

# Corporate Governance

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VIA EMAIL: [shareholderproposals@sec.gov](mailto:shareholderproposals@sec.gov)  
Office of Chief Counsel  
Division of Corporation Finance  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

December 6, 2020

Re: The Walt Disney Company

To Whom It May Concern:

This is in response to a supplemental No-Action Request of November 25, 2020 letter by Lillian Brown of WilmerHale, acting as an agent of The Walt Disney Company (the “Company” or “Disney”).

## **False Assertions Relative to Rule 14a-8(I)(7)**

The Walt Disney Company attempts to justify exclusion of my Proposal using the same unconvincing arguments provided in their No-Action Request of October 31, 2020 by invoking basically the same unsuccessful arguments used in the no-action requests previously cited, simply reframing interference with the discretion of board and management as “micromanagement.” Although cloaked in the term “micromanagement,” the basis of the prior ordinary business objections made by other companies and previously rejected by the Staff is identical—undue interference with board and management discretion.

Rule 14a-8(i)(7) permits a company to omit a proposal that “deals with a matter relating to the company’s ordinary business operations.” Disney argues, “The Proposal would limit the Board’s discretion and its flexibility in carrying out its director selection process.”

The Commission has stated that micromanagement “may come into play in a number of circumstances, such as where the proposal involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies.”<sup>1</sup> However, the Commission has also, in so stating, made it clear that it has not endorsed or proposed a prohibition against requests for timelines or specific methods. Quite to the contrary, the Commission in the 1998 Release, the most recent and authoritative Commission-level statement regarding the application of micromanagement -- made it clear that requests regarding methods and timelines can be acceptable:

. . . . in the Proposing Release we explained that one of the considerations in making the ordinary business determination was the degree to which the proposal seeks to micromanage the company. We cited examples such as where the proposal seeks

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<sup>1</sup> Exchange Act Release No. 40018, “Amendments to Rules on Shareholder Proposals” (May 21, 1998).

intricate detail, or seeks to impose specific timeframes or to impose specific methods for implementing complex policies. **Some commenters thought that the examples cited seemed to imply that all proposals seeking detail, or seeking to promote timeframes or methods, necessarily amount to ordinary business. . . We did not intend such an implication. Timing questions, for instance, could involve significant policy where large differences are at stake, and proposals may seek a reasonable level of detail without running afoul of these considerations. (*Emphasis added*).**

The Proposal does not involve intricate detail of the kind present in proposals the Staff has allowed companies to exclude on micromanagement grounds.<sup>2</sup> My Proposal specifies no such detail.

The Commission, and staff precedent, have long has made it clear that not all “methods” described in proposals are excludable as ordinary business. In *Staff Legal Bulletin 14J*, the Staff consolidated its discussion of micromanagement and noted an intent to consider the potential for micromanagement in proposals addressing “specific timelines and methods.”<sup>3</sup> However, the Bulletin also noted that it was the Staff’s intention to implement this new framework “consistent with the Commission’s guidance in this area.”<sup>4</sup>

The policy promoted in this advisory proposal is notable for its simplicity rather than overlaying complicated policies: initial lists from which new director nominees are chosen should include non-management employees, and consultants that draw up lists of potential nominees should be “requested” to include nonmanagement employees. The Proposal, as an advisory proposal, does not dictate or control any other aspect of the selection process, including the board’s ultimate nominee selections taken after the production of the initial list. This is a stark contrast, as compared with proxy access proposals, in which shareholders can directly put forth nominees to a board election. In this instance, the ultimate choice of which nominees appear remains in the hands of the board.

The Supplemental Letter attempts to distinguish prior decisions that we cited demonstrating non-excludability of the present proposal under Rule 14a-8(i)(7) as not having addressed the issue of micromanagement:

Each of the cited no-action requests **relied on grounds other than whether the proposals may have micromanaged the companies at issue**, which is the basis on which the Company seeks to exclude the Proposal. Therefore, the letters cited by the Proponent are neither relevant nor instructive with regard to the No-Action Request.

Yet examination of the recent staff precedents in *Walmart Inc.* (April 1, 2020) and *Apple Inc.* (December 4, 2018) demonstrate that both companies in fact had argued the point of *interference with board discretion*, which is equivalent to micromanagement as asserted by the company in the current matter. Moreover, the precedent in *McDonnell Douglas Corporation*

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<sup>2</sup> *Ford Motor Company* (Mar. 2, 2004) provides an example of an allowable exclusion. The proposal asked Ford to produce an annual report on climate science, including “detailed information on temperatures, atmospheric gases, sun effects, carbon dioxide production, carbon dioxide absorption, and costs and benefits at various degrees of heating and cooling.” The Staff reasoned that the proposal addresses “the specific method of preparation and the specific information to be included in a highly detailed report.”

<sup>3</sup> *Staff Legal Bulletin 14J*, Oct. 23, 2018.

<sup>4</sup> See Release No. 34-40018 (May 21, 1998).

(March 23, 1993) involved an even more directive proposal in terms of board management of the nomination process, yet the Staff found that this does not unduly interfere with board discretion: “In the staff’s view the proposal relates to the qualifications of and procedures for nominating directors, a matter not related to the Company’s ordinary business.”

The fact that the Staff found a lack of basis for ordinary business exclusion, in each of these instances, aligns with a finding that the proposals do not micromanage, because micromanagement is merely a subset of ordinary business, and in this instance, reflect the same considerations (interfering with board discretion) being asserted here.

The proposal at issue in *Walmart Inc.* (April 1, 2020) is close to the current proposal and the company’s ordinary business argument included the same issue, interference with board discretion, albeit with employee relations rather than the board’s decisions on who appears on the chosen board nominee slots. The proposal, similar to the present proposal, stated:

Shareholders of Walmart Inc. (“Walmart”) urge the board to adopt a policy (the “Policy”) of promoting significant representation of employee perspectives among corporate decision makers by requiring that the initial list of candidates from which new nominees are chosen (the “Initial List”) by the Nominating and Governance Committee include (but need not be limited to) hourly Associates. The Policy should provide that any third-party consultant asked to furnish an Initial List will be requested to include such candidates.

In that instance, the company’s ordinary business argument, rejected by the Staff in denying the no action request focused on the idea that the proposal would interfere with the discretion of the board and management to conduct employee relations and communications. The no action challenge also mentioned the board’s role in employee relations:

Moreover, in the Company’s 2019 Proxy Statement, the Company describes the role of the Board and the Compensation and Management Development Committee in providing “oversight and guidance on workforce development, compensation, benefits, recruiting and retention, and culture, diversity and inclusion. We continue to invest in our associates’ wages and training, and recently enhanced our leave and paid-time-off benefits. We believe that these actions have resulted in a more engaged and effective workforce that is better equipped to serve our customers in today’s rapidly changing retail environment.

If anything, the rights of investors to weigh in on the procedures used for selection of board members is a far less protected category of board discretion than the category of activity raised by *Walmart* of employee communication/ relations. Because the board members are the representatives of shareholders, it is fully within the right of shareholders to encourage that the company start with a diversified slate of candidates, even if the board ultimately nominates others for the election.

So, given the Staff conclusion that the Walmart proposal model does not interfere with employee relations to a degree that is problematic, this procedural proposal certainly does not interfere with board discretion to ultimately decide which nominees to put forward for the board.

A second recent proposal, at issue in *Apple Inc.*, requested that the board adopt a policy to disclose the specific minimum qualifications that must be met by a director nominee and each nominee’s skills, ideological perspectives, and experience in a chart or matrix form. The focus of the proposal was *disclosure of director nominee qualifications*. Apple Inc. sought to exclude the

proposal under Rule 14a-8 (i)(7), on the basis that the proposal would subject to direct shareholder oversight basic decisions about the form and content of the company's communications to its shareholders by attempting to govern the manner in which the qualifications and attributes of director nominees are disclosed to shareholders. The company argued the following:

[I]t is solely within the discretion of a company's board of directors, and therefore a matter of a company's ordinary business, to determine the form and content of a company's reports to shareholders, including proxy statements [...] Specifically, the Proposal attempts to govern the manner in which the qualifications and attributes of nominees to the Company's board of directors are disclosed to shareholders. [...] [T]he Proposal impermissibly infringes upon a core ordinary business function by dictating the form and content of the Company's proxy statement.

An even stronger staff precedent against the proposed treatment of the proposal as micromanaging exists in the older precedent of *McDonnell Douglas Corporation* (March 23, 1993). The Proponent requested that an employee-nominee be included on the company's ballot. McDonnell Douglas Corporation argued a number of bases for exclusion, including Rule 14a8(c)(7), asserting that the proposal's position that electing employee representative board members was necessary to ensure the "balancing of short-term share value against long-term corporate health" demonstrated the purely ordinary business function of the proposal.

Significantly, the company had argued at length about board discretion:

The procedure requested by the Proposal would require the Board of Directors of the Company (the "Board of Directors" or "Board") to select as one of its own nominees an individual selected by a group of individuals holding interests in two employee benefit plans established for the benefit of certain employees of the Company. No discretion would be permitted to the Board to consider the qualifications of the designated nominee. The Board would be required to include the nominee as one of its own nominees. Thus, the Proposal would remove from the Board part of the responsibility for nominating candidates for election as directors and confer it upon one group of stockholders whose interests may not be coextensive with the best interests of the Company as an entity.

The Staff ruling stated that, "In the staff's view the proposal relates to the qualifications of and procedures for nominating directors, a matter not related to the Company's ordinary business." In short, the staff had to directly address the issue of whether the proposal unduly affected the board's discretion in rejecting the ordinary business claim. This is still valid precedent applicable to the current proposal. If it is not ordinary business or interference with board discretion to include among the candidates a representative from employee benefit plans, it is far less interference in the present matter, to include some employee nominees on a list of possible candidates but to not dictate whether the board includes those nominees in the ultimate slate of candidates that it puts forward.

In a similar staff precedent *Sears, Roebuck and Company* (February 4, 1993) the proposal requested that "no person associated with or who derives primary income from the tobacco industry self serve as a member of the Board of Directors." In rejecting the ordinary business

and micromanagement claims, the Staff noted “The Division does not view proposals relating to qualifications of board candidates to be matters relating to a registrant's ordinary business.”

### **False Assertions Relative to Rule 14a-8(i)(3)**

In attempting to characterize our title's inclusion of “diversity” as misleading, the Company has a heavy lift, because its own discussion of board participation uses the term “diversity” in its sustainability report to include the perspective of employees. Under the heading of “DIVERSITY ON OUR BOARD,” page 6 of the Corporate Social Responsibility update for 2019 the Company notes:

The Board of Directors of The Walt Disney Company is currently comprised of nine directors, recruited to provide a range of talents, experiences, and skills. One criterion with which the Board evaluates new members is “the extent to which the prospective nominee helps the Board reflect the diversity of the Company's shareholders, **employees**, customers and guests, and the communities in which it operates.”  
[Emphasis added]

While the supplemental letter acknowledges a movement toward increased gender, racial and ethnic diversity on boards led by the New York City Comptroller and California law, it contends, without evidence, “There is currently no similar level of focus on employee representation on boards.”

While the question of employee representation on boards may not be as visible a solution to the question of board diversity, the Company's own publication above, demonstrates clear recognition by the board under the title of “diversity” that the ability of a nominee to reflect the diversity of the company's “employees” is quite relevant to *diversity*.

Moreover, as the proposal itself makes clear, employee participation on boards is highlighted in the tradition of German co-determination, the UK Corporate Governance Code, as well as legislation by US Senators Tammy Baldwin (D-Wisc.) and Elizabeth Warren (D-Mass.) . Given the recent election results, those pieces of legislation are likely to get more attention in 2021 and beyond.

There is worldwide focus on the issue, with employee representation required in more than a dozen countries ranging alphabetically from Austria to the UK. Last year in the US, shareholder proposals sought employees in the pool of board candidates (Walmart), specified that a nominee must have human and/or civil rights experience (Alphabet, Facebook), sought an environmental expert on the board (MGE Energy), and directly asked for an employee representative on the board (AT&T, Alphabet).

There is no dearth of proposals seeking specific expertise and/or diverse characteristics on corporate boards. This year there will be more than a dozen proposals filed at US companies asking for employees to be included in the initial list of candidates or for companies to report on the feasibility of adding employees to corporate boards.

As indicated in my previous letter, SEC guidance advises reliance on rule 14a-8(i)(3) to exclude or modify a statement may be appropriate where:

- statements directly or indirectly impugn character, integrity, or personal reputation, or directly or indirectly make charges concerning improper, illegal, or immoral conduct or association, without factual foundation;
- the company demonstrates objectively that a factual statement is materially false or misleading.

Disney fails to demonstrate either of the above.

## **Conclusion**

In permitting the exclusion of proposals, Rule 14a-8(g) imposes the burden of proof on companies. Companies seeking to establish the availability of exclusion under Rule 14a-8, therefore, have the burden of showing ineligibility. As argued above, the Company has failed to meet that burden. Staff must deny the No-Action request.

Disney could more productively use its time and resources negotiating with the Proponent, rather than simply trying to avoid the topic. I would be pleased to respond to Staff questions or to negotiate with Disney mutually agreeable terms for withdrawing the Proposal. Reach me directly by e-mailing [jm@corp.gov.net](mailto:jm@corp.gov.net).

Sincerely,

A handwritten signature in black ink, appearing to read "J. McRitchie", with a long horizontal flourish extending to the right.

James McRitchie  
Shareholder Advocate

Lillian Brown

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November 25, 2020

**Via E-mail to shareholderproposals@sec.gov**

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

**Re: The Walt Disney Company  
Exclusion of Shareholder Proposal by James McRitchie**

Ladies and Gentlemen:

We are writing on behalf of our client, The Walt Disney Company (the “Company”), in response to the correspondence from James McRitchie (together with his designated representative, John Chevedden, the “Proponent”) dated November 11, 2020 (the “Reply Letter”) concerning the Company’s intention to exclude from its proxy statement and proxy to be filed and distributed in connection with its 2021 annual meeting of shareholders (the “Proxy Materials”) the shareholder proposal and supporting statement (collectively, the “Proposal”) submitted by the Proponent. The Company continues to believe, both for the reasons set forth below and the reasons provided in the Company’s October 31, 2020 correspondence (the “No-Action Request”), that the Proposal may be excluded from the Proxy Materials pursuant to Rule 14a-8(i)(7) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), on the basis that the Proposal seeks to micromanage the Company, or, alternatively, pursuant to Rule 14a-8(i)(3) of the Exchange Act on the basis that the Proposal is materially false and misleading in violation of Rule 14a-9.

***The Proposal May Be Excluded Pursuant to Rule 14a-8(i)(7) Because It Seeks to Micromanage the Company***

As described in more detail in the No-Action Request, the Proposal seeks to micromanage the Board’s process and decisions regarding director searches by specifying that any initial list of candidates from which new director nominees are chosen by the Governance and Nominating Committee (the “Committee”) include non-management employees. As is discussed in Staff Legal Bulletin 14K (October 16, 2019) (“SLB 14K”), “[w]hen a proposal prescribes specific actions that the company’s management or the board must undertake without affording them sufficient flexibility or discretion in addressing the complex matter presented by the proposal, the

proposal may micromanage the company to such a degree that exclusion of the proposal would be warranted.” The Staff further clarified in SLB 14K that the micromanagement analysis “rests on an evaluation of the manner in which a proposal seeks to address the subject matter raised, rather than the subject matter itself” and provided various factors that may be considered. Among these factors are whether the “method or strategy for implementing the action requested by the proposal is overly prescriptive, thereby potentially limiting the judgment and discretion of the board and management” and whether the proposal “unduly limit[s] the ability of management and the board to manage complex matters with a level of flexibility necessary to fulfill their fiduciary duties to shareholders.” The Proposal would limit the Board’s discretion and its flexibility in carrying out its director selection process. Determining who or what category of persons may be appropriate candidates for nomination to the Board, including who should be included in an initial list of candidates, is a complex process that is undertaken by the Committee and the Board. Any such process involves taking into account various considerations, including determining what type of experience a director candidate should possess. By dictating that individuals with a particular type of experience (i.e., experience as non-management employees of the Company) be included on the list of director candidates, the Proposal prescribes the manner by which the Committee should fulfill its responsibilities under its charter and satisfy its fiduciary duties to the Company.

The Proponent argues in the Reply Letter that the Proposal is not prescriptive because the Board could choose from “tens of thousands of Disney employees”; however, the number of non-management employees is not dispositive of whether the Proposal micromanages. Rather, the concern is that the Proposal would prescribe that a particular attribute (experience as a non-management employee of the Company) must be reflected in the director candidate pool. This one attribute would be required regardless of particular expertise or any of a myriad of other complex and important considerations that must go into the Board’s consideration in building a candidate pool that will result in the mix of skills, qualities and other attributes that may be needed on the Board at any given time. Accordingly, the Proposal would “supplant[] the judgment of [] the Board”, thus infringing on the Board’s exercise of its fiduciary duties.

The Proponent cites three no-action letters in support of the Proponent’s view that the Proposal is not properly excludable under Rule 14a-8(i)(7) – McDonnell Douglas Corporation (March 23, 1993),<sup>1</sup> Apple Inc. (December 4, 2018)<sup>2</sup> and Walmart Inc. (April 1, 2020).<sup>3</sup> The Proponent’s

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<sup>1</sup> In McDonnell Douglas Corporation the Proponent requested that an employee-nominee be included on the company’s ballot. McDonnell Douglas Corporation argued a number of bases for exclusion, including Rule 14a-8(c)(7), asserting that the proposal’s position that electing employee representative board members was necessary to ensure the “balancing of short-term share value against long-term corporate health” demonstrated the purely ordinary business function of the proposal.

<sup>2</sup> The proposal at issue in Apple Inc. requested that the board adopt a policy to disclose the specific minimum qualifications that must be met by a director nominee and each nominee’s skills, ideological perspectives and experience in a chart or matrix form. The focus of the proposal was disclosure of director nominee qualifications, and not any specific actions of the board relating to director nominations. Apple Inc. sought to exclude the proposal under Rule 14a-8(i)(7), on the basis that the proposal would subject to direct shareholder oversight basic decisions about the form and content of the company’s communications to its shareholders by attempting to govern the manner in which the qualifications and attributes of director nominees are disclosed to shareholders.



reliance on these letters is misplaced as these letters do not specifically address and, hence are not precedential with respect to, the grounds for exclusion advanced here. Each of the cited no-action requests relied on grounds other than whether the proposals may have micromanaged the companies at issue, which is the basis on which the Company seeks to exclude the Proposal. Therefore, the letters cited by the Proponent are neither relevant nor instructive with regard to the No-Action Request.

For the reasons discussed in the No-Action Request and above, the Proposal micromanages the Company and the Board and, as such, may be excluded pursuant to Rule 14a-8(i)(7).

***The Proposal May Be Excluded Pursuant to Rule 14a-8(i)(3)***

The Proponent argues in the Reply Letter that the references to “diversity” in the Proposal’s heading and supporting statement are not “objectively false and misleading” and that the Commission has adopted a broad view of the term “diversity.” While the Company acknowledges that the term “diversity” has any multitude of meanings, depending on context and speaker, here the Proponent is clearly seeking to exploit deceptively the groundswell of support for increased gender, racial and ethnic diversity on boards of directors. The movement toward greater diversity on boards – and indeed the initiatives that are giving meaning to that term – are found in the “Rooney Rule” policies adopted by certain companies and the New York City Comptroller’s Boardroom Accountability Project that the Proponent references, as well as California and other state law requirements requiring disclosure of board diversity and/or minimum board representation by women and racially or ethnically diverse directors. There is currently no similar level of focus on employee representation on boards as part of the movement by shareholders and other stakeholders to increase diversity on boards. Accordingly, the Company continues to believe that the references in the Proposal’s heading and supporting statement to “diversity” do not accurately reflect the actual substance of the Proposal – which is to increase employee representation on the Board – and thus are both materially and objectively misleading.

Nor is this an instance where the Proponent can avoid accountability for objectively false and misleading statements by hiding behind the argument that the misleading falsity engendered can be corrected by the Company in its statement in opposition. This Proposal simply goes too far in seeking to mislead – it reflects, quite cynically, a veiled attempt to capitalize on an important social justice movement to increase gender, racial and ethnic board diversity for the purpose of garnering greater voting support for the Proposal that has nothing to do with those aims. It is therefore not only objectively misleading, but materially so in that it seeks to mislead stockholders as to the core purpose and effect of the Proposal if implemented. Thus, the

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<sup>3</sup> The proposal at issue in Walmart Inc. was similar to the Proposal as it urged the board to adopt a policy requiring that the initial list of candidates from which new nominees are chosen by the Nominating and Governance Committee include hourly associates, but the focus of Walmart Inc.’s argument to exclude the proposal under Rule 14a-8(i)(7) was that the proposal focused on communications between the company and its employees and, thus, concerned ordinary business matters, specifically the management of the company’s workforce and relationships with its employees.

November 25, 2020

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Proposal fits into the limited line of recent precedent in which the Staff has concurred in exclusion under Rule 14a-8(i)(3).

Accordingly, and as discussed in the No-Action Request, the Proposal is materially misleading in violation of Rule 14a-9 and, therefore, may be excluded in its entirety under Rule 14a-8(i)(3).

### **Conclusion**

For the foregoing reasons and the reasons set forth in the No-Action Request, we respectfully reiterate our request that the Staff concur that it will take no action if the Company excludes the Proposal from its Proxy Materials pursuant to Rule 14a-8(i)(7), on the basis that the Proposal seeks to micromanage the Company, or, alternatively, Rule 14a-8(i)(3), on the basis that the Proposal is materially false and misleading in violation of Rule 14a-9.

If the Staff has any questions with respect to this request or requires additional information, or if for any reason the Staff does not agree that the Company may exclude the Proposal from its Proxy Materials, please do not hesitate to contact me at [lillian.brown@wilmerhale.com](mailto:lillian.brown@wilmerhale.com) or (202) 663-6743. In addition, should the Proponent choose to submit any response or other correspondence to the Commission, we request that the Proponent concurrently submit that response or other correspondence to the Company, as required pursuant to Rule 14a-8(k) and Staff Legal Bulletin 14D (November 7, 2008), and copy the undersigned.

Best regards,



Lillian Brown

Enclosures

cc: Jolene Negre, Associate General Counsel and Assistant Secretary  
The Walt Disney Company

John Chevedden

# Corporate Governance

*CorpGov.net: improving accountability through democratic corporate governance since 1995*

VIA EMAIL: shareholderproposals@sec.gov  
Office of Chief Counsel  
Division of Corporation Finance  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

November 11, 2020

Re: The Walt Disney Company

To Whom It May Concern:

This is in response to an October 31, 2020 letter by Lillian Brown of WilmerHale, acting as an agent of The Walt Disney Company (the “Company” or “Disney”).

Ms. Brown makes several false assertions regarding my shareholder proposal (“Proposal”), which I address below in the order they are raised.

## **False Assertions Relative to Rule 14a-8(i)(7)**

The Proposal may be excluded in reliance on Rule 14a-8(i)(7) on the basis that it seeks to micromanage the determinations of the Company’s board of directors (the “Board”) as to which individuals to consider as candidates for nomination to the Board.

The proposal specifies no requirements as to which “individuals” to consider, only that the Nominations and Governance Committee include non-management employees in their initial list of candidates. The Committee is free to choose such individuals from tens of thousands of Disney employees with flexibility and discretion.

Ms. Brown cites several no-action requests the Staff granted to companies regarding chartering of new committees and requiring approval of buybacks by shareholders. None of these decisions related to qualifications or procedures for nominating directors.

In 1993 Staff rejected an assertion by McDonnell Douglas Corp (Mar. 23, 1993) that including an employee representative on management’s slate of board nominees would interfere with an ordinary business function. The Staff concluded: “In the staff’s view the proposal relates to the qualifications of and procedures for nominating directors, a matter not related to the Company’s ordinary business.”

Staff declined to concur with Apple’s view that disclosing the minimum qualifications the nominating committee believes must be met in order to serve on the board could be excluded on ordinary business grounds, noting “the Proposal relates to director qualifications.” Apple Inc. (Dec. 4, 2018).

More recently, Staff was “unable to concur that Rule 14a-8(i)(7) provides a basis to exclude” a proposal at WalMart that “resembled” the Rooney Rule, requesting “the initial list of candidates from which new nominees are chosen (the “Initial List”) by the Nominating and Governance Committee include (but need not be limited to) hourly Associates.” (April 1, 2020)

### **False Assertions Relative to Rule 14a-8(i)(3)**

Ms. Brown asserts the Proposal’s title, ‘Increase Diversity of Director Nominees’ “does not relate to “diversity” as is commonly understood (such as gender, ethnic or racial diversity).

This is an advocacy issue, and a difference of opinion between the proponent and the company of a type the Staff does not find excludable under Rule 14a-8(l)(3). The Company letter makes a series of advocacy arguments that it might appropriately include in a statement in opposition to the Proposal that appears on the Company’s proxy. However, the arguments raised by the Company do not rise to the level of “objectively false and misleading” statements that merit Staff action to exclude them.

The Staff has long made it clear that it will not intervene in arguments that merely represent advocacy positions of the issuer or proponent, rather than objectively false and misleading statements. In Staff Legal Bulletin 14B of September 15, 2004, where the Staff noted that the process of reviewing company no action letters had devolved to forcing the Staff to evaluate line-by-line company objections to the wording of proposals, the Staff stated:

Accordingly, going forward, we believe that it would not be appropriate for companies to exclude supporting statement language and or an entire proposal in reliance on rule 14a-8(i)(3) in the following circumstances:

- the company objects to factual assertions because they are not supported;
- the company objects to factual assertions that, while not materially false or misleading, may be disputed or countered;
- the company objects to factual assertions because those assertions may be interpreted by shareholders in a manner that is unfavorable to the company, its directors, or its officers; and or
- the company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such.

We believe that it is appropriate under rule 14a-8 for companies to address these objections in their statements of opposition.

There continue to be certain situations where we believe modification or exclusion may be consistent with our intended application of rule 14a-8(i)(3). . . . Specifically, reliance on rule 14a-8(i)(3) to exclude or modify a statement may be appropriate where:

- statements directly or indirectly impugn character, integrity, or personal reputation, or directly or indirectly make charges concerning improper, illegal, or immoral conduct or association, without factual foundation;
- the company demonstrates objectively that a factual statement is materially false or misleading;

. . . . As such, the staff will concur in the company's reliance on rule 14a-8(i)(3) to exclude or modify a proposal or statement only where that company has demonstrated objectively that the proposal or statement is *materially* false or misleading. [emphasis added]

Applying this standard, it becomes clear the Company letter's assertions fall into the "not excludable" categories of statements in which the Company is either objecting to factual assertions that, while not materially false or misleading, may be disputed or countered, or which may be interpreted by shareholders in a manner that is unfavorable to the Company.

As evidence that the title is not objectively misleading, it should be noted that the Commission has itself described diversity in a manner that would encompass the current proposal.

On December 16, 2009, the Securities and Exchange Commission (SEC) approved a new rule requiring companies to make more meaningful disclosures about diversity in their proxy statements. The rule became effective on February 28, 2010. Contrary to Ms. Brown's constrained conception, the SEC adopted a broad view of the term "diversity."

For instance, some companies may conceptualize diversity expansively to include differences of viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity, while others may focus on diversity concepts such as race, gender and national origin. We believe that for purposes of this disclosure requirement, companies should be allowed to define diversity in ways that they consider appropriate. As a result we have not defined diversity in the amendments.  
(<https://www.sec.gov/rules/final/2009/33-9089.pdf>)

In an annual letter to chief executive officers, Larry Fink, the head of BlackRock (the world's largest asset manager) states:

We will continue to emphasize the importance of a diverse board. Boards with a diverse mix of genders, ethnicities, career experiences, and ways of thinking have, as a result, a more diverse and aware mindset. They are less likely to succumb to groupthink or miss new threats to a company's business model. And they are able to identify opportunities that promote long-term growth. (Gloom to Boom,  
[https://www.google.com/books/edition/Gloom\\_to\\_Boom/eD63DwAAQBAJ?hl=en&gbpv=1&dq=fink+%22We+will+continue+to+emphasize+the+importance+of+a+diverse+board.+Boards+with+a+diverse+mixture+of+genders,+ethnicities,+career+experiences,+and+ways+of+thinking+have,+as+a](https://www.google.com/books/edition/Gloom_to_Boom/eD63DwAAQBAJ?hl=en&gbpv=1&dq=fink+%22We+will+continue+to+emphasize+the+importance+of+a+diverse+board.+Boards+with+a+diverse+mixture+of+genders,+ethnicities,+career+experiences,+and+ways+of+thinking+have,+as+a))

Subsequent SEC guidance, as recently as September 21, 2020 (<https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm>), indicates any discussion relating to director qualifications and a company's diversity policy would include qualifications "such as diverse work experiences, military service, or socio-economic or demographic characteristics."

Ms. Brown fails in her attempt to narrowly define the term diversity. Its use in the Proposal comports with how the term is used in common practice, as well as in SEC rules and guidance.

In addition, I recognize Disney may claim it has the ability to exclude the title from the published proposal. However, the title is in fact part of the proposal, is not misleading, and should be included in the proxy.

Ms. Brown next claims reference to the "Rooney Rule" is materially misleading because the Rule invokes racial diversity. However, the Proposal fully describes its intent is to include non-management employees on an Initial List of candidates to be considered by the Nominations and Governance Committee. Only after exhaustively discussing the benefits of this approach to obtaining a more diverse candidate pool does the Proposal note the Policy advocated "resembles the Rooney Rule" in football operations. The reference to the Rooney Rule is not objectively misleading but is a reasonable analogy.

Similarly, the City of New York Comptroller's Boardroom Accountability Project referred to "a version of the 'Rooney Rule'" aimed at increasing the consideration of "people of color" and "women" for board director positions.

(<https://comptroller.nyc.gov/services/financial-matters/boardroom-accountability-project/overview/>) A shareholder proposal that "resembles" or is a "version" of the Rooney Rule is not easily confused with the Rooney Rule itself. Few, if any, will read the Proposal and mistakenly assume they are being asked to vote to create racial diversity in football.

Finally, Ms. Brown contends violation of subdivision (i)(3) because the Proposal lacks clarity.

[I]t is unclear from the resolution and the supporting statements how including non-management employees in an initial list of director nominees would increase the diversity of the board and the Proponent does not provide any support for this objective.

The Proposal clearly argues the following in support:

- According to the National Bureau of Economic Research, giving workers formal control rights increases female board representation and raises capital formation.
- Employees are also often more diverse than boards in terms of race, gender, and wealth.
- The German "co-determination" model of shared governance is lauded as an excellent check against short-term capital allocation practices.
- Polling demonstrates bipartisan public support (over 53%) for employee representation.

- Anticipated benefits include reduced turnover as employees are more empowered to make firm-specific investments, better informed decision-making because employees have specialized knowledge, better monitoring of management with increased information channels, and reduced shareholder myopia since employees often take a longer-term view

If the Disney Board believes these arguments are without merit, they can include such objections in an opposition statement.

Ms. Brown points out one of the footnotes cited in the Proposal references a website address could not be found.

As Ms. Brown acknowledges, such a nonfunctioning link would *only* be grounds for excluding a proposal under subdivision (i)(3) if the inoperative link “provides information necessary for shareholders and the company to understand with reasonable certainty exactly what actions or measures the proposal requires, and such information is not also contained in the proposal or in the supporting statement.”

Ms. Brown contends, “Without the information included in the link, the Company’s stockholders will not be able to make an informed voting decision,” implying the information is crucial to understanding what the Proposal requires. However, she offers no arguments to support that contention.

The website address for the cited paper in question was changed after I submitted the proposal to Disney. The paper is now located at [https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI\\_Policies-for-Worker-Representation-on-Corporate-Boards-Working-Paper-201910.pdf](https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_Policies-for-Worker-Representation-on-Corporate-Boards-Working-Paper-201910.pdf). The paper is not crucial to understanding what the Proposal requires.

While the Proposal within its text is clear that it offers the Board and management maximum flexibility in their approach to considering which employees to include in an “Initial List” and as final candidates, the referenced paper merely offers background information and some ideas for readers concerning how such arrangements may be configured. Since all these decisions are clearly left up to the Board and management in the Proposal, the paper is not necessary for stockholders to make an informed voting decision.

The referenced Staff Legal Bulletin 14G does not require exclusion of the proposal or the URL in the present instance. That Bulletin provides:

*If the proposal or supporting statement refers to a website that provides information necessary for shareholders and the company to understand with reasonable certainty exactly what actions or measures the proposal requires, and such information is not also contained in the proposal or in the supporting statement, then the proposal would be subject to exclusion under Rule 14a-8(i)(3) of the Exchange Act as vague and indefinite. If, however, shareholders and the company can understand with reasonable certainty exactly what actions or measures the proposal requires without reviewing the information provided on the website and the website reference only supplements the information contained in the proposal and in the supporting statement, then the proposal*

*would not be subject to exclusion under Rule 14a-8(i)(3) of the Exchange Act on the basis of the reference to the website. [emphasis added]*

In this case, the information on the website only supplements the information contained in the proposal and in the supporting statement. The linked information is supplemental and not essential to shareholder and company interpretation of the proposal. For purposes of assisting shareholders and the Company in avoiding this dead link, I recommend the footnote be updated with the correct URL. Alternatively, but less preferable, would be the deletion of the problematic footnote.

## **Conclusion**

In permitting the exclusion of proposals, Rule 14a-8(g) imposes the burden of proof on companies. Companies seeking to establish the availability of exclusion under Rule 14a-8, therefore, have the burden of showing ineligibility. As argued above, the Company has failed to meet that burden. Staff must deny the no-action request.

I would be pleased to respond to Staff questions or to negotiate with Disney mutually agreeable terms for withdrawing the Proposal. You can reach me directly by e-mailing [jm@corp.gov.net](mailto:jm@corp.gov.net).

Sincerely,



James McRitchie  
Shareholder Advocate



Lillian Brown

+1 202 663 6743 (t)

+1 202 663 6363 (f)

lillian.brown@wilmerhale.com

October 31, 2020

**Via E-mail to shareholderproposals@sec.gov**

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

**Re: The Walt Disney Company  
Exclusion of Shareholder Proposal by James McRitchie**

Ladies and Gentlemen:

We are writing on behalf of our client, The Walt Disney Company (the “Company”), to inform you of the Company’s intention to exclude from its proxy statement and proxy to be filed and distributed in connection with its 2021 annual meeting of shareholders (the “Proxy Materials”) the enclosed shareholder proposal and supporting statement (collectively, the “Proposal”) submitted by James McRitchie (together with his designated representative, John Chevedden, the “Proponent”) requesting that the Company adopt a policy of “promoting significant representation of employee perspectives among corporate decision makers by requiring the initial list of candidates from which new director nominees are chosen include (‘Initial List’) by the Nomination and Governance Committee (but need not be limited to) non-management employees.”

The Company respectfully requests that the staff of the Division of Corporation Finance (the “Staff”) of the Securities and Exchange Commission (the “Commission”) advise the Company that it will not recommend any enforcement action to the Commission if the Company excludes the Proposal from its Proxy Materials pursuant to Rule 14a-8(i)(7) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), on the basis that the Proposal seeks to micromanage the Company’s ordinary business operations, or, alternatively, pursuant to Rule 14a-8(i)(3) of the Exchange Act on the basis that the Shareholder Proposal is materially false and misleading in violation of Rule 14a-9.

Pursuant to Exchange Act Rule 14a-8(j) and Staff Legal Bulletin No. 14D (November 7, 2008) (“SLB 14D”), the Company is submitting electronically to the Commission this letter, and the Proposal and related correspondence (attached as Exhibit A to this letter), and is concurrently

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sending a copy to the Proponent, no later than eighty calendar days before the Company intends to file its definitive Proxy Materials with the Commission.

## Background

On August 31, 2020, the Company received the Proposal from the Proponent, which states as follows:

### **Proposal 4\*: Increase Diversity of Director Nominees**

**Resolved:** Shareholders of Walt Disney Company (‘Disney’ or ‘Company’) urge the board to adopt a policy (‘Policy’) of promoting significant representation of employee perspectives among corporate decision makers by requiring the initial list of candidates from which new director nominees are chosen (‘Initial List’) by the Nominations and Governance Committee include (but need not be limited to) non-management employees. The Policy should provide that any third-party consultant asked to furnish an Initial List will be requested to include such candidates.

**Whereas:** There is growing consensus that employees on corporate boards can contribute to long-term corporate sustainability. Policymakers note, having companies run exclusively to benefit shareholders contributes to “stagnant wages, runaway executive compensation and underinvestment in research and innovation.”<sup>1</sup> The Business Roundtable asks corporations to align with stakeholder interests, including employees.<sup>2</sup> Employee representation grows long-term value of companies in several ways. According to the National Bureau of Economic Research, giving workers formal control rights increases female board representation and raises capital formation.<sup>3</sup> Employees are also often more diverse than boards in terms of race, gender, and wealth. The German “co-determination” model of shared governance is lauded as an excellent check against short-term capital allocation practices.<sup>4</sup>

The 2018 UK Corporate Governance Code calls on boards to establish a method for gathering workforce views. Options include a director appointed from the workforce, a formal workforce advisory panel or designating a director to liaise with workers.<sup>5</sup>

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<sup>1</sup> <https://www.nytimes.com/2019/01/06/opinion/warren-workers-boards.html>

<sup>2</sup> <https://opportunity.businessroundtable.org/wp-content/uploads/2020/06/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures.pdf>

<sup>3</sup> <http://economics.mit.edu/files/17273>

<sup>4</sup> [https://rooseveltinstitute.org/wp-content/uploads/2017/10/Corp-Gov\\_FINAL.pdf](https://rooseveltinstitute.org/wp-content/uploads/2017/10/Corp-Gov_FINAL.pdf)

<sup>5</sup> <https://assets.kpmg/content/dam/kpmg/uk/pdf/2018/07/designated-NED.pdf>

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Senators Baldwin and Warren have introduced legislation codifying employee representation on corporate boards, noting that modern corporate governance needs to be accountable to a wider array of interests, notably employees.<sup>6</sup> Polling demonstrates bipartisan public support (over 53%) for employee representation.<sup>7</sup>

Anticipated benefits include reduced turnover as employees are more empowered to make firm-specific investments, better informed decision-making because employees have specialized knowledge, better monitoring of management with increased information channels, and reduced shareholder myopia since employees often take a longer-term view.<sup>8</sup>

While our Board satisfies independence requirements, it lacks representation from non-management employees, who bring a different understanding of operations than other directors. Additionally, Disney's CEO to median employee pay ratio is 911:1 and Disney has no employee stock ownership plan (ESOP) to help grow employee wealth and engagement.<sup>9</sup>

The Policy we propose resembles the Rooney Rule, which requires teams to interview minority candidates for head coaching and senior operations openings. By adopting the Rooney Rule, National Football League teams increased diversity and set a precedent for other industries. Policies similar to the Rooney Rule have been adopted by Amazon, Costco, Home Depot, Activision Blizzard, Dover, Expedia, Fastenal, Hilton Worldwide Holdings, L Bands, Robert Half International, Ross Stores and others.

## **Basis for Exclusion**

### ***The Proposal May Be Excluded Pursuant to Rule 14a-8(i)(7)***

Rule 14a-8(i)(7) permits a company to exclude a shareholder proposal if the proposal “deals with a matter relating to the company’s ordinary business operations.” The underlying policy of the ordinary business exclusion is “to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting.” SEC Release No. 34-40018 (May 21, 1998) (the “1998 Release”). As set out in the 1998 Release, there are two “central considerations” underlying the ordinary business exclusion. One consideration is that “[c]ertain

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<sup>6</sup> <https://www.wsj.com/articles/companies-shouldnt-be-accountable-only-to-shareholders-1534287687>

<sup>7</sup> <https://www.dataforprogress.org/blog/2018/12/14/employee-governance>

<sup>8</sup> <https://www.corpgov.net/2020/04/kokkinis-and-sergakis-employee-participation-in-uk-companies/>

<sup>9</sup> [https://smlr.rutgers.edu/sites/default/files/rutgerskelloggreport\\_april2019.pdf](https://smlr.rutgers.edu/sites/default/files/rutgerskelloggreport_april2019.pdf)

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tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight." The other consideration is that a proposal should not "seek[] to 'micro-manage' the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." We believe the Proposal implicates the second of these considerations.

***The Proposal May Be Excluded Because It Seeks to Micromanage the Company***

The Proposal may be excluded in reliance on Rule 14a-8(i)(7) on the basis that it seeks to micromanage the determinations of the Company's board of directors (the "Board") as to which individuals to consider as candidates for nomination to the Board. As the Staff explained in Staff Legal Bulletin 14K (October 16, 2019) ("SLB 14K"), "[w]hen a proposal prescribes specific actions that the company's management or the board must undertake without affording them sufficient flexibility or discretion in addressing the complex matter presented by the proposal, the proposal may micromanage the company to such a degree that exclusion of the proposal would be warranted." The Staff further specified in SLB 14K that in considering arguments for exclusion based on micromanagement, it will "look to whether the proposal seeks intricate detail or imposes a specific strategy, method, action, outcome or timeline for addressing an issue, thereby supplanting the judgment of management and the board."

The Proposal seeks adoption of a policy requiring that any initial list of candidates from which new director nominees are chosen by the Governance and Nominating Committee include non-management employees in order to promote "significant representation of employee perspectives among corporate decision makers." The Proposal seeks to micromanage the Board's approach and decisions regarding director searches, which is one of the ordinary business operations of the Board, by prescribing the manner by which the Board decides who will be included in an initial pool of director candidates. Specifically, the Proposal dictates that individuals with a particular type of experience (i.e., experience as non-management employees of the Company) be included on an initial list of director candidates. Determining what type of experience a director candidate should possess is the responsibility of the Board and the Governance and Nominating Committee as part of the process for determining which candidates to include in the pool of candidates to be considered for nomination to the Board, which is a specified responsibility of the Governance and Nominating Committee pursuant to its charter. The Staff has consistently concurred in exclusion under Rule 14a-8(i)(7) of shareholder proposals requesting that the board of directors take certain actions related to the ordinary business operations of the board of directors. *See* Exxon Mobil Corporation (March 6, 2020) (concurring in exclusion of a proposal requesting that the board charter a new board committee on climate risk because the proposal "micromanages the Company by dictating that the board charter a new board committee on climate risk"); Royal Caribbean Cruises Ltd. (March 14, 2019) (concurring in exclusion of a proposal requesting that

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any stock buybacks adopted by the Board after approval of the proposal not become effective until approved by shareholders because it “micromanages the Company”); Walgreens Boots Alliance, Inc. (November 20, 2018) (concurring in exclusion of a proposal requesting that stock buybacks adopted by the board not become effective until approved by shareholders because it “micromanages the Company”); and JPMorgan Chase & Co. (March 30, 2018) (concurring in exclusion of a proposal requesting the company establish a “Human and Indigenous Peoples’ Rights Committee” because it “micromanages the Company by seeking to impose specific methods for implementing complex policies”).

As part of its ordinary business, the Board determines the processes and procedures necessary to conduct searches for new director candidates. The Proposal attempts to micromanage the Company and the Board by “supplanting the judgment of management and the Board” in connection with the complex matter of determining who or what category of persons may be appropriate candidates for nomination to the Board and prescribing a specific action that the Board must undertake in connection with director searches. Accordingly, the Proposal may be excluded pursuant to Rule 14a-8(i)(7) as it seeks to micromanage the Company and the Board.

***The Proposal May Be Excluded Pursuant to Rule 14a-8(i)(3)***

Rule 14a-8(i)(3) permits a company to exclude all or portions of a shareholder proposal “[i]f the proposal or supporting statement is contrary to any of the Commission’s proxy rules, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials.” Specifically, Rule 14a-9 provides that no solicitation may be made by means of any proxy materials “containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.” The Staff takes the view that a proposal may be excluded pursuant to Rule 14a-8(i)(3) where “neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires” and where “the company demonstrates objectively that a factual statement is materially false or misleading.” Staff Legal Bulletin No. 14B (September 15, 2004).

The Staff has previously concurred in the exclusion of shareholder proposals pursuant to Rule 14a-8(i)(3) in cases where the proposals contained statements that were “materially false or misleading.” *See, e.g.*, Ferro Corporation (March 17, 2015) (concurring in exclusion of a proposal requesting that the company reincorporate in Delaware based on misstatements of Ohio law, which suggested that the stockholders would have increased rights if the Delaware law

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governed the company instead of Ohio law); General Electric Co. (January 6, 2009) (concurring in exclusion of a proposal regarding director service on board committees as false and misleading where the proposal repeatedly referred to “withheld” votes and incorrectly implied that the company offered shareholders the ability to withhold votes in elections of directors); and Johnson & Johnson (January 31, 2007) (concurring in exclusion of a proposal as materially false or misleading where the proposal involved an advisory vote to approve the company’s compensation committee report but contained misleading implications about the contents of the report in light of SEC disclosure requirements).

The Proposal is materially misleading in several respects. Notably, and most concerning, the references in the Proposal’s heading and its supporting statement to “diversity” do not accurately reflect the substance of the Proposal and would be misleading to the Company’s stockholders. We believe these references are intentionally misleading and represent a cynical attempt to capitalize on an important social justice movement to garner greater voting support for a proposal unrelated to diversity.

The Proponent describes the Proposal as a proposal to “Increase Diversity of Director Nominees” in the Proposal’s heading, when in fact the Proposal does not relate to “diversity” as is commonly understood (such as gender, ethnic or racial diversity), but rather advocates for director nominees who are Company non-management employees. The misleading title may cause the Company’s stockholders to have a fundamentally different understanding as to what they are voting to support or oppose. In this regard we note that pursuant to Rule 14a-4(a)(3) of the Exchange Act, the form of proxy must “identify clearly and impartially each separate matter intended to be acted upon.” Were the Company to include the title as written, stockholders reading the Company’s proxy card would be materially misled as to the Proposal’s subject matter.

Further, the Proposal references the “Rooney Rule” which, as the Proposal states, requires National Football League teams to interview minority candidates for head coaching and senior operations openings. By referencing the “Rooney Rule,” which has become a familiar term invoking racial diversity, the Proposal may mislead stockholders into thinking that the Proposal relates to diversity as is commonly understood when in fact the substance of the Proposal, which is to have the Governance and Nominating Committee include Company non-management employees in an initial list of director nominees, does not appear to relate to diversity. While the supporting statement includes a general statement that “Employees are often more diverse than boards in terms of race, gender, and wealth,” the Proponent does not further explain the connection between how including “non-management employees” (without any further specific qualifications or backgrounds) in an initial list of director nominees would increase diversity of the board of directors. Even if increasing diversity of the board is truly the objective of the

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Proposal, it is unclear from the resolution and the supporting statements how including non-management employees in an initial list of director nominees would increase the diversity of the board and the Proponent does not provide any support for this objective.

In addition, the Proponent cites to online materials that are not publicly available and which neither the Company nor its stockholders would be able to access to assess the Proponent's supporting statements. In footnote 4 of the Proposal, the Proponent references a website address which, as of the date of this letter, cannot be found, a screen shot of which is attached hereto as Exhibit B. In Staff Legal Bulletin No. 14 (July 13, 2001) ("SLB 14"), the Staff included the following interpretive guidance:

**May a reference to a website address in the proposal or supporting statement be subject to exclusion under the rule?**

Yes. In some circumstances, we may concur in a company's view that it may exclude a website address under rule 14a-8(i)(3) because information contained on the website may be materially false or misleading, irrelevant to the subject matter of the proposal or otherwise in contravention of the proxy rules. Companies seeking to exclude a website address under rule 14a-8(i)(3) should specifically indicate why they believe information contained on the particular website is materially false or misleading, irrelevant to the subject matter of the proposal or otherwise in contravention of the proxy rules.

The Staff expanded on its approach to website links in Staff Legal Bulletin 14G (October 16, 2012) ("SLB 14G"), reiterating that website references may be excludable under Rule 14a-8(i)(3) and noting that "if a proposal references a website that is not operational at the time the proposal is submitted, it will be impossible for a company or the [S]taff to evaluate whether the website reference may be excluded." Specifically, the Staff stated that it considers "only the information contained in the proposal and supporting statement and determine[s] whether, based on that information, shareholders and the company can determine what actions the proposal seeks." Further, "[i]f a proposal or supporting statement refers to a website that provides information necessary for shareholders and the company to understand with reasonable certainty exactly what actions or measures the proposal requires, and such information is not also contained in the proposal or in the supporting statement, then we believe the proposal would raise concerns under Rule 14a-9 and would be subject to exclusion under Rule 14a-8(i)(3) as vague and indefinite." Without the information included in the link, the Company's stockholders will not be able to make an informed voting decision. In addition, as the Staff noted in SLB 14G, "a reference to a non-operational website in a proposal or supporting statement could be excluded under Rule 14a-8(i)(3) as irrelevant to the subject matter of a proposal."

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As discussed above, the Proponent has included misleading references to “diversity” in the Proposal while also citing to online materials that are not available for the Company and its stockholders to evaluate. Accordingly the Proposal is materially misleading in violation of Rule 14a-9 and therefore may be excluded in its entirety under Rule 14a-8(i)(3), consistent with SLB 14 (the Staff may “find it appropriate for [the Company] to exclude the entire proposal, supporting statement, or both, as materially false or misleading.”).

### **Conclusion**

For the foregoing reasons, and consistent with the Staff’s prior no-action letters, we respectfully request that the Staff concur that it will take no action if the Company excludes the Proposal from its Proxy Materials pursuant to Rule 14a-8(i)(7), on the basis that the Proposal relates to the Company’s ordinary business operations, or, alternatively, Rule 14a-8(i)(3), on the basis that the Proposal is materially false and misleading in violation of Rule 14a-9.

If the Staff has any questions with respect to the foregoing, or if for any reason the Staff does not agree that the Company may exclude the Proposal from its Proxy Materials, please do not hesitate to contact me at [lillian.brown@wilmerhale.com](mailto:lillian.brown@wilmerhale.com) or (202) 663-6743. In addition, should the Proponent choose to submit any response or other correspondence to the Commission, we request that the Proponent concurrently submit that response or other correspondence to the Company, as required pursuant to Rule 14a-8(k) and SLB 14D, and copy the undersigned.

Best regards,



Lillian Brown

Enclosures

cc: Jolene Negre, Associate General Counsel and Assistant Secretary  
The Walt Disney Company

John Chevedden



**EXHIBIT A**

# Corporate Governance

CorpGov.net: improving accountability through democratic corporate governance since 1995

Mr. Alan N. Braverman  
Corporate Secretary  
The Walt Disney Company (DIS)  
500 S Buena Vista Street  
Burbank CA 91521

Dear Mr. Braverman:

I am delighted to own shares in The Walt Disney Company. However, I believe the Board should take this opportunity to signal improvement in its corporate governance.

My attached proposal requesting to **Increase Diversity of Director Nominees** is for the next annual shareholder meeting. I will meet Rule 14a-8 requirements, including the continuous ownership of the required stock value until after the date of the respective shareholder meeting. My submitted format, with the shareholder-supplied emphasis, is intended to be used for definitive proxy publication.

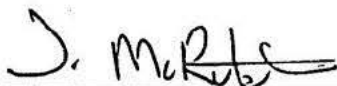
This is my delegation to John Chevedden and/or his designee to forward this Rule 14a-8 proposal to the company and to act as my agent regarding this Rule 14a-8 proposal, negotiations and/or modification, and presentation of it for the forthcoming shareholder meeting.

Please direct all future communications regarding my rule 14a-8 proposal to John Chevedden

to facilitate prompt and verifiable communications. Please identify me exclusively as the lead filer of the proposal.

This letter does not cover proposals that are not rule 14a-8 proposals. This letter does not grant the power to vote. Your consideration and the consideration of the Board of Directors is appreciated in support of the long-term performance of our company. *Please acknowledge receipt of my proposal promptly by email to* \*\*\* We look forward to negotiations and implementation.

Sincerely



James McRitchie

August 30, 2020

Date

cc: Jolene Negre, Associate General Counsel and Assistant Secretary, The Walt Disney Company

[DIS: Rule 14a-8 Proposal, August 30, 2020]  
[This line and any line above it – *Not* for publication.]  
Proposal 4\* - **Increase Diversity of Director Nominees**

**Resolved:** Shareholders of Walt Disney Company ('Disney' or 'Company') urge the board to adopt a policy ('Policy') of promoting significant representation of employee perspectives among corporate decision makers by requiring the initial list of candidates from which new director nominees are chosen ('Initial List') by the Nominations and Governance Committee include (but need not be limited to) non-management employees. The Policy should provide that any third-party consultant asked to furnish an Initial List will be requested to include such candidates.

**Whereas:** There is growing consensus that employees on corporate boards can contribute to long-term corporate sustainability. Policymakers note, having companies run exclusively to benefit shareholders contributes to "stagnant wages, runaway executive compensation and underinvestment in research and innovation."<sup>1</sup> The Business Roundtable asks corporations to align with stakeholder interests, including employees.<sup>2</sup>

Employee representation grows long-term value of companies in several ways. According to the National Bureau of Economic Research, giving workers formal control rights increases female board representation and raises capital formation.<sup>3</sup> Employees are also often more diverse than boards in terms of race, gender, and wealth. The German "co-determination" model of shared governance is lauded as an excellent check against short-term capital allocation practices.<sup>4</sup>

The 2018 UK Corporate Governance Code calls on boards to establish a method for gathering workforce views. Options include a director appointed from the workforce, a formal workforce advisory panel or designating a director to liaise with workers.<sup>5</sup>

Senators Baldwin and Warren have introduced legislation codifying employee representation on corporate boards, noting that modern corporate governance needs to be accountable to a wider array of interests, notably employees.<sup>6</sup> Polling demonstrates bipartisan public support (over 53%) for employee representation.<sup>7</sup>

Anticipated benefits include reduced turnover as employees are more empowered to make firm-specific investments, better informed decision-making because employees have specialized knowledge, better monitoring of management with increased information channels, and reduced shareholder myopia since employees often take a longer-term view.<sup>8</sup>

While our Board satisfies independence requirements, it lacks representation from non-management employees, who bring a different understanding of operations than other directors. Additionally, Disney's CEO to median employee pay ratio is 911:1 and Disney has no employee stock ownership plan (ESOP) to help grow employee wealth and engagement.<sup>9</sup>

The Policy we propose resembles the Rooney Rule, which requires teams to interview minority candidates for head coaching and senior operations openings. By adopting the Rooney Rule, National Football League teams increased diversity and set a precedent for other industries. Policies similar to the Rooney Rule have been adopted by Amazon, Costco, Home Depot, Activision Blizzard, Dover, Expedia, Fastenal, Hilton Worldwide Holdings, L Brands, Robert Half International, Ross Stores and others.

1 <https://www.nytimes.com/2019/01/06/opinion/warren-workers-boards.html>

2 <https://opportunity.businessroundtable.org/wp-content/uploads/2020/06/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures.pdf>

3 <http://economics.mit.edu/files/17273>

4 [https://rooseveltinstitute.org/wp-content/uploads/2017/10/Corp-Gov\\_FINAL.pdf](https://rooseveltinstitute.org/wp-content/uploads/2017/10/Corp-Gov_FINAL.pdf)

5 <https://assets.kpmg/content/dam/kpmg/uk/pdf/2018/07/designated-NED.pdf>

6 <https://www.wsj.com/articles/companies-shouldnt-be-accountable-only-to-shareholders-1534287687>

7 <https://www.dataforprogress.org/blog/2018/12/14/employee-governance>

8 <https://www.corpgov.net/2020/04/kokkinis-and-sergakis-employee-participation-in-uk-companies/>

9 [https://smir.rutgers.edu/sites/default/files/rutgerskelloggreport\\_april2019.pdf](https://smir.rutgers.edu/sites/default/files/rutgerskelloggreport_april2019.pdf)

James McRitchie of CorpGov.net

Increase Long-Term Shareholder Value

Vote to **Increase Diversity of Director Nominees** – Proposal [4\*]  
[This line and any below, *except for footnotes*, are *not* for publication]  
Number 4\* to be assigned by DIS

Notes:

This proposal is believed to conform with Staff Legal Bulletin No. 14B (CF), September 15, 2004 including (emphasis added):

Accordingly, going forward, we believe that it would not be appropriate for companies to exclude supporting statement language and/or an entire proposal in reliance on rule 14a-8(l)(3) in the following circumstances:

- the company objects to factual assertions because they are not supported;
- the company objects to factual assertions that, while not materially false or misleading, may be disputed or countered;
- the company objects to factual assertions because those assertions may be interpreted by shareholders in a manner that is unfavorable to the company, its directors, or its officers; and/or
- the company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such.

**We believe that it is appropriate under rule 14a-8 for companies to address these objections in their statements of opposition.**

See also: Sun Microsystems, Inc. (July 21, 2005).

The stock supporting this proposal will be held until after the annual meeting and the proposal will be presented at the annual meeting. Please acknowledge this proposal promptly by email

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**Ameritrade**

9/11/2020

James Mcritchie  
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Re: Your TD Ameritrade Account Ending in \*\*\*

Dear James Mcritchie,

Pursuant to your request, this letter is to confirm that as of the date of this letter, James McRitchie held and had held continuously for at least 13 months, 100 shares common shares of Walt Disney Co (DIS) in an account ending in \*\*\* at TD Ameritrade. The DTC clearinghouse number for TD Ameritrade is 0188.

If we can be of any further assistance, please let us know. Just log in to your account and go to the Message Center to write us. You can also call Private Client Services at 800-400-4078. We're available 24 hours a day, seven days a week.

Sincerely,

Matt Beckman  
Sr. Resource Specialist  
TD Ameritrade

This information is furnished as part of a general information service and TD Ameritrade shall not be liable for any damages arising out of any inaccuracy in the information. Because this information may differ from your TD Ameritrade monthly statement, you should rely only on the TD Ameritrade monthly statement as the official record of your TD Ameritrade account.

Market volatility, volume, and system availability may delay account access and trade executions.

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**EXHIBIT B**

## Footnote 4 Website Screenshot

