



## Icahn-Illumina Contest: Board Accountability and the UPC

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The circumstances surrounding gene sequence business Illumina, Inc.'s acquisition of GRAIL, Inc. for \$8 billion in cash and stock and Carl Icahn's proxy contest to hold the board accountable provide a cautionary tale for directors who feel invincible, as well as lessons for shareholders seeking to hold boards accountable in light of the SEC's new universal proxy regime.

When a company structures an acquisition in a way that avoids the need for shareholder approval, its directors may take some comfort from their knowledge that shareholders cannot reverse their decision and they may feel less inclined to sufficiently justify the rationale and the price for the acquisition. While it is not rare for an acquirer to close on a transaction even in the face of informal shareholder opposition, it is **extremely noteworthy** when a board takes so much comfort from their insulation from accountability that they close a transaction in the face of formal opposition from governments and antitrust regulators around the world. Shareholders who do not have the right to reject a transaction still have tools at their disposal to hold the boards of acquirers responsible for strategic missteps and value-destructive decisions through traditional director elections at annual meetings.

Icahn's decision to launch a proxy contest to replace three of the nine directors of Illumina's board at its upcoming annual meeting was a clear referendum on the board's decision to close its acquisition of Grail considering formal investigations and opposition from antitrust regulators in the U.S. and the E.U. and the significant resulting legal risks and liabilities. Shareholders — and governments around the world — had foreseeable concerns with the proposed acquisition from the get-go. These included the fact that the company was spending \$8 billion to re-acquire a company it had just spun off four years earlier and obvious antitrust issues that would be presented by the gene sequencing business's acquisition of a company developing cancer tests reliant on gene sequencing.

Antitrust regulators in the U.S. and the E.U. both independently expressed significant concerns with the proposed acquisition. Almost a year after announcing the acquisition, the FTC had filed an administrative complaint and was set to go to trial to block the transaction, while the European Commission had announced a formal investigation of the transaction. In the midst of such challenges, Illumina's board made the unusual decision to go ahead and close the transaction despite such opposition and the associated risks — both legal and financial — from preemptively closing the deal. Shortly thereafter, the European Commission issued a decision prohibiting the

transaction and requiring Grail to be held legally separate from Illumina (“Company”). Illumina’s board (“Board”) was unwavering in its intention to battle regulators in both continents.

When Icahn decided to nominate three directors to the Illumina board nearly a year after the closing, the Company had yet to resolve the antitrust concerns of either regulator and had opted to challenge these regulatory objections. The Board was still appealing the European regulator’s order and was defending itself in front of the commissioners of the FTC, who were still considering whether to issue an order barring the transaction. Shortly after Icahn’s public opposition, the FTC issued an order requiring the divestiture of Grail, which was still held legally separate two years after announcing the deal. The board’s unrelenting pursuit of the transaction was a clear overhand on the company. The Company’s stock had lost nearly \$50 billion in value in under two years, indicating significant shareholder dissatisfaction with the Board’s decisions.

As a result of the SEC’s universal proxy rules that recently went into effect, all of the board’s nine incumbent director nominees and all three of Icahn’s board nominees would be listed on each side’s proxy cards. This permitted shareholders to mix and match directors from both slates and to individually select which nine directors they would vote for, instead of being forced to pick just one of the slates. In a 2022 research note regarding how it intended to approach director election contests under the universal proxy regime, influential proxy advisory firm Institutional Shareholder Services (“ISS”) predicted that boards would no longer be able to shield their weakest contributors.

While Icahn has never shied away from attacking individual directors, in light of shareholders’ ability to mix and match slates using a universal proxy card, Icahn went to great lengths to target specific board nominees. His invective against the Board was particularly focused on the performance and alleged conflicts of two directors in particular: the CEO and the Board chairman. (To a lesser extent, he also targeted another tenured member of the Board.) Meanwhile, the Company attacked the experience of Icahn’s nominees and their ties to him, while defending its directors against Icahn’s attacks.

Icahn left no room for shareholders to be confused about whom he wanted them to vote against — an important consideration when using a universal proxy. The flip side to that, however, is that it is necessary for parties of proxy contests to explain why each of their individual board nominees is the better choice as compared to their opponents. In the eyes of some investors and ISS, although he made an effective case that some change was needed on the Board, Icahn did not make a compelling case for all three of his individual board nominees. As a result, ISS recommended that shareholders elect only one of Icahn’s nominees and vote against the election of the Board chair. At the May annual meeting, the majority of shareholders appeared to have agreed that change was needed in the boardroom and opted to oust the Board chairman and elect one of Icahn’s nominees. Their decision to only elect one Icahn nominee provides evidence of the importance of devoting sufficient attention to explaining why each of the individual nominees on your director slate brings experience that is preferable to the opposing side’s directors you are targeting.

While CEOs often present a rife target for activists given their particular responsibility for company underperformance and execution, the results of the Illumina proxy contest should serve as a reminder that it is especially difficult to convince shareholders to remove management from a board. ISS recommended against the reelection of the Board chair but ultimately supported the

CEO's election and stressed the potential disruptiveness to a company of removing management. While Icahn managed to remove the chair of the Board, Illumina's CEO was re-elected to the Board. Activists should attempt to assuage investors reluctant to remove a CEO by making a convincing case that the CEO's removal would not be excessively disruptive to the company in light of its current position and plans. It is especially helpful if the activist has identified a qualified replacement.