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

DIVISION OF
CORPORATION FINANCE

March 16, 2022

Michael G. Berner
The Wendy's Company

Re: The Wendy's Company (the "Company")
Incoming letter dated January 10, 2022

Dear Mr. Berner:

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

The Proposal requests that the Company confirm the individual crate confinement of gestating pigs will be eliminated from its North American supply by the end of 2022. If the Company cannot so confirm, the proposal requests: 1) its percentage of gestation crate-free pork, and 2) risks the Company may face over the disparity between its gestation crate assurances and the use of crates beyond 2022.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, the Proposal transcends ordinary business matters.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(10). Based on the information you have presented, it appears that the Company's public disclosures do not substantially implement the Proposal.

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/2021-2022-shareholder-proposals-no-action.

Sincerely,

Rule 14a-8 Review Team

cc: Matthew Prescott
The Humane Society of the United States

Phone: (614) 764-3220
Email: Michael.Berner@wendys.com

January 10, 2022

VIA EMAIL (*shareholderproposals@sec.gov***)**

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

RE: The Wendy's Company — Shareholder Proposal of The Humane Society of the United States

Dear Ladies and Gentlemen:

Pursuant to Rule 14a-8(j) of the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"), The Wendy's Company, a Delaware corporation (the "**Company**" or "**Wendy's**"), hereby requests confirmation that the staff of the Division of Corporation Finance (the "**Staff**") of the U.S. Securities and Exchange Commission (the "**Commission**") will not recommend any enforcement action if the Company omits from its proxy statement and form of proxy for its 2022 Annual Meeting of Stockholders (collectively, the "**2022 Proxy Materials**") the shareholder proposal (the "**Proposal**") and statement in support thereof (the "**Supporting Statement**") submitted by The Humane Society of the United States (the "**Proponent**"), which are further described below.

In accordance with Rule 14a-8(j) of the Exchange Act, this letter is being submitted to the Commission no later than eighty (80) calendar days before the Company intends to file its definitive 2022 Proxy Materials with the Commission. In accordance with Section C of Staff Legal Bulletin No. 14D (Nov. 7, 2008) ("**SLB No. 14D**"), we are submitting this letter to the Commission via email to *shareholderproposals@sec.gov*. Pursuant to the guidance provided in Section F of Staff Legal Bulletin No. 14F (Oct. 18, 2011), we request that the Staff provide its response to this request for no-action relief via email to the undersigned at the email address noted in the last paragraph of this letter.

Pursuant to Rule 14a-8(j) of the Exchange Act, we are simultaneously sending a copy of this letter and the attachments hereto to the Proponent. Rule 14a-8(k) of the Exchange Act and SLB No. 14D provide that a shareholder proponent is required to send the company a copy of any correspondence that such proponent elects to submit to the Commission or the Staff. Accordingly, we hereby inform the Proponent that, if the Proponent elects to submit additional correspondence to the Commission or the Staff relating to the Proposal, the Proponent should concurrently furnish a copy of such correspondence to the undersigned on behalf of the Company.

I. THE PROPOSAL

The text of the resolution contained in the Proposal is set forth below:

> **RESOLVED:** Shareholders request Wendy's confirm the individual crate confinement of gestating pigs will be eliminated from its North American supply by the end of 2022. If Wendy's cannot so confirm, shareholders request: 1) its percentage of gestation crate-free pork, and 2) risks Wendy's may face over the disparity between its gestation crate assurances and the use of crates beyond 2022. These disclosures should occur within three months of the 2022 annual meeting, at reasonable cost, and omit proprietary information.

Copies of the Proposal and the Supporting Statement, together with other relevant correspondence relating to the Proposal, are attached hereto as **Exhibit A**, pursuant to Staff Legal Bulletin No. 14C (June 28, 2005) ("**SLB No. 14C**").

II. BASIS FOR EXCLUSION OF THE PROPOSAL

As discussed more fully below, we hereby respectfully request that the Staff concur in our view that the Proposal may be properly excluded from the 2022 Proxy Materials for the following, separately sufficient, reasons:

- Rule 14a-8(i)(10) of the Exchange Act ("**Rule 14a-8(i)(10)**") because the Company has already substantially implemented the Proposal; and

- Rule 14a-8(i)(7) of the Exchange Act ("**Rule 14a-8(i)(7)**") because the Proposal deals with matters relating to the Company's ordinary business operations.

III. BACKGROUND OF THE WENDY'S SYSTEM AND WENDY'S GESTATION STALL POLICY

The Company is the world's third-largest quick-service hamburger company. The Wendy's® restaurant system (the "**Wendy's System**") includes approximately 6,900 franchise and Company-operated restaurants globally, with more than ninety percent (90%) located in the United States and Canada. Approximately 95% of restaurants in the Wendy's System are operated by franchisees. Wendy's core values were created by our founder, Dave Thomas, more than 50 years ago — "Quality is our Recipe," "Do the Right Thing," "Treat People with Respect," "Profit Means Growth" and "Give Something Back." They are timeless guideposts for our employees and franchisees, as well as our suppliers.

Ensuring the humane treatment of animals has been a core element of Wendy's quality assurance and supply chain practices for decades, and many of the requirements that Wendy's has developed for our suppliers have set the standard for the quick-service restaurant industry. We are guided by our long-standing relationships with progressive industry experts, many of whom serve on the Wendy's Animal Welfare Council, and our data-based approach to animal welfare. Wendy's Animal Welfare Council provides a cross functional forum to shape the Company's policies and

advance the cause of proper animal care and welfare, including the standards and expectations we apply to our protein supply chain and the process for driving continuing improvement. The Company regularly communicates about important animal welfare topics, including its practices, standards, expectations and goals, via our corporate website, our frequently updated "The Square Deal" blog, our annual Corporate Responsibility reports and other public forums.

As part of our animal welfare program, in 2012, the Company announced a 10-year goal (the "**10-year goal**") to transition our supply chain for products containing pork (specifically bacon and sausage) away from individual sow gestation stalls in favor of open pen/group housing for pregnant sows, which allows them to socialize and exhibit natural behaviors. Following the announcement of our 10-year goal, the Company has publicly communicated a number of updates on its gestation stall policy and has continually affirmed its commitment to meet our 10-year goal. With the deadline for our 10-year goal approaching, the Company issued an additional update on our policy regarding the use of gestation stalls in our supply chain (the "**Policy Update**") in December 2021, which is publicly available on our corporate website[1] and attached hereto as **Exhibit B**. The Policy Update (i) reaffirms the Company's commitment to transition our supply chain for pork products away from individual sow gestation stalls in favor of open pen/group housing for pregnant sows, (ii) confirms that the Company remains on track to complete this transition by the end of 2022 and (iii) provides considerable detail regarding the Company's overall approach to gestation stalls, including additional background regarding the announcement and parameters of the 10-year goal.

IV. RULE 14A-8(I)(10) ANALYSIS

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

Rule 14a-8-(i)(10) permits a company to exclude a shareholder proposal from its proxy materials "[i]f the company has already substantially implemented the proposal." The Commission stated in 1976 that the predecessor to Rule 14a-8(i)(10) was "designed to avoid the possibility of shareholders having to consider matters which already have been favorably acted upon by the management." *See* Proposed Amendments to Rule 14a-8 Under the Securities Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 34-12598 (July 7, 1976) (the "**1976 Release**"). Originally, the Staff narrowly interpreted this predecessor rule and granted no-action relief only when a proposal was "'fully' effected" by the company. *See* Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 34-19135 (Oct. 14, 1982). By 1983, the Commission recognized that the "previous formalistic application of [the Rule] defeated its purpose" of avoiding shareholder votes on matters already addressed by management because proponents were successfully convincing the Staff to deny no-action relief by submitting proposals that differed from existing company policy by only a few words. *See* Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Related to Proposals by Security Holders, Exchange Act Release No. 34-20091 (Aug. 16, 1983) (the "**1983 Release**"). The Commission subsequently adopted this revised interpretation to the rule to permit the omission of proposals that have been "substantially

[1] The Policy is publicly available at https://www.wendys.com/csr-what-we-value/food/responsible-sourcing/pork/gestation-stall-policy.

implemented." *Id*. The 1998 amendments to Rule 14a-8 of the Exchange Act codified this position and provides that "substantial" implementation under the rule does not require the company to implement a shareholder proposal fully or exactly as presented or preferred by the proponent. *See* Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018 (May 21, 1998) (the "**1998 Release**").

When a company has demonstrated that it has already taken actions to address the underlying concerns and essential objectives of a shareholder proposal, the Staff has concurred that the proposal has been "substantially implemented" and may be excluded as moot. *See, e.g., AGL Resources, Inc.* (Mar. 5, 2015); *Exelon Corp.* (Feb. 26, 2010); and *Anheuser-Busch Cos., Inc.* (Jan. 17, 2007). The Staff has noted that "a determination that the company has substantially implemented the proposal depends upon whether [the company's] particular policies, practices and procedures compare favorably with the guidelines of the proposal." *See Texaco, Inc.* (Mar. 28, 1991).

The staff has repeatedly found that a company's actions may address the underlying concerns and essential objectives of, and compare favorably with, a proposal despite not taking the exact action requested by the proponent and not taking the requested action in the exact form requested by the proponent. In 2019, for example, the Staff concurred with our decision to exclude a proposal under Rule 14a-8(i)(10) to commission a report assessing human rights risks of the Company's operations, including the principles and methodology used to make the assessment, the frequency of assessment and how we would use the assessment's results, because our Code of Conduct for Suppliers to Wendy's and other public disclosures on our corporate website "compared favorably" with the Proposal's guidelines and therefore substantially implemented it. *See, e.g., The Wendy's Company* (Apr. 10, 2019). *See also Hess Corp.* (Apr. 11, 2019) (concurring with the exclusion on substantial implementation grounds of a proposal requesting a report on how the company could reduce its carbon footprint in alignment with greenhouse gas reductions necessary to achieve the Paris Agreement's goal where the company had addressed the underlying concern and essential objective of the proposal in its most recent Sustainability Report, its response to a CDP Climate Change Questionnaire and its recent Investor Day Presentation); *Pfizer Inc*. (Mar. 1, 2018) (concurring with the exclusion of a proposal requesting a report on the risks to the company from rising pressure to contain U.S. prescription drug prices because disclosures in the company's periodic reports and proxy statement "compare favorably with the guidelines of the proposal"); *MGM Resorts International* (Feb. 28, 2012) (concurring with the exclusion on substantial implementation grounds of a proposal requesting a report on the company's sustainability policies and performance, including multiple, objective statistical indicators, where the company's annual sustainability report addressed the underlying concern and essential objective of the proposal); *Duke Energy Corporation* (Feb. 21, 2012) (concurring with exclusion of a proposal requesting the company to assess potential actions to reduce certain greenhouse gas and other emissions because the requested information was available in the company's Annual Report on Form 10-K and annual sustainability report); and *Wal-Mart Stores, Inc.* (Mar. 30, 2010) (concurring with the exclusion of a proposal seeking the adoption of six principles to stop global warming because the company's sustainability report already included principles that addressed most of the issues raised in the proposal).

B. The Proposal is Excludable under Rule 14a-8(i)(10) Because It Has Been Substantially Implemented by the Company

The Proposal and Supporting Statement request confirmation from the Company regarding whether it will eliminate individual crate confinement of gestating pigs from its North American supply by the end of 2022. *See* **Exhibit A**. The Proposal further requests that, *if the Company cannot confirm such elimination*, the Company disclose (i) its percentage of gestation crate-free pork, and (ii) risks the Company may face over the disparity between its gestation crate assurances and the use of crates beyond 2022. *Id*.

The Company believes that it has already specifically and completely addressed the Proposal by issuing the Policy Update in December 2021. The Policy Update, which is publicly available on our corporate website, explicitly addresses the request of the Proposal and Supporting Statement by confirming that, by the end of 2022, the Company expects that all of the pork products used by Wendy's restaurants in North America "will come from pigs that have been kept in open pen/group housing, not in gestation stalls during pregnancy, consistent with the State of Ohio's guidance and our previously announced commitment." *See* **Exhibit B**. The Policy Update also notes that the Company expects that it "will start 2022 with about 10% of our bacon and sausage sourced this way, moving to 100% by year-end, consistent with the requirements that we built into our pork supply contracts that went into effect in 2021." *Id.*

The Policy Update also provides considerable detail regarding the Company's overall approach to gestation stalls, including additional background regarding the announcement and parameters of our 10-year goal.

As described in the Policy Update, "[s]tarting in the early 2000s, some states began adopting new standards or requirements for the housing of pregnant sows, which required phasing out the use of individual gestation stalls that a sow would live in throughout its pregnancy." *Id.* The Policy Update explains that "Wendy's also began studying the issue more closely, and in 2012 announced a goal to eliminate this practice in our supply chain, consistent with the State of Ohio's recently announced guidance on eliminating gestation stalls." *Id.* The Policy Update further explains how guidance from the State of Ohio, the location of the Company's headquarters, has informed the Company's own goals with respect to the use and elimination of gestation stalls, noting that by 2012, "Ohio had clearly defined and published guidance for sow housing systems, which was created with input and agreement by the agriculture community, animal welfare advocates and government representatives" and that "Ohio's guidance was also outlined in a 2010 agreement that was signed by the Governor, multiple state agricultural producer groups and the Humane Society of the United States (HSUS) [i.e., the Proponent of the Proposal]." *Id.*

The Policy Update clarifies that "consistent with Ohio's guidance, there are two time periods in a breeding sow's life when it may not be housed in an open pen/group housing:

- First, when the sow (or gilt) is being bred through artificial insemination, it may be housed in an individual pen until pregnancy is confirmed (a period that our suppliers report is typically 4-6 weeks). This is done to best ensure the embryos attach and remain intact,

promoting a successful pregnancy.[2] After pregnancy is confirmed, the sow, which is now a gestating sow, is returned to open pen/group housing for the duration of pregnancy (a period that our suppliers report is typically 10-12 weeks).

- Second, shortly before giving birth, the sow is moved to a farrowing stall where it gives birth and remains with its piglets until they are weaned from the sow (a period that our suppliers report is typically about 3 weeks). A farrowing stall is designed to keep the piglets warm and safe and prevent the sow from laying on her newborn piglets. Once the piglets are weaned, they typically become market hogs, although some become breeding sows or boars." *Id.*

The Policy Update reaffirms that "[b]y the end of 2022, we expect that all of our bacon and sausage will come from pigs that have been kept in open pen/group housing, not in gestation stalls during pregnancy, consistent with the State of Ohio's guidance and our previously announced commitment." *Id.*

The Policy Update also notes that other states may adopt requirements that are stricter or more specific than the requirements in the State of Ohio and affirms that the Company intends to comply with any additional requirements in other states to the extent applicable to our operations. *See* **Exhibit B**.

The Company believes that the information publicly disclosed in the Policy Update clearly provides the confirmation requested by the Proposal regarding the elimination of gestation stalls from the Company's North American pork supply by the end of 2022. Accordingly, the Company does not need to address the Proposal's supplemental requests with respect to (i) the Company's percentage of gestation crate-free pork or (ii) risks the Company may face over the disparity between its gestation crate assurances and the use of crates beyond 2022. Nevertheless, the Policy Update reports that the Company expects to start 2022 with about 10% of our bacon and sausage sourced using gestation crate-free pork, moving to 100% by year-end, consistent with the requirements that we built into our pork supply contracts that went into effect in 2021.

Based on the information publicly disclosed in the Policy Update, and the Staff's existing precedent, the Company believes the Policy Update (i) compares favorably with the guidelines of the Proposal and (ii) addresses the underlying concern and essential objective of the Proposal—confirmation regarding whether the Company will eliminate individual crate confinement of gestating pigs from its North American supply by the end of 2022. Accordingly, the Company believes that the Proposal is excludable pursuant to Rule 14a-8(i)(10).

[2] This approach is consistent with Rule 901:12-8-02 promulgated under the Ohio Administrative Code, which provides that breeding/gestation stalls may be used post weaning for a period of time that seeks to maximize embryonic welfare and allows for the confirmation of pregnancy. Similarly, the 2010 agreement between Ohio's agricultural community and HSUS also stated "It is understood that in all housing systems, sows may be housed in breeding/gestation stalls until they are confirmed pregnant."

V. RULE 14A-8(I)(7) ANALYSIS

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

Rule 14a-8(i)(7) allows for the exclusion of a shareholder proposal that "deals with a matter relating to the company's ordinary business operations." In its release accompanying the 1998 amendments to Rule 14a-8 of the Exchange Act, the Commission stated that the term "ordinary business" "refers to matters that are not necessarily 'ordinary' in the common meaning of the word" but instead "is rooted in the corporate law concept providing management with flexibility in directing certain core matters involving the company's business and operations." *See* the 1998 Release. According to the Commission in the 1998 Release, 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 shareholder meeting."

The Commission identified "two central considerations" that underlie the ordinary business exclusion, as set forth in the 1998 Release, one of which was 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.* (citing Exchange Act Release No. 12999 (Nov. 22, 1976)).

In the 1998 Release, the Commission distinguished proposals pertaining to ordinary business matters from those "focusing on sufficiently significant social policy issues." While proposals focusing on sufficiently significant social policy issues "generally would not be considered to be excludable" under Rule 14a-8(i)(7), the Staff has indicated that proposals relating to both ordinary business matters and significant social policy issues may be excludable in their entirety in reliance on Rule 14a-8(i)(7) if they do not "transcend the day-to-day business matters" discussed in the proposals. *Id. See also* Staff Legal Bulletin No. 14L (November 3, 2021). When the Staff assesses Rule 14a-8(i)(7) proposals in this regard, the Staff considers both the proposal and the supporting statement as a whole. *See* SLB No. 14C.

Furthermore, the Commission has indicated that a proposal that requests that a company disclose specific risks does not preclude exclusion of the proposal if the underlying subject matter of the proposal relates to the company's ordinary business operations. As the Staff indicated in Staff Legal Bulletin No. 14E (Oct. 27, 2009), in evaluating shareholder proposals that request a risk assessment:

> "[R]ather than focusing on whether a proposal and supporting statement relate to the company engaging in an evaluation of risk, we will instead focus on the subject matter to which the risk pertains or that gives rise to the risk. . . . [S]imilar to the way in which we analyze proposals asking for the preparation of a report, the formation of a committee or the inclusion of disclosure in a Commission-prescribed document—where we look to the underlying subject matter of the report, committee or disclosure to determine whether the proposal relates to ordinary business—we will consider whether the underlying subject matter of the risk evaluation involves a matter of ordinary business to the company."

Here, the Proposal requests that, in the event Wendy's is unable to "confirm the individual crate confinement of gestating pigs will be eliminated from its North American supply chain by the end of 2022," the Company provide disclosure of the "risks Wendy's may face over the disparity between its gestation crate assurances and the use of crates beyond 2022." As discussed in Section IV above, the Company issued the Policy Update in December 2021 to reaffirm our commitment to our 10-year goal and confirm that we are on track to complete the transition of our pork supply chain away from individual sow gestation stalls in favor of open pen/group housing for confirmed pregnant sows by the end of 2022. Accordingly, by its terms, the Proposal does not require the Company to provide disclosure of potential risks related to its gestation stall policy. In the alternative, however, the Company believes that the Proposal may also be excluded under Rule 14a-8(i)(7) because it requests an assessment of risks relating to aspects of the Company's ordinary business operations and does not focus on a significant social policy issue that transcends the Company's ordinary business operations, as further described below.

B. The Proposal is Excludable under Rule 14a-8(i)(7) Because it Relates to the Company's Ordinary Business Matters and it Does Not Transcend the Company's Ordinary Business

The Proposal is excludable under Rule 14a-8(i)(7) as relating to the Company's ordinary business operations because it addresses the Company's assessment and management of the potential consequences and risks of the pork products used in the Wendy's System and the Company's historic public statements regarding the use of gestation stalls in its pork supply. Specifically, the Proposal requests that the Company disclose "risks Wendy's may face over the disparity between its gestation crate assurances and the use of crates beyond 2022." The Company is the world's third largest quick-service hamburger company, and the sale of pork products and the management of challenges and risks related to those products (including the specifications for those products and the Company's public disclosures related to those products) are part of its ordinary business operations. The humane treatment of animals is a core element of the Company's quality assurance and supply chain practices, and the Company is focused on maintaining or strengthening the standards it applies to itself and its suppliers. In addition, the Company devotes significant time and resources in identifying, monitoring and managing potential risks to our business. For example, in 2019, the Company began a materiality assessment to inform our Environmental, Social and Governance (ESG) strategy and to help prioritize our efforts with respect to the topics that we believe may have a significant impact on Wendy's. Through the materiality assessment,[3] animal care and welfare was identified as a priority topic within our responsible sourcing and supply chain management strategy. Managing potential environmental and social risks related to animal welfare, including the humane treatment of animals in our pork supply and the Company's historic public statements regarding the use of gestation stalls in its pork supply, is a critical part of the Company's ordinary business operations. Reviewing and addressing those matters is a complex process and is "so fundamental to management's ability to run [the Company] on a day-

[3] The Company made the results of the materiality assessment publicly available as part of our 2020 Corporate Responsibility report. The results of the materiality assessment are also separately available on our corporate website at: https://www.wendys.com/sites/default/files/2021-04/Materiality%26Matrices.pdf.

to-day basis that [they] could not, as a practical matter, be subject to direct shareholder oversight." *See* 1998 Release.

The Staff has consistently found that proposals seeking information around a company's disclosure strategy or disclosure regarding risks are excludable under Rule 14a-8(i)(7). For example, in *Tyson Foods Inc.* (Oct. 1, 2020), the Staff considered a proposal requesting an analysis of risks inherent in the company's disclosure decisions related to a 2018 California law that required specific animal welfare standards for some pork produced or sold statewide. The Staff concluded that the proposal was excludable under Rule 14a-8(i)(7) as dealing with a matter relating to the company's ordinary business operations. The Proposal is also similar to a proposal that the Staff concurred could be excluded in *McDonald's Corporation* (Mar. 12, 2019). There, the Staff considered a proposal which it described as requesting McDonald's to disclose the risks it faces as a result of campaigns targeting the company over concerns about cruelty to chickens. Like in *Tyson Foods Inc.*, the Staff concluded the proposal was excludable under Rule 14a-8(i)(7) as focusing primarily on matters relating to the company's ordinary business operations. *See also Dean Foods Co.* (Mar. 9, 2007), *recon. denied* (requesting, among other things, a report on the company's policies and procedures to address consumer and media criticism of the company's organic dairy production because the proposal related to "customer relations and decisions relating to supplier relationships"); *Exxon Mobil Corp.* (Mar. 6, 2012) (concurring that a proposal seeking a report "discussing possible short and long term risks to the company's finances and operations posed by the environmental, social and economic challenges associated with the oil sands" was excludable under Rule 14a-8(i)(7) "as relating to [the company's] ordinary business operations"); and *The TJX Companies, Inc.* (Mar. 29, 2011) (concurring with the exclusion of a proposal requesting an annual assessment of the risks created by the actions the company takes to avoid or minimize U.S. federal, state and local taxes and a report to shareholders on the assessment as "relating to TJX's ordinary business operations").

In the 1998 Release, the Staff stated that proposals "focusing on sufficiently significant social policy issues . . . generally would not be considered to be excludable." Here, however, the Proposal and Supporting Statement are not focused on the policy issue of humane treatment of animals, but are instead focused on aspects of the Company's ordinary business operations, including the Company's assessment and management of the potential consequences and risks of the pork products used in the Wendy's System and the Company's historic public statements regarding the use of gestation stalls in its pork supply. Because the Proposal encompasses the Company's ordinary business matters, the Proposal can properly be excluded under Rule 14a-8(i)(7).

For example, in *McDonald's Corporation* (Mar. 12, 2019), the Staff considered a proposal which it described as requesting McDonald's to disclose the risks it faces as a result of campaigns targeting the company over concerns about cruelty to chickens. The Staff concluded the proposal was excludable under Rule 14a-8(i)(7) as focusing primarily on matters relating to the company's ordinary business operations. In addition, in *PetSmart, Inc.* (Mar. 24, 2011), the proposal requested that the board require its suppliers to certify they had not violated "the Animal Welfare Act, the Lacey Act, or any state law equivalents," the principal purpose of which related to preventing animal cruelty. The Staff granted no-action relief under Rule 14a-8(i)(7) and stated, "[a]lthough the humane treatment of animals is a significant policy issue, we note your 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.'" Thus, because the

shareholder proposal encompassed ordinary business matters, it was excludable under Rule 14a-8(i)(7) even though it mentioned a significant policy issue.

Moreover, the Staff has consistently concurred with the exclusion of shareholder proposals relating to the sale of products and/or services even where the shareholder proposal purported to address the humane treatment of animals as a significant policy issue. *See, e.g., McDonald's Corporation* (Mar. 12, 2019); *Amazon.com, Inc.* (Mar. 11, 2016) (concurring with the exclusion of a proposal asking the board to prepare "a report addressing animal cruelty in the supply chain . . . [including] the reputational and financial risks associated [there]with" as "relating to Amazon's ordinary business operations" because "the proposal relates to the products and services offered for sale by the company"); and *Amazon.com, Inc.* (Mar. 27, 2015) (concurring with the exclusion of a proposal requesting disclosure of reputational and financial risks related to the treatment of animals in the company's supply chain as "relating to Amazon's ordinary business operations" because it "relates to the products and services offered for sale by the company").

VI. CONCLUSION

For the reasons discussed above, the Company believes that the Proposal may be omitted from the 2022 Proxy Materials in reliance on both Rule 14a-8(i)(10) and Rule 14a-8(i)(7).

Based on the foregoing analysis, we respectfully request that the Staff concur with the Company's view and confirm that the Staff will not recommend enforcement action to the Commission if the Company omits the Proposal from its 2022 Proxy Materials.

If you have any questions, or if the Staff is unable to concur with our view without additional information or discussions, we respectfully request the opportunity to confer with members of the Staff prior to the issuance of any written response to this letter. Please do not hesitate to contact me by telephone at (614) 764-3220 or by email at *Michael.Berner@wendys.com*.

Regards,

Michael G. Berner
Vice President – Corporate & Securities Counsel and Chief Compliance Officer, and Assistant Secretary

Attachments

cc: Matthew Penzer
Special Counsel
The Humane Society of the United States
mpenzer@humanesociety.org

Matthew Prescott
Senior Director of Food and Agriculture
The Humane Society of the United States
mprescott@humanesociety.org

Adam L. Miller
Vorys, Sater, Seymour and Pease LLP
almiller@vorys.com

EXHIBIT A

PROPOSAL AND PROPONENT DOCUMENTATION

THE HUMANE SOCIETY OF THE UNITED STATES

November 3, 2021

EJ Wunsch
Chief Legal Officer, Chief Compliance Officer and Secretary
The Wendy's Co.
Via e-mail: ej.wunsch@wendys.com

Dear Mr. Wunsch,

Enclosed with this letter is a shareholder proposal submitted for inclusion in the proxy statement for the 2022 annual meeting and a letter from The Humane Society of the United States' (HSUS) brokerage firm, BNY Mellon, confirming ownership of Wendy's common stock.

The HSUS has continuously held at least $2,000.00 in market value of shares eligible to vote on the proposal for at least one year as of January 4, 2021 and has continuously maintained at least $2,000 of such securities from January 4, 2021 through the date of this letter; we will hold at least this amount through and including the date of the 2022 annual meeting.

Please e-mail me to confirm receipt of this proposal. As well, please note that as Wendy's proxy states proposals "must be received" by the Secretary but does not specify a means of delivery or receipt, we are only submitting this electronically. If you require a hard copy to be submitted, please let me know immediately. As well, if the company will attempt to exclude any portion of this proposal under Rule 14a-8, please advise me within 14 days.

I am available to discuss this proposal via teleconference at your earliest convenience. Specifically, I am free any time between 9am – 5pm ET, any business day between November 17 and December 15, 2021. Please let me know a day and time within those options that works for you and I'll be happy to schedule a call.

Sincerely,

Matt Prescott

Matthew Prescott
Senior Director of Food and Agriculture
240-620-4432
mprescott@humanesociety.org

BNY MELLON
WEALTH MANAGEMENT

Stacy Stout
Vice President
Client Service Manager

BNY Mellon Wealth Management
Family Office
500 Grant Street, Floor 38
Pittsburgh, PA 15258

T 412.236.1775
stacy.stout@bnymellon.com

November 3, 2021

EJ Wunsch

Chief Legal Officer, Chief Compliance Officer and Secretary

The Wendy's Co.

Via e-mail: ej.wunsch@wendys.com

Dear Mr. Wunsch,

BNY Mellon National Association, custodian for The Humane Society of the United States, verifies that The HSUS has continuously held at least $2,000.00 in market value of Wendy's common stock for at least one year as of January 4, 2021 and has continuously maintained at least $2,000 of such securities from January 4, 2021 through the date of this letter.

Thank you.

Sincerely,

Stacy Stout

Stacy Stout
Vice President, Client Service Manager
BNY Mellon Wealth Management
Family Office Group
500 Grant Street, 38th Floor/Suite 3840/151-3840
Pittsburgh, PA 15258
T (412) 236-1775 | F (866) 230-4247
bnymellonwealth.com

Is Wendy's knowingly misleading shareholders about ESG issues?

First, consider Wendy's *many* assurances about eliminating gestation stalls (restrictive cages that confine pigs) from its pork supply chain:

- **2007**: "Wendy's agrees that the…move away from single sow gestation crates is the right way to go" and encourages its suppliers to adopt plans "to eliminate sow gestation stalls."
- **2012:** "Wendy's is working with its…pork suppliers to eliminate the use of sow gestation stalls" and requires its "suppliers to provide their plans to phase out" their use.
- **2014:** "We now require…quarterly progress reports that reflect the percentage of stall-free pork."
- **2015:** "We maintain our commitment of achieving gestation stall-free sourcing" and are "confident" progress will continue "towards our goal of eliminating the use of sow gestation stalls…by the end of 2022."
- **2016:** "In the spirit of doing the right thing…we set a goal to eliminate the use of gestation stalls" and are "making good progress."
- **2018:** Wendy's explicitly states that its commitment has been to "entirely" eliminate gestation crates by 2022.
- **2019:** "We are confident we will continue to make progress toward our goal of eliminating the use of sow gestation stalls…by the end of 2022."
- **2021:** "Wendy's is proud to be on track toward our commitment to eliminate…sow gestation stalls in our North American supply chain by the end of 2022."

Now, consider Wendy's proclamations about "honest" and "specific" words being fundamental to its business:

- "We understand how powerful words can be," Wendy's says. "We were founded on the words, 'Quality is our Recipe.' And…believe that there's a difference between talking the talk and walking the walk. Without specifics, 'quality' is just another word that sounds good but has no real meat on it."
- That "recipe" includes Wendy's "four foundational 'ingredients'"— one of which is being honest. "We're transparent about how we source our ingredients," Wendy's claims.

Really?

Because, despite Wendy's specific, repeated, and unequivocal assurances about "eliminating" gestation stalls "entirely" by 2022, the proponent is confident that in reality, Wendy's is actually just *reducing* the time it allows gestating pigs to spend locked inside solitary stalls.

And there's strong reason to believe Wendy's knows the difference.

"To live up to [our] words," says Wendy's animal welfare policy, "we've studied every aspect of how our food makes it to your plate."

So, has Wendy's been *telling* shareholders it's doing one thing while knowingly *doing* another? And while making such bold proclamations about "walking the walk" and being "honest" and living up to its specific words?

Shareholders deserve to know.

RESOLVED: Shareholders request Wendy's confirm the individual crate confinement of gestating pigs will be eliminated from its North American supply by the end of 2022. If Wendy's cannot so confirm, shareholders request: 1) its percentage of gestation crate-free pork, and 2) risks Wendy's may face over the disparity between its gestation crate assurances and the use of crates beyond 2022. These disclosures should occur within three months of the 2022 annual meeting, at reasonable cost, and omit proprietary information.

From:	Matthew Prescott
To:	Wunsch, EJ
Cc:	Berner, Michael; Johnson, Mark
Subject:	[EXT] Shareholder proposal filing for 2022 Proxy
Date:	Wednesday, November 3, 2021 12:53:55 PM
Attachments:	Wendys 2022 Proposal Packet.pdf

Hi EJ,

Attached is a shareholder proposal for Wendy's 2022 proxy.

FYI that we've been raising the concerns outlined in this proposal with Wendy's through various channels for several years. Most recently, as Michael Berner (copied) can confirm, I raised them on a call with Liliana Esposito last April, though she refused to engage (or even reply to them) in any substantive way. And we have not heard from the company since then.

That said, as noted in my cover letter, I'm happy to discuss this with you should you like.

Best,
Matt Prescott

Matt Prescott
Senior Director, Food & Agriculture
The Humane Society of the United States
240-620-4432

EXHIBIT B

GESTATION STALL POLICY

In 2012, Wendy's announced a 10-year goal to transition our supply chain for pork (bacon and sausage used by Wendy's restaurants in North America) away from individual sow gestation stalls (an individual enclosure) in favor of open pen/group housing for confirmed pregnant sows, which provide the opportunity to socialize and exhibit natural behaviors. With the goal year fast approaching, we wanted to re-affirm our commitment and confirm that we are on track to complete this transition in our supply chain by the end of 2022.

Overview of the Wendy's Gestation Stall Policy and How It Came to Be

First, we think it's helpful to provide some background on pork production and the Wendy's supply chain. Our specification calls for pork from market hogs, which are animals raised specifically for marketing pork products. We do not utilize meat from sows (or mother pigs raised for breeding). We do, however, extend our animal welfare practices to breeding sows in addition to market hogs, which are their offspring.

Starting in the early 2000s, some states began adopting new standards or requirements for the housing of pregnant sows, which required phasing out the use of individual gestation stalls that a sow would live in throughout its pregnancy. Several states are now in the process of transitioning to these new requirements for sows raised in the state and/or pork sold in the state regardless of where it was sourced from. Wendy's also began studying the issue more closely, and in 2012 announced a goal to eliminate this practice in our supply chain, consistent with the State of Ohio's recently announced guidance on eliminating gestation stalls.

Wendy's corporate headquarters is located in Dublin, Ohio, and we have used the State of Ohio's guidance to inform our own goal since announcing it in 2012. At that time, Ohio had clearly defined and published guidance for sow housing systems, which was created with input and agreement by the agriculture community, animal welfare advocates and government representatives. Ohio's guidance was also outlined in a 2010 agreement that was signed by the Governor, multiple state agricultural producer groups and the Humane Society of the United States (HSUS). In 2010-11, Ohio announced its new expectations for the housing of sows with a 15-year implementation timeline through 2025. We set our own goal ahead of this timeline, committing to transition to pork raised in open pen/group housing by the end of 2022.

A sow is first bred at around 32 weeks of age (and is called a gilt until it births its first litter), and consistent with Ohio's guidance, there are two time periods in a breeding sow's life when it may not be housed in an open pen/group housing:

- First, when the sow (or gilt) is being bred through artificial insemination, it may be housed in an individual pen until pregnancy is confirmed (a period that our suppliers report is typically 4-6 weeks). This is done to best ensure the embryos attach and remain intact,

promoting a successful pregnancy.[1] After pregnancy is confirmed, the sow, which is now a gestating sow, is returned to open pen/group housing for the duration of pregnancy (a period that our suppliers report is typically 10-12 weeks).

- Second, shortly before giving birth, the sow is moved to a farrowing stall where it gives birth and remains with its piglets until they are weaned from the sow (a period that our suppliers report is typically about 3 weeks). A farrowing stall is designed to keep the piglets warm and safe and prevent the sow from laying on her newborn piglets. Once the piglets are weaned, they typically become market hogs, although some become breeding sows or boars.

Key Progress and Transition Status

By the end of 2022, we expect that all of our bacon and sausage will come from pigs that have been kept in open pen/group housing, not in gestation stalls during pregnancy, consistent with the State of Ohio's guidance and our previously announced commitment. As described above, the sows will be individually housed during breeding and housed with their piglets during farrowing. We expect we will start 2022 with about 10% of our bacon and sausage sourced this way, moving to 100% by year-end, consistent with the requirements that we built into our pork supply contracts that went into effect in 2021.

To the extent other states adopt requirements that are stricter or more specific than the requirements in the State of Ohio, we intend to comply with those additional requirements to the extent applicable to our operations. For example, in 2022, a new standard will take effect in the State of California that requires at least 24 feet of space per pig and does not allow the animals to be individually housed while they are being bred before pregnancy is confirmed. It does allow for individual housing in the five-day period prior to the sow's expected date of giving birth, and any day that the sow is nursing piglets. We are on track to source our bacon for California from suppliers who meet this more restrictive standard starting in 2022.

The humane treatment of animals is a core element of Wendy's quality assurance and supply chain practices. Two aspects that underpin our work in this area are our longstanding relationships with industry experts, many of whom serve on the Wendy's Animal Welfare Council, and our audit-based approach to animal welfare. We have recently enhanced these relationships and auditing practices further by bringing in new expertise in the areas of auditing, animal science, wellbeing and behavior, with specialties across our key protein categories. Looking ahead, we will leverage the council to strengthen the standards we apply to ourselves and our suppliers through the Animal Care Standards Program and our recently announced Responsible Sourcing goal. We look forward to continuing to share updates on our progress on our website, The Square Deal Blog and annual Corporate Responsibility report.

[1] This approach is consistent with Rule 901:12-8-02 promulgated under the Ohio Administrative Code, which provides that breeding/gestation stalls may be used post weaning for a period of time that seeks to maximize embryonic welfare and allows for the confirmation of pregnancy. Similarly, the 2010 agreement between Ohio's agricultural community and HSUS also stated "It is understood that in all housing systems, sows may be housed in breeding/gestation stalls until they are confirmed pregnant."

February 9, 2022

Via Electronic Mail: shareholderproposals@sec.gov

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

Re: The Wendy's Company – Shareholder Proposal submitted by the Humane Society of the United States

Ladies and Gentlemen:

I am writing on behalf of the Humane Society of the United States (the "Proponent"), who is the beneficial owner of common stock of The Wendy's Company (the "Company") and who has submitted a shareholder proposal (the "Proposal") to the Company. I am in receipt of a letter dated January 10, 2022 ("Company Letter") sent to the Securities and Exchange Commission on behalf of the Company. In that letter, the Company contends that the Proposal may be excluded from the Company's 2022 proxy statement. A copy of this reply is being emailed concurrently to counsel for the Company.

BACKGROUND

Because the Company adopts an overly technical (and misleading) interpretation of the Proposal, Proponent begins this response by setting forth the Proposal's actual text:

> Is Wendy's knowingly misleading shareholders about ESG issues?
>
> First, consider Wendy's *many* assurances about eliminating gestation stalls (restrictive cages that confine pigs) from its pork supply chain:
>
> - 2007: "Wendy's agrees that the…move away from single sow gestation crates is the right way to go" and encourages its suppliers to adopt plans "to eliminate sow gestation stalls."

- 2012: "Wendy's is working with its…pork suppliers to eliminate the use of sow gestation stalls" and requires its "suppliers to provide their plans to phase out" their use.
- 2014: "We now require…quarterly progress reports that reflect the percentage of stall-free pork."
- 2015: "We maintain our commitment of achieving gestation stall-free sourcing" and are "confident" progress will continue "towards our goal of eliminating the use of sow gestation stalls…by the end of 2022."
- 2016: "In the spirit of doing the right thing…we set a goal to eliminate the use of gestation stalls" and are "making good progress."
- 2018: Wendy's explicitly states that its commitment has been to "entirely" eliminate gestation crates by 2022.
- 2019: "We are confident we will continue to make progress toward our goal of eliminating the use of sow gestation stalls…by the end of 2022."
- 2021: "Wendy's is proud to be on track toward our commitment to eliminate…sow gestation stalls in our North American supply chain by the end of 2022."

Now, consider Wendy's proclamations about "honest" and "specific" words being fundamental to its business:

- "We understand how powerful words can be," Wendy's says. "We were founded on the words, 'Quality is our Recipe.' And…believe that there's a difference between talking the talk and walking the walk. Without specifics, 'quality' is just another word that sounds good but has no real meat on it."
- That "recipe" includes Wendy's "four foundational 'ingredients'"— one of which is being honest. "We're transparent about how we source our ingredients," Wendy's claims.

Really?

Because, despite Wendy's specific, repeated, and unequivocal assurances about "eliminating" gestation stalls "entirely" by 2022, the proponent is confident that in reality, Wendy's is actually just *reducing* the time it allows gestating pigs to spend locked inside solitary stalls.

And there is also strong reason to believe Wendy's knows the difference.

"To live up to [our] words," says Wendy's animal welfare policy, "we've studied every aspect of how our food makes it to your plate."

So, has Wendy's been *telling* shareholders it's doing one thing while knowingly *doing* another? And while making such bold proclamations

about “walking the walk” and being “honest” and living up to its specific words?

Shareholders deserve to know.

RESOLVED: Shareholders request Wendy’s confirm the individual crate confinement of gestating pigs will be eliminated from its North American supply by 2022. If Wendy’s cannot so confirm, shareholders request: 1) its percentage of gestation crate-free pork, and 2) risks Wendy’s may face over the disparity between its gestation crate assurances and the use of crates beyond 2022. These disclosures should occur within three months of the 2022 annual meeting, at reasonable cost, and omit proprietary information.

Proposal, Exhibit 1.

The Company argues for exclusion of the Proposal on the basis of Rule 14a-8(i)(10), claiming that it has substantially implemented the proposal, and Rule 14a-8(i)(7), claiming both that the Proposal concerns matters of ordinary business, and that it does not involve a significant policy issue. But, as explained below, the Company has not carried—and indeed could not carry—its burden to prove the Proposal may be omitted from its 2022 proxy materials and the Proponent, therefore, asks that the Company’s no-action request be denied.

ANALYSIS

The Proposal Seeks Disclosures and a Risk Analysis Relating to the Use of Intensive Gestation Stall Confinement for Pigs

At the outset, it is important to be clear about the subject matter and essential objective of the Proposal. It is repeatedly and unambiguously stated that the Proposal concerns the *elimination* of sow gestation stalls, cages which are so restrictive they barely permit any movement for the entire time in which pigs are confined in them. Gestation stalls prevent sows the ability to turn around, lie down comfortably, walk freely or express nearly any normal behaviors. They often result in painful sores, lameness, muscle weakness, and other forms of discomfort.

The essential objective of the Proposal is to disclose specific information about the Company’s policies and practices relating to gestation stalls, which the Company began urging its suppliers in 2007 “to eliminate.”[1] At the time, the Company stated that “at least 10% of the company's pork products come from hogs

[1] *See*, Internet Archive Wayback Machine (capturing web page as it appeared on December 18, 2007), https://web.archive.org/web/20071218151910/https:/www.wendys.com/community/animal_welfare.jsp

not raised in gestation stalls."[2] The Company further stated that its "goal is to reach 20% by the end of 2008 and continue to increase over time."

As Proponent sets out in the Proposal's timeline, the Company has expressly repeated its commitment to *eliminate* crates many times:

- 2012: "…eliminate the use of sow gestation stalls"...
- 2014: "…stall-free pork"…
- 2015: "…commitment of achieving gestation stall-free sourcing"; "… our goal of eliminating the use of sow gestation stalls…by the end of 2022."
- 2016: "…we set a goal to eliminate the use of gestation stalls"…
- 2018: Company specifies its commitment is to "entirely" eliminate gestation crates by 2022.
- 2019: "…our goal of eliminating the use of sow gestation stalls…by the end of 2022."
- 2021: "…our commitment to eliminate…sow gestation stalls in our North American supply chain by the end of 2022."[3]

The reason for laying out this framework is because the month following submission of the Proposal, the Company issued a gestation stall "Policy Update" that for the first time claims it never actually intended to totally eliminate gestation crates (despite its plain language to the contrary). Company Letter, p. 5. The Company argues that its "gestation stall-free" policy applies to pigs only after they are *confirmed* pregnant, which it says is "typically" done after as many as 4-6 weeks. *Id.*, p. 5-6. For context, six weeks comprises nearly 40% of a pig's roughly 16-week pregnancy.[4] Yet, according to the Company, it is only at this point—near the middle of her pregnancy—that suppliers first confirm a pig is pregnant and it is at that point—according to the Company—that she becomes a "gestating sow." *Id.* The Company also carefully avoids the term gestation stall and instead uses "individual pen" for the cage in which the pig is confined for weeks before her pregnancy is confirmed (when presumably the gestation stall label first applies).

But setting aside the Company's questionable understanding of when gestation in a living being *actually* begins, for purposes of resolving the no-action challenge the focus is on the subject matter and essential objective of the Proposal. And, as plainly shown above, is an effort to provide shareholders information on whether the Company is *eliminating* gestation stalls completely from its pork supply chain

---

[2] *Id.* (emphasis added).
[3] The Company's letter contains no challenge to the truth or accuracy of the statements attributed to it in the Proposal.
[4] *See*, Overview of the U.S. Hog Industry (October 2015), p. 15, USDA, National Agricultural Statistics Service, https://downloads.usda.library.cornell.edu/usda-esmis/files/rr171x21v/cz30pw658/js956j577/hogview-10-29-2015.pdf; *see also*, https://www.humanesociety.org/sites/default/files/docs/Scorecard.pdf#page=7.

by 2022. If elimination of gestation stalls is not the Company's plan, the Proposal asks for additional disclosures and actions, including the percentage of the Company's pork supply that is produced entirely without gestation crates, and a risk analysis of the Company's practices with respect to total versus partial elimination of these restrictive confinement structures.

The Proposal has not been Substantially Implemented and so May Not be Excluded under Rule 14a-8(i)(10).

The Proposal cannot be excluded under Rule 14a-8(i)(10) because it has not been substantially implemented by the Company. In analyzing such claims, the staff has stated that "a determination that [a company] has substantially implemented the proposal depends upon whether its particular policies, practices and procedures compare favorably with the guidelines of the proposal." *Texaco, Inc.* (March 28, 1991). Where a Proposal contains multiple elements, substantial implementation may be found if the Company demonstrates that it has taken actions to address each element. *See, e.g., Southwestern Energy* (March 15, 2011) (political contributions disclosure proposal that sought accounting of direct and indirect expenditures was not substantially implemented by disclosure of direct expenditures only). Substantial implementation does not require that the Company have taken the exact measures requested in the proposal, but it does demand that the essential objective of the Proposal be satisfied. *See, e.g., Quest Diagnostics, Inc.* (Mar. 17, 2016).

A. The Company did not, as called for by the Proposal, confirm that it would eliminate the use of gestation stalls.

Consistent with its subject matter and essential objective, explained in the previous section, the Proposal first asks the Company to affirm it will *eliminate* its use of sow gestation stalls by 2022. Specifically, the Proposal asks the Company to "confirm the individual crate confinement of gestating pigs will be eliminated from its North American supply by 2022." And, as is evident from the text and objective of the Proposal, Proponent employed the common (and USDA-defined) meaning of the term "gestating" as constituting the entire pregnancy "from conception until birth."[5] In other words, the first essential objective of the Proposal called for the Company to confirm for shareholders that it would not be using gestation stalls at all to house pregnant pigs during the entirety of their 16-week gestation periods. If the Company does not confirm it will *eliminate* gestation stalls across its supply chain, the Proposal then calls for additional disclosures and actions.

[5] *See*, *American Heritage® Dictionary of the English Language, Fifth Edition*. (2011); *see also*, *Collins English Dictionary – Complete and Unabridged, 12th Edition* 2014; Overview of the U.S. Hog Industry (October 2015), p. 15, USDA, National Agricultural Statistics Service, https://downloads.usda.library.cornell.edu/usda-esmis/files/rr171x21v/cz30pw658/js956j577/hogview-10-29-2015.pdf.

The Company misleadingly claims it did provide "the confirmation requested by the Proposal regarding the elimination of gestation stalls from the Company's North American pork supply by the end of 2022." Company Letter, p. 6. In fact, it *did not* provide the requested confirmation. What the Company did provide was something very different. The Company's new policy states that gestation crates will be eliminated not for *gestating* pigs, but for "confirmed" gestating pigs (again, with confirmation not occurring until as much as six weeks after gestation begins). *Id.*, p. 5-6. As noted above, six weeks in a gestation stall—regardless of what moniker the Company places on the enclosure—amounts to nearly 40% of a pig's entire pregnancy. While Proponent certainly acknowledges the Company's policy update confirms that the use of gestation crates will be *reduced* from 100% of a sow's gestation to 40%, this is decidedly different from the *elimination* confirmation called for by the Proposal.[6] *See, e.g.*, *Lear Corporation* (March 6, 2020).

To be clear, Proponent does not claim that the Company has made no disclosures about its use of gestation stalls, but rather that the disclosures the Company has made are materially different, and significantly less, than those called for by the Proposal. As such, the Company has not substantially implemented it.

B. The Company did not provide the disclosures or risk analysis requested by the Proposal.

Because the Company did not confirm it would eliminate the use of gestation stalls for pregnant pigs, the Proposal's guidelines calling for additional disclosures and a risk assessment were triggered. Yet, incorrectly claiming that it has provided the confirmation called for by the Proposal, the Company concedes it did not find it necessary to address these Proposal requests. Company Letter, p. 6. Thus, these elements of the Proposal have not been substantially implemented.

The additional disclosure called for by the Proposal, in the event the Company does not plan to completely eliminate gestation crates across its supply chain, seeks to provide clear and specific information for shareholders about what percentage, if any at all, of the Company's pork was produced *without any use* of gestation crates

[6] The Company spills much ink attempting to justify its 6-week gestation stall policy as consistent with a State of Ohio regulation, even pointing to a 2010 negotiation about sow housing in which Proponent was involved. Company Letter, p. 6. But the Company's newly hatched approach to gestation stalls is simply not relevant to a determination of whether the Company substantially implemented the essential objective of the instant Proposal. Whether the Company really meant to align its gestation stall approach with the state regulation all along, despite its repeated statements otherwise and despite December 2021 being the first time the Company has ever even mentioned the state regulation, the express text of the Proposal is what governs the substantial implementation inquiry. And the Proposal calls for specific disclosures and analyses the Company has to date not made.

(i.e. "gestation crate-free"). As detailed in the Proposal, for more than a decade, the Company repeatedly made statements that it was progressing in its goal *to eliminate* gestation crates (without any of its nascent qualifications). Proponent believes shareholders should be provided specific disclosures about the results of the Company's efforts with respect to gestation stall-free pork products in its supply chain.

Instead of providing this disclosure (or a favorably comparable one), the Company has made a materially different one—the percentage of pigs who are "not in gestation stalls during pregnancy, *consistent with the State of Ohio's guidance*." Company Letter, Ex. B. That is, the Company has disclosed only the percentage of pigs that are moved to group housing after spending up to six weeks, nearly 40% of their pregnancy cycles, in gestation stalls. Such a percentage, though, does not meet the essential objective of the Proposal, which seeks to inform shareholders how much of the Company's pork supply has eliminated gestation stalls entirely.

Compare, for example, the Company's current disclosure phrasing with the one released in 2007, when it then stated that "at least 10% of the company's pork products come from hogs *not raised in gestation stalls*."[7] In fact, the Company's newly released Policy Update demonstrates even more forcefully why the current disclosure is insufficient to satisfy the one called for by the Proposal. In the fourteen years since the Company's 2007 statement that it was using 10% gestation crate-free pork, the Company repeatedly affirmed—as documented in the Proposal's timeline—that it was "making progress" toward its goal of eliminating gestation crates. Yet, the Company's latest update suggests it is still at 10%, and that's only for the reduction (not elimination) of crates. Company Letter, p. 6. Shareholders have a right to vote to compel disclosure, as requested by the Proposal, of the percentages of the Company's pork products that are truly gestation stall-free, i.e. "come from hogs not raised in gestation stalls" at all.

Moreover, because the Company is not committing to fully eliminate gestation stalls, the Proposal calls for an analysis of the risks implicated by its apparent disparate positions on this important animal welfare issue. The Company concedes it did not perform such an analysis. Company Letter, p. 6. But as noted above, the Company's position turns on a mischaracterization of the effective guidelines of the Proposal, which seeks to inform shareholders about the Company's specific policies and practices relating to a sow welfare issue about which the Company until very recently had been clear in its commitment to eliminate.[8]

Proponent notes that resolution of this matter does not require the Staff to pass judgment on whether the Company is being truthful when it now argues it always meant something different than what it actually (and repeatedly) said in its

[7] *See*, Fn. 1 (emphasis added).
[8] *See*, https://www.humanesociety.org/sites/default/files/docs/Scorecard.pdf#page=69.

numerous pledges to "eliminate" gestation stalls. Nor need the Staff question why, before December 2021, the Company never once mentioned the Ohio regulation on sow housing it now claims to have been following since 2012. Instead, resolution of this matter turns on the core principle that shareholders are entitled to seek disclosures and a risk analysis that provide clear and cohesive explanations of the Company's animal welfare policies and practices, particularly in light of apparent disparities in its previously claimed positions (none of which the Company disputes saying). While the Company is free to attempt to harmonize its positions and practices in its assessment of risks, it is not free to ignore shareholder concern about the Company's impacts on such significant policy issues.

Because the Company has not published the risk analysis called for by the Proposal—nor any that aligns with the Proposal's request—it may not rely on the substantial implementation exception to exclude the Proposal from its proxy materials.

The Proposal May Not be Excluded under Rule 14a-8(i)(7).

The Proposal may not be excluded under Rule 14a-8(i)(7) because it does not relate to "ordinary business practices" and, in any event, it raises a significant policy issue that transcends the Company's ordinary business. *See* Release No. 34-40018 (May 21, 1998).

A. The Proposal raises a significant policy issue that transcends the Company's ordinary business.

From start to finish, the Proposal's subject matter focuses on a single and significant policy issue: the Company's practices and commitments with respect to housing pregnant pigs in ultra-restrictive, solitary stalls. The humane treatment of animals is well-established as a significant policy issue that transcends ordinary business matters. *See, e.g.*, *The TJX Companies, Inc.* (Apr. 9, 2020); *Revlon, Inc.* (Mar. 18, 2014); *Coach, Inc.*, (Aug. 19, 2010); *Bob Evans Farms, Inc.* (June 6, 2011); *Denny's* (Mar. 17, 2009). Indeed, as amply illustrated in the Proposal, the Company itself has repeatedly proclaimed its commitment to eliminating the use of gestation stalls not in the name of ordinary business interests, but rather "[i]n the spirit of doing the right thing."[9]

The Company does not actually dispute that the humane treatment of animals generally or gestation stalls specifically are significant policy issues. To the contrary, the Company states that "animal care and welfare was identified as a priority topic" in the Company's recent materiality assessment. The assessment was

[9] *See*, Proposal, Ex. 1; *see also*, "What's humane when it comes to Animal Welfare," Wendy's Square Deal Blog, Mar. 30, 2016, https://www.squaredealblog.com/homewendys/animalwelfare.

intended to identify and prioritize matters the Company believes either "may have a significant impact on [the Company], *or could be significantly affected by [the Company's] operations*."[10] Yet despite the express recognition that the Company's animal care and welfare practices implicate risks that may affect significant policy issues, it nonetheless takes the position that shareholders should not be entitled to vote on the Proposal's call for an analysis of those policy risks:

> Managing potential environmental and social risks related to animal welfare, including the humane treatment of animals in our pork supply and the Company's historic public statements regarding the use of gestation stalls in its pork supply, is a critical part of the Company's ordinary business operations. Company Letter, p. 8.

However, as explained in Staff Legal Bulletin No. 14E (October 27, 2009), when "a proposal's underlying subject matter transcends the day-to-day business matters of the company and raises policy issues so significant that it would be appropriate for a shareholder vote, the proposal generally will not be excludable under Rule 14a-8(i)(7)…" And when a proposal calls for a risk analysis, the determination similarly depends whether "the subject matter to which the risk pertains or that gives rise to the risk" involves a transcendent policy issue or a matter of ordinary business. *Id.*

The subject matter that gives rise to the instant Proposal—and that is "the subject matter to which the risk pertains"—is squarely focused on the Company's policies and practices relating to the humane treatment of animals. And none of the Staff decisions cited by the Company change the result here in that each involved Proposals that are fundamentally distinguishable from the one now under consideration. Company Letter, p. 9-10. While the instant Proposal speaks only to the Company's animal welfare-related risks, the proposals in the decisions cited by the Company called for called for evaluations of ordinary business matters, such as financial and reputational risks. *See, e.g.*, *Tyson Foods Inc.* (Oct. 1, 2020)(involving proposal calling for disclosures and risk assessment of potential "material losses" from regulatory compliance issues); *McDonald's Corporation* (Mar. 12, 2019)(involving proposal calling for disclosure of "economic risks" the company faces from activist campaigns); *Dean Foods Co.* (Mar. 9, 2007)(involving a proposal to address the "company's reputation" and consumer criticism of the company); *Exxon Mobil Corp.* (Mar. 6, 2012)(involving proposal calling for discussion of "risks to the company's finances and operations"); *The TJX Companies, Inc.* (Mar. 29, 2011)(involving a proposal calling for assessment of the company's tax avoidance risks); *Amazon.com, Inc.* (Mar. 11, 2016)(involving a proposal calling for a report that includes an assessment of "reputational and financial risks" to the company for offering certain products for sale); *Amazon.com, Inc.* (Mar. 27, 2015)(involving a

[10] "Wendy's materiality assessment and stakeholder engagement" (emphasis added), https://www.wendys.com/sites/default/files/2021-04/Materiality%26Matrices.pdf.

proposal calling for disclosure of "reputational and financial risks" to the company as a result of "negative publicity" from certain product sales).[11]

Nowhere in the instant Proposal is there any mention of or focus on the Company's management of internal business risks. Nowhere is there a mention of or focus on the Company's finances. Nowhere is there a mention of or focus on the Company's reputation. Nowhere is there a mention of or focus on product sale choices. Instead, there is a laser focus on the Company's policies and practices relating only to the significant policy issue of the humane treatment of animals, specifically the intensive confinement of pigs.

To be sure, the Proposal highlights the incongruity between the Company's 14-year history of pledges to *eliminate* gestation stalls and its recent policy update that permits their use for nearly 40% of a pig's pregnancy. But when such incongruities involve issues of significant policy, they have not been excludable as ordinary business. *See*, *T. Rowe Price Group, Inc.* (March 13, 2020) (explaining that Staff did not concur in exclusion under Rule 14a-8(i)(7) where the proposal "focused on possible differences between [the company's] public statements and pledges regarding climate change and the voting policies and practices of its subsidiaries . . . regarding climate change").

Thus, because the Proposal's narrowly focused underlying subject matter transcends the day-to-day business matters of the Company and raises policy issues so significant that it would be appropriate for a shareholder vote, the Proposal is not excludable under Rule 14a-8(i)(7).

B. The Proposal does not involve the type of day-to-day business decisions that cannot practically be submitted to a shareholder vote.

Although the Proposal's focus on a significant policy issue is dispositive here, Proponent briefly discusses here why the ordinary business exception wouldn't apply even without the transcendent issue. The Commission has explained that "ordinary business matters" for purposes of rule 14a-8(i)(7) are those tasks that 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." Release No. 34-40018 (May 21, 1998). The purpose of the exception is "to confine the resolution of ordinary business problems to management and the board

[11] The Company also includes a reference to *PetSmart, Inc.* (Mar. 24, 2011), which recognized "the humane treatment of animals is a significant policy issue," but concurred in exclusion of the proposal because of its extraordinarily overbroad scope, implicating everything from major policy issues to minor administrative matters. The instant Proposal, however, is honed on the single significant policy issue of the humane treatment of pregnant pigs.

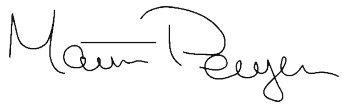
of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting." *Id.*

The instant Proposal does not intrude on any such on-the-ground business practices, but instead focuses disclosures and impacts of the Company's policies with respect to animal housing issues. The Proposal does not call for any prescriptions that would interfere with management's ability to make business decisions, but only provides shareholders the ability to call for greater clarity from management on the nature of the Company's housing systems and the considerations that brought them about. Despite having the burden of proof, the Company fails to provide any substantive explanation of how the Proposal actually infringes on management's ability to conduct core business matters. Instead, the Company relies only on boilerplate generalities that "managing … risks related to animal welfare … is a critical part of the Company's ordinary business operations." Company Letter, p. 8. But lest they swallow the Commission's defining limitation on ordinary business practices, such generalities cannot satisfy the Company's burden to demonstrate it is entitled to exclude the Proposal. *See* 17 C.F.R. § 240.14a–8(g).

CONCLUSION

In conclusion, the Company has failed to carry its burden under Rule 14a-8(g) of establishing that the Proposal is excludable on the basis of Rule 14a-8(i)(10) or Rule 14a-8(i)(7). Accordingly, we request that the Company's petition for no-action be declined.

Respectfully,



Matthew Penzer
Special Counsel
The Humane Society of the United States
1255 23rd Street, NW, Suite 450
Washington, D.C. 20037
mpenzer@humanesociety.org
240.271.6144

cc:
Michael G. Berner

Exhibit 1

Is Wendy's knowingly misleading shareholders about ESG issues?

First, consider Wendy's *many* assurances about eliminating gestation stalls (restrictive cages that confine pigs) from its pork supply chain:

- **2007**: "Wendy's agrees that the…move away from single sow gestation crates is the right way to go" and encourages its suppliers to adopt plans "to eliminate sow gestation stalls."
- **2012:** "Wendy's is working with its…pork suppliers to eliminate the use of sow gestation stalls" and requires its "suppliers to provide their plans to phase out" their use.
- **2014:** "We now require…quarterly progress reports that reflect the percentage of stall-free pork."
- **2015:** "We maintain our commitment of achieving gestation stall-free sourcing" and are "confident" progress will continue "towards our goal of eliminating the use of sow gestation stalls…by the end of 2022."
- **2016:** "In the spirit of doing the right thing…we set a goal to eliminate the use of gestation stalls" and are "making good progress."
- **2018:** Wendy's explicitly states that its commitment has been to "entirely" eliminate gestation crates by 2022.
- **2019:** "We are confident we will continue to make progress toward our goal of eliminating the use of sow gestation stalls…by the end of 2022."
- **2021:** "Wendy's is proud to be on track toward our commitment to eliminate…sow gestation stalls in our North American supply chain by the end of 2022."

Now, consider Wendy's proclamations about "honest" and "specific" words being fundamental to its business:

- "We understand how powerful words can be," Wendy's says. "We were founded on the words, 'Quality is our Recipe.' And…believe that there's a difference between talking the talk and walking the walk. Without specifics, 'quality' is just another word that sounds good but has no real meat on it."
- That "recipe" includes Wendy's "four foundational 'ingredients'"— one of which is being honest. "We're transparent about how we source our ingredients," Wendy's claims.

Really?

Because, despite Wendy's specific, repeated, and unequivocal assurances about "eliminating" gestation stalls "entirely" by 2022, the proponent is confident that in reality, Wendy's is actually just *reducing* the time it allows gestating pigs to spend locked inside solitary stalls.

And there's strong reason to believe Wendy's knows the difference.

"To live up to [our] words," says Wendy's animal welfare policy, "we've studied every aspect of how our food makes it to your plate."

So, has Wendy's been *telling* shareholders it's doing one thing while knowingly *doing* another? And while making such bold proclamations about "walking the walk" and being "honest" and living up to its specific words?

Shareholders deserve to know.

RESOLVED: Shareholders request Wendy's confirm the individual crate confinement of gestating pigs will be eliminated from its North American supply by the end of 2022. If Wendy's cannot so confirm, shareholders request: 1) its percentage of gestation crate-free pork, and 2) risks Wendy's may face over the disparity between its gestation crate assurances and the use of crates beyond 2022. These disclosures should occur within three months of the 2022 annual meeting, at reasonable cost, and omit proprietary information.