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Disney's Victory in 2024 Proxy Contest: Lessons for Boards and Practitioners

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On April 3, 2024, The Walt Disney Company ("Disney") successfully won a proxy contest launched by Nelson Peltz's Trian Fund Management LP ("Trian") and Blackwells Onshore I LLC and affiliates ("Blackwells") at its 2024 Annual Shareholders Meeting. The outcome of this high-profile contest offers several insights for boards and practitioners on how to prepare for and respond to activist challenges in today's corporate governance landscape. In this article, we highlight some of the key takeaways from Disney's 2024 Annual Meeting.

I. UNIVERSAL PROXY RULES MIGHT MAKE IT HARDER FOR DISSIDENTS TO WIN A BOARD SEAT

Prior to the universal proxy rules going into effect, due to the use of separate proxy cards by the company and dissidents and the applicable proxy rules, it was common practice for dissident shareholders nominating a "short slate" of nominees to "round out" their slates by committing to vote any proxies they held for the company's nominees other than certain company nominees whose names were listed on the dissident's proxy card.[1] As a result, it was not possible for a shareholder to vote for certain company nominees if the shareholder used the dissident proxy card,[2] which ensured for the dissident that at least certain company nominees would not receive any votes for their election if a shareholder used the dissident's proxy card. Under the universal proxy rules, all nominees are required to be listed on each proxy card, so a shareholder's use of the dissident proxy card by itself would not guarantee that certain company nominees would not also receive votes from that shareholder. A shareholder voting for two out of two nominees of the dissident could properly complete a proxy card by voting for all but any two company nominees, so, if shareholders supportive of the dissident voted for company nominees across a greater number of company nominees than could be voted for on the dissident's proxy card under the previous proxy rules, there is the potential to reduce the likelihood that the dissident's nominees receive sufficient votes to be elected.

Under the plurality voting standard that applied in Disney's proxy contest, the nominees that received the greatest number of votes for their election would be elected to the available board seats.[3] Notwithstanding the historical practice of dissidents rounding out their slates by committing to vote for enough company nominees to equal the number of board seats up for election, the best strategy for a dissident is for shareholders to vote for all the dissident's nominees and not vote for any other nominees. This "undervote" strategy would result in fewer votes for every company nominee, thereby making it easier for dissident nominees to be elected under a plurality voting standard. Nevertheless, Trian and Blackwells took different approaches in how they requested Disney shareholders to vote. Trian's voting recommendation was that shareholders vote for Trian's two nominees and withhold on two named Disney nominees (discussed below) and all Blackwells nominees. Trian stated that it made no voting recommendation regarding the other 10 Disney nominees, whom it referred to as "Acceptable Company Nominees".[4] Blackwells was more direct in its approach and asked that shareholders vote for only its three nominees and withhold on all Disney nominees and Trian nominees.

II. UNIVERSAL PROXY RULES ARE BRINGING INCREASED FOCUS ON THE CREDENTIALS AND EXPERIENCE OF ALL DIRECTOR NOMINEES

Trian's proxy contest at Disney reflects the consistent strategy of dissident shareholders nominating a "short slate" and highlights the increased focus of companies, dissident shareholders and voting shareholders on the credentials and experience of individual nominees. Trian publicly targeted incumbent Disney directors Michael Froman and Maria Elena Lagomasino, advocating that Disney shareholders withhold votes from them and instead vote for Peltz himself and Disney's former Chief Financial Officer, James Rasulo. Trian's targeting of Lagomasino was rooted in her role as the chairperson of Disney's compensation committee, which, he argued, was responsible for having "overseen a number of misaligned compensation practices." With respect to Froman, Trian argued that he had no experience as a public company director outside of Disney and lacked experience in fields related to Disney's businesses. However, Rasulo, who had left Disney in 2015 and was touted by Trian for his previous CFO experience at Disney, was alleged by Disney to have an "outdated perspective" by being out of the company for too long and Peltz was alleged to have insufficient media experience. With each side combing through the experience and credentials of the other's candidates, though Trian was ultimately unsuccessful, Froman and Lagomasino received the lowest support of Disney's shareholders—of the 1,264,705,371 shares of Disney common stock represented at the 2024 Annual Meeting,[5] 1,041,678,945 (or ~82%) supported Froman and 748,599,867 (or ~59%) supported Lagomasino. By contrast, the closest other incumbent directors, Mark Parker and Derica Rice, were supported by holders of ~83% and ~86% of Disney shares, respectively. Trian's targeting of Froman and Lagomasino likely resulted in their receiving the least amount of support from shareholders, and, had Trian not targeted specific incumbent directors, shareholders may have withheld votes from other, varying Disney nominees. As the variation among the incumbent nominees that shareholders vote for increases, the likelihood for Trian's nominees to ultimately overtake any two particular Disney nominees would have decreased. This dynamic supports the trend in continued targeting by dissidents of individual incumbent nominees and was at play during Carl Icahn's proxy contest at Illumina, Inc. ("Illumina") in May 2023: Carl Icahn targeted three incumbent directors, Francis deSouza, Robert Epstein and John Thompson, and those three received the lowest amount of support of Illumina's nominees, resulting in Icahn securing one seat on Illumina's board.

This pattern of publicly targeting nominees and focusing on their credentials and experience highlights the importance of boards being mindful of the potential vulnerability of directors who may be perceived as "weaker" or "less qualified" by shareholders or whose performance in their roles at the company, such as the CEO or the chair of the compensation committee, is fairly subject to criticism. Boards should give thought to the credentials of the incumbent directors and consider how to best reflect their qualifications and contributions in the proxy materials and communications, while distinguishing those of dissident nominees.

III. BOARDS SHOULD CONSIDER USING A VARIETY OF CREATIVE TOOLS TO ENGAGE WITH THEIR SHAREHOLDERS, INCLUDING BY WELL-EXECUTED USE OF VIDEOS OR OTHER MEDIA AS WELL AS USE OF ENDORSEMENTS BY CELEBRITY SHAREHOLDERS

Disney has a significant retail shareholder base, which accounted for 33.1% of its shares—which is higher than the average of 31.5% for publicly traded companies in 2023. Approximately 75% of Disney's retail shareholders backed the company's slate, which was in line with historic trends of retail shareholders supporting management's nominees. As a result, retail investors can be a valuable source of support for boards facing activist situations in the universal proxy rule era.

Disney engaged its retail investors by leveraging influential investors, such as George Lucas, who received 37.1 million shares of Disney stock as part of Disney's purchase of Lucasfilm in 2012 and who publicly endorsed Disney's board. Disney also used its website, www.votedisney.com, to provide updates on its progress towards the strategic plan it began implementing in the wake of Trian's first proxy contest in 2023 and by providing detailed instructions on how retail investors could vote at the 2024 Annual Meeting, including by leveraging its media resources to produce and advertise a video featuring Disney characters that instructs Disney shareholders on how to vote.[6] In this video, Disney highlighted that its shareholders should use the "white" proxy card, which has historically been used by the company, which Disney expressly reserved through an amendment to its bylaws.

These measures helped Disney to connect with its retail shareholders in a very real way while also showcasing its strength in creative media and filmmaking. While most companies and activists often establish a webpage devoted to all things relevant to the proxy contest, putting out an animated video that educates shareholders on the voting process and reinforces the reasons why shareholders should have trust and confidence in the board and management is something novel coming out of the Disney-Trian proxy contest. As retail investment continues to grow, boards would be well served to continually consider ways for the company to further bolster its ties to retail shareholders and leverage the company's strengths and history, whether through communications or governance procedural measures.

IV. INDEX FUNDS MAINTAIN HEAVY INFLUENCE ON PROXY CONTEST OUTCOMES AND PROXY ADVISORS STILL PLAY A KEY ROLE IN THE UNIVERSAL PROXY RULE ERA

Index funds are among the largest and most influential institutional investors in the market, and their voting decisions continue to have a significant impact on the outcome of proxy contests. In Disney's case, Blackrock and Vanguard, which held ~4.24% and ~7.84% of Disney's shares, respectively, both supported Disney's slate, signaling to other institutional investors that a collective of over 12% of Disney's shares would back the board's nominees.

In addition, the continued influence of the two major proxy advisors, Institutional Shareholder Services (ISS) and Glass Lewis, remains front and center. While Glass Lewis endorsed the entirety of management's slate, ISS split its recommendation and advised shareholders to vote for Trian's Nelson Peltz and withhold from Disney's Maria Elena Lagomasino, citing her role as the compensation committee chair and membership on the governance nominating committee with respect to Disney's historic executive compensation practices and leadership succession planning. This split recommendation likely contributed to the relatively close vote margin between Peltz and Lagomasino as some institutional investors may have followed ISS's guidance and used the universal proxy card to vote for a mix of nominees. This is not the first time that ISS and Glass Lewis have issued split recommendations; they both split recommendations in Icahn's contest at Illumina and ISS split its recommendation in Land & Buildings' proxy contest at Apartment Investment and Management In those contests, each of the dissidents ultimately gained one board seat but did not succeed in having all of their respective nominees elected.

In the universal proxy rule era, proxy advisors are able to focus their analysis and recommendations with further specificity on a per-nominee basis. By implementing a strategy of self-assessment in consideration of the criteria and methodology that proxy advisors use to evaluate board nominees, boards will be better positioned to address any potential concerns or criticisms that proxy advisors may raise in their reports. Keeping in mind the continued influence of index funds and their view on proxy advisor recommendations should be an important component of this strategy to enable boards to have meaningful and appropriate conversations with large institutional shareholders to find a path forward and secure support when a proxy advisor's recommendation is either split or in support of a dissident shareholder.

V. ACKNOWLEDGMENT OF A DISSIDENT SHAREHOLDER'S VIEWS AND IMPLEMENTATION OF INITIATIVES TO ADDRESS THEM BEFORE A PROXY CONTEST CAN PREEMPT ACTIVIST CONCERNS

Disney's victory in the proxy contest also reflects its proactive and preemptive response to Trian's calls for change. Disney announced a series of initiatives in the autumn of 2023 to address the issues that Trian had raised in its 2023 activism campaign, such as increasing streaming profitability, improving the output and economics of film studios, and increasing profitability of Disney's Experiences business. Many of these initiatives had parallels to those that Trian had suggested and may have blunted some of the criticism coming from Trian in the 2024 campaign.

Disney took the proactive approach of implementing changes prior to the annual shareholders' meeting to address in some form certain of Trian's criticisms. The company commenced certain operational initiatives that resulted in positive financial results during the financial quarter immediately preceding the 2024 Annual Meeting. While boards may not always have the benefit of knowing the basis for a dissident's misgivings prior to the launch of a proxy contest or have the time or resources to implement strategic changes, Disney's success highlights the value boards can achieve by regularly meeting with shareholders (including with shareholders who are known to take activist positions) to hear-out their views, and proactively implementing changes to address concerns, as the board deems appropriate. Boards that are open to receiving appropriate input from shareholders may leverage this information to preempt potential activists by building a track record and/or financial results that address the issues raised by a potential activist, which shows a willingness by incumbent directors to consider and seek to address the concerns of shareholders.

VI. WHILE SUCCESSION PLANNING IS AN IMPORTANT PRIORITY, HAVING A STRONG CEO IN PLACE IS CRITICAL TO INSTILLING SHAREHOLDER CONFIDENCE

Trian's proxy contest placed heavy emphasis on the succession planning at Disney, which had been disrupted by the COVID-19 pandemic and the termination of Bob Chapek as CEO in 2022, which led to the return of Bob Iger as CEO. Trian questioned Iger's role and future at Disney, and Trian argued that Disney needed a clear and transparent succession plan to ensure stability and continuity. Disney acknowledged that succession planning was the board's top priority, and that it was working on finding and developing the next generation of leaders for the company.

Succession planning is a critical issue for boards to address, not only to blunt activist criticism, but also to ensure the long-term success and stability of the company. However, Trian's loss at the 2024 Annual Meeting underscores that a lack of a clearly announced succession plan is not fatal if the current executive leadership is viewed as strong and capable. Iger remains synonymous with the modern success of Disney, grounded in deep experience in the media industry, compared to

Peltz's relative lack of industry experience. The positive financial results released by Disney in the run-up to the 2024 Annual Meeting may also have reinforced shareholder confidence in Iger, reflected in their support for Disney's slate of nominees. Further, Disney is far from the only company to struggle with succession planning and continuity of executive leadership. Several other companies have, in recent years, waived their mandatory retirement ages for their existing CEOs as they look to take a thoughtful and measured approach to leadership transition. For example, in 2023, Chevron waived its mandatory retirement age for CEO Mike Wirth, while Caterpillar Inc. and Target Corp. did the same for Jim Umpleby and Brian Cornell, respectively, in 2022.

Succession planning can be challenging, especially in times of uncertainty and potential activist activity, but boards should be mindful of the potential costs and risks of mismanaging or accelerating succession, including losing talent, undermining credibility, or creating uncertainty. By striving to establish a robust and transparent succession process that involves regular evaluation, communication, and development of potential candidates, boards can avoid triggering dissident misgivings while touting the experience of current executives and potential successor candidates.

CONCLUSION

Disney's success at its 2024 Annual Meeting highlights the continued focus on the credentials and experience of nominees, the impact of a single ballot listing all nominees, the effectiveness of communication and connection with all types of shareholders, the ever-present influence of proxy advisors and the criteria they use in making recommendations, and the importance of strong executive leadership in securing shareholder support. As boards navigate future challenges, the lessons from Disney's victory provide greater clarity on how shareholder activism and corporate governance dynamics will continue to evolve in the era of the universal proxy rules.

Endnotes

[1]Under the proxy rules before the adoption of the universal proxy rules, a dissident could not list the names of the company nominees that it would vote for but it could list the names of the company nominees that it would not vote for. The number of company nominees that a dissident would not vote for was typically the same as the number of nominees that the dissident nominated on its short slate, thereby permitting a shareholder using the dissident proxy card to vote for a number of nominees equal to the number of board seats up for election (although a shareholder could always withhold authority to vote for any nominee that it specified on the completed proxy card).(go back)

[2]Similarly, if a shareholder used the company's proxy card, the shareholder could not vote for any of the dissident's nominees.(go back)

[3]Under plurality voting, "Withhold" votes do not affect the outcome of the election.(go back)

[4]Trian indicated that if a shareholder returned a signed Trian proxy card with no voting instruction for the election of directors, Trian would, among other things, vote Withhold for the Acceptable Company Nominees.(go back)

[5]Approximately 69% of Disney's outstanding shares were represented at the meeting.(go back)

[6]https://d23.com/who-is-ludwig-von-drake-video/how-to-vote_compressed/(go back)