



DIVISION OF
CORPORATION FINANCE

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

April 12, 2023

Lyuba Goltser
Weil, Gotshal & Manges LLP

Re: The Kroger Co. (the "Company")
Incoming letter dated February 16, 2023

Dear Lyuba Goltser:

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

The Proposal requests the Company issue a public report detailing the potential risks associated with omitting "viewpoint" and "ideology" from its written equal employment opportunity policy.

There appears to be some basis for your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, the Proposal relates to, and does not transcend, ordinary business matters. Accordingly, we will not recommend enforcement action to the Commission if the Company omits the Proposal from its proxy materials in reliance on Rule 14a-8(i)(7).

Copies of all of the correspondence on which this response is based will be made available on our website at <https://www.sec.gov/corpfin/2022-2023-shareholder-proposals-no-action>.

Sincerely,

Rule 14a-8 Review Team

cc: Sarah Rehberg
National Center for Public Policy Research

Weil, Gotshal & Manges LLP

767 Fifth Avenue
New York, NY 10153-0119
+1 212 310 8000 tel
+1 212 310 8007 fax

Lyuba Goltser
lyuba.goltser@weil.com

February 16, 2023

VIA E-MAIL (shareholderproposals@sec.gov)

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

**Re: The Kroger Co.
 2023 Annual Meeting Omission of Shareholder Proposal of the National
 Center for Public Policy Research
 Securities Exchange Act of 1934 – Rule 14a-8**

Ladies and Gentlemen:

This letter is submitted on behalf of our client, The Kroger Co. (the “Company” or “Kroger”), pursuant to Rule 14a-8 under the Securities Exchange Act of 1934, as amended (the “Exchange Act”). The Company has received the shareholder proposal and related correspondence attached as Exhibit A hereto (the “Proposal”) submitted by the National Center for Public Policy Research (the “Proponent”) for inclusion in the Company’s form of proxy, proxy statement and other proxy materials (together, the “Proxy Materials”) for its 2023 annual meeting of shareholders (the “2023 Annual Meeting”). In reliance on Rule 14a-8 under the Exchange Act, the Company intends to omit the Proposal from the Proxy Materials pursuant to Rule 14a-8(i)(7) (ordinary business operations).

We respectfully request the concurrence of the Staff of the Division of Corporation Finance (the “Staff”) of the Securities and Exchange Commission (the “Commission”) that no enforcement action will be recommended if the Company omits the Proposal from the Proxy Materials. Pursuant to Rule 14a-8(j), this letter is being filed with the Commission no later than eighty (80) calendar days before the Company intends to file the Proxy Materials in definitive form with the Commission.

Pursuant to Section C of Staff Legal Bulletin No. 14D (November 7, 2008) (“SLB 14D”), the Company has submitted this letter and the related exhibits to the Staff via email to shareholderproposals@sec.gov. Also, in accordance with Rule 14a-8(j), a copy of this letter and related exhibits is being simultaneously provided by email on this date to the Proponent informing it of the Company’s intention to exclude the Proposal from the Proxy Materials.

The Company agrees to promptly forward to the Proponent any Staff response to the Company's no-action request that the Staff transmits to the Company by mail, email and/or facsimile. Rule 14a-8(k) and SLB 14D provide that a shareholder proponent is required to send to the company a copy of any correspondence which the proponent elects to submit to the Commission or the Staff. Accordingly, the Company hereby informs the Proponent that the undersigned on behalf of the Company is entitled to receive from the Proponent a concurrent copy of any additional correspondence submitted to the Commission or the Staff relating to the Proposal.

I. The Proposal

The Company received the Proposal, accompanied by a cover letter from the Proponent, via FedEx on December 21, 2022.

The Proposal states:

RESOLVED

Shareholders request the Kroger Company ("Kroger") issue a public report detailing the potential risks associated with omitting "viewpoint" and "ideology" from its written equal employment opportunity (EEO) policy. The report should be available within a reasonable timeframe, prepared at a reasonable expense and omit proprietary information.

The cover letter and the Proposal, along with a statement in support of the Proposal (the "Supporting Statement"), are attached to this letter as Exhibit A.

II. Basis for Exclusion

We hereby respectfully request that the Staff concur in Kroger's view that it may exclude the Proposal from the 2023 Proxy Materials pursuant to Rule 14a-8(i)(7) because the Proposal deals with matters relating to Kroger's ordinary business operations.

The Proposal May be Excluded Pursuant to Rule 14a-8(i)(7) Because the Proposal Deals with Matters Relating to the Company's Ordinary Business Operations.

Rule 14a-8(i)(7) permits the omission of a shareholder proposal dealing with matters relating to a company's "ordinary business operations." According to the Commission's release accompanying the 1998 amendments to Rule 14a-8, 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." Release No. 34-40018 (May 21, 1998) (the "1998 Release").

In the 1998 Release, the Commission identified the two central considerations underlying the general policy for the ordinary business exclusion. The first consideration relates to the subject

matter of the proposal. The Commission stated that, “[c]ertain 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.” *Id.* Examples of the tasks cited by the Commission include “management of the workforce.” *Id.* The second consideration relates to the “degree to which the proposal seeks 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.” *Id.*; *see also* Staff Legal Bulletin No. 14L (Nov. 3, 2021) (“SLB 14L”). The term “ordinary business” is rooted in the fundamental “corporate law concept providing management with flexibility in directing certain core matters involving the company’s business and operations.” 1998 Release (citing Release No. 12999 (Nov. 22, 1976)).

The Commission has stated that a proposal requesting the dissemination of a report is excludable under Rule 14a-8(i)(7) if the substance of the proposal involves a matter of ordinary business of the company. *See* Exchange Act Release No. 34-20091 (Aug. 16, 1983) (the “1983 Release”) (“[T]he staff will consider whether the subject matter of the special report or the committee involves a matter of ordinary business; where it does, the proposal will be excludable under Rule 14a-8(c)(7).”); *see also* *Netflix, Inc.* (Mar. 14, 2016) (permitting exclusion under Rule 14a-8(i)(7) of a proposal that requested a report describing how company management identifies, analyzes and oversees reputational risks related to offensive and inaccurate portrayals of Native Americans, American Indians and other indigenous peoples, how it mitigates these risks and how the company incorporates these risk assessment results into company policies and decision-making, noting that the proposal related to the ordinary business matter of the “nature, presentation and content of programming and film production”).

In accordance with the policy considerations underlying the ordinary business exclusion, the Staff consistently has permitted exclusion of proposals under Rule 14a-8(i)(7) that relate to management of a company’s workforce. *See* 1998 Release (excludable matters “include the management of the workforce, such as the hiring, promotion, and termination of employees”); *see also, e.g., Walmart, Inc.* (Apr. 8, 2019) (permitting exclusion under Rule 14a-8(i)(7) of a proposal that requested the company’s board prepare a report evaluating discrimination risk from the company’s policies and practices for hourly workers taking medical leave, noting that the proposal “relates generally to the [c]ompany’s management of its workforce”); *Yum! Brands, Inc.* (Mar. 6, 2019) (permitting exclusion under Rule 14a-8(i)(7) of a proposal that sought to prohibit the company from engaging in certain employment practices, noting that “the [p]roposal relates generally to the [c]ompany’s policies concerning its employees”).

In particular, the Staff has permitted exclusion of proposals under Rule 14a-8(i)(7) that are substantially similar to the Proposal, including proposals submitted after the publication of SLB 14L in November 2021. For example, in *Blackrock, Inc.* (Apr. 4, 2022), as supported by SLB 14L, the Staff permitted exclusion under Rule 14a-8(i)(7) of a proposal submitted by the Proponent that asked for a report detailing the potential risks associated with omitting “viewpoint” and “ideology” from the company’s written equal employment opportunity policy. This was consistent with

American Express Company (Feb. 26, 2021)* and *Apple Inc.* (Dec. 20, 2019, recon. denied Jan. 17, 2020), where the Staff permitted exclusion under Rule 14a-8(i)(7) of proposals submitted by the Proponent that asked for a report detailing the potential risks associated with omitting “viewpoint” and “ideology” from the company’s written equal employment opportunity policy. In *Apple Inc.*, the Staff noted that the proposal “does not transcend the [c]ompany’s ordinary business operations.” See also, e.g., *Alphabet Inc.* (Apr. 9, 2020, recon. denied Apr. 22, 2020)* (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting a report detailing the potential risks associated with omitting “viewpoint” and “ideology” from the company’s written equal employment opportunity policy); *salesforce.com, Inc.* (Apr. 9, 2020, recon. denied Apr. 22, 2020)* (same); *CVS Health Corp.* (Feb. 27, 2015) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting that the company amend its equal employment opportunity policy (or equivalent policy) to “explicitly prohibit discrimination based on political ideology, affiliation or activity” because the proposal “relates to [the company’s] policies concerning its employees.”); *The Walt Disney Company* (Nov. 24, 2014, recon. denied Jan. 5, 2015) (permitting exclusion under Rule 14a-8(i)(7) of a proposal that requested the company’s board consider the possibility of adopting anti-discrimination principles protecting employees’ right to “engage in legal activities relating to the political process, civic activities and public policy without retaliation in the workplace” as relating to the ordinary business matter of “policies concerning [the company’s] employees.”).

In this instance, the Proposal focuses on Kroger’s management of its workforce and policies concerning employees, both of which are ordinary business matters. In particular, the Proposal requests a report “detailing the potential risks associated with omitting ‘viewpoint’ and ‘ideology’ from [Kroger’s] written equal employment opportunity (EEO) policy.” In addition, the Proposal’s Supporting Statement claims that “shareholders are unable to evaluate how Kroger prevents discrimination towards employees based on their ideology or viewpoint, mitigates employee concerns of potential discrimination, and ensures a respectful and supportive work atmosphere that bolsters employee performance.” When read together, the Proposal’s resolved clause and Supporting Statement clearly articulate a concern with the ordinary business matters of how Kroger manages its workforce through employee policies. Decisions with respect to the management of employees and the substance of policies relating to the relationship between Kroger and its employees are at the heart of Kroger’s business as the nation’s largest supermarket retailer, and are so fundamental to its day-to-day operations that they cannot, as a practical matter, be subject to direct shareholder oversight. Notably, as of January 2022, Kroger employed over 420,000 full- and part-time employees across 35 states and the District of Columbia; managing this workforce is fundamentally ordinary business. Therefore, consistent with the precedent described above, the Proposal may be excluded under Rule 14a-8(i)(7) as relating to Kroger’s ordinary business operations.

We note that a proposal may not be excluded under Rule 14a-8(i)(7) if it is determined to focus on a significant policy issue. The fact that a proposal may touch upon a significant policy issue, however, does not preclude exclusion under Rule 14a-8(i)(7). Instead, the question is

* Citations marked with an asterisk indicate Staff decisions issued without a letter.

whether the proposal focuses primarily on a matter of broad public policy versus matters related to the company's ordinary business operations. *See* 1998 Release; Staff Legal Bulletin No. 14E (Oct. 27, 2009). The Staff has consistently permitted exclusion of shareholder proposals where the proposal focused on ordinary business matters, even though it also related to a potential significant policy issue. For example, in *PetSmart, Inc.* (Mar. 24, 2011), the proposal requested that the company's board require suppliers to certify that they had not violated certain laws regulating the treatment of animals. Those laws affected a wide array of matters dealing with the company's ordinary business operations beyond the humane treatment of animals, which the Staff has recognized as a significant policy issue. In permitting exclusion under Rule 14a-8(i)(7), the Staff noted the company's view that "the scope of the laws covered by the proposal is 'fairly broad in nature from serious violations such as animal abuse to violations of administrative matters such as record keeping.'" *See also, e.g., CIGNA Corp.* (Feb. 23, 2011) (permitting exclusion under Rule 14a-8(i)(7) when, although the proposal addressed the potential significant policy issue of access to affordable health care, it also asked CIGNA to report on expense management, an ordinary business matter); *Capital One Financial Corp.* (Feb. 3, 2005) (permitting exclusion under Rule 14a-8(i)(7) when, although the proposal addressed the significant policy issue of outsourcing, it also asked the company to disclose information about how it manages its workforce, an ordinary business matter).

In this instance, even if the Proposal were to touch on a potential significant policy issue, the Proposal's overwhelming concern with how Kroger manages its workforce through employee policies demonstrates that the Proposal's focus is on ordinary business matters. Moreover, the Staff previously has determined that a nearly identical proposal did not transcend the company's ordinary business operations in *Blackrock* (Apr. 4, 2022). Therefore, even if the Proposal could be viewed as touching upon a significant policy issue, its focus is on ordinary business matters.

Accordingly, the Proposal should be excluded from Kroger's Proxy Materials pursuant to Rule 14a-8(i)(7) as relating to its ordinary business operations.

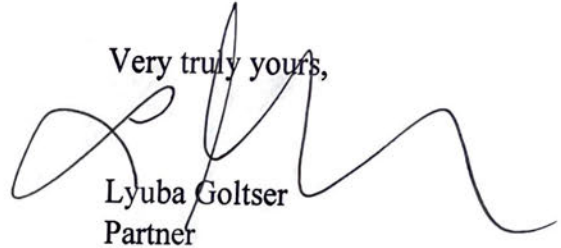
III. Conclusion

For the foregoing reasons, please confirm that the Staff will not recommend any enforcement action to the Commission if the Proposal is omitted from the Proxy Materials.

Should the Staff disagree with our conclusions regarding the omission of the Proposal, or should any additional information be desired in support of the Company's position, we would appreciate an opportunity to confer with the Staff concerning these matters prior to the issuance of the Staff's Rule 14a-8 response.

If we can provide additional correspondence to address any questions that the Staff may have with respect to this no-action request, please do not hesitate to call me at 212-310-8048 or contact me via email at lyuba.goltser@weil.com.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Lyuba Goltser', written over the typed name and title.

Lyuba Goltser
Partner

Enclosures

cc:

Christine Wheatley
Stacey Heiser
The Kroger Co.

Sarah Rehberg
National Center for Public Policy Research

Exhibit A

Shareholder Proposal and Related Correspondence



December 21, 2022

Via FedEx to

Corporate Secretary
The Kroger Co.
1014 Vine Street
Cincinnati, Ohio 45202-1100

Dear Sir/Madam,

I hereby submit the enclosed shareholder proposal ("Proposal") for inclusion in the Kroger (the "Company") proxy statement to be circulated to Company shareholders in conjunction with the next annual meeting of shareholders. The Proposal is submitted under Rule 14(a)-8 (Proposals of Security Holders) of the United States Securities and Exchange Commission's proxy regulations.

I submit the Proposal as the Coordinator of the Free Enterprise Project of the National Center for Public Policy Research, which has continuously owned Company stock with a value exceeding \$2,000 for at least 3 years prior to and including the date of this Proposal and which intends to hold these shares through the date of the Company's 2023 annual meeting of shareholders. A proof of ownership letter is forthcoming.

Pursuant to interpretations of Rule 14(a)-8 by the Securities & Exchange Commission staff, I initially propose as a time for a telephone conference to discuss this proposal January 10, 2022 or January 11, 2022 from 1-4 p.m. eastern. If that proves inconvenient, I hope you will suggest some other times to talk. Please feel free to contact me at [REDACTED] so that we can determine the mode and method of that discussion.

Copies of correspondence or a request for a "no-action" letter should be sent to me at the National Center for Public Policy Research, 2005 Massachusetts Ave. NW, Washington, DC 20036 and emailed to [REDACTED]

Sincerely,

A handwritten signature in cursive script, appearing to read "Sarah Rehberg".

Sarah Rehberg

cc: Scott Shepard, FEP Director
Enclosures: Shareholder Proposal

EEO Policy Risk Report

RESOLVED

Shareholders request the Kroger Company (“Kroger”) issue a public report detailing the potential risks associated with omitting “viewpoint” and “ideology” from its written equal employment opportunity (EEO) policy. The report should be available within a reasonable timeframe, prepared at a reasonable expense and omit proprietary information.

SUPPORTING STATEMENT

Kroger does not explicitly prohibit discrimination based on viewpoint or ideology in its written EEO policy.

Kroger’s lack of a company-wide best practice EEO policy sends mixed signals to company employees and prospective employees and calls into question the extent to which individuals are protected due to inconsistent state policies and the absence of a relevant federal protection. Approximately half of Americans live and work in a jurisdiction with no legal protections if their employer takes action against them for their political activities or discriminates on the basis of viewpoint in the workplace.

Companies with inclusive policies are better able to recruit the most talented employees from a broad labor pool, resolve complaints internally to avoid costly litigation or reputational damage, and minimize employee turnover. Moreover, inclusive policies contribute to more efficient human capital management by eliminating the need to maintain different policies in different locations.

There is ample evidence that individuals with conservative viewpoints may face discrimination at Kroger.

Kroger recently kowtowed to leftwing social media criticism by removing patriotic and Second Amendment related paraphernalia from store shelves. For instance, after someone complained on Twitter about a drink sleeve that stated, “Arms Change, Rights Don’t”, the Company reportedly recalled the items.¹ Kroger’s subsidiary grocery store, Harris Teeter, likewise complied with liberal demands to pull “Freedom Series” items from its shelves, removing items that read, “Give me liberty or give me death” and “America, love it or leave it.”²

While removing patriotic items from its stores, Kroger has simultaneously pushed a leftwing social agenda. Published in 2021, the Company released an “allyship guide” that told employees

¹ <https://www.bizpacreview.com/2022/06/21/harris-teeter-kroger-remove-pro-america-items-from-shelves-after-woke-complaints-backlash-is-swift-1252599/>; <https://www.foxbusiness.com/retail/harris-teeter-kroger-backlash-pro-america-items-complaints>

² <https://www.bizpacreview.com/2022/06/21/harris-teeter-kroger-remove-pro-america-items-from-shelves-after-woke-complaints-backlash-is-swift-1252599/>; <https://www.foxbusiness.com/retail/harris-teeter-kroger-backlash-pro-america-items-complaints>

to use “inclusive language” and celebrate transgender holidays.³ Defining terms such as “non-binary,” “transgender,” and “pansexual,” the guide asserts that, “Some people’s morality can be a barrier to accepting LGBTQ+ people.”⁴

Removing pro-America items from store shelves while publishing “allyship” training guides for staff certainly raise concerns over how Kroger treats employees with diverse points of view, particularly those who disagree with the Company’s blatant leftwing actions. This places the Company in reputational, legal, and financial risk, as evidenced by a recent settlement with fired employees who refused to wear a Company issued apron adorning a rainbow on account of it violating their religious beliefs.⁵

Presently, shareholders are unable to evaluate how Kroger prevents discrimination towards employees based on their ideology or viewpoint, mitigates employee concerns of potential discrimination, and ensures a respectful and supportive work atmosphere that bolsters employee performance.

We recommend that the report evaluate risks including, but not limited to, negative effects on employee hiring and retention, as well as litigation risks from conflicting state and company anti-discrimination policies.

³ <https://www.breitbart.com/social-justice/2022/08/31/kroger-allyship-guide-tells-employees-to-celebrate-trans-holidays-support-bail-fund/>

⁴ https://www.thekrogerco.com/wp-content/uploads/2021/03/AAP-Alllyship-Guide_v3.2-External-merged.pdf

⁵ <https://news.yahoo.com/kroger-pay-180k-lawsuit-over-162047710.html>



UBS Financial Services Inc.
1000 Harbor Blvd
3rd Floor
Weehawken, NJ 07086

Confirmation

ubs.com/fs

Office of the Secretary
Kroger Company

12/28/2022

Confirmation: Information regarding the account of The National Center for Public Policy Research

Dear Sir or Madam,

The following client has requested that UBS Financial Services Inc provide you with a letter of reference to confirm it's banking relationship with our firm.

As of 12/28/2022, The National Center for Public Policy Research holds, and has held continuously since December 21st, 2019 more than \$2000 of Kroger Company common stock.

Disclosure

Please be aware this account is a securities account, not a "bank" account. Securities, mutual funds and other non-deposit investment products are not FDIC-insured or bank guaranteed and are subject to market fluctuation. The assets in the account, including cash balances, may also be subject to the risk of withdrawal and transfer.

Questions

If you have any questions about this information, please contact the UBS Wealth Advice Center at 877-827-7870.

UBS Financial Services is a member firm of the Securities Investor Protection Corporation (SIPC).

Sincerely,

Evan Yeaw
Head of Wealth Advice Center Operations
UBS Financial Services



March 2, 2023

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

RE: Stockholder Proposal of the National Center for Public Policy Research, Securities Exchange Act of 1934 – Rule 14a-8

Ladies and Gentlemen,

This correspondence is in response to the letter of Lyuba Goltser on behalf of The Kroger Co. (the “Company”) dated February 16, 2023, requesting that your office (the “Commission” or “Staff”) take no action if the Company omits our Shareholder Proposal (the “Proposal”) from its 2023 proxy materials for its 2023 annual shareholder meeting.

RESPONSE TO KROGER’S CLAIMS

Our Proposal asks the Company to:

issue a public report detailing the potential risks associated with omitting “viewpoint” and “ideology” from its written equal employment opportunity (EEO) policy. The report should be available within a reasonable timeframe, prepared at a reasonable expense and omit proprietary information.

The Company seeks to exclude our Proposal from the 2023 Proxy Materials pursuant to Rule 14a-8(i)(7) because it claims the Proposal concerns the Company’s ordinary business operations.

Under Rule 14a-8(g), the Company bears the burden of persuading the Staff that it may omit our Proposal. The Company has failed to meet that burden.

Additionally, if the Staff determines to issue the Company relief, that act would raise significant constitutional and administrative law issues.

Should the Staff nonetheless find our Proposal omissible, we intend to seek reconsideration of that decision from the SEC Commissioners. We mention this now to avoid any possibility of a reprise of the developments in *BlackRock, Inc.* (avail. Apr. 4, 2022; *reconsideration denied* May 4, 2022) in which proceeding we indicated to BlackRock and to the Staff our intention to seek reconsideration within approximately 15 minutes of receiving the Staff's decision that our proposal in that proceeding was omissible, and yet by some set of events still not fully clear to us, the Staff allowed BlackRock to unilaterally block our request for reconsideration. The Staff did this by delaying its omissibility decision for an inordinate time, long enough for BlackRock purportedly to have been able to begin its printing process within the 15-odd minutes between the issuance of the Staff's letter and our indication of our intent to seek reconsideration, and then agreeing with BlackRock that this unilateral act by BlackRock barred Commission reconsideration of the Staff's omissibility determination. We think the behavior of the Staff last year, whatever the specific details, demonstrated the arbitrariness, capriciousness and bias of its processes and determinations, and underscored the structural flaws that characterize the entire no-action review process.

Relatedly, we ask that any information pertinent to this proceeding, conveyed between the Company and the Staff by any means whatever, promptly be conveyed to us as well, as required by section G.9 of SLB No. 14.¹ This particularly applies to any communications by the Company or any representative of the Company to the Staff of its plans or schedule for printing proxy materials, and includes phone calls, which cannot be used to evade the transparency requirements and are generally discouraged by SEC Staff under section G.10.²

Finally, we ask the Staff to render its no-action determination in light of our stated intention to seek reconsideration, and to issue it with sufficient timeliness to avoid functionally denying us a reconsideration opportunity that is facially a part of this review system.

¹ <https://www.sec.gov/pdf/cfslb14.pdf>; <https://www.sec.gov/corpfin/staff-legal-bulletin-14d-shareholder-proposals>; <https://www.sec.gov/interps/legal/cfslb14.htm>

² <https://www.sec.gov/interps/legal/cfslb14.htm>

Analysis

Part I. Our Proposal does not implicate the ordinary business operations of the company, and it is a matter of substantial policy concern so that it transcends ordinary-business analysis.

A. Rule 14a-8(i)(7).

The Company seeks permission to omit our Proposal on the ground of Rule 14a-8(i)(7), the ordinary business exception. The exception, in its entirety, permits exclusion of a proposal “[i]f the proposal deals with a matter relating to the company’s ordinary business operations.”³

The initial rule does not flesh out this provision at all. It has, though, been amended. One of those amendments, made in 1998, was restated and explained in a Staff Legal Bulletin (SLB) in 2002. There the Staff explained that:

[t]he fact that a proposal relates to ordinary business matters does not conclusively establish that a company may exclude the proposal from its proxy materials. ...[P]roposals that relate to ordinary business matters but that focus on ‘sufficiently significant social policy issues ... would not be considered to be excludable because the proposals would transcend the day-to-day business matters.’⁴

As the amendment itself explained, in detail particularly relevant to our considerations here:

The policy underlying the ordinary business exclusion rests on two central considerations. The first relates to the subject matter of the proposal. Certain 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. Examples include the management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers. *However, proposals relating to such matters but focusing on sufficiently significant social policy issues (e.g., **significant discrimination matters**) generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.*⁵

There matters stood until 2017. That fall, Staff issued a bulletin (“SLB 14I”) recognizing that corporate boards would likely have some insight into whether issues raised in shareholder

³ 17 C.F.R. § 240.14a-8(i)(7).

⁴ *Staff Legal Bulletin* No. 14A (July 12, 2002) (quoting *Amendments to Rules on Shareholder Proposals, Exchange Act Release* No. 40018 (May 21, 1998), available at <https://www.sec.gov/rules/final/34-40018.htm>) (last accessed Feb. 15, 2023).

⁵ *Amendments to Rules on Shareholder Proposals, Exchange Act Release* No. 40018 (May 21, 1998) (emphasis added) (“*Amendments to Rules*”), available at <https://www.sec.gov/rules/final/34-40018.htm> (last accessed Feb. 15, 2023).

proposals were of sufficiently substantial importance to transcend the category of ordinary business operations.⁶ It therefore invited corporations, in arguing for an ordinary business exception, to include in support of their claims details of their boards' analyses of the shareholder proposals and the underlying policy significance of those proposals.⁷ Staff expanded this guidance further in 2018 ("SLB 14J") and suggested that in demonstrating its board's analysis of the substantiality of an issue, a company should be expansive in its communications with the Staff.⁸ In doing so, Staff welcomed details about particulars such whether the company had already addressed the issue in some manner, including the difference – or the delta – between the proposal's specific request and the actions the company has already taken, and an analysis of whether the delta presented a significant policy issue for the company.⁹ Additional Staff guidance appeared again in the fall of 2019 ("SLB 14K"), wherein Staff underscored the value of the 2018 "delta analysis."¹⁰

Then most recently, on November 3, 2021, Staff reverted to the aforementioned 1998 guidance by rescinding SLB 14I, SLB 14J, and SLB 14K following "a review of staff experience applying the guidance in them."¹¹ Relevantly, of the rescinded bulletins, Staff said an "undue emphasis was placed on evaluating the significance of a policy issue to a particular company at the expense of whether the proposal focuses on a significant social policy...." Staff went on to explain that it was prospectively realigning its "approach for determining whether a proposal relates to 'ordinary business' with the standard the Commission initially articulated in 1976, which provided an exception for certain proposals that raise significant social policy issues, and which the Commission subsequently reaffirmed in the 1998 Release."¹² The Staff explained that it:

will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal. In making this determination, the staff

⁶ See *Staff Legal Bulletin* No. 14I (Nov. 17, 2017), available at <https://www.sec.gov/interps/legal/cfs1b14i.htm> (Feb. 15, 2023) ("A board acting in this capacity and with the knowledge of the company's business and the implications for a particular proposal on that company's business is well situated to analyze, determine and explain whether a particular issue is sufficiently significant because the matter transcends ordinary business and would be appropriate for a shareholder vote.").

⁷ See *id.* ("Accordingly, going forward, we would expect a company's no-action request to include a discussion that reflects the board's analysis of the particular policy issue raised and its significance. That explanation would be most helpful if it detailed the specific processes employed by the board to ensure that its conclusions are well-informed and well-reasoned.").

⁸ See *Staff Legal Bulletin* No. 14J (Oct. 23, 2018), available at <https://www.sec.gov/corpfin/staff-legal-bulletin-14j-shareholder-proposals> (last accessed Feb. 15, 2023).

⁹ *Id.*

¹⁰ See *Staff Legal Bulletin* No. 14K (Oct. 16, 2019), available at <https://www.sec.gov/corpfin/staff-legal-bulletin-14k-shareholder-proposals> (last accessed Feb. 15, 2023).

¹¹ See *Staff Legal Bulletin* No. 14L (Nov. 3, 2021), available at <https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals> (last accessed Feb. 15, 2023).

¹² *Id.*

will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.¹³

The staff in particular emphasized that “proposals squarely raising human capital management issues with a broad societal impact would not be subject to exclusion solely because the proponent did not demonstrate that the human capital management issue was significant to the company.”¹⁴ Our proposal raises exactly such an issue: whether current Company policies and practices raise risks as a result of a discriminatory workplace. Further, the Staff’s longstanding position is that “the presence of widespread public debate” must be considered in determining whether the issue transcends ordinary business operations.¹⁵

B. The Proposal does not relate to the Company’s ordinary business and raises issues of significant social policy so as to exempt it from omission on such grounds.

Our Proposal requests the Company “issue a public report detailing the potential risks associated with omitting ‘viewpoint’ and ‘ideology’ from its written equal employment opportunity (EEO) policy.” Nowhere, despite the Company’s claims to the contrary, does the Proposal seek to manage the Company’s workforce. It instead seeks the issuance of a report gauging the risk of not prohibiting discrimination – a request that has been consistently recognized by the Staff as an appropriate request that either does not inappropriately interfere with workforce management or implicates such significant social policy issues as to transcend that concern. *See, e.g., Levi Strauss & Co.* (avail. Feb. 10, 2022), *The Walt Disney Co.* (avail. Jan. 19, 2022), *Amazon.com, Inc.* (avail. Apr. 7, 2021).

These decisions are manifestly correct. If following the issuance of the report the Company elects to change certain practices, that is a wholly separate matter left up to the Company. The mere practice of ascertaining information on the risk of the Company’s failure to protect its workforce against discrimination does not seek to direct business operations themselves, but rather seeks a review of the impacts or effects thereof.

In support of its claim that our Proposal seeks inappropriately to manage the Company’s workforce, the Company cites *Walmart, Inc.* (avail. Apr. 8, 2019) and *Yum! Brands, Inc.* (avail. Mar. 6, 2019), but neither is applicable. The proposal in *Walmart* was concerned with whether Walmart’s policies and practices for hourly workers taking absences from work for personal or family illness resulted in discrimination. In doing so, the proposal concerned the company’s handling of a very specific employee benefit: sick leave. The proposal in *Yum Brands!* similarly concerned itself with specific terms of employment and whether the company could require employees to participate in mandatory arbitration, and non-compete and non-disclosure

¹³ See *Staff Legal Bulletin* No. 14L (Nov. 3, 2021), available at <https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals> (last accessed Feb. 15, 2023).

¹⁴ *Id.*

¹⁵ See *Staff Legal Bulletin* No. 14A (Jul. 12, 2002), available at <https://www.sec.gov/interp/legals/cfslb14a.htm> (last accessed Feb. 27, 2023).

agreements. Unlike the proposals in *Walmart* and *Yum Brands!*, our Proposal does not relate to a specific employee benefit or a term of employment. We just ask for a risk-management review of a failure to forbid discrimination – a report of just the sort found non-omissible in *Levi Strauss, Disney Co., Amazon.com,* and *CorVel Corp.* (avail. June 5, 2019) (the proposal in *CorVel* being the one upon which our Proposal here was explicitly modeled – indistinguishable except for the type of discrimination on which the proposals focus) and many other proceedings in recent years.

Moreover, the opinions in *Walmart* and *Yum! Brands* were issued before the substantial changes instituted by SLB 14L, changes which significantly privilege proposals that seek to address concerns of workforce management and potential discrimination such as those raised in our Proposal. That bulletin is particularly relevant here. In it, the Staff emphasized that “proposals squarely raising human capital management issues with a broad societal impact would not be subject to exclusion solely because the proponent did not demonstrate that the human capital management issue was significant to the company,”¹⁶ thus underscoring the special propriety of “raising human capital management issues with broad societal impact.”

That is exactly what our Proposal does – and in fact all that our proposal does. We seek an audit and report that will let shareholders know whether and to what extent the Company has recognized the importance to the Company of including a wide diversity of opinion and viewpoint, and of protecting employees from discrimination because of their willingness to express unpopular (with company management) viewpoints at the Company to the same extent that opinions that are popular (with company management) are protected – the former being the most valuable viewpoints exactly because they are non-dominant, and therefore insightful and challenging – and protecting their freedom to hold them outside of the Company without retaliation or harassment.

The Company rightly notes that our Proposal is essentially identical to proposals that we submitted before the changes wrought by SLB 14L, and that before those changes our proposal was considered “not [to] transcend the [c]ompany’s ordinary business operations.” *Apple Inc.* (Dec. 20, 2019, *reconsid. denied* Jan. 17, 2020). But the analysis under which that and similar determinations were made has been swept away by SLB 14L.

Whatever the merit of those decisions then, it surely cannot stand under the rules established by SLB 14L. As we have noted, SLB 14L especially privileges proposals that raise concerns of “human capital management issues with a broad societal impact,”¹⁷ while Rule 14a-8(i)(7) challenges have been particularly disfavored when brought against proposals that raise “significant discrimination matters” for more than 20 years.¹⁸ That’s exactly what, and only what, our Proposal raises. The Company does not argue, because it could not, that discrimination on the basis of race or sex or sexual orientation – whether for or against groups that companies honor with the label “diverse” – implicates substantial policy concerns while viewpoint

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Amendments to Rules, supra* note 3.

discrimination does not. And it does not, because it cannot, argue that viewpoint discrimination is not now an issue of significant public concern; in fact, it is an issue of overwhelming concern for the approximately half of the country experiencing that discrimination throughout their lives. Barring discrimination against Americans based on their political views even has a pedigree in civil rights law. Though political views remain an emerging field in federal nondiscrimination law, the civil rights laws of numerous states already treat political affiliation or political activities as protected characteristics.¹⁹ Accordingly, political views are well within the scope of established civil rights and are socially significant, as evidenced by their codification in law.

The only post-SLB 14L precedent cited by the Company is the Staff's decision in *BlackRock, Inc.* (Apr. 4, 2022; *reconsideration denied* May 4, 2022). We not only believe that proceeding to have been wrongly decided in light of SLB 14L, but as previously discussed, we believe the Staff's engineering of that process to deny us review of its determination in that proceeding by the Commission demonstrated the arbitrariness, capriciousness and bias of its processes and determinations, and underscored the structural flaws that characterize the entire no-action review process. Our intent in this proceeding is to achieve that Commission review, or to lay bare those systemic flaws.

The overriding reason why the Staff's decision in *BlackRock, Inc.* last spring was manifestly in error is that viewpoint and ideological discrimination, the issue raised by our Proposal, is most certainly an issue of significant social policy concern, and so under SLB 14L is not amenable to exclusion on ordinary-business grounds. Polls in recent years demonstrate that individuals holding viewpoints other than liberal often feel discriminated against. For instance, a March 2021 *The Economist/YouGov* poll reveals that 45% of conservatives polled feel that conservatives are discriminated against "a great deal" and 34% of conservatives feel that conservatives are discriminated against "a fair amount;" only 21% feel that conservatives are not discriminated against "much" or "at all."²⁰ Similarly, in a 2019 Hill-HarrisX survey, "78 percent of GOP respondents said that they believe that conservatives have to deal with discriminatory behavior from other Americans," with the "plurality of Republicans, 31 percent, sa[ying] that conservatives face 'a lot' of discrimination."²¹ The same survey found that "just 16 percent of Democrats said that liberals face a lot of discrimination from society."²²

In fact, we have been sounding the alarm over viewpoint and ideology discrimination for years, yet these concerns have been – and continue to be – ignored by the Staff. Take, for instance, our December 4, 2020 Request for Reconsideration of the decision to omit our proposal from the 2021 Walgreens Boots Alliance, Inc. shareholder meeting. In that request we outlined the growing issue of individuals being "cancelled" for expressing his or her viewpoint and how this

¹⁹ See, e.g., D.C. Code § 2-1402.11; N.Y. Lab. Law § 201-d; Wash. Rev. Code. Ann. § 42.17A.495(2).

²⁰ *The Economist/YouGov* Poll, Mar. 20-23, 2021, available at: <https://docs.cdn.yougov.com/5v6z1pywv7/econTabReport.pdf> (last accessed Mar. 10, 2022).

²¹ The Hill, *Poll: Republicans more likely to see 'a lot' of discrimination against conservatives than Democrats see against liberals*, Mar. 8, 2019, available at: <https://thehill.com/hilltv/what-americas-thinking/433259-poll-republicans-more-likely-to-see-a-lot-of-discrimination> (last accessed Mar. 10, 2022).

²² *Id.*

particular issue is “at the very top of any list of the most important issues currently affecting – and threatening – our culture.”²³ In that request we also discuss the rise in calls by government officials for discrimination on the basis of viewpoint and public participation.²⁴ As we explained, there have been calls by current and former members of congress and presidential administrations effectively seeking revenge against those individuals who have dared to participate in democracy in ways that displease them.²⁵

A Pew Research Center survey conducted in June 2020 found that “roughly three-quarters of U.S. adults say it is very (37%) or somewhat (36%) likely that social media sites intentionally censor political viewpoints that they find objectionable. Just 25% believe this is not likely the case.”²⁶ According to the survey, “Majorities in both major parties believe censorship is likely occurring, but this belief is especially common – *and growing* – among Republicans. Nine-in-ten Republicans and independents who lean toward the Republican Party say it’s at least somewhat likely that social media platforms censor political viewpoints they find objectionable.”²⁷ (emphasis added).

Despite the dismissal of such concerns by those with a leftwing worldview, the veracity of these concerns was finally proven true when Elon Musk released the “Twitter Files” detailing the company’s extensive efforts to “shadow ban” and otherwise censor conservatives and others not sharing the same left-of-center worldview. “A new [Twitter Files] investigation reveals that teams of Twitter employees build blacklists, prevent disfavored tweets from trending, and actively limit the visibility of entire accounts or even trending topics — all in secret, without informing users,” journalist Bari Weiss shared with the public.²⁸ Weiss then shared examples of Twitter censoring -- and thereby discriminating against -- users based on viewpoint and ideology. These examples include Stanford’s Dr. Jay Bhattacharya, who Twitter secretly placed on a “Trends Blacklist” to prevent his tweets from trending because he argued that Covid lockdowns would harm children; popular conservative talk show host Dan Bongino, who Twitter placed on a “Search Blacklist;” and Turning Point USA’s Charlie Kirk, who Twitter set his account to “Do Not Amplify.”²⁹

²³ See Request for Reconsideration of November 25, 2020 Decision Permitting Walgreens Boots Alliance, Inc. to Exclude Stockholder Proposal of the National Center for Public Policy Research, Securities Exchange Act of 1934 – Rule 14a-8, Section V (December 4, 2020), included herein as an attachment.

²⁴ *Id.* at Section IV.

²⁵ *Id.*

²⁶ <https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/>

²⁷ <https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/>

²⁸ <https://twitter.com/bariweiss/status/1601008766861815808?s=20&t=-e4ic59DaLSa3Q0eE9ZPIA;>
<https://nypost.com/2022/12/08/suppression-of-right-wing-users-exposed-in-latest-twitter-files/>

²⁹ <https://twitter.com/bariweiss/status/1601008766861815808?s=20&t=-e4ic59DaLSa3Q0eE9ZPIA;>
[https://nypost.com/2022/12/08/suppression-of-right-wing-users-exposed-in-latest-twitter-files/;](https://nypost.com/2022/12/08/suppression-of-right-wing-users-exposed-in-latest-twitter-files/)
<https://thehill.com/opinion/civil-rights/3770581-elon-musk-shows-shadow-banning-of-conservatives-no-conspiracy-theory/>

The evidence therefore shows that viewpoint and ideology discrimination are indeed an issue of significant social policy concern that transcends ordinary business. In an increasingly polarized political age, risks associated with political viewpoint and ideology are highly significant. On one hand, businesses increasingly deal with public scrutiny and risks based on the politics of those they do business with.³⁰ On the other hand, businesses face public scrutiny and risks for choosing not to do business with groups based on their political affiliations.³¹

Our Proposal takes no position on the proper balance of these risks, except that the balance reached should be applied objectively. But it is undeniable that they are significant—and are growing in their significance—in our society today. A straightforward and objective approach would recognize our Proposal addresses a matter of immense social significance.

Absent any credible explanation by the Staff to the contrary, it appears that the only reason the Staff has refused to agree with this assessment is because it, as a matter of personal policy preference, or perhaps unconscious or even conscious bias, does not object to viewpoint and ideology discrimination of the sort that too many companies have indulged in over the past few years. But this personal policy preference, bias, or whatever it may be, does not and cannot alter the standard set forth in SLB 14L by the Staff itself, and that the Staff is now bound to faithfully apply. Proposals that “focus on sufficiently significant social policy issues” that “transcend the ordinary business operations” of the company are not excludable under Rule 14a-8(i)(7). And in SLB 14L, the Staff reiterated this position by citing “[m]atters related to employment discrimination” as an example of an issue that “may rise to the level of transcending the company’s ordinary business operations.”³²

The precedent the Company cites to in favor of its argument that our Proposal should nonetheless be found ommissible do not abide by this standard. It cites *PetSmart, Inc.* (avail. Mar. 24, 2011), *CIGNA Corp.* (avail. Feb. 23, 2011), and *Capital One Financial Corp.* (avail. Feb. 3, 2005). Such pre-SLB 14L precedent is irrelevant to the analysis at hand. As SLB 14L points out, “Under this realigned approach, proposals that the staff previously viewed as excludable because they did not appear to raise a policy issue of significance *for the company* [rather than in general] may no longer be viewed as excludable under Rule 14a-8(i)(7)” (emphasis added). Consequently, these proceedings cannot be used to find our Proposal excludable on grounds our Proposal somehow inappropriately relate to the Company’s ordinary business because these proceedings do not apply the appropriate standard to determine whether a proposal transcends the ordinary business of a company.

³⁰ See, e.g., Jessica Piper and Zach Montellaro, *Corporations gave \$10M to election objectors after pledging to cut them off*, Politico (Jan. 6, 2023) <https://www.politico.com/news/2023/01/06/corporations-election-objectors-donations-00076668>.

³¹ See, e.g., Lydia Beyoud & Nushin Huq, *Texas Puts Banks in Tight Spot with New Law Backing Gunmakers*, Bloomberg Law (Sept. 1, 2021) <https://news.bloomberglaw.com/banking-law/texas-puts-banks-in-tight-spot-with-new-law-backing-gunmakers>.

³² Staff Legal Bulletin No. 14L, *supra* at n.5.

But as we point out in our Supporting Statement, there is ample evidence that individuals with conservative viewpoints or ideologies may face discrimination at the Company, such that even without the significant changes made by SLB 14L, our proposal would be non-omissible. Kroger removed patriotic and Second Amendment related paraphernalia from store shelves; it released an “allyship guide” that told employees to celebrate transgender holidays,³³ and asserted that, “[s]ome people’s morality can be a barrier to accepting LGBTQ+ people;”³⁴ and it reached a settlement with fired employees who refused to wear a Company issued apron adorning a rainbow on account of it violating their religious beliefs.³⁵

Finally, the Company argues that even if our Proposal is on a matter of social policy significance, our Proposal may be excluded because it relates to matters of ordinary business. As we have demonstrated, our proposal does not raise proper ordinary-business objections, but even if we hadn’t, the argument is both an incorrect statement of Staff guidance and an inaccurate characterization of our Proposal. After the Staff determines that the subject matter of a proposal transcends ordinary business matters, that is the end of the inquiry. The Staff does not then assess whether the proposal merely “touches upon” or “focuses” on ordinary business matters.

Accordingly, the Company has offered no Rule 14a-8(i)(7) grounds on which the Staff may omit our Proposal, and there are none. The only distinction between our Proposal and the proposals in *Levi Strauss*, *Disney Co.*, *Amazon.com*, and *CorVel* is that our Proposal focuses on discrimination on the basis of viewpoint or ideology while those earlier proposals focused on discrimination on other, also pernicious, grounds. The Staff cannot allow or refuse to allow omission of materially indistinguishable proposals on the grounds that the Staff itself dislikes discrimination on some grounds, but doesn’t mind that same discrimination on other grounds. And as there is no other way to distinguish these proposals, our Proposal is not omissible.

Part II. Issuing relief to the Company would raise serious constitutional and administrative law concerns.

For the reasons discussed above, our Proposal’s merits under Commission and Staff rules, interpretations, guidance, and precedent require that Staff deny the Company’s request for relief. If the Staff elects to issue relief to the Company despite its clear merits, the Staff’s decision would raise a host of constitutional and administrative law issues.

A. The Company is asking the Staff to discriminate on the basis of viewpoint in violation of the First Amendment.

Our Proposal relates to nondiscrimination against individuals on the basis of viewpoint or ideology—a matter of objectively significant social policy concern. By urging the Staff to issue

³³ <https://www.breitbart.com/social-justice/2022/08/31/kroger-allyship-guide-tells-employees-to-celebrate-trans-holidays-support-bail-fund/>

³⁴ https://www.thekrogerco.com/wp-content/uploads/2021/03/AAPILyship-Guide_v3.2-External-merged.pdf

³⁵ <https://news.yahoo.com/kroger-pay-180k-lawsuit-over-162047710.html>

relief for the Proposal regardless, the Company invites the Staff to itself discriminate based on viewpoint against our Proposal.

It is well-established that the government cannot engage in viewpoint discrimination. *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019). This principle prevents governments from regulating speech “because of the speaker’s specific motivating ideology, opinion, or perspective.” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 820 (1995). And the Supreme Court defines “the term ‘viewpoint’ discrimination in a broad sense.” *Matal*, 137 S. Ct. at 1763. This is because “[v]iewpoint discrimination is a poison to a free society.” *Iancu*, 139 S. Ct. at 2302 (Alito, J., concurring).

The rule against viewpoint discrimination prevents allowing speech based on one “political, economic, or social viewpoint” while disallowing other views on those same topics. *Id.* at 831. It also prohibits excluding views that the government deems “unpopular,” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995), or because of a perceived hostile reaction to the views expressed, *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

Here, the Company invites the Staff to engage in viewpoint discrimination by issuing relief on our Proposal. Our Proposal requests an audit of the potential risks associated with omitting “viewpoint” and “ideology” from its written EEO policy. The Staff has routinely denied no-action relief to similar requests focusing on risks from discrimination on other grounds. *See, e.g., McDonald’s Corp.*, (avail. Apr. 5, 2022) (audit analyzing the adverse impact of the Company’s policies and practices on the civil rights of Company stakeholders), *Levi Strauss & Co.* (Feb. 10, 2022), *The Walt Disney Co.*, (Jan. 19, 2022), *Amazon.com* (Apr. 7, 2021). And in *Corvel Corp.* (June 5, 2019), the Staff denied relief for a proposal that was substantially identical to our Proposal. The only difference is the proposal requested a report detailing the potential risks associated with omitting “sexual orientation” and “gender identity” from its written EEO policy. Our Proposal is the same, except our Proposal focuses on discrimination based on “viewpoint” and “ideology.” So if the Staff opts to issue relief to exclude our Proposal, one might reasonably conclude that it could only do so because of its opinion of the distinctive political *views* our Proposal expresses.

The Staff—and the Commission—needs a principled basis for such a distinction. The Company proposes none. As the Supreme Court has explained, to avoid viewpoint discrimination the government must have “narrow, objective, and definite” standards to prevent officials from covertly discriminating based on viewpoint through subjective and unclear terms. *Forsyth Cnty., Ga.*, 505 U.S. at 131. And here, the Staff has complete discretion to determine what “issues” are significant and even to censor on the same issue when they are presented by speakers with different political or religious views.

The easiest course would be for the Staff to deny relief to the Company, and avoid making such a weighty decision. But if the Staff chooses to discriminate against the viewpoint expressed by the Proposal, that would highlight a new and significant issue with Staff Legal Bulletin 14L, and indeed, the 1998 Release. It would provide a clear demonstration of how the Staff’s open-ended

discretion in determining which views count as “socially significant” may be facially invalid under the First Amendment.

B. The Company is asking the Staff to take arbitrary and capricious action under the Administrative Procedure Act.

The Company identifies no reasonable basis for distinguishing between our Proposal and other anti-discrimination proposals. As a result, the Company’s request for relief invites the Staff to take arbitrary and capricious action.

Under the Administrative Procedure Act (APA), agency action that is “arbitrary and capricious” may be set aside. 5 U.S.C. § 706(2)(A). The Supreme Court has succinctly explained that “[t]he APA’s arbitrary and capricious standard requires that agency action be reasonable and reasonably explained.” *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021); *see also Motor Vehicle Mfgs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Under this precedent, in order for action to be reasonable and reasonably explained, the agency must at least consider the record before it and rationally explain its decision. *See FCC*, 141 S. Ct. at 1160.

Additionally, where an agency seeks to change its position from a prior regime, it must “display awareness that it is changing position,” “show that there are good reasons for the new policy” and provide an even “more detailed justification” when the “new policy rests upon factual findings that contradict those which underlay its prior policy,” and “take[] into account” “reliance interests” on the prior policy. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Given the Staff’s longstanding precedent permitting the consideration of shareholder proposals relating to nondiscrimination matters, issuing relief to the Company would undoubtedly be a change in its position. Yet if the Staff issued relief for our Proposal, it would allow a proposal that focuses on significant discrimination to be excluded. At a bare minimum, the Staff—or the Commission—would have to explain its reasoning for the reversal in position to comply with the APA.

For the above reasons and others, the Staff’s decision on our Proposal is an important action. Most often, the Staff’s decision to issue relief is the final action by the Commission in dealing with a particular shareholder proposal. While the Commission may also affirm the Staff’s decision to issue relief, the vast majority of relief decisions are made by the Staff without formal review. Significant legal consequences also flow from these decisions because they help determine whether or not the Company will be able to exclude the proposal. It is undeniable that companies treat the no-action process as a safe harbor. And the reality is that by issuing relief, the Staff provides companies with a legal defense in any potential court action. What’s more, issuing relief is at the core the Commission’s complex regulatory scheme, and the authority of the Commission and Staff to issue relief is expressly indicated by Rule 14a-8. *See* Rule 14a-8(j).

In sum, the Company is asking the Staff to tread in precarious waters by issuing relief to a well-supported Proposal given the APA's requirements for reasoned decisionmaking. The safer and more prudent course would be for the Staff to deny the Company's request.

C. The Company is requesting relief the Staff lacks statutory authority to issue.

If the Staff elects to issue relief for our Proposal, it would raise significant concerns that the Staff is acting beyond its statutory authority. The Proposal is a permissible subject for stockholder concern under state law. If the Staff acted to block our Proposal, the Staff would be reaching beyond what they are authorized to do.

Section 14(a) of the Exchange Act prohibits anyone from "solicit[ing] any proxy" "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78n(a)(1). While this authority might be read "broadly," "it is not seriously disputed that Congress's central concern [in enacting § 14(a)] was with disclosure." *Business Roundtable v. SEC*, 905 F.2d 406, 410 (D.C. Cir. 1990). The purpose of Section 14(a) was to ensure that investors had "adequate knowledge" about the "financial condition of the corporation . . . [and] the major questions of policy, which are decided at stockholders' meetings." S. Rep. No. 792 at 12 (1934). While Section 14(a) gave the Commission authority to compel investor-useful disclosures, the substantive regulation of stockholder meetings was left to the "firmly established" state-law jurisdiction over corporate governance. *Business Roundtable*, 905 F.2d at 413 (internal citation omitted). Recognizing that state law provides the "confining principle" to Section 14(a)'s otherwise "vague 'public interest' standard," the United States Court of Appeals for the District of Columbia Circuit has held that "the Exchange Act cannot be understood to include regulation of" "the substantive allocation" of corporate governance that is "traditionally left to the states." *Business Roundtable v. SEC*, 905 F.2d at 407, 413 (internal citation omitted). Issuing relief under Rule 14a-8 would exceed this limit by regulating the substantive considerations and outcomes of corporate stockholder meetings, which are properly matters for state law.

i. Substantive regulation of corporations' proxy statements.

Issuing relief under Rule 14a-8 would regulate the substance of corporate governance because it would regulate the substantive matters that a corporation is required to include in its proxy statement. Under state law, corporate directors tasked with soliciting proxies have "a fiduciary duty to disclose all facts germane" to items presented for stockholders' consideration. *Smith v. VanGorkom*, 488 A.2d 858, 890 (Del. 1986). For an annual meeting, this duty requires that a corporation include a shareholder proposal in its proxy statement if the shareholder proposal will be presented for consideration at the corporation's annual meeting. In turn, a shareholder proposal may be presented for consideration at the corporation's annual meeting if the proposal is a proper subject for action by the corporation's stockholders. *See CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 277 (Del. 2008). A proposal is a proper subject for action by stockholders if it is within the scope or reach of the stockholders' power to adopt, *id.* at 232, but stockholders do not have the power to adopt proposals that would cause the board of directors to

breach its fiduciary duties, *see Paramount Commc 'ns Inc. v. Time Inc.*, 1989 WL 79880, at *30 (Del. Ch. July 14, 1989), *aff'd*, 571 A.2d 1140, (Del. 1990) (“The corporation law does not operate on the theory that directors, in exercising their powers to manage the firm, are obligated to follow the wishes of a majority of shares.”).

Issuing relief under Rule 14a-8 would displace this system of state law by subjecting the Proposal to additional requirements to be included in the corporation’s proxy statement.³⁶ The current Rule 14a-8 goes far further. Specifically, Rule 14a-8 provides that a corporation may exclude proposals that relate to the company’s “ordinary business operations.” And the SEC has further interpreted Rule 14a-8, via sub-regulatory guidance, to permit the exclusion of proposals that do not “transcend the day-to-day business matters” of the corporation, 1998 Release, or which insufficiently “raise[] issues with a broad societal impact,” Division of Corporation Finance, Staff Legal Bulletin No. 14L, *supra*.

These additional limits go beyond the limits of the state law proper-subject requirement. A proposal that fails to sufficiently raise an issue “with a broad societal impact” may nonetheless be within stockholders’ power to adopt and consistent with the board of directors’ fiduciary duties. But issuing relief under Rule 14a-8 would authorize the Company to exclude such a proposal, even though state law would allow it to be considered. That is not what Congress gave the Commission power to do under Section 14(a).

ii. Substantive regulation of stockholder meetings.

Issuing relief under Rule 14a-8 would also regulate the substance of corporate governance because it would regulate the substantive issues that a corporation considers at its stockholder meetings. The matters that may be validly brought before stockholders at a corporation’s meetings of stockholders are exclusively governed by state law. “Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.” *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977) (emphasis in original). Section 14(a) makes no such express requirement. Section 14(a) provides general language that Congress understood to merely authorize disclosure requirements that ensures investors have “adequate knowledge” of the “major questions of policy . . . decided at stockholders’ meetings.” S. Rep. No. 792, *supra*. It does not provide the authority for the SEC to regulate *which* questions must be decided at a corporation’s stockholder meetings. Yet issuing relief under Rule 14a-8 would regulate the substantive aspects of stockholder meetings in at least two ways.

First, even though Rule 14a-8 applies primarily to the content of a corporation’s proxy statement, its regulation of the proxy statement has the eminently predictable *effect* of regulating the stockholder meeting for which proxies are solicited. Today, substantially all stockholder

³⁶ To be sure, one provision of the current Rule 14a-8, (i)(1), mirrors the state law requirement that a shareholder proposal must be a proper subject for action by stockholders. But that is not what the Company has raised here.

voting is conducted by proxy. “Because most shareholders do not attend public company shareholder meetings in person, voting occurs almost entirely by the use of proxies that are solicited before the shareholder meeting, thereby resulting in the corporate proxy becoming ‘the forum for shareholder suffrage.’” *Concept Release on the Proxy System*, SEC Release No. 34-62495 (July 24, 2010) (quoting *Roosevelt v. E.I duPont de Nemours & Co.*, 958 F.2d 416, 422 (D.C. Cir. 1992)). As a practical matter, if a stockholder proposal is excluded from the corporation’s proxy statement, it is functionally unavailable for consideration at a stockholder meeting. Not many stockholders would be aware of the proposal, nor would many be able to vote on it. To be sure, a stockholder proponent could pay for his own proxy forms to be distributed. But that is hardly a remedy given the complex realities of the modern proxy system. With Rule 14a-8, the Commission has clearly put its thumb on the scale, allowing some stockholders to access the corporate proxy statement, but not others, on bases untethered to state law. By permitting the exclusion from corporate proxy statements of proposals otherwise valid for consideration under state law, Rule 14a-8 not only regulates the content of the proxy statement—it regulates which proposals are considered by the vast majority of stockholders, and therefore the content and outcomes of corporations’ stockholder meetings.

Second, Rule 14a-8 goes beyond the regulation of proxy statements to directly regulate what stockholders may consider at stockholder meetings. Specifically, Rule 14a-8 compels the consideration of its permissible proposals by compelling their inclusion in the corporation’s form of proxy. If a proposal meets the Rule’s requirements, Rule 14a-8(a) provides that “a company *must* include a shareholder’s proposal in its proxy statement and . . . its form of proxy” for a stockholder meeting. Rule 14a-8 (emphasis added). In turn, if a proposal is on the form of proxy, it must be considered at the relevant stockholder meeting. Under federal law, a corporation’s “form of proxy” must include the matters to be voted on at the meeting. *See, e.g.*, 17 C.F.R. § 240a-4(a) (“[T]he form of proxy . . . shall identify clearly and impartially each separate matter intended to be acted upon”). By requiring the inclusion of a proposal on the proxy card, Rule 14a-8 compels consideration of the proposal at a stockholder meeting. If the corporation were to put a proposal on its form of proxy, but not consider the proposal at the meeting, its form of proxy may be unlawfully misleading. Rule 14a-8 therefore requires a corporation to consider a shareholder proposal at its annual meeting even if it could lawfully exclude the shareholder proposal under state law. *See SEC v. Transamerica Corp.*, 163 F.2d 511, 518 (3d Cir. 1947) (stating that, assuming a corporate bylaw excluding shareholder proposals was valid under state law, Rule 14a-8 would invalidate the bylaw).

By intruding upon the substantive affairs of corporate governance “traditionally left to the states,” issuing relief under Rule 14a-8 would exceed the Commission’s—and the Staff’s—lawful authority under Section 14(a). As a result, issuing relief to the Company would raise serious concerns about the validity of the Staff’s action.

Conclusion

Given the precedent in *Levi Strauss*, *Disney Co.*, *Amazon.com* and *CorVel Corp.*, the Company’s proposed grounds for exclusion on the basis of the ordinary business exception fall short. Our

Proposal seeks only a report about the risks associated with a failure to prohibit discrimination, not in any way the management of the Company, and the Staff has unquestionably declared discrimination against employees to be of significant social policy interest.

As such, the Company has failed to meet its burden that it may exclude our Proposal under Rule 14a-8(g). Therefore, based upon the analysis set forth above, we respectfully request that the Staff reject the Company's request for a no-action letter concerning our Proposal.

If the Staff nonetheless decides to issue relief to the Company, that action would raise significant constitutional and administrative law concerns that "involve matters of substantial importance and where the issues are novel or highly complex" invoking Commission review under 17 C.F.R. § 202.1(d).

A copy of this correspondence has been timely provided to the Company. If we can provide additional materials to address any queries the Commission may have with respect to this letter, please do not hesitate to call us at (202) 507-6398 or email us at sshepard@nationalcenter.org and at srehberg@nationalcenter.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Shepard". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Scott Shepard
FEP Director

A handwritten signature in black ink, appearing to read "Sarah Rehberg". The signature is cursive and somewhat stylized, with a long horizontal stroke at the end.

Sarah Rehberg
National Center for Public Policy Research

cc: Lyuba Goltser, Weil, Gotshal & Manges LLP (lyuba.goltser@weil.com)

Weil, Gotshal & Manges LLP

767 Fifth Avenue
New York, NY 10153-0119
+1 212 310 8000 tel
+1 212 310 8007 fax

Lyuba Goltser
lyuba.goltser@weil.com

March 8, 2023

VIA E-MAIL (shareholderproposals@sec.gov)
U.S. Securities and Exchange Commission
Division of Corporation Finance
Office of Chief Counsel
100 F Street, N.E.
Washington, DC 20549

**Re: The Kroger Co. – 2023 Annual Meeting
Supplement to Letter Dated February 16, 2023
Relating to Shareholder Proposal of the National Center for Public Policy
Research**

Ladies and Gentlemen:

We refer to our letter dated February 16, 2023 (the “No-Action Request”), submitted on behalf of our client, The Kroger Co. (the “Company” or “Kroger”), pursuant to which we requested that the Staff of the Division of Corporation Finance (the “Staff”) of the U.S. Securities and Exchange Commission (the “Commission”) concur with the Company’s view that the shareholder proposal and supporting statement (the “Proposal”) submitted by the National Center for Public Policy Research (the “Proponent”) may be excluded from the proxy materials to be distributed by Kroger in connection with its 2023 annual meeting of shareholders (the “Proxy Materials”).

This letter is in response to the letter to the Staff, dated March 2, 2023, submitted by the Proponent (the “Proponent’s Letter”), and supplements the Company’s No-Action Request. In accordance with Rule 14a-8(j), a copy of this letter is also being sent to the Proponent simultaneously.

The Proponent’s Letter misinterprets the Staff’s guidance and precedent with regard to the ordinary business exclusion of Rule 14a-8(i)(7). In particular, the Proponent’s Letter erroneously asserts that the Proposal is comparable to other proposals where the Staff denied requests for relief under the ordinary business exclusion. The examples cited in the Proponent’s Letter relate to racial discrimination and gender and sexual orientation discrimination and have a broad societal impact such that they were determined by the Staff to transcend ordinary business matters. *See, e.g., Levi Strauss & Co.* (Feb. 10, 2022); *The Walt Disney Co.* (Jan. 19, 2022);

CorVel Corporation (June 5, 2019).¹ The Proponent, however, does not cite any instances where the Staff has determined that the issue of viewpoint and ideological discrimination raised by the Proposal transcends ordinary business matters for purposes of Rule 14a-8(i)(7). As explained in more detail in the Company’s No-Action Request, the Staff has consistently permitted the exclusion of proposals raising the issue of viewpoint and ideological discrimination as relating to ordinary business. See *BlackRock, Inc.* (Apr. 4, 2022); *American Express Company* (Feb. 26, 2021); *Apple Inc.* (Dec. 20, 2019, recon. denied Jan. 17, 2020); *Alphabet, Inc.* (Apr. 9, 2020, recon. denied Apr. 22, 2020); *salesforce.com, Inc.* (Apr. 9, 2020, recon. denied Apr. 22, 2020); *CVS Health Corp.* (Feb. 27, 2015); *The Walt Disney Company* (Nov. 24, 2014, recon. denied Jan. 5, 2015).

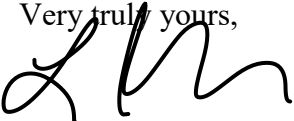
The Proponent’s Letter attempts to argue that recent Staff decisions reiterating the view that such proposals are excludable as relating to the company’s ordinary business should be reversed due to the publication of Staff Legal Bulletin No. 14L (Nov. 3, 2021) (“SLB 14L”), which rescinded certain Staff guidance from 2017 through 2019 relating to the ordinary business exclusion. The Proponent’s argument is misguided for several reasons. First, SLB 14L does not expressly rescind all Staff no-action decisions relating to 14a-8(i)(7) reached between 2017 and 2019. Second, the Staff’s position on matters raised by the Proposal pre-dates the rescinded guidance. For example, in *The Walt Disney Company* (Nov. 24, 2014, recon. denied Jan. 5, 2015), the Staff permitted the exclusion of a substantially similar proposal requesting the board consider the possibility of adopting anti-discrimination principles that protect employees’ right to “engage in legal activities relating to the political process, civic activities and public policy without retaliation in the workplace.” In its no-action response letter, the Staff noted that the proposal related to the ordinary business matter of “policies concerning [the company’s] employees.” Finally, since the publication of SLB 14L, the Staff has continued to permit the exclusion of proposals raising the issue of viewpoint and ideological discrimination as relating to ordinary business. See *BlackRock* (Apr. 4, 2022). Accordingly, the publication of SLB 14L does not alter this long-standing position.

Moreover, following the publication of SLB 14L, the Staff has continued to permit the exclusion of proposals that “touch upon” significant social policy issues but primarily relate to ordinary business matters, even when the subject relates to human capital matters. See *Amazon.com, Inc.* (Apr. 8, 2022); *Dollar Tree, Inc.* (May 2, 2022); *Apple, Inc.* (Jan. 3, 2023). In these instances, proposals implicating human capital management issues were determined not to

¹ In *Levi Strauss & Co.* (Feb. 10, 2022), the Staff declined to permit exclusion under Rule 14a-8(i)(7) of a proposal requesting that the board commission a racial-equity audit analyzing the company’s impacts on civil rights and non-discrimination. In *The Walt Disney Co.* (Jan. 19, 2022), the Staff declined to permit exclusion under Rule 14a-8(i)(7) of a proposal requesting that the board commission a workplace non-discrimination audit analyzing the company’s impacts, including the impacts arising from company-sponsored or promoted employee training, on civil rights and non-discrimination in the workplace. In *Amazon.com* (Apr. 7, 2021), the Staff declined to permit exclusion under Rule 14a-8(i)(7) of a proposal requesting that the board commission a racial equity audit analyzing the company’s impacts on civil rights, equity, diversity and inclusion, and the impacts of those issues on the company’s business. In *CorVel Corporation* (June 5, 2019), the Staff declined to permit exclusion under Rule 14a-8(i)(7) of a proposal requesting the company issue a public report detailing the potential risks associated with omitting “sexual orientation” and “gender identity” from its written equal employment opportunity policy.

transcend the company's ordinary business matters.² Under SLB 14L, a proposal can overcome the ordinary business exception only if the proposal "focuses on a significant social policy issue." Here, even if the Proposal could be viewed as touching upon a significant policy issue, the Proposal, together with the supporting statement, clearly focus on the Company's operational decisions regarding the reporting of its EEO policies, which are inherently ordinary business matters relating to the management of its workforce, which is at the heart of the Company's business. For these reasons, the Proposal should be excluded from Kroger's 2023 Proxy Materials pursuant to Rule 14a-8(i)(7) as relating to its ordinary business operations.

Should the Staff disagree with the conclusions set forth in this letter, or should any additional information be desired in support of Kroger's position, we would appreciate the opportunity to confer with the Staff concerning these matters prior to the issuance of the Staff's response. Please do not hesitate to call me at 212-310-8048 or contact me via email at lyuba.goltser@weil.com.

Very truly yours,

Lyuba Goltser

cc:

Christine Wheatley
Stacey Heiser
The Kroger Co.

Scott Shepard
Sarah Rehberg
National Center for Public Policy Research

² In *Amazon.com, Inc.* (Apr. 8, 2022), the Staff permitted exclusion of a proposal that requested that the company report on its workforce turnover rates and the effects of labor market changes that have resulted from the COVID-19 pandemic, including an assessment of the impact of workforce turnover on the company's diversity, equity and inclusion. In *Dollar Tree* (May 2, 2022), the Staff permitted exclusion of a proposal that requested a report from the company's board of directors on risks to the company's business strategy in the face of labor market pressure, particularly as it related to the company's lowest paid employees. In *Apple, Inc.* (Jan. 3, 2023), the Staff permitted exclusion of a proposal that requested a report from the company's board of directors to assess the effects of Apple's return-to-office policy on employee retention and the company's competitiveness.



March 9, 2023

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

RE: Stockholder Proposal of the National Center for Public Policy Research, Securities Exchange Act of 1934 – Rule 14a-8

Ladies and Gentlemen,

This correspondence is in response to the supplemental letter of Lyuba Goltser on behalf of The Kroger Co. (the “Company”) dated March 8, 2023, requesting that your office (the “Commission” or “Staff”) take no action if the Company omits our shareholder proposal (the “Proposal”) from its 2023 proxy materials for its 2023 annual shareholder meeting.

RESPONSE TO KROGER’S SUPPLEMENTAL CLAIMS

The Company argues in its supplemental letter that our reply “erroneously asserts that [our] Proposal is comparable to other proposals where the Staff denied requests for relief under the ordinary business exclusion.” In doing so, the Company underscores the very reason for our Proposal, as it effectively admits that the Company finds discrimination against employees on some grounds to be less pernicious – and therefore not “comparable” – to discrimination based on other grounds.

But the question is not whether one type of discrimination is somehow worse than another. The question is whether the proposal “focus[es] on sufficiently significant social policy issues” that “transcend the ordinary business operations” of the company; our Proposal does.

It does not matter, despite the Company's claims to the contrary, whether we cite to any instances where the Staff has already determined that the issue of viewpoint and ideological discrimination raised by our Proposal transcends ordinary business. The Company again raises the issue of the Staff's decision last year in *BlackRock, Inc.* (Apr. 4, 2022; reconsideration denied May 4, 2022), but as we have previously made clear, we believe that proceeding to have been wrongly decided in light of SLB 14L. The Staff's decision in *BlackRock* effectively carves out a special exception for viewpoint and ideology discrimination, discrimination that the Staff apparently does not believe to be a significant social policy issue despite the fact that, as discussed in our initial reply letter, the civil rights laws of numerous states already treat political affiliation or political activities as protected characteristics, meaning political views are indeed socially significant.¹

Furthermore, as we likewise point out in our March 2 reply letter, polling in recent years has revealed that the vast majority of conservatives feel discriminated against. Now those *not* holding conservative viewpoints or ideologies may be quick to dismiss the reporting of such discrimination for whatever reason, but these claims should not be and cannot be dismissed as somehow less genuine or less believable than claims by individuals claiming to have experienced discrimination based on other pernicious grounds of discrimination such as race or sex. Accordingly, we believe *BlackRock* to have been decided in error, and that the Staff's refusal in that proceeding to present its decision and our Proposal to the Commission for reconsideration was, like its underlying decision in that proceeding, an error. We have filed this proceeding to give the Staff an opportunity to correct one or the other of those errors.

The Company also claims our argument regarding the validity of pre-SLB 14L precedent is misguided, but insofar as pre-14L precedent is incompatible with 14L, it is completely true that such precedent is no longer operative. Our reply simply states the obvious and does so using the plain language of SLB 14L, which asserts that in post-SLB 14L proceedings, the Staff will "focus on the social policy significance of the issue that is the subject of the shareholder proposal. In making this determination, the staff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company."²

Finally, despite the Company's claims to the contrary, our Proposal does not merely "touch upon" a significant social policy issue. What our Proposal merely "touches upon," as we explained in our initial no-action reply letter, are the ordinary-business details of human capital management – in exactly the same way that other proposals regarding other discrimination issues of profound public interest and public-policy significance have done. Viewpoint and ideology discrimination is indisputably the focus of our Proposal – not the inherent management of the Company's workforce – unless, of course, the Company is asserting that discriminating based on viewpoint and ideology is inherent to the management of its workforce. But we do not believe

¹ See, e.g., D.C. Code § 2-1402.11; N.Y. Lab. Law § 201-d; Wash. Rev. Code. Ann. § 42.17A.495(2).

² See *Staff Legal Bulletin* No. 14L (Nov. 3, 2021), available at <https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals> (last accessed Mar. 9, 2023).

Office of the Chief Counsel
Division of Corporation Finance
March 9, 2023
Page 3

the Company is intending to make such a point, but if it did, it would thereby underscore that its deep and systemic discrimination on this front is of the greatest public moment.

Therefore, based upon the analysis set forth above and contained in our March 2 no-action reply, we respectfully request that the Staff reject the Company's request for a no-action letter concerning our Proposal.

A copy of this correspondence has been timely provided to the Company. If we can provide additional materials to address any queries the Commission may have with respect to this letter, please do not hesitate to call us at (202) 507-6398 or email us at sshepard@nationalcenter.org and at srehberg@nationalcenter.org.

Sincerely,

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Scott Shepard
FEP Director

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

Sarah Rehberg
National Center for Public Policy Research

cc: Lyuba Goltser, Weil, Gotshal & Manges LLP (lyuba.goltser@weil.com)