



DIVISION OF
CORPORATION FINANCE

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

April 25, 2023

Lyuba Goltser
Weil, Gotshal & Manges LLP

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

Dear Lyuba Goltser:

This letter is in response to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by the Domini Impact Equity Fund for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

The Proposal requests the board take the necessary steps to pilot participation in the Fair Food Program for the Company's tomato purchases in the Southeast United States, in order mitigate severe risks of forced labor and other human rights violations in the Company's produce supply chain.

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

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

Sincerely,

Rule 14a-8 Review Team

cc: Mary Beth Gallagher
Domini Impact Investments LLC

Weil, Gotshal & Manges LLP

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Lyuba Goltser
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February 16, 2023

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

**Re: The Kroger Co. – 2023 Annual Meeting
Omission of Shareholder Proposal of Domini Impact Equity Fund Pursuant
to Securities Exchange Act of 1934 – Rule 14a-8**

Ladies and Gentlemen:

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

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

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

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

I. The Proposal

The Company received the Proposal, accompanied by a cover letter from the Proponent, via email on December 29, 2022.

The Proposal states, in relevant part:

RESOLVED: Shareholders request the Board take the necessary steps to pilot participation in the Fair Food Program for the Company's tomato purchases in the Southeast United States, in order mitigate severe risks of forced labor and other human rights violations in Kroger's produce supply chain.

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

II. Background

The Fair Food Program (the "FFP") is a farmworker initiative that was developed by the Coalition of Immokalee Workers (the "CIW") to support the rights and labor conditions of farm workers in the Southeastern United States. FFP participants include corporate purchasers of tomatoes referred to as "Participating Buyers". The FFP mandates each Participating Buyer to enter into a binding agreement with the CIW under which the Participating Buyer agrees to (i) a wage increase for tomato workers that is supported by a price premium (the "Fair Food Premium") paid by the Participating Buyer, which is in addition to the price paid by such buyer for tomatoes, and (ii) the Fair Food Code of Conduct applicable to both Participating Buyers and participating tomato growers. Each Participating Buyer is also required to give purchase preference within their supply chain to "Participating Growers" and to suspend purchases from Participating Growers that do not comply with the Fair Food Code of Conduct. The Fair Food Standards Council is the third-party monitoring organization that oversees implementation of the FFP, and the FFSC reviews monthly supply chain records to confirm that Participating Buyers only source tomatoes from Participating Growers.¹

¹ Fair Food Program 2021 Report. Available at <https://fairfoodprogram.org/wp-content/uploads/2022/02/Attachable-Size-SOTP-2021-Report.pdf>. See also Fair Food Program, *The Power of Prevention, Market-Based Enforcement*, available at <https://fairfoodprogram.org/about/> (last visited Jan. 21, 2023).

Kroger is one of the world's largest grocery retailers, with fiscal 2021 sales of \$137.8 billion. The Kroger Co. Family of Stores spans 35 states and the District of Columbia with store formats that include grocery and multi-department stores, discount, convenience stores and jewelry stores. As of January 2022, the Company operated 2,726 supermarkets, all of which share the same belief in building strong local ties and brand loyalty with its customers.

As a result of the number, variety and complexity of the Company's supplier relationships, the Company regularly analyzes its suppliers and considers ways to mitigate risk, and increase efficiency, of its supply chain. The Company places considerable importance on forging strong supplier relationships. The Company's suppliers, large or small, are essential components in accomplishing its mission.

Furthermore, the Company's day-to-day relationships with its suppliers are governed in part by the Company's comprehensive Vendor Code of Conduct.² The Code of Conduct requires suppliers to, among other things, comply with all applicable labor laws and regulations and that wages meet or exceed legal and industry standards, and also prohibits, among other things, exposing workers to unreasonably hazardous, unsafe or unhealthy conditions. In turn, the Company expects all of its suppliers to maintain strong management systems to address labor concerns in their respective supply chains, and maintains a robust risk-based compliance program to verify that its suppliers are abiding by the Code of Conduct. The Company's Code of Conduct prohibits those that do business with the Company from engaging in the type of conduct of concern to the Proponents. As a result, suppliers that violate the Company's Code of Conduct will not be permitted to do business with the Company unless they comply.

III. Basis for Exclusion

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

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

Rule 14a-8(i)(7) permits the omission of a shareholder proposal dealing with matters relating to a company's "ordinary business operations." According to the Commission's release accompanying the 1998 amendments to Rule 14a-8, the underlying policy of the ordinary business exclusion is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting." Release No. 34-40018 (May 21, 1998) (the "1998 Release").

² Kroger Vendor Code of Conduct. Available at: <https://www.thekrogerco.com/wp-content/uploads/2017/09/code-of-conduct.pdf>

In the 1998 Release, the Commission identified the two central considerations underlying the general policy for the ordinary business exclusion. The first consideration relates to the subject matter of the proposal. The Commission stated that, “[c]ertain tasks are so fundamental to management’s ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight.” *Id.* Examples of the tasks cited by the Commission include “management of the workforce.” *Id.* The second consideration relates to the “degree to which the proposal seeks to ‘micro-manage’ the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment.” *Id.*; *see also* Staff Legal Bulletin No. 14L (Nov. 3, 2021) (“SLB 14L”). The term “ordinary business” is rooted in the fundamental “corporate law concept providing management with flexibility in directing certain core matters involving the company’s business and operations.” 1998 Release (citing Release No. 12999 (Nov. 22, 1976)).

As the Commission noted in the 1998 Release, proposals relating to ordinary business matters are distinguishable from those “focusing on sufficiently significant social policy issues,” which generally are not excludable under Rule 14a-8(i)(7) because “the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.” The ordinary business exception therefore “recognize[s] the board’s authority over most day-to-day business matters,” while at the same time “preserving shareholders’ right to bring important issues before other shareholders by means of the company’s proxy statement.” *See* SLB 14L, Part B.2.

A. The Proposal is Excludable Under Rule 14a-8(i)(7) Because it Would Hinder Management’s Fundamental Ability to Run the Company’s Day-to-Day Operations.

The Proposal urges the Company’s Board of Directors to “take the necessary steps to pilot participation in the Fair Food Program for the Company’s tomato purchases in the Southeast United States.” Participation in the FFP would require Kroger to enter into a binding agreement with the CIW, pursuant to which Kroger must, among other things, purchase tomatoes only from growers within the Southeast United States that comply with the Fair Food Code of Conduct. If implemented, the Proposal would restrict the Company’s ability to source tomatoes from established tomato suppliers and impose a Fair Food Premium on top of the regular price paid for tomatoes, thus restricting the Company’s established ability to independently negotiate and obtain satisfactory pricing and products that meet its quality standards. The management of Kroger’s supply chain, supplier relationships and contracting practices is fundamental to Kroger’s day-to-day business operations. The Proposal, if adopted, would therefore hinder management’s fundamental ability to run the Company’s day-to-day operations.

Supplier relationships and decisions regarding such relationships are fundamental to the Company’s day-to-day business operations.

Kroger has invested significant time and resources in identifying, approving and maintaining relationships with suppliers who exemplify its core values and ethical principles and

comply with its Responsible Sourcing Framework, which includes 13 policies that embed responsible procurement practices throughout its value chain, including policies related to respecting human rights and fair labor practices.³ The Company's supplier relationships have been developed over an extensive period of time and the Company maintains comprehensive processes for vetting, contracting with and monitoring its suppliers. The Company's success is contingent upon customer confidence in its products. One of the Company's four pillars of its go-to-market strategy is Fresh. Customers choose grocery retailers based on the quality of fresh categories. The Company's end-to-end Fresh initiative is driving ways to get produce from suppliers into customers' hands fresher and faster than before. Accordingly, the Company's ability to source high-quality, fresh products from code-compliant suppliers that meet its quality assurance standards is an intrinsic and fundamental component of the Company's day-to-day business operations and business strategy.

In the 1998 Release, the Commission cited "management of the workforce, . . . decisions on production quality and quantity, and the retention of suppliers" as examples of tasks that are fundamental to management's ability to run a company on a daily basis. The Staff has consistently concurred with the exclusion under Rule 14a-8(i)(7) of proposals relating to a company's supplier relationships. Notably, in *The Wendy's Company* (Mar. 2, 2017), the Staff permitted exclusion under Rule 14a-8(i)(7) of a proposal that called on Wendy's to "take all necessary steps to join the Fair Food Program" for the purchase of tomatoes from Florida. Under this proposal, Wendy's would have been similarly bound to an agreement with the CIW pursuant to which Wendy's would have been required to, among other things, purchase Florida tomatoes only from growers that comply with the Fair Food Code of Conduct. In *The Wendy's Company*, the Staff permitted exclusion under Rule 14a-8(i)(7), noting that "the proposal seeks to micromanage the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." Here, like in *The Wendy's Company*, the Proposal seeks to influence and restrict the manner in which the Company monitors and determines its supplier relationships.

The Staff's decision in *The Wendy's Company* was consistent with the Staff's more recent concurrence of Rule 14a-8(i)(7) exclusion of proposals related to a company's supplier relationships and supply chain. In *Home Depot* (Mar. 20, 2020), the Staff permitted exclusion under Rule 14a-8(i)(7) of a proposal calling for a report summarizing the extent of known usage of prison labor in Home Depot's supply chain. *See also Kraft Foods Inc.* (Jan. 6, 2012) (concurring with Rule 14a-8(i)(7) exclusion of a proposal calling for a report assessing water risk to the Company's agricultural supply chain and on board action to be taken to mitigate the impact of such risk on shareholder value); *Foot Locker, Inc.* (Mar. 3, 2017) (concurring with Rule 14a-8(i)(7) exclusion of a proposal requesting a report on the company's use of subcontractors by its overseas apparel suppliers, and more specifically, "[t]he extent to which company codes of conduct are applied to apparel suppliers and sub-contractors"); *Walmart Inc.* (Mar. 8, 2018) (concurring with the exclusion of a proposal seeking a report outlining the requirements suppliers must follow

³ Kroger Responsible Sourcing Framework. Available at: <https://www.thekrogerco.com/wp-content/uploads/2018/07/The-Kroger-Co.-Responsible-Sourcing-Framework-2018-July-1.pdf>

regarding engineering ownership and liability as relating to the company's ordinary business matters); *The Southern Co.* (Jan. 19, 2011) (concurring with Rule 14a-8(i)(7) exclusion of a proposal requesting that the company "strive to purchase a very high percentage" of "Made in the USA" goods and services because the proposal related to "decisions relating to supplier relationships"); *Spectra Energy Corp.* (Sept. 10, 2010, recon. denied Oct. 25, 2010) (concurring with Rule 14a-8(i)(7) exclusion of a proposal the same as that in *Southern Co.*, *supra*, on the same basis); *Alaska Air Group, Inc.* (March 8, 2010) (concurring with Rule 14a-8(i)(7) exclusion of a proposal requesting a report on contract repair facilities because the proposal related to "decisions relating to vendor relationships"); *Continental Airlines, Inc.* (March 25, 2009) (concurring with Rule 14a-8(i)(7) exclusion of a proposal requesting a policy on contract repair stations because the proposal related to "decisions relating to vendor relationships"); *International Business Machines Corp.* (Dec. 29, 2006) (concurring with Rule 14a-8(i)(7) exclusion of a proposal that sought to have the company update its supplier evaluation and selection process because the proposal related to company business operations and "decisions relating to supplier relationships" specifically); and *PepsiCo, Inc.* (Feb. 11, 2004) (concurring with Rule 14a-8(i)(7) exclusion of a proposal concerning company relationships with different bottlers because the proposal related to "decisions relating to vendor relationships").

Decisions regarding the purchase, sale, pricing and offering of products and services are management functions in running the day-to-day operations of the Company.

Kroger's supply chain lies at the heart of its business. Kroger employs robust operations to negotiate and contract with suppliers and aggregate product purchasing to reduce costs, drive quality and ensure continuous supply for Kroger stores nationwide. Kroger's Fresh for Everyone mission is anchored in consistently and creatively providing fresh and affordable food to its customers to make the best of food accessible to all. Kroger's participation in the Fair Food Program would limit the flexibility and interfere with the direct supplier relationships that it currently has in purchasing and obtaining fresh and affordable goods on a consistent basis from suppliers that meet its Vendor Code of Conduct and Responsible Sourcing Framework. This could occur if, for example, the pool of FFP-selected suppliers includes fewer suppliers than the number of existing Company-approved suppliers and if any of the FFP-selected suppliers are not and do not become compliant with the Company's Code of Conduct. The variety, quality, and availability of products available to the Company could potentially decrease, which could negatively impact the Company's ability to obtain products that meet the quality assurance expected by its customers and other stakeholders and consistent with Kroger's focus on supplier conduct through its Vendor Code of Conduct and Responsible Sourcing Framework as discussed above. Moreover, the Company would be subject to monthly reviews conducted by the Fair Food Standards Council of the Company's supply chain records to ensure that the Company sources tomatoes within the Southeast United States only from participating growers in the FFP, and that the Fair Food

Premium is paid on all FFP tomato purchases.⁴ Such oversight further infringes upon Kroger's day-to-day ordinary business operations.

The Staff has reaffirmed its position that proposals concerning company products and services, including the pricing and cost thereof, are matters of ordinary business operations. *See JPMorgan Chase & Co.* (Feb. 21, 2019) (concurring with Rule 14a-8(i)(7) exclusion of a proposal requesting that the board complete a report evaluating the company's overdraft policies and practices and those impacts those have on customers because the proposal related to "ordinary business operations," and specifically," the products and services offered for sale" by the company); *AT&T Inc.* (Jan. 4, 2017) (concurring with Rule 14a-8(i)(7) exclusion of a proposal requesting the company to report on its progress toward providing internet service and products for low-income customers because the proposal related to "products and services offered by the company"); *AT&T Inc.* (Dec. 28, 2016) (concurring with Rule 14a-8(i)(7) exclusion of a proposal that would have required the company to provide free advanced tools to its customers at no cost and within a reasonable time because the proposal related to "the products and services that the company should offer to its customers"); *Verizon Communications Inc.* (Dec. 16, 2016) (concurring with Rule 14a-8(i)(7) exclusion of a proposal that would have required the company to offer its shareholders a discount on the company's services because the proposal related to setting prices charged or discounts offered by a company for its products and services and to the company's "discount pricing policies"). *See also Dominion Resources, Inc.* (Feb. 19, 2014) (concurring with Rule 14a-8(i)(7) exclusion of a proposal requesting the company to develop and provide information concerning renewable energy generation services because the proposal related to "products and services that the company offers[, which] are generally excludable"); *Equity LifeStyle Properties, Inc.* (Feb. 6, 2013) (concurring with Rule 14a-8(i)(7) exclusion of a proposal asking the company for a report on, among other things, inequitable rent increases on fixed-income homeowners because the proposal related to "pricing policies"); *Pepco Holdings, Inc.* (Feb. 18, 2011) (concurring with Rule 14a-8(i)(7) exclusion of a proposal requesting that the company pursue and implement a new business activity of marketing third party solar providers on the company's website and providing financing to customers to install solar systems because "[p]roposals concerning the sale of particular products and services are generally excludable"); *Wells Fargo & Co.* (Jan. 28, 2013, recon. denied March 4, 2013) (concurring with Rule 14a-8(i)(7) exclusion of a proposal that related to the company's decision to offer specific lending products and services to its customers); *Wal-Mart Stores, Inc.* (March 20, 2014) (concurring with Rule 14a-8(i)(7) exclusion of a proposal requesting that a committee of the company's board of directors be charged with oversight of the company's policies and standards for determining whether or not to sell certain products); *Wal-Mart Stores, Inc.* (March 30, 2010) (concurring with Rule 14a-8(i)(7) exclusion of a proposal requiring that all company stores stock certain amounts of locally produced and packaged food); *Wal-Mart Stores, Inc.* (March 26, 2010) (concurring with Rule 14a-8(i)(7) exclusion of a proposal requesting a policy that all products and services offered for sale in the U.S. be manufactured or produced in the U.S.); *The Procter & Gamble Company* (July 15, 2009)

⁴ Fair Food Program 2021 Annual Report, available at: <https://indd.adobe.com/view/2e8c5302-3772-4122-a6a7-f345d4801a16>

(concurring with Rule 14a-8(i)(7) exclusion of a proposal requesting the company to cease making cat-kibble).

B. The Proposal Seeks to Micro-manage the Company by Probing Too Deeply Into Complex Matters and Aspects of the Company's Business and Operations.

Kroger is committed to ensuring fair labor practices in its supply chain, and maintains a comprehensive Vendor Code of Conduct and Responsible Sourcing Framework that articulate the Company's practices pertaining to responsible sourcing. For example, the Vendor Code of Conduct prohibits the Company's vendors from violating laws and regulations related to labor, immigration, health and safety, working hours, and the environment. All of the Company's suppliers are expected to abide by the Vendor Code of Conduct, and the Company conducts risk-based due diligence to ensure its suppliers' compliance with these standards. In the context of Rule 14a-8(i)(7), the Proposal focuses on company decisions and actions (i.e., joining the FFP) that directly concern its relationships with its suppliers which, in turn, considerably impact product quality, pricing and obtainability, the overall availability of products and services offered to customers, deployment of capital and legal and regulatory compliance. The Staff has consistently permitted the exclusion of proposals regarding capital deployment decisions and has consistently noted that a company's choice of products and services is a management function. *See, e.g., The Wendy's Company, supra*, (concurring with Rule 14a-8(i)(7) exclusion of a proposal requesting that the company join the Fair Food Program for tomato purchases in the Southeast, because "the proposal seeks to micromanage the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment"); *see also Fauquier Bankshares, Inc.* (March 19, 2013) (concurring with Rule 14a-8(i)(7) exclusion of a proposal related to the locations of the company's new branch offices because the proposal related to the company's "ordinary business operations"); *Minnesota Corn Processors, LLC* (April 3, 2002) (concurring with Rule 14a-8(i)(7) exclusion of a proposal related to building a new corn processing plant); *The Allstate Corporation* (Feb. 19, 2002) (concurring with Rule 14a-8(i)(7) exclusion of a proposal requiring the company to cease operations in a particular state); *First Energy Corp.* (March 8, 2013) (concurring with Rule 14a-8(i)(7) exclusion of a proposal calling for diversification of the company's energy sources to include increased energy efficiency and renewable energy resources because "proposals that concern a company's choice of technologies for use in its operations are generally excludable"); *AT&T Inc.* (Feb 13, 2012) (concurring with Rule 14a-8(i)(7) exclusion of a proposal requesting a report disclosing company actions taken to address inefficient electricity consumption by its products).

The Proposal seeks to micro-manage the Company by substituting the shareholder's decisions regarding the Company's supply chain for management's practices, a decision upon which the shareholders, as a group, are not in a position to make an informed judgment. Kroger's selection of suppliers and management of supplier relationships are complicated matters that are integrally entwined with its ordinary business operations and fundamental to management's ability

to run the Company's operations on a day-to-day basis. Evaluating and weighing these matters involves the expertise of professionals in various disciplines who carefully evaluate complex and competing considerations that relate to the Company and its suppliers, such as industry and product advancements, fresh and quality standards, business operations and expenditures, regulatory requirements and compliance. Participation in the FFP would require Kroger to enter into a binding agreement with the CIW, the negotiation and review of which would be complex and involve, among other things, assessments of business risks regarding Kroger's supply chain. Discussions and negotiations of the terms and conditions within the Company's commercial contracts are customary management functions in running its day-to-day business operations. Shareholder involvement would not be appropriate because shareholders cannot make an informed judgment on complex contractual matters for which they do not have access to complete information.

The Commission noted in the 1998 Release that consideration of complex matters upon which shareholders could not make an informed judgment "may come into play in a number of circumstances, such as where the proposal involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies" (footnote omitted). The Proposal implicates precisely the type of day-to-day business operations that the 1998 Release indicated are too impractical and complex to subject to direct shareholder oversight, including the Company's supply chain operations and approved suppliers therein, the sourcing of goods that meet Kroger's quality standards, and Kroger's ability to negotiate and contract with approved suppliers. The Proposal does not contemplate the fluctuations in supply, availability and quality and freshness of produce, and how these factors are influenced by various circumstances, such as the Company's logistics operations or weather. Such product purchasing determinations are made by management as part of the Company's routine operations. As such, the matters discussed herein are of the very type contemplated by the Commission as better resolved by management as part of the Company's day-to-day business operations rather than by shareholders at an annual meeting. If not excluded from the 2023 Proxy Materials, shareholders would be asked to vote upon a proposal that would displace the Company's tested and effective judgments on business and operations with a mandate that effectively disregards the complexity of the Company's supply chain, the benefits of direct collaborative relationships with suppliers, quality and freshness standards and the Company's existing robust supplier integrity program. Accordingly, the Proposal should be excluded pursuant to Rule 14a-8(i)(7) on this basis.

C. The Proposal Does Not Focus on a Significant Policy Issue that Transcends the Company's Ordinary Business Operations.

The well-established precedent set forth above demonstrates that that the Proposal squarely addresses ordinary business matters and, therefore, is excludable under Rule 14a-8(i)(7). While the 1998 Release indicated that proposals that "focus on" significant social policy issues may not be excludable under Rule 14a-8(i)(7), in contrast, proposals with passing references touching upon topics that might raise significant social policy issues—but that do not focus on or have only tangential implications for such issues—are not transformed from an otherwise ordinary business

proposal into one that transcends ordinary business, and as such, remain excludable under Rule 14a-8(i)(7).

In SLB 14L, the Staff outlined its present approach to evaluating ordinary business proposals, noting a plan to “realign” with the Commission’s standard in the 1998 Release, first articulated in 1976, by focusing on “the social policy significance of the issue that is the subject of the shareholder proposal” rather than “the nexus between a policy issue and the company.” The explanation provided in SLB 14L confirms the Staff’s intent to preserve the Commission’s policy objectives behind the ordinary business exclusion, namely, as noted above, “to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting.” 1998 Release.

Following SLB 14L’s publication, the Staff has illustrated the application of these principles to distinguish between proposals that transcend ordinary business matters and those that are excludable under Rule 14a-8(i)(7). For example, in *Dollar Tree, Inc.* (avail. May 2, 2022), the proposal at issue requested that the company’s board of directors report to shareholders on risks to its business strategy in the face of increasing labor market pressure, including “explain[ing] how the Company’s forward-looking strategy and incentives will enable competitive employment standards, including wages, benefits and employee safety.” *Dollar Tree* argued that the proposal, which sought “a broad array of information concerning routine, employee-related challenges,” focused on issues that the Staff had determined to be ordinary business matters for purposes of Rule 14a-8(i)(7), and that the passing references in the proposal to safety-, workforce-participation- or pandemic-related concerns that might raise a significant social policy issue did not transform the otherwise ordinary business proposal into one that transcends ordinary business. *Id.* The Staff concurred with the exclusion of this proposal under Rule 14a-8(i)(7), noting that the proposal relates to, and does not transcend, ordinary business matters. *Id.* In *Amazon.com, Inc.* (avail. Apr. 8, 2022), the proposal at issue requested that the company report to shareholders on its workforce turnover rates and the effects of labor market changes that have resulted from the COVID-19 pandemic, including an assessment of the impact of workforce turnover on the company’s diversity, equity and inclusion. Amazon noted that the proposal “addresses the [c]ompany’s human capital management practices in terms of workforce retention and turnover,” arguing that a proposal that merely “touches upon a significant social policy issue”, but primarily relates to an ordinary business matter, is distinguishable from a proposal related to human capital management practices that raise specific social policy issues “with a broad societal impact.” *Id.* The Staff concurred with the exclusion of this proposal under Rule 14a-8(i)(7), agreeing that the proposal did “not focus on significant social policy issues.” *Id.* See also *Amazon.com, Inc.* (avail. Apr. 7, 2022) (concurring with the exclusion of a proposal requesting preparation of a report on the risks to the company related to ensuring adequate staffing of its business and operations on the basis that the proposal relates to, and does not transcend, ordinary business matters); *TJX* (Apr. 9, 2021), (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal requesting a report “evaluating whether the company is supporting systemic racism through undetected supply chain prison labor and noting that “the Proposal acknowledges that the Company already prohibits prison

labor and does not otherwise explain how its compliance program raises a significant issue for the Company”).

Similar to the foregoing precedent, the Proposal fails to focus on any significant social policy issue that transcends the ordinary business of the Company. The clear focus of the Proposal is the Company’s operational decisions regarding its supply chain, which, as noted above, is an inherently ordinary business matter integral to the Company’s business as a grocery retailer. The Proposal does not ask the Company to adopt a policy related to human rights risks in its supply chain, but instead directs the Company to enter into a binding agreement with the CIW, which would result in financial implications to the Company, subject the Company to the price premium requirement of the FPP, and constrain the Company’s ability to select and approve appropriate suppliers. The human rights aspect of the Proposal is, at best, secondary to the Proposal’s design to micro-manage the Company’s supply chain operations and contracting practices by controlling supplier selection and product purchasing options. The central objective of the Proposal regards the Company’s purchase of tomatoes in the Southeast United States, not human rights issues. Consistent with Staff precedent, including *The Wendy’s Company* and *Dollar Tree*, merely referencing topics in passing that might raise significant social policy issues, but which have only tangential implications for the issues that constitute the central focus of a proposal, does not transform an otherwise ordinary business proposal into one that transcends ordinary business.

Furthermore, the Staff’s recent no-action determinations under Rule 14a-8(i)(7) and guidance in SLB 14L reconfirm several key principles underlying the ordinary business exclusion. First, as demonstrated in *Dollar Tree*, the Staff will not recast matters that are inherently operational as social policy issues. Second, as demonstrated in *Amazon.com, Inc.* (avail. Apr. 8, 2022), citing potential social policy implications in a proposal does not qualify as “focusing” on such issues, even if the social policies happen to be the subject of substantial public focus (such as diversity, equity and inclusion considerations). Finally, SLB 14L makes clear that a proposal can overcome the ordinary business exclusion only if the proposal “focuses on a significant social policy issue.” As described above, the human rights aspect of the Proposal is secondary to the central objective of the Proposal regarding the Company’s supplier selection and product purchasing decisions, specifically the purchase of tomatoes from the Southeast United States. Such issues are inherently ordinary business matters integral to the Company’s business as a grocery retailer. The Proposal therefore fails to focus on any significant social policy issue that transcends the ordinary business of the Company. For these reasons, the significant social policy issue exception does not support inclusion of the Proposal in the Company’s Proxy Materials.

IV. Conclusion

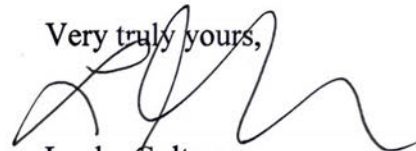
For the foregoing reasons, please confirm that the Staff will not recommend any enforcement action to the Commission if the Proposal is omitted from the Proxy Materials.

Should the Staff disagree with our conclusions regarding the omission of the Proposal, or should any additional information be desired in support of the Company’s position, we would

appreciate an opportunity to confer with the Staff concerning these matters prior to the issuance of the Staff's Rule 14a-8 response.

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

Very truly yours,



Lyuba Goltser

Enclosures

cc:

Christine Wheatley
Stacey Heiser
The Kroger Co.

Mary Beth Gallagher
Domini Impact Investments LLC

Exhibit A

Shareholder Proposal and Related Correspondence



December 29, 2022

Via Fedex and Email ([REDACTED])

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

Re: Shareholder proposal for 2023 Annual Shareholder Meeting

Dear Corporate Secretary:

I am writing to you on behalf of the Domini Impact Equity Fund (“the Fund”), a The Kroger Co. shareholder. The attached shareholder proposal is submitted for inclusion in the next proxy statement in accordance with Rule 14a-8 of the General Rules and Regulations of the Securities Exchange Act of 1934. The Fund is the lead filer for the Proposal and we may have additional co-filers.

As of December 29, 2022, the Fund beneficially owned, and had beneficially owned continuously for at least one year, shares of The Kroger Co. common stock worth at least \$25,000. The Fund will maintain ownership of the required number of shares through the date of the next stockholders’ annual meeting.

The Fund welcomes the opportunity to discuss this proposal with the Company. We are available to meet with the Company on January 9th between 11:00 – 2:00 EST, January 13th between 10:00 1:00 EST, January 17th at 3:00 EST or January 23rd between 9:00 -11:00 EST. I can be reached at [REDACTED], or at [REDACTED] to schedule a meeting.

A letter verifying our ownership of shares from our portfolio’s custodian is forthcoming. A representative of the filers will attend the stockholders' meeting to move the resolution as required by SEC Rules.

Domini.

We strongly believe the attached proposal is in the best interests of our company and its shareholders and welcome the opportunity to continue to discuss the issues raised by the proposal with you.

Sincerely,

A handwritten signature in black ink that reads "Mary Beth Gallagher". The signature is written in a cursive, flowing style.

Mary Beth Gallagher
Director of Engagement
Domini Impact Investments LLC

Encl.

RESOLVED: Shareholders request the Board take the necessary steps to pilot participation in the Fair Food Program for the Company's tomato purchases in the Southeast United States, in order to mitigate severe risks of forced labor and other human rights violations in Kroger's produce supply chain.

Whereas:

Human rights abuses, including modern-day slavery, are widespread in agricultural supply chains, with severe risks in Mexico and the Southeast United States. Recent law enforcement actions include an import ban on millions of pounds of Mexican tomatoes to distributors that supply Kroger and Albertsons,¹ 24 indictments in one forced labor conspiracy in the Southeast involving over 70,000 farmworkers,² and indictments and convictions in two others there.³

Kroger has faced scrutiny from investors and customers regarding its supply chain and has been encouraged to join the Fair Food Program (FFP), a worker-driven social responsibility program recognized as the gold standard for preventing human rights abuses, especially forced labor.⁴ It includes worker to worker education, rigorous monitoring, and ensures access to remedy through a 24/7 complaint mechanism. Founded in 2011 in Florida by the Coalition of Immokalee Workers (CIW), it now operates on farms in nine states, including major tomato growers in five Southeast states. Its reach is expanding due to demand from supermarkets⁵ and the U.S. government.⁶

Proponents are concerned that Kroger participates in programs and processes that may lack adequate oversight or be ineffective at addressing forced labor and other human rights abuses, exposing Kroger to legal and reputational risk. Kroger itself acknowledged the "success of the" FFP represents "best practices for respecting human rights."⁷ But instead of participating in the FFP, Kroger uses social audits or self-assessments of suppliers, and purchases its *Our Brands* tomatoes from Mexican and Arizona farms certified by Fair Trade USA (FTUSA).⁸ Kroger indicates FTUSA purchases "improve livelihoods," but abuse on Mexican farms certified by FTUSA have recently been documented, including retaliation against workers complaining of unsafe conditions.⁹ Moreover, social audits have been declared "ineffective in

¹ <https://www.latimes.com/california/story/2021-12-31/u-s-blocks-tomato-shipments-from-mexican-farms-accused-of-abusing-workers>

² <https://www.justice.gov/usao-sdga/pr/human-smuggling-forced-labor-among-allegations-south-georgia-federal-indictment>

³ <https://www.justice.gov/usao-sc/pr/multi-count-federal-indictment-returned-labor-trafficking-violations>;
<https://www.justice.gov/opa/pr/three-defendants-sentenced-multi-state-racketeering-conspiracy-involving-forced-labor-mexican>

⁴ <https://fairfoodprogram.org/recognition/>

⁵ <https://ciw-online.org/blog/2020/08/largest-cut-flower-farm-on-us-east-coast-joins-the-fair-food-program/>

⁶ <https://www.grants.gov/web/grants/view-opportunity.html?oppld=344432>

⁷ https://www.sec.gov/Archives/edgar/data/56873/000110465922054782/tm2212949-2_defc14a.htm

⁸ <https://www.thekrogerco.com/wp-content/uploads/2018/07/The-Kroger-Co.-Social-Compliance-Program-2018-July.pdf>; <https://www.thekrogerco.com/wp-content/uploads/2022/08/Kroger-Co-2022-ESG-Report.pdf>

⁹ <https://online.ucpress.edu/msem/article-abstract/38/3/379/194642/Fairwashing-and-Union-Busting-The-Privatization-of?redirectedFrom=fulltext>

identifying and reducing forced labor” in supply chains by the U.S. government¹⁰ and experts,¹¹ who recommend the FFP instead.

Kroger remains an outlier—compared to peers like Walmart, Whole Foods, Giant, Stop & Shop, Fresh Market, and Trader Joe’s—in not joining the FFP. In explaining its decision, Kroger misrepresented the Program as only operating in Florida, though the FFP has market density in tomatoes on farms throughout the Southeast. Kroger also implied the FFP negotiates produce prices, but the Program is not involved in negotiations with suppliers and simply includes a price premium, similar to other certifications Kroger uses. If Kroger is going to invest resources attempting to manage human rights risks through commitments to certification programs or audits, it should fully evaluate investment in a solution recognized to work, starting in the high-risk Southeast region with the most widely available FFP crop, tomatoes.

¹⁰ <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/CBP%202021%20VTW%20FAQs%20%28Forced%20Labor%29.pdf>

¹¹ <https://www.theguardian.com/global-development/2020/jul/16/ethical-labels-not-fit-for-purpose-report-warns-consumers>; <https://www.business-humanrights.org/en/big-issues/labour-rights/beyond-social-auditing/>



01/03/2023

Mary Beth Gallagher
Managing Director of Corporate Engagement
Domini Impact Investments LLC
180 Maiden Ln, Suite 1302
New York, NY 10038-4925

Re: Custodial Letter

Ms. Gallagher,

As your custodian, State Street confirms that As of 12/29/2022 Domini Impact Equity Fund beneficially owned and had beneficially owned continuously for at least one year, shares of the Kroger common stock [REDACTED] worth at least \$25,000.

If you have any questions, please feel free to call me at (617) 662-0559.

Thanks and kind regards,

Deborah Carter
Deborah Carter
Assistant Vice President
State Street Global Services
1 Iron St.
Boston, MA 02210



March 28, 2023

Via e-mail at shareholderproposals@sec.gov

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

Re: Request by The Kroger Co. to omit proposal submitted by Domini Impact Equity Fund

Ladies and Gentlemen,

Pursuant to Rule 14a-8 under the Securities Exchange Act of 1934, Domini Impact Equity Fund (the “Proponent”) submitted a shareholder proposal (the “Proposal”) to The Kroger Co. (“Kroger” or the “Company”). The Proposal asks Kroger’s board to take the necessary steps to pilot participation in the Fair Food Program (“FFP”) for the Company’s tomato purchases in the Southeast United States, to mitigate risks of forced labor and other human rights violations in Kroger’s product supply chain.

In a letter to the Division dated February 16, 2023 (the “No-Action Request”), Kroger stated that it intends to omit the Proposal from its proxy materials to be distributed to shareholders in connection with the Company’s 2023 annual meeting of shareholders. Kroger argues that it is entitled to exclude the Proposal in reliance on Rule 14a-8(i)(7), on the ground that the Proposal deals with Kroger’s ordinary business operations. Kroger’s arguments are based on misrepresentations regarding many aspects of the FFP. The Company has not met its burden of proving its entitlement to exclude the Proposal on that basis, and the Proponent respectfully requests that Kroger’s request for relief be denied.

The Proposal

The Proposal states:

RESOLVED: Shareholders request the Board take the necessary steps to pilot participation in the Fair Food Program for the Company’s tomato purchases in the Southeast United

States, in order mitigate severe risks of forced labor and other human rights violations in Kroger’s produce supply chain.

Background

The FFP was created by farmworker human rights organization the Coalition of Immokalee Workers (“CIW”) in response to the systemic abuses in agriculture and finding “multiple, horrific cases of modern-day slavery” among farmworkers in southwest Florida. After helping to free workers and prosecute their abusers, CIW turned its attention to prevention, founding the FFP in order to prevent human rights abuses by addressing the power imbalance between farmworkers and their employers.¹

The FFP does so by leveraging the purchasing power of grocery stores and chain restaurants at the “top of the supply chain.”² The FFP requires participating growers to adopt the FFP’s Code of Conduct (the “Code”), which protects workers from human rights abuses and dangerous conditions on the job, and to agree to rigorous audits of their compliance with the Code by the Fair Food Standards Council (“FFSC”).³ (Participating buyers are not bound by the Code, as Kroger incorrectly asserts.⁴) To report violations of the Code, workers have 24/7 access to a multilingual toll-free complaint line staffed by FFSC investigators. The investigation and complaint resolution processes are transparent, and the FFP’s market-backed enforcement mechanism ensures that workers who make complaints do not face retaliation.⁵ The FFP’s worker-driven nature means that both obvious and the more subtle forms of exploitation are identified and addressed.⁶

Buyers participating in the FFP agree to pay a premium (the “Premium”) to a participating grower on each pound of produce, which is passed through to workers. If a grower violates the Code, fails to comply with monitoring, or does not pass through the Premium, it is suspended from the FFP and participating buyers, like Kroger, agree to suspend their purchases from the participating grower until the grower is returned to good standing.⁷ Importantly, if participating growers are unable to meet a participating buyer’s demand, the buyer is free to purchase from non-FFP growers. The promise of preferred purchasing and the risk of losing market access have worked as powerful drivers of compliance with the Code among participating growers.

The FFP has been lauded for its effectiveness in preventing and remedying human rights abuses,⁸ and both the Department of Labor and Customs and Border Protection have named the FFP as an example of an effective, worker-driven solution for preventing forced labor.⁹ Large buyers such as McDonald’s, Subway, Whole Foods, and Walmart have joined the FFP.¹⁰ It avoids

¹ Fair Food Program, State of the Program Report, 2021, <https://indd.adobe.com/view/2e8c5302-3772-4122-a6a7-f345d4801a16>

² <https://indd.adobe.com/view/2e8c5302-3772-4122-a6a7-f345d4801a16>

³ <https://fairfoodprogram.org/about/>

⁴ See No-Action Request, at 2.

⁵ <https://fairfoodprogram.org/about/>

⁶ <https://billmoyers.com/2014/05/29/the-fair-food-program-worker-driven-social-responsibility-for-the-21st-century/>

⁷ <https://fairfoodprogram.org/wp-content/uploads/2022/02/Attachable-Size-SOTP-2021-Report.pdf>, at 8.

⁸ See <https://fairfoodprogram.org/recognition/>

⁹ <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/CBP%202021%20VTW%20FAQs%20%28Forced%20Labor%29.pdf>;

<https://blog.dol.gov/2022/01/13/exposing-the-brutality-of-human-trafficking>

¹⁰ <https://fairfoodprogram.org/wp-content/uploads/2022/02/Attachable-Size-SOTP-2021-Report.pdf>, at 5.

the shortcomings inherent in the traditional corporate social responsibility model, including ineffective grievance mechanisms and reliance on top-down audits that employ inexperienced evaluators, fail to adequately engage workers, rely on checklists, lack language capabilities, and are unable to protect workers from retaliation.¹¹ Research shows that top-down monitoring of the kind Kroger appears to use to enforce its code of conduct is not effective in preventing human rights abuses.¹²

During the Program's existence, workers and FFSC investigators have successfully resolved thousands of complaints¹³ and uncovered one case of forced labor – a case that arose because the FFP's prevention mechanisms were ignored by the grower. The Program's complaint notification and investigation procedures enabled the swift investigation, resolution, and prosecution of the perpetrator in the forced labor case, as well as prompt suspension of the grower. There have been no further cases of forced labor on FFP farms.¹⁴

Meanwhile, growers outside the FFP continue to face risks of forced labor, and farmworkers lack any effective tools to report or prevent such abuses. Earlier this year, a Florida labor contractor that provided crews for farms in Florida, Indiana, and Kentucky was sentenced to 118 months in prison for violations of federal law involving forced labor and worker intimidation. One of the farms grew watermelons for sale to Kroger locations, and another grew melons that would be sold to Kroger stores through a distributor. The Department of Labor's press release identified Kroger as a purchaser of the produce.¹⁵

These considerations led the Proponent to suggest in the Proposal that Kroger pilot participation in the FFP for its tomato purchases in a limited geography. The CIW has been calling on Kroger to join the FFP for many years,¹⁶ but Kroger claims that its own code of conduct and enforcement mechanisms are sufficient.¹⁷ The recent Florida prosecution casts doubt on that assertion, however.

Ordinary Business

Rule 14a-8(i)(7) allows exclusion of proposals related to a company's ordinary business operations. Kroger urges that the Proposal deals with the Company's ordinary business operations because:

- The primary focus of the Proposal is Kroger's supplier relationships or decisions regarding products, neither of which is a significant policy issue; and
- The Proposal would micromanage Kroger.

¹¹ See https://www.msi-integrity.org/wp-content/uploads/2020/07/MSI_Not_Fit_For_Purpose_FORWEBSITE.FINAL_.pdf, at 128-134.

¹² See https://www.msi-integrity.org/wp-content/uploads/2020/07/MSI_Not_Fit_For_Purpose_FORWEBSITE.FINAL_.pdf, at 134-138.; Fairwashing and Union Busting: The Privatization of Labor Standards in Mexico's Agro-export Industry <https://online.ucpress.edu/msem/article-abstract/38/3/379/194642/Fairwashing-and-Union-Busting-The-Privatization-of?redirectedFrom=fulltext>

¹³ <https://fairfoodprogram.org/wp-content/uploads/2022/02/Attachable-Size-SOTP-2021-Report.pdf>

¹⁴ <https://fairfoodprogram.org/wp-content/uploads/2022/02/Fair-Food-Program-2018-SOTP-Update-Final.pdf>

¹⁵ <https://www.dol.gov/newsroom/releases/whd/whd20230202-2>

¹⁶ See <https://ciw-online.org/blog/2023/02/breaking-us-department-of-labor-press-release-on-latest-forced-labor-prosecution-names-buyers-including-fair-food-program-holdout-kroger/>

¹⁷ <https://ciw-online.org/blog/2023/02/breaking-us-department-of-labor-press-release-on-latest-forced-labor-prosecution-names-buyers-including-fair-food-program-holdout-kroger/>

The Proposal's Subject is Human Rights, Not Supplier Relationships

Kroger claims that the Proposal deals with the Company's ordinary business operations because the primary focus is supplier relationships or pricing and sale of products, rather than human rights. According to Kroger, "[t]he human rights aspect of the Proposal is, at best, secondary to the Proposal's design to micro-manage the Company's supply chain operations and contracting practices by controlling supplier selection and product purchasing options."¹⁸

Kroger has it backwards--human rights is the Proposal's primary focus. Because the sole purpose of the FFP is to prevent human rights abuses, the Proposal does not merely "touch[] upon topics that might raise significant social policy issues," as Kroger claims.¹⁹ Supplier selection and product purchasing are subsumed in, and inseparable from, the Proposal's request that the Company manage risks associated with forced labor and other human rights abuses by joining the FFP. Put another way, the decision to join the FFP and buy first from FFP participating growers is not an ordinary supplier and product selection decision; instead, it is a tool for mitigating the demonstrated human rights risks in Kroger's supply chain.

There is no principled basis for asserting that a proposal on human rights must not implicate supplier relationships or the sale of products, or risk being classified as ordinary business. Managing human rights risk through choice of suppliers is an established approach, especially for retailers whose primary source of risk is their suppliers. High-profile examples of companies tainted by human rights abuses in their supply chain include Nike's association with violations at Asian apparel factories in the 1990s²⁰ and reports by the Associated Press ("AP") and The New York Times in 2014 and 2015, for which the AP received a Pulitzer Prize, uncovering egregious human rights abuses by companies processing shrimp sold in major U.S. supermarkets.²¹

Kroger itself recognizes the centrality of supply chains in managing human rights risk. In keeping with its commitment to more closely align its human rights policies and framework with the U.N. Guiding Principles on Business and Human Rights ("UNGPs"), Kroger says it plans to update its supplier policies and formalize its human rights due diligence framework.²² The UNGPs state that companies should "[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."²³

Both the Commission's 1998 release addressing the ordinary business exclusion and Staff Legal Bulletin 14H make clear that once a proposal's subject is deemed a significant social policy

¹⁸ No-Action Request, at 11.

¹⁹ See No-Action Request, at 9.

²⁰ Max Nisen, "How Nike Solved its Sweatshop Problem," *Business Insider*, May 9, 2013 (As revenues slumped, Nike's CEO admitted that "[t]he Nike product has become synonymous with slave wages, forced overtime, and arbitrary abuse . . . the American consumer doesn't want to buy products made under abusive conditions.")

²¹ E.g., Chris Isidore, "Whole Foods Denies its Shrimp is Prepared by Slave Labor," CNNMoney, Dec. 15, 2015; Adam Chandler, "Walmart, Whole Foods and Slave Labor Shrimp," *The Atlantic*, Dec. 16, 2015; Jonathan Chew, "Report Alleges Walmart and Whole Foods Are Selling Shrimp Peeled by Slaves," *Fortune*, Dec. 14, 2015.

²² <https://www.thekrogerco.com/wp-content/uploads/2022/02/Kroger-Human-Rights-Progress-Update-Policy-Feb-2022.pdf>

²³ https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf, at 14.

issue, it is irrelevant that the proposal implicates a matter that would otherwise be considered ordinary business. The 1998 release explained:

Certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. . . . However, proposals relating to such matters but focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.²⁴

Similarly, Staff Legal Bulletin 14H took issue with a federal court's analytical approach to the ordinary business exclusion, stating that "a proposal may transcend a company's ordinary business operations even if the significant policy issue relates to the 'nitty-gritty of its core business.'"²⁵

Consistent with this approach, the Staff has rejected arguments like the ones Kroger makes here on numerous occasions. For example:

- In Amazon (2020),²⁶ the company challenged a proposal asking the company to conduct and publish at least one human rights risk assessment of a high-risk product on the ground that it related to the sale and sourcing of the products the company sold. The Staff agreed with the proponent that the proposal's subject was human rights.
- The proposal in Amazon (2015)²⁷ requested disclosure on the company's human rights due diligence process and, again, the Staff did not concur with Amazon's argument that the proposal's main focus was its products.
- In Yahoo,²⁸ the proposal would have prohibited the company from selling information technology products or providing certain kinds of assistance to authorities in China and other repressive countries. Despite the fact that the proposal would have significantly limited management's decision making regarding sales to a category of customers, the Staff was unpersuaded by the argument that the proposal's subject was Yahoo's products and services rather than human rights.
- Walgreens²⁹ urged that a proposal asking it to report on corporate governance changes it had implemented to more effectively monitor and manage risks related to the opioid crisis was excludable because the proposal's subject was the company's sale of particular products (i.e., opioids). The proponents countered that the proposal's sole subject was risk related to the opioid crisis, which was a significant policy issue. The Staff declined to grant relief.

Unlike the proposals discussed above, those in the determinations Kroger cites on pages 5-7 of the No-Action Request did not address a significant social policy issue like human rights or the

²⁴ Exchange Act Release No. 40018 (May 21, 1998) (emphasis added).

²⁵ Staff Legal Bulletin 14H (Oct. 22, 2015).

²⁶ Amazon.com Inc. (Apr. 1, 2020).

²⁷ Amazon.com Inc. (Mar. 25, 2015).

²⁸ Yahoo Inc. (Apr. 5, 2011).

²⁹ Walgreens Boots Alliance Inc. (Nov. 20, 2018).

opioid crisis. The proponents did not respond at all to seven of the no-action requests,³⁰ so no significant policy issues were identified. Four proponent responses failed even to argue that the proposals addressed significant social policy issues.³¹ The proposal in Foot Locker³² did not limit the scope of the requested report on monitoring overseas apparel suppliers to human rights violations, though human rights were mentioned in the supporting statement.

Finally, the Staff was not convinced by proponent responses to the remaining requests that the subjects, including “concerns over water risk,”³³ use of prison labor,³⁴ aircraft maintenance outsourcing,³⁵ overdraft policies,³⁶ digital equity,³⁷ the “carbon footprint of our nation’s electricity generation,”³⁸ and the sale of harmful products such as guns,³⁹ were significant social policy issues. Kroger makes much of the Wendy’s determination,⁴⁰ but the Staff permitted exclusion of that proposal on micromanagement grounds, not because the proposal addressed supplier relationships.

The Proposal Would Not Micromanage Kroger

Kroger claims that the Proposal seeks to micro-manage the Company by “substituting the shareholder’s decisions regarding the Company’s supply chain for management’s practices, a decision upon which the shareholders, as a group, are not in a position to make an informed judgment.”⁴¹ Kroger’s arguments overstate the role of shareholders in the Proposal as well as the extent to which the Proposal would constrain the Company’s decisions.

Neither voting on nor implementing the Proposal would result in shareholders making day-to-day decisions about supplier and product selection. At the outset, it is important to keep in mind that the Proposal suggests only a pilot program for tomatoes, not participation for all types of produce, and limits the geography of the pilot to the southeastern United States. The vote itself is a one-time communication about whether to join the FFP. Expressing an informed opinion on that question does not require shareholders to know about “industry and product advancements, fresh and quality standards, business operations and expenditures, regulatory requirements and compliance,” as Kroger claims.⁴² Rather, shareholders need to compare the effectiveness of Kroger’s existing code of conduct and enforcement mechanisms for detecting and preventing human rights abuses against those of the FFP.

³⁰ Walmart Inc. (Mar. 8, 2018); The Southern Company (Doremus) (Jan. 19, 2011); International Business Machines Corp. (Dec. 29, 2006); Equity LifeStyle Properties Inc. (Feb. 6, 2013); AT&T Inc. (Dec. 28, 2016); Verizon Communications Inc. (Dec. 16, 2016); Wal-Mart Stores Inc. (Mar. 20, 2014).

³¹ The Procter & Gamble Company (July 15, 2009); Wal-Mart Stores, Inc. (Porter) (Mar. 26, 2010); PepsiCo, Inc. (Feb. 11, 2004); Spectra Energy Corp. (Sept. 10, 2010), recon. denied, Oct. 25, 2010).

³² Foot Locker, Inc. (Mar. 3, 2017)

³³ Kraft Foods Inc. (Jan. 6, 2012).

³⁴ The Home Depot Inc. (Mar. 20, 2020).

³⁵ Alaska Air Group, Inc. (Mar. 8, 2010); Continental Airlines Inc. (Mar. 25, 2009).

³⁶ JPMorgan Chase & Co. (Feb. 21, 2019); Wells Fargo & Co. (Jan. 28, 2013, recon. denied, Mar. 4, 2013).

³⁷ AT&T Inc. (Jan. 4, 2017).

³⁸ Dominion Resources, Inc. (Feb. 19, 2014).

³⁹ Wal-Mart Stores, Inc. (Trinity Church) (Mar. 20, 2014).

⁴⁰ The Wendy’s Company (Mar. 2, 2017).

⁴¹ No-Action Request, at 8.

⁴² See No-Action Request, at 9.

Piloting the FFP would not subject individual choices about suppliers and products to shareholder oversight, as the roster of FFP tomato suppliers depends on grower participation and compliance with the Code. Growers representing over 90 percent of Florida tomato production and major tomato operations in five other states on the East Coast have agreed to implement the Code on their farms, ensuring a wide and diverse range of potential suppliers.⁴³ Contrary to Kroger's representation,⁴⁴ if Kroger were to pilot the FFP, it would retain complete discretion to negotiate pricing, evaluate product quality, and set quality standards. The fact that large buyers of produce like McDonald's and Walmart can get their needs met within the bounds of the FFP suggests that these issues do not present major obstacles. Kroger's suggestion that shareholders would need to evaluate its contract with the FFP, which involves "complex contractual matters," finds no support in the Proposal.

Kroger relies on the Wendy's⁴⁵ determination, in which the Staff allowed the company to exclude a proposal somewhat similar to the Proposal on micromanagement grounds. But that determination was issued during a period in which, according to the Division, guidance was in effect that "expanded the concept of micromanagement beyond the Commission's policy directives."⁴⁶ Accordingly, it should not be viewed as representing the current approach of the Division.

As well, the Wendy's proposal was much broader than the Proposal: It asked the company to join the FFP "as promptly as feasible," with no limitations on the type of produce or geography. The proposals in the other determinations Kroger cites sought to inject shareholders into decisions about specific aspects of the companies' businesses, from the location of operations to energy consumption of set-top boxes and a utility's fuel mix. That is not the case here.

* * *

Kroger has failed to meet its burden of proving it is entitled to omit the Proposal in reliance on Rule 14a-8(i)(7). The Proposal's subject, human rights, is a significant social policy issue transcending ordinary business, even though it implicates Kroger's supplier and product choices. The Proposal would not micromanage Kroger, as it would not involve shareholders in those individual choices, only in the decision whether to undertake pilot participation in the FFP for tomatoes bought in the southeastern United States. The Proponent therefore respectfully asks that Kroger's request for relief on ordinary business grounds be denied.

⁴³ <https://fairfoodprogram.org/wp-content/uploads/2022/02/Attachable-Size-SOTP-2021-Report.pdf>

⁴⁴ No-Action Request, at 4, 8.

⁴⁵ The Wendy's Co. (Mar. 2, 2017).

⁴⁶ Staff Legal Bulletin 14L (Nov. 3, 2021).

We appreciate the opportunity to be of assistance in this matter. If you have any questions or need additional information, please contact me at (212) 217-1027.

Sincerely,

A handwritten signature in black ink that reads "Mary Beth Gallagher". The signature is written in a cursive, flowing style.

Mary Beth Gallagher
Director of Engagement
Domini Impact Investments, LLC

cc: Lyuba Goltser
lyuba.goltser@weil.com

April 6, 2023

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

**Re: The Kroger Co. – 2023 Annual Meeting
Supplement to Letter Dated February 16, 2023
Relating to Shareholder Proposal of Domini Impact Equity Fund**

Ladies and Gentlemen:

We refer to our letter dated February 16, 2023 (the “No-Action Request”), submitted on behalf of our client, The Kroger Co. (the “Company” or “Kroger”), pursuant to which we requested that the Staff of the Division of Corporation Finance (the “Staff”) of the U.S. Securities and Exchange Commission (the “Commission”) concur with the Company’s view that the shareholder proposal and supporting statement (the “Proposal”) submitted by Domini Impact Equity Fund (the “Proponent”) may be excluded from the proxy materials to be distributed by Kroger in connection with its 2023 annual meeting of shareholders (the “Proxy Materials”). This letter is in response to the letter to the Staff, dated March 28, 2023, submitted by the Proponent (the “Proponent’s Letter”), and supplements the Company’s No-Action Request. In accordance with Rule 14a-8(j), a copy of this letter is also being sent to the Proponent simultaneously.

The Proponent’s Letter misinterprets the Staff’s guidance and precedent with regard to the micromanagement basis of the ordinary business exclusion of Rule 14a-8(i)(7). The Proponent’s Letter minimizes the extent to which the Proposal would constrain the Company’s day-to-day business operations, and mischaracterizes previous Staff decisions that have permitted exclusion of proposals on the basis of micromanagement, such as *The Wendy’s Company* (Mar. 2, 2017) (“Wendy’s”).

Although the Proponent’s Letter claims that the vote on the Proposal is merely a “one-time communication about whether to join the [Fair Food Program] (FFP)” and would not result in shareholders making day-to-day decisions about supplier and product selection, the adoption of the Proposal would affect Kroger’s supply chain by displacing existing suppliers, impacting pricing structures, requiring new vendor contracts to be put in place, and limiting available suppliers. As discussed in the No-Action Request, Kroger’s supply chain lies at the heart of its

business and complex supply operations. These decisions—the Company’s selection of suppliers and management of supplier relationships—are integrally entwined with the Company’s ordinary business operations, fall squarely within management’s role in operating the Company on a day-to-day basis, and are too complex for shareholder oversight. The clear focus of the Proposal is on complex and detailed operational matters rather than policy.

The Proponent’s Letter erroneously asserts that the Staff’s determination in *Wendy’s* “should not be viewed as representing the current approach of the Division” because the determination was issued during a period in which, as outlined in Staff Legal Bulletins Nos. 14J and 14K, guidance was in effect that “expanded the concept of micromanagement beyond the Commission’s policy directives.¹” The *Wendy’s* decision, however, was issued on March 2, 2017, prior to the publication dates of the now-rescinded SLB Nos. 14J, and 14K, which were published on October 23, 2018, and October 26, 2019, respectively. The *Wendy’s* decision is grounded in the Staff’s Release No. 34-40018 (May 21, 1998) (“1998 Release”), which stated that “[c]ertain tasks are so fundamental to management’s ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. Examples include . . . decisions on production quality and quantity, [and] retention of suppliers.” Staff Legal Bulletin 14L (Nov. 3, 2021) (“SLB 14L”) describes the Staff’s current approach to the ordinary business exclusion of Rule 14a-8, noting that the Staff will “focus on the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management,” and reaffirming the guidance of the 1998 Release. Under both the 1998 Release and SLB 14L, the No-Action Request is excludable as a matter relating to the company’s ordinary business operations that seeks to micromanage the Company.

The Proponent’s Letter also attempts to distinguish the *Wendy’s* proposal from the Proposal by asserting that *Wendy’s* was much broader in scope than the Proposal. However, this distinction is without merit, because the two proposals are substantially similar. The Proponent argues that the *Wendy’s* proposal was “much broader” than the Proposal because it asked the company to “take all necessary steps to join the Fair Food Program as promptly as feasible” (emphasis added) rather than to “*pilot* participation in the Fair Food Program” (emphasis added). There is no real distinction between those two requests because, in both cases, the adoption of the Proposal would necessitate a significant shift in management’s practices and would impact decisions regarding suppliers immediately. Further, the Proponent’s letter asserts that *Wendy’s*, unlike the Proposal, had no limitations on the type of produce or geography to be considered. However, the Fair Food Program is rooted in the tomato industry,² with the plurality of the participating growers in the Fair Food Program being Florida tomato farms.³ In addition, the *Wendy’s* proposal discusses the procurement of tomatoes at length,⁴ and begins with an acknowledgement that *Wendy’s* “purchases significant

¹ Staff Legal Bulletin 14L (Nov. 3, 2021).

² See Fair Food Program, About. (“The Fair Food Program emerged from the Coalition of Immokalee Workers’ (CIW) successful Campaign for Fair Food, a campaign to affirm the human rights of tomato workers and improve the conditions under which they labor.”) <https://www.fairfoodstandards.org/about/>

³ Fair Food Program, Current Partners. <https://fairfoodprogram.org/partners/>

⁴ *The Wendy’s Company* (Mar. 2, 2017) (“WHEREAS, the United States Department of Justice has successfully prosecuted numerous cases of modern-day slavery in the U.S. agricultural industry since 1996, including in

amounts of produce, such as tomatoes.” Similar to the *Wendy’s* proposal, the Proposal requests the Company to “take the necessary steps to pilot participation in the Fair Food Program for the Company’s tomato purchases in the Southeast United States.” The *Wendy’s* proposal and the Proposal both focus on the respective companies’ initial participation in the Fair Food Program with a focus on tomato purchases in the Southeast United States, and are thus nearly identical in scope and focus. For these reasons, and similar to the determination made in *Wendy’s*, the Staff should permit the Company to omit the Proposal from its proxy materials in reliance on Rule 14a-8(i)(7).

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

Very truly yours,



Lyuba Goltser

cc:

Christine Wheatley
Stacey Heiser
The Kroger Co.

Mary Beth Gallagher
Domini Impact Investments, LLC

tomatoes, and involving over 1,200 workers”; “WHEREAS, Wendy's shift of tomato purchases away from Fair Food Program-participating growers in Florida to Mexico, including a Mexican supplier that was the subject of a slavery prosecution in 2013, Bioparques de/ Occidente, generated an ongoing national consumer boycott.”)