



DIVISION OF
CORPORATION FINANCE

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

March 22, 2023

Elizabeth A. Ising
Gibson, Dunn & Crutcher LLP

Re: The Home Depot, Inc. (the "Company")
Incoming letter dated January 13, 2023

Dear Elizabeth A. Ising:

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.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(a). Rule 14a-8(f) requires a company to notify a proponent of a problem under Question 1, or Rule 14a-8(a), and it does not appear the Company has done so.

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: Ethan Peck
National Center for Public Policy Research

January 13, 2023

VIA E-MAIL

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

*Re: The Home Depot, Inc.
Shareholder Proposal of the National Center for Public Policy Research
Securities Exchange Act of 1934 (“Exchange Act”)—Rule 14a-8*

Ladies and Gentlemen:

This letter is to inform you that our client, The Home Depot, Inc. (the “Company”), intends to omit from its proxy statement and form of proxy for its 2023 Annual Meeting of Shareholders (collectively, the “2023 Proxy Materials”) a purported shareholder proposal (the “Submission”), including statements in support thereof (the “Supporting Statement”) from the National Center for Public Policy Research (the “Proponent”).

Pursuant to Rule 14a-8(j), we have:

- filed this letter with the Securities and Exchange Commission (the “Commission”) no later than eighty (80) calendar days before the Company intends to file its definitive 2023 Proxy Materials with the Commission; and
- concurrently sent a copy of this correspondence to the Proponent.

Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) (“SLB 14D”) provide that shareholder proponents are required to send companies a copy of any correspondence that the proponent elects to submit to the Commission or the staff of the Division of Corporation Finance (the “Staff”). Accordingly, we are taking this opportunity to inform the Proponent that if it elects to submit additional correspondence to the Commission or the Staff with respect to the Submission, a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Company pursuant to Rule 14a-8(k) and SLB 14D.

BACKGROUND

In connection with the Company's 2022 Annual Meeting of Shareholders, the Company received a shareholder proposal pursuant to Rule 14a-8 requesting "the Board of Directors to oversee an independent racial equity audit analyzing Home Depot's adverse impacts on nonwhite stakeholders and communities of color" (the "2022 Racial Equity Audit Proposal"). In accordance with the requirements of Rule 14a-8, the Company included the 2022 Racial Equity Audit Proposal in its proxy statement and on its proxy card for consideration at the Company's 2022 Annual Meeting of Shareholders that was held on May 19, 2022. The 2022 Racial Equity Audit Proposal received support from a majority of the votes cast at the Company's 2022 Annual Meeting of Shareholders.

THE SUBMISSION

The Submission states:

Resolved: Shareholders commit to rescind the 2022 Racial Equity Audit proposal and reject any racially discriminatory practices at the company.

A copy of the Submission and Supporting Statement is attached as Exhibit A.

BASIS FOR EXCLUSION

We respectfully request that the Staff concur in our view that the Submission may be excluded from the Company's 2023 Proxy Materials pursuant to Rule 14a-8(a) because the Submission is not a proposal for purposes of Rule 14a-8.

ANALYSIS

The Submission May be Excluded Pursuant to Rule 14a-8(a) Because the Submission Is Not a Proposal Within the Meaning of the Rule.

The Submission is not a proposal for purposes of Rule 14a-8 because it is not a recommendation or requirement that the Company or its Board of Directors take action, but instead it seeks to allow a shareholder vote as a vehicle to express shareholders' views on a matter previously voted on and supported by the Company's shareholders. Under the Commission's rules, Staff responses to no-action requests under Rule 14a-8(a) and other Staff precedent, such a vote is not a proper subject under Rule 14a-8.

Rule 14a-8(a) defines a shareholder "proposal" for purposes of Rule 14a-8 as a "recommendation or requirement that the company and/or its board of directors take action, which [the shareholder proponent] intend[s] to present at a meeting of the company's shareholders." Rule 14a-8(a) further provides that a shareholder proposal "should state as clearly

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as possible the course of action that [the shareholder proponent] believe[s] *the company* should follow” (emphasis added).

The rulemaking history of Rule 14a-8 also demonstrates that a shareholder proposal must specifically request a company to take an action in order for such proposal to be deemed appropriate for inclusion in a company’s proxy materials. In the Commission’s 1997 release proposing amendments to Rule 14a-8, the Commission stated:

The answer to Question 1 of revised rule 14a-8 would define a “proposal” as a request that the company or its board of directors take an action. *The definition reflects our belief that a proposal that seeks no specific action, but merely purports to express shareholders’ views, is inconsistent with the purposes of rule 14a-8 and may be excluded from companies’ proxy materials.* The Division, for instance, declined to concur in the exclusion of a “proposal” that shareholders express their dissatisfaction with the company’s earlier endorsement of a specific legislative initiative. Under the proposed rule, the Division would reach the opposite result, because the proposal did not request that the company take an action.

Proposing Release, *Amendments to Rules on Shareholder Proposals*, Exchange Act Release No. 39093 (Sept. 18, 1997) (*emphasis added*) (*citations omitted*) (the “1997 Release”).

The Commission subsequently adopted this definition, as proposed, in SEC Release No. 34-40018 (May 21, 1998) (“We are adopting as proposed the answer to Question 1 of the amended rule defining a proposal as a request or requirement that the board of directors take an action.”).

Following adoption of Rule 14a-8(a), the Staff has consistently confirmed that a shareholder submission is excludable if it “merely purports to express shareholders’ views” on a subject matter. For example, in *Longs Drug Stores Corp.* (avail. Jan. 23, 2008), the Staff concurred that a submission seeking to allow a shareholder vote to express displeasure with respect to the company’s general employment and compensation practices, including “hours, benefits, discounts, and morale” could be omitted from the company’s proxy materials under Rule 14a-8(a) because the submission “does not recommend or require that Longs or its board of directors take any action.” *See also Sensar Corp.* (avail. Apr. 23, 2001) (concurring with exclusion under Rule 14a-8(a) where a submission sought to allow a shareholder vote to express shareholder displeasure over the terms of stock options granted to management but did not recommend or require any action by the company or its board of directors); and *CSX Corp.* (avail. Feb. 1, 1999) (concurring with exclusion under Rule 14a-8(a) where a shareholder submitted three poems for consideration but did not recommend or require any action by the company or its board of directors).

The Company believes that it may exclude the Submission under Rule 14a-8(f)(l) because the Submission does not meet the requirements of Rule 14a-8(a). As written, the Submission

does not recommend any action on the part of the Company or its Board of Directors; the Submission instead seeks to allow a shareholder vote as a vehicle to express shareholders' views on a prior shareholder vote regarding a matter that, as a direct result of another shareholder's proper use of the Rule 14a-8 process, was previously submitted to shareholders and approved by a majority of the votes cast at the Company's 2022 Annual Meeting of Shareholders. The Staff has consistently confirmed that a shareholder submission is excludable if it "merely purports to express shareholders' views" on a subject matter. The Submission is exactly of the type directly addressed by the Commission in the 1997 Release and is parallel to the excluded submissions in *Longs Drug Stores* and *Sensar*: it merely provides shareholders an opportunity to express their displeasure on a principle without requesting the Company or its Board of Directors to take a specific action. Contrary to the requirements of Rule 14a-8(a), the Submission neither recommends nor requires that the Company or its Board of Directors take any specific action with respect to the matters discussed therein, but instead requests that the Company's shareholders commit to unknown, future actions to "rescind the 2022 Racial Equity Audit proposal and reject any racially discriminatory practices at the company." The Supporting Statement highlights the parallels to the submissions in *Longs Drug Stores* and *Sensar*, demonstrating the Proponent's objective of seeking to allow a shareholder vote to express displeasure with the 2022 Racial Equity Audit Proposal and a previous shareholder vote by providing background information that serves to promote the Proponent's view that the 2022 Racial Equity Audit Proposal "may jeopardize Home Depot's value..."

Further, the Submission is distinguishable from the proposals in *Capital One Financial Corp.* (avail. Feb. 7, 2007) and *General Electric Co.* (avail. Jan. 10, 2012). In *Capital One Financial Corp.* the proposal requested the board of directors adopt a policy "that company shareholders be given the opportunity at each annual meeting of shareholders to vote on an advisory resolution... to ratify the compensation of named executive officers" set forth in the proxy statement's summary compensation table. In *General Electric Co.* the proposal requested that the board of directors "re-examine the company's dividend policy and consider special dividends as a means of returning excess cash to shareholders." In both instances, the Staff did not concur with the exclusion of the proposal under Rule 14a-8(a) because in the Staff's view, the proposals requested the board of directors to take action. The Submission, by contrast, does not request any action on the part of the Board of Directors or the Company. Instead, the Submission seeks a shareholder vote to express shareholders' views on a matter that was previously submitted to shareholders and approved by a majority of the votes cast at the Company's 2022 Annual Meeting of Shareholders. As noted above, it is precisely the type of matter that the Commission described as "inconsistent with the purposes of rule 14a-8 and may be excluded from companies' proxy materials." Based on the clear language of Rule 14a-8(a) and the precedents cited above, the Submission does not constitute a proposal within the meaning of Rule 14a-8, is not a proper proposal under Rule 14a-8 and may be excluded from the Company's 2023 Proxy Materials.

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CONCLUSION

Based upon the foregoing analysis, we respectfully request that the Staff concur that it will take no action if the Company excludes the Submission from its 2023 Proxy Materials under Rule 14a-8.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to shareholderproposals@gibsondunn.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 955-8287, or Stacy S. Ingram, the Company's Associate General Counsel and Deputy Corporate Secretary, at (770) 384-2858.

Sincerely,



Elizabeth A. Ising

Enclosures

cc: Stacy S. Ingram, The Home Depot, Inc.
Ethan Peck, The National Center for Public Policy Research

EXHIBIT A



November 10, 2022

Via FedEx to

Ms. Teresa Wynn Roseborough
Corporate Secretary
The Home Depot Inc.
2455 Paces Ferry Road, Building C-22
Atlanta, Georgia 30339

Dear Ms. Roseborough,

I hereby submit the enclosed shareholder proposal (“Proposal”) for inclusion in The Home Depot Inc. (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 an Associate 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. Proof of ownership documents have been included in this package, and we intend to retain ownership of our Company stock through the 2023 shareholder meeting.

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 November 28 or 29, 2022 from 2-5 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, [REDACTED] and emailed to [REDACTED].

Sincerely,

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

Ethan Peck

cc: Scott Shepard, FEP Director
Enclosure: Shareholder Proposal
Proof of ownership documents

Rescission of 2022 “Racial Equity Audit” Proposal

Whereas shareholders adopted in 2022 a “Shareholder Proposal Regarding [a] Racial Equity Audit” that called for the company to “analyz[e] Home Depot’s adverse impacts [exclusively] on nonwhite stakeholders and communities of color,” and whereas racial equity calls for potential discrimination on the basis of race,

Resolved: Shareholders commit to rescind the 2022 Racial Equity Audit proposal and reject any racially discriminatory practices at the company.

Supporting statement: Such an audit may jeopardize Home Depot’s value by elevating divisive identity politics above its commitment to excellence, while also raising serious legal and commercial risks for the company.

Racial equity audits do not benefit the companies that conduct them. They are non-neutral evaluations designed to embarrass the companies who elect to conduct them, and there is no evidence to suggest that such audits increase shareholder value. The 2022 proposal essentially admits as much as the evidence cited for the audit focused on Home Depot’s philanthropic and political donations noting, “Home Depot has donated to police foundations in Detroit and Atlanta... The Atlanta Police Foundation has funded a network of 11,000 surveillance cameras... surveillance technology has been used to target communities of color and nonviolent protestors.” And “[d]uring the 2019-2020 election cycle, Home Depot’s political action committee (“PAC”) gave \$465,000 to 63 Republican Congress members who objected to the 2020 election results, an action some viewed as ‘a direct attack on the voting rights of people of color.’”¹

Racial equity audits also increase in-company racial division rather than ameliorating it. They distract leadership and staff from focusing on core business concerns. They promote claims about “white supremacy” in America that many Home Depot employees, shareholders, and customers don’t accept. They sow division among employees and consumers. They’re also expensive: some auditors reportedly charge more than \$2,000 per hour.

Racial equity audits generally do not help the audited companies: the publication of such reports often trigger more negative news, criticism, and boycotts of the company by certain consumers, while also alienating other consumers who disapprove of the company’s decision to conduct such an audit in the first place. Such reports may also fuel unwarranted government investigations, employee grievances, and meritless discrimination claims.

Home Depot’s board was correct to oppose the 2022 proposal. The board strongly opposed the proposal noting that its firm “commitment to diversity, equity and inclusion for our associates,

¹ https://otp.tools.investis.com/clients/us/home_depot/SEC/sec-show.aspx?FilingId=15708089&Cik=0000354950&Type=PDF&hasPdf=1

customers and the communities we serve.”² Given this commitment, combined with the rest of the board’s opposition statement, conducting such an audit now would not serve a recognizable business interest for Home Depot.

Such an audit is therefore far beyond the Company’s fiduciary remit. That remit requires that Home Depot make decisions so as to maximize the objectively determined and financially measurable return on shareholders’ investment. To the extent that Home Depot hires, promotes, or trains on the basis of any metrics other than merit, it violates its fiduciary duties by privileging considerations that cannot enhance the financially measurable return on shareholder investment.

² *Id.*



February 13, 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 Elizabeth Ising on behalf of the Home Depot, Inc. (the “Company”) dated January 13, 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 HOME DEPOT’S CLAIMS

Our Proposal states:

Resolved: Shareholders commit to rescind the 2022 Racial Equity Audit proposal and reject any racially discriminatory practices at the company.

The Company asserts our Proposal is not a proposal under Rule 14a-8(a) and therefore seeks to exclude the Proposal from its 2023 Proxy Materials.

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.

Analysis

Part I. Rule 14a-8(a)

Under Rule 14a-8(a), a shareholder proposal is a “recommendation or requirement that the company and/or its board of directors take action, which [the proponent] intend[s] to present at a meeting of the company’s shareholders.” A proposal “should state as clearly as possible the course of action that [the proponent] believe[s] the company should follow.”

Part II. Our Proposal is a proposal under Rule 14a-8(a).

Our Proposal clearly meets the definition of a shareholder “proposal” under Rule 14a-8(a). As previously stated, our Proposal seeks to have shareholders commit the Company to rescind the 2022 Racial Equity Audit proposal and reject any racially discriminatory practices at the Company. As required by Rule 14a-8(a), our Proposal states the action it seeks from the Company: “*rescind* the 2022 Racial Equity Audit proposal” that required that such an audit be conducted and “*reject* any racially discriminatory practices at the company.” (emphasis added) Moreover, our Proposal states the course of action we believe the Company should follow by specifying the exact 2022 Racial Equity Audit to be rescinded, and by explaining how to reject racially discriminatory practices at the company (*e.g.*, stop elevating divisive identity politics and focus on merit). Furthermore, we intend to present our Proposal at the Company’s shareholder meeting. Therefore, our Proposal meets *all* of the requirements set forth in Rule 14a-8(a) and constitutes a facially valid non-omissible proposal.

Despite our Proposal meeting the requirements of Rule 14a-8(a), the Company nonetheless misapplies several proceedings that it claims demonstrate the omissibility of our Proposal. First, the Company cites *Longs Drug Stores Corp.* (avail. Jan. 23, 2008) as evidence of our Proposal’s omissibility. The submission in that proceeding appeared in the form of a letter and was submitted by a long-time employee of Longs Drug Stores who had worked for the company for “over fifteen years.” The intent of the employee-proponent in submitting the letter was to, “ask that this letter from but one worker be put in the Long’s (sic) shareholder meeting notice because there is clearly a problem with upper management at Longs of which most shareholders may be unaware[.]” The employee-proponent letter contained a series of personal grievances the employee had with the company, including the company’s alleged reduction in employee discounts, the company’s purported favoritism that led to the employee-proponent working more night than day shifts, and the company allegedly freezing the employee-proponent’s salary.

The Company argues that our Proposal is parallel to the submission in *Longs Drug Stores Corp.*, but our Proposal is hardly comparable. As described above, the submission in *Longs Drug Stores Corp.* outlines a series of complaints by an employee with the stated objective of informing shareholders of problems with the company’s upper management. In other words, the submission in that proceeding was nothing more than a letter outlining the grievances of a long-time disgruntled employee. But we are not employees of the Company with a laundry list of complaints about our employer to which we wish to draw shareholders’ attention. There are

simply no similarities between our Proposal and the letter written by the aggrieved employee in *Longs Drug Stores Corp.*, particularly given the proponent in that proceeding makes clear that the entire point behind the submission is to make shareholders aware of purported problems with the company—not to actually require or recommend the company take any action or make any changes.

The Company likewise misapplies *Sensar Corp.* (avail. Apr. 23, 2001) to our Proposal. The submission in that proceeding reads:

The shareholders *wish to express displeasure* over the terms of the options on 2.2 million shares of *Sensar* that were recently granted to management, the board of directors, and certain consultants, and the shareholders *wish to express displeasure* over the seemingly unclear or misleading disclosures relating to those options.

The submission did not include any request or requirement that the company take action, let alone explain how the company should clearly do so. It is therefore unsurprising that SEC Staff found some basis for the company’s view that it could exclude the proposal under rule 14a-8(a) because it did not recommend or require the company or its board of directors take any action—nor did it purport to do so.

There is therefore no “parallel” between our Proposal and the submission in *Sensar*. Our Proposal does not simply “wish to express our displeasure” regarding the 2022 Racial Equity Audit. It contains clear instructions to: 1) *rescind* the Audit; and 2) *reject* racially discriminatory practices at the Company. If instead of seeking to *rescind* the Audit and *reject* racially discriminatory practices, our Proposal merely “expressed our displeasure with the Audit” and “expressed our displeasure with racially discriminatory practices at the Company,” then the Company’s claim that our Proposal is “parallel” to the submission in *Sensar* would be an accurate characterization, but that is not the case. Unlike our Proposal’s request for rescission and rejection, the submission in *Sensar* makes no attempt at requesting or recommending any form of action by the company. Our Proposal is therefore completely distinguishable from the submission in *Sensar* and cannot be found omissible on the same grounds.

Finally, the Company cites to *CSX Corp.* (avail. Feb. 1, 1999) as support that our Proposal is not actually a proposal. This is an absurd comparison that, if anything, actually demonstrates the validity of our Proposal. The submission by the proponent in *CSX Corp.*, which consisted of poems, was rejected by SEC Staff. The SEC Staff expectedly determined that the submission could be excluded because it did “not recommend or require that CSX or its board of directors take an action.” One of the poems in the submission reads:

PAPER TOWELS

I wish to speak about paper towels;
Perhaps my thought will bring some howls.

When we dry our hands on cotton style,
We tend to hang it back for awhile.
Now, if our hands were washed in a way,
Can't we let paper dry for one day,
Instead of immediately tossing away?

Neither the Company nor the SEC Staff can compare our Proposal to the “poetic” submission in *CSX Corp.* and find our Proposal similarly omissible. To the contrary, such a comparison demonstrates the viability of our proposal, which is drafted in the typical fashion containing a “resolution” instructing the Company how to act (*e.g.*, “rescind” and “reject”) and a “supporting statement” explaining how (*e.g.*, stop elevating divisive identity politics). Any assertion that our Proposal is similar to the submission in *CSX Corp.* and should be found omissible on the same grounds is completely absurd.

The Company also argues our Proposal is distinguishable from other proposals that were previously determined to be non-omissible. In particular, the Company argues our Proposal is distinguishable from the proposal in *General Electric Co.* (avail. Jan. 10, 2012). But the two proposals are actually quite similar. The proposal in that proceeding reads:

THEREFORE BE IT RESOLVED that, as GE stockholders, we urge our company to reverse its nuclear energy policy and, as soon as possible, phase out all its nuclear activities, including proposed fuel reprocessing and uranium enrichment.

And as previously noted, our Proposal reads:

Resolved: Shareholders commit to rescind the 2022 Racial Equity Audit proposal and reject any racially discriminatory practices at the company.

Just like the proposal in *General Electric*, our Proposal seeks to have the Company reverse a previously enacted plan. And just like the proposal in *General Electric*, our Proposal seeks to reject similar prospective behavior. Our Proposal’s supporting statement also points out the risks of the Company proceeding with the 2022 Audit and racially discriminatory behavior the same way that the supporting statement in *General Electric* points out the risks as determined by the proponent of General Electric proceeding with its current nuclear power policy. It would therefore be incongruous for the SEC Staff to find the proposal in *General Electric* non-omissible while acceding to the Company’s request to omit our Proposal.

Conclusion

Based on the foregoing analysis, our Proposal clearly meets the definition of a “proposal” under Rule 14a-8(a). Our Proposal would have shareholders commit the Company to taking the action of rescinding a previously enacted 2022 Racial Equity Audit and rejecting racially discriminatory acts at the Company. Unlike the proceedings cited by the Company as evidence of our Proposal’s

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omissibility, our Proposal is not a letter written by a disgruntled employee with a list of grievances, a statement literally expressing “our displeasure” with the Company, or a poem. To the contrary, our Proposal is akin to non-omissible precedent and therefore must also be found non-omissible.

The Company has therefore 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.

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 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: Elizabeth Ising, Gibson, Dunn & Crutcher LLP (Eising@gibsondunn.com)
shareholderproposals@gibsondunn.com