this proposal topic in one-year and one-year implementation is a best practice, this proposal allows the option to phase it in.

Classified Boards like the Kyndryl Holdings Board have been found to be one of 6 entrenching mechanisms that are negatively related to company performance according to “What Matters in Corporate Governance” by Lucien Bebchuk, Alma Cohen and Allen Ferrell of the Harvard Law School.

Arthur Levitt, former Chairman of the Securities and Exchange Commission said, “In my view it’s best for the investor if the entire board is elected once a year. Without annual election of each director shareholders have far less control over who represents them.”

A total of 79 S&P 500 and Fortune 500 companies, worth more than \$1 trillion, have adopted this important proposal topic since 2012. Annual election of each director could make directors more accountable, and thereby contribute to improved performance and increased company value at virtually no extra cost to shareholders. Thus it was not a surprise that this proposal topic won more than 96%-support at both Centene Corporation and Teleflex in 2021.

Annual election of each director gives shareholders more leverage if the Board of Directors performs poorly. For instance if the Board of Directors approves excessive executive pay or is poorly incentivized executive pay shareholders can soon vote against the Board’s executive pay committee members instead of potentially waiting 3 long years under the current setup.

With the current 3-year terms for directors a director who is routinely absent from Board of Directors meetings could escape a wake-up shareholder vote for 3 long years. Thus the outdated 3-year terms for Kyndryl Holdings directors unfortunately opens the gate for poor director performance and is due for a change.

Please vote yes:

Elect Each Director Annually – Proposal 4

Section 5.2 of the Charter

5.2 Classified Board. The Board (other than those directors elected by the holders of any series of Preferred Stock pursuant to the terms of any Preferred Stock Designation (the “Preferred Stock Directors”)) shall be divided into three classes, as nearly equal in number as possible, designated Class I, Class II and Class III. If the number of directors has changed, any increase or decrease shall be apportioned among the classes so as to maintain the number of directors in each class as nearly equal as possible, and any additional director of any class elected to fill a vacancy resulting from an increase in such class shall hold office for a term that shall coincide with the remaining term of that class. The initial assignment of directors to each such class shall be made by the Board of Directors. The term of office of the initial Class I directors shall expire at the 2022 annual meeting of stockholders, the term of office of the initial Class II directors shall expire at the 2023 annual meeting of stockholders and the term of office of the initial Class III directors shall expire at the 2024 annual meeting of stockholders. Each director elected at the 2022, 2023 or 2024 annual meeting of stockholders shall belong to the same class as the director whose term shall have then expired and who is being succeeded by such director and shall hold office for a three-year term and until his or her successor shall have been duly elected and qualified or until his or her earlier resignation or removal. Commencing with the 2025 annual meeting of stockholders and at each annual meeting thereafter, each director up for election at such meeting shall be elected annually and shall hold office until the next annual meeting of stockholders and until his or her respective successor shall have been duly elected and qualified or until his or her earlier resignation or removal. Pursuant to such procedures, effective as of the conclusion of the 2027 annual meeting of stockholders, the Board of Directors will no longer be classified under Section 141(d) of the DGCL and directors shall no longer be divided into three classes. The election of directors need not be by written ballot.

JOHN CHEVEDDEN

March 15, 2024

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

1 Rule 14a-8 Proposal
Kyndryl Holdings, Inc. (KD)
Annual Election of Each Director
Kenneth Steiner
538531

Ladies and Gentlemen:

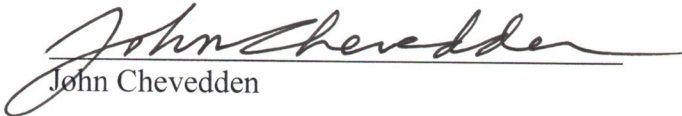
This is a counterpoint to the March 13, 2024 no-action request.

The no action request says that that the Company has already taken the necessary steps to declassify the Board but it fails to state when this was done. This may have been done years ago.

Kyndryl Holdings has not addressed the likelihood that the Board could reverse declassifying the Board at the last minute before declassification would start to take effect.

Thus the Charter could be changed before the 2025 annual meeting.

Sincerely,


John Chevedden

cc: Kenneth Steiner

Evan Barth

[KD: Rule 14a-8 Proposal, December 8, 2023]
[This line and any line above it – *Not* for publication.]

Proposal 4 – Elect Each Director Annually

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Please vote yes:

Elect Each Director Annually – Proposal 4

[The line above – *Is* for publication. Please assign the correct proposal number in the 2 places.]