



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 Louis B & Diane R Eichhold Trust for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

The Proposal requests that the board of directors consider listing on the Company website any recipient of \$10,000 or more of direct contributions, excluding employee matching gifts.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In this regard, we believe that the Proposal does not seek to micromanage the Company.

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

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

Sincerely,

Rule 14a-8 Review Team

cc: Louis B. Eichhold  
Louis B & Diane R Eichhold Trust

# Weil, Gotshal & Manges LLP

767 Fifth Avenue  
New York, NY 10153-0119  
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**Lyuba Goltser**  
lyuba.goltser@weil.com

February 16, 2023

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

**Re: The Kroger Co. – 2023 Annual Meeting Omission of Shareholder Proposal of The Louis B & Diane R Eichhold Trust 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 Louis B & Diane R Eichhold Trust (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) and pursuant to Rule 14a-8(i)(10) (substantial implementation).

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](mailto: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 certified mail on December 9, 2022.

The Proposal states:

**Whereas** the Company's charitable contributions, properly managed, are likely to enhance the reputation of the Company:

**Whereas** increased disclosure regarding appropriate charitable contributions can create goodwill for our Company.

**Whereas** making the benefits of our Company's philanthropic programs better known is likely to promote the Company's interests:

**Whereas** feedback from employees, shareholders, and customers could help guide the Company's future charitable giving process.

**Resolved:** The Proponent requests that the Board of Directors consider listing on the Company website any recipient of \$10,000 or more of direct contributions, excluding employee matching gifts.

## **Supporting Statement**

Absent a system of accountability and transparency; some charitable contributions may be made unwisely, potentially harming the Company's reputation and shareholder value. Corporate philanthropic gifts should be given as much exposure as possible, lest their intended impact on goodwill is diminished. For example, if we gave to the American Cancer Society, thousands of our stakeholders might potentially approve of our interest in challenging this disease. Likewise, our support for Planned Parenthood could win the praise of millions of Americans who have had an abortion at one of their facilities. Educational organizations like the Southern Poverty Law Center have seen an increase in funding since they included several conservative Christian organizations on their list of hate groups. Our stakeholders and customers might be similarly enthused if we supported them. Be it the Girl Scouts, American Heart Association, Boys and Girls Club of America, Red Cross, or countless other possible recipients, our support should be publicly noted. Those who might disagree with our decisions can play a valuable role also.

Some charities may be controversial. Charitable contributions come from the fruit of our employee's labor and belong to our shareholders. Both groups represent a wide diversity of opinions. More importantly, we market ourselves to the general public and should avoid offending segments of this most critical group. It would be unfortunate if a charitable contribution resulted in lower employee morale and shareholder interest, much less a loss of potential revenue.

Fuller disclosure would provide enhanced feedback opportunities from which our Company could make more beneficial choices.

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

## II. Basis for Exclusion

### (A) The Proposal May be Excluded Pursuant to Rule 14a-8(i)(10) Because Kroger Has Substantially Implemented the Proposal.

Rule 14a-8(i)(10) permits the omission of a shareholder proposal if the company has already substantially implemented the proposal. The Commission adopted the "substantially implemented" standard in 1983 after determining that the "previous formalistic application" of the rule defeated its purpose, which is to "avoid the possibility of shareholders having to consider matters which already have been favorably acted upon by the management." *See* Exchange Act Release No. 34-20091 (Aug. 16, 1983) (the "1983 Release") and Exchange Act Release No. 34-12598 (July 7, 1976). Accordingly, the actions requested by a proposal need not be "fully effected" provided that they have been "substantially implemented" by the company. *See* 1983 Release.

Applying this standard, the Staff has consistently permitted the exclusion of a proposal when it has determined that the company's policies, practices and procedures or public disclosures compare favorably with the guidelines of the proposal. *See, e.g., United Cont'l Holdings, Inc.* (Apr. 13, 2018); *eBay Inc.* (Mar. 29, 2018); *Kewaunee Scientific Corp.* (May 31, 2017); *Wal-Mart Stores, Inc.* (Mar. 16, 2017); *Dominion Resources, Inc.* (Feb. 9, 2016); *Ryder Sys., Inc.* (Feb. 11, 2015); *Wal-Mart Stores, Inc.* (Mar. 27, 2014); *Peabody Energy Corp.* (Feb. 25, 2014); *The Goldman Sachs Group, Inc.* (Feb. 12, 2014); *Hewlett-Packard Co.* (Dec. 18, 2013); *Deere & Co.* (Nov. 13, 2012); *Duke Energy Corp.* (Feb. 21, 2012); *Exelon Corp.* (Feb. 26, 2010).

In addition, the Staff has permitted exclusion under Rule 14a-8(i)(10) where a company has addressed the underlying concerns and satisfied the essential objectives of the proposal, even if the proposal had not been implemented exactly as proposed by the proponent. For example, in *Pfizer Inc.* (Dec. 20, 2019), the Staff permitted exclusion of a proposal requesting disclosure of Pfizer's charitable giving standards and rationale for charitable contributions, including listing the recipients of donations on its website. In arguing that the proposal had been substantially implemented, Pfizer referred to its website, where the company had included disclosure relating to many of its charitable contributions, including its standards and rationale for charitable contributions and lists of donation recipients and amounts. Pfizer also referred to several published quarterly reports disclosing its grants, charitable contributions and other funding to U.S. medical,

scientific, patient and civic organizations. *See also PG&E Corp.* (Mar. 10, 2010) (permitting exclusion on substantial implementation grounds of a proposal requesting a report on the company’s standards for choosing the organizations to which it makes charitable contributions and the “business rationale and purpose for each” of the charitable contributions, where PG&E had a website describing its policies and guidelines for determining the types of grants it makes); *The Boeing Co.* (Feb. 3, 2016) (permitting exclusion on substantial implementation grounds of a proposal requesting a report on, among other matters, the intended purpose of each charitable contribution by the company, where Boeing disclosed the intended purpose of its charitable giving but did not disclose each contribution made by the company); *MGM Resorts Int’l* (Feb. 28, 2012) (permitting exclusion on substantial implementation grounds of a proposal requesting a report on the company’s sustainability policies and performance, including multiple objective statistical indicators, where the company published an annual sustainability report); *Exelon Corp.* (Feb. 26, 2010) (permitting exclusion on substantial implementation grounds of a proposal requesting a report disclosing policies and procedures for political contributions and monetary and non-monetary political contributions where the company had adopted corporate political contributions guidelines).

The Company has substantially implemented the Proposal. The Proposal’s essential objective is disclosure of the Company’s charitable giving to enhance the Company’s reputation, create good will for the Company and promote the Company’s interests. In addition, the recitals explain that the Proposal’s request for disclosure is based on the view that “the Company’s charitable contributions, properly managed, are likely to enhance the reputation of the Company,” and “increased disclosure regarding appropriate charitable contributions can create goodwill for our Company.” The Supporting Statement also explains, “[c]orporate philanthropic gifts should be given as much exposure as possible, lest their intended impact on goodwill is diminished.” Moreover, the Proposal’s essential objective primarily appears to be to publicize the Company’s charitable efforts, which, as further explained below, the Company does in detail in various reports and other initiatives, including on its website. Such reports are reviewed by the Public Responsibilities Committee of Kroger’s Board of Directors (the “Board”) in connection with their oversight of the Company’s charitable giving.

The Company’s website contains and makes available to the Company’s stakeholders extensive disclosures relating to the Company’s charitable contributions and philosophy. The Company’s philanthropic mission is to lift up “the communities we call home” by focusing its efforts on building stronger communities and supporting neighbors in need.<sup>1</sup> Since introducing Kroger’s Zero Hunger | Zero Waste plan in 2017, the Company has focused on aligning the majority of its charitable giving to causes and organizations that provide hunger relief for individuals and families and that drive positive changes for our planet. The “Impact” landing page of the Company’s website features an ESG Hub with links to recent years’ reports on key topics, including charitable giving.<sup>2</sup> In 2020, Kroger began publishing annual reports for each of its nonprofit foundations – The Kroger Co. Foundation and The Kroger Co. Zero Hunger | Zero Waste Foundation – to provide transparency on how the Company aligns its philanthropic strategy on the national and local level to its ESG strategy. As discussed in further detail below, the Company’s

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<sup>1</sup> *See, e.g.* The Kroger Co. Foundation 2022 Report, available at <https://www.thekrogerco.com/wp-content/uploads/2022/08/Kroger-Co-Foundation-2022-Report.pdf>.

<sup>2</sup> *See* The Kroger Co. “Impact” webpage, available at <https://www.thekrogerco.com/impact/>.

“Community” landing page describes in further detail the Company’s corporate and retail division charitable giving initiatives as well as the Company’s two foundations.<sup>3</sup> Further, each foundation publishes an annual report reaffirming its mission, reflecting its fiscal year performance and impact, and highlighting charitable contributions to certain grantees. For example, The Kroger Co. Foundation’s 2022 report includes a detailed breakdown of the Foundation’s total giving in 2021.<sup>4</sup> The report discloses that the Foundation funded \$12.7 million in grants to 322 nonprofits, categorized by strategic priority: Zero Hunger/Hunger Relief; Zero Waste/Sustainability; Direct Response and Disaster Relief; Diversity and Inclusion; Education and Youth Development; and Other. The Kroger Co. Foundation report also discloses many notable grant recipients and the contribution received. For example, the report notes that The Kroger Co. Foundation donated \$1 million to the Colorado Healing Fund and directed \$250,000 to the Global Foodbanking Network. Similarly, The Kroger Co. Zero Hunger | Zero Waste Foundation report discloses that a donation at the \$500,000 level was directed to the American Red Cross Annual Disaster Giving Program, and includes an itemization by dollar amount of the contributions granted in 2021.<sup>5</sup> Both foundation reports include a breakdown of each foundation’s funding by total contribution and by geographic focus in the United States. The Company also discloses its Donations Guidelines on its website. The Guidelines provide direction on the types of organizations that Kroger supports and importantly, make clear the types of organizations to which donations will not be granted.<sup>6</sup> As the Company discloses in its publicly available ESG Report, in 2022 Kroger’s charitable giving totaled \$343 million company-wide; of that, \$200 million supported improved national and local food access and hunger-relief efforts.<sup>7</sup>

In light of the foregoing, the Company has satisfied the essential objective of the Proposal, which is to provide transparency about Kroger’s charitable giving, and provide stakeholders with an opportunity to review Kroger programs and give feedback, as discussed in the Proponent’s Supporting Statement. The Company has implemented the Proposal’s essential elements of disclosure and publicity of the Company’s charitable contributions. Moreover, the Company discloses charitable giving in an effort to, among other things, enhance the Company’s reputation, create goodwill and promote the Company’s interests, even if it does not list all recipients of charitable contributions over \$10,000 in value, which is burdensome, impractical and unnecessary to address the essential objective of the Proposal. The Company generally does not disagree with the premise that disclosure of its corporate philanthropic efforts is important, which is why the Company has made publicly available its various charitable efforts and intends to continue to do so consistent with the Company’s strategic goals and mission.

Accordingly, the Proposal has been substantially implemented and may be excluded under Rule 14a-8(i)(10).

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<sup>3</sup> See The Kroger Co. “Community” webpage, available at <https://www.thekrogerco.com/community>.

<sup>4</sup> See The Kroger Co. Foundation 2022 Report, available at <https://www.thekrogerco.com/wp-content/uploads/2022/08/Kroger-Co-Foundation-2022-Report.pdf>.

<sup>5</sup> See The Kroger Co. Zero Hunger | Zero Waste Foundation 2022 Report, available at <https://www.thekrogerco.com/wp-content/uploads/2022/08/Kroger-Co-Zero-Hunger-Zero-Waste-Foundation-2022-Report.pdf>.

<sup>6</sup> Available on The Kroger Co. “Giving Back” webpage, at <https://cdn.versaic.com/kroger/0c45b4a2-d152-4a32-ad23-015774948505>.

<sup>7</sup> See The Kroger Co. 2022 ESG Report, available at <https://www.thekrogerco.com/esgreport/>.

**(B) The Proposal May be Excluded Under Rule 14a-8(i)(7) Because the Proposal Relates 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” that does not focus on a significant policy issue. According to the Commission’s release accompanying the 1998 amendments to Rule 14a-8, the underlying policy of the ordinary business exclusion is “to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting.” Release No. 34-40018 (May 21, 1998) (the “1998 Release”).

In the 1998 Release, the Commission identified the two primary 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.* 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”). Both considerations are rooted in a 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.

As further discussed below, the Company believes that the Proposal seeks to micromanage the Company and does not transcend the ordinary business of the Company, and therefore is excludable from its Proxy Materials under Rule 14a-8(i)(7).

**a. *The Proposal Seeks to Micromanage the Company***

The 1998 Release identified that a proposal could “probe too deeply” where “the proposal involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies” thereby seeking to micromanage the Company. The Staff reiterated its view and application of this standard of assessing whether a proposal micromanages in Staff Legal Bulletin No. 14J (Oct. 23, 2018). In SLB 14L, the Staff clarified that in evaluating companies’ micromanagement arguments, it 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.” The Staff further noted that this approach is “consistent with the Commission’s views on the ordinary business exclusion, which is designed to preserve management’s discretion on ordinary business

matters but not prevent shareholders from providing high-level direction on large strategic corporate matters.”

Since publication of SLB 14L, the Staff has concurred that proposals that probe too deeply into matters of a complex nature by seeking disclosure of intricate details around internal company policies and practices micromanage the company and therefore may be excluded in reliance on Rule 14a-8(i)(7). *See, e.g., Verizon Communications Inc.* (March 17, 2022) (concurring in exclusion of a proposal requesting that the company publish annually the written and oral content of diversity, inclusion, equity or related employee-training materials offered to the Company’s employees on the basis that the proposal “micromanages the company by probing too deeply into matters of a complex nature by seeking disclosure of intricate details regarding the company’s employment and training practices”); *American Express Co.* (March 11, 2022) (same); and *Deere & Co.* (January 3, 2022) (same).

The Staff has also concurred in the exclusion of proposals requesting disclosure of charitable contributions on the grounds that they seek to micromanage a company’s management prior to the release of SLB 14L. *See, e.g. Starbucks Corporation* (Nov. 3, 2020) (permitting exclusion of a proposal requesting an annual report listing and analyzing charitable contributions made or committed during the prior year, where the company argued that compiling such report would require substantial investment of time and resources and would distract the company’s management and employees); *The Walt Disney Company* (Oct. 31, 2020) (same).

Here, the Proposal would require granular information about the Company’s charitable giving and would inappropriately limit the Company’s discretion in determining the manner to convey its charitable giving. More specifically, the Proposal would require the Company to analyze its various charitable contributions, which are made in multiple forms, to identify the contributions that result in direct contributions to any single recipient in excess of \$10,000, which is a relatively low amount given the Company’s size. Through corporate giving and the work of the Company’s two foundations – The Kroger Co. Foundation and The Kroger Co. Zero Hunger | Zero Waste Foundation – the Company directed \$343 million in 2022 to partners and causes that align with its mission.<sup>8</sup> In the last five years alone, the Company made over \$1.6 billion in total charitable contributions to various recipients in the form of financial contributions, surplus food rescue/donations, and other in-kind food and product donations.<sup>9</sup> The Proposal seeks to prescribe how the Company should report on the recipients of donations by requiring a specific \$10,000 threshold and by requiring the recipients to be listed on the Company’s website. The Company already reports its charitable contributions on its website in an easily digestible and aggregated manner that aligns with its public relations and charitable giving strategy. Specifically, the Company publishes annual reports on the charitable giving of its two foundations. For example, The Kroger Co. Foundation’s 2022 report includes a detailed breakdown of the Foundation’s total giving in 2021. The report discloses that the Foundation gave \$12.7 million in grants to 322 nonprofits, categorized by strategic priority: Zero Hunger/Hunger Relief; Zero Waste/Sustainability; Direct Response and Disaster Relief; Diversity and Inclusion; Education and Youth Development; and Other. The Kroger Co. Foundation report also discloses several notable grant recipients and the contributions received. For example, the report notes that The Kroger Co.

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<sup>8</sup> See The Kroger Co. “Community” webpage, accessible at <http://www.thekrogerco.com/community>.

<sup>9</sup> See The Kroger Co. “Community” webpage, accessible at <http://www.thekrogerco.com/community>.



Foundation donated \$1 million to the Colorado Healing Fund and directed \$250,000 to the Global Foodbanking Network. Requiring the Company to list the specific recipients who received over \$10,000 in donations is not only burdensome and impractical, but it deprives the Company's management of the flexibility and discretion to address the complex matters of the Company's charitable giving strategy, charitable contributions and public relations activities. Further, the disclosure contemplated by the Proposal is not the type of "large strategic corporate matters" the Staff has stated shareholders should be able to provide "high-level direction on"; rather, it is an attempt to micromanage how the Company publicizes its charitable contributions.<sup>10</sup>

The Company recognizes that the Staff has previously denied certain no-action requests for shareholder proposals containing similar requests relating to the disclosure of charitable contributions. *See, Walt Disney* (Jan. 12, 2023) (Staff unable to concur with the exclusion of a proposal requesting that the company list any recipient of \$10,000 or more in direct contributions); *JPMorgan Chase & Co.* (Jan. 13, 2020) (Staff unable to concur with the exclusion of a proposal requesting that the company disclose on its website any recipient which receives \$1,000 or more of direct contributions); *Wells Fargo & Co.* (Feb. 19, 2010) (Staff unable to concur with the exclusion of a proposal requesting the company list the recipients of charitable contributions on its website); *PepsiCo, Inc.* (Mar 2, 2009) (Staff unable to concur with the exclusion of a proposal requesting a report on the company's charitable contributions and related information); and *Ford Motor Co.* (Feb. 25, 2008) (Staff unable to concur with the exclusion of a proposal requesting the company list the recipients of charitable contributions on its website).

We believe that the Proposal aims to micromanage the Company by making information regarding all of the Company's charitable donations over \$10,000 available, leaving management open to second-guessing and potentially inappropriate assumptions regarding the Company's charitable priorities and may serve, ultimately, to inappropriately limit management discretion over the Company's charitable giving. Through the Company's existing disclosure framework on charitable contributions and its administration of corporate philanthropy, management is able to and does execute its discretion to make public certain information about its charitable initiatives, which distinguishes the Proposal from the factual situations that were the focus of the proposals in the above paragraph. For example, The Walt Disney Company's charitable contributions website included a limited overview of the company's philanthropic efforts but did not provide any detail as to the recipients of charitable gifts.<sup>11</sup> Similarly, JPMorgan Chase & Co.'s "Impact" website does not include specific disclosures relating to charitable giving.<sup>12</sup> In contrast, as discussed above, the Company publishes annual reports on the charitable giving of its two foundations; each report discloses grants categorized by strategic priority; and the reports also disclose several of the investment recipients and the contributions received. Because the Company's management, under the oversight of the Public Responsibilities Committee, has already made extensive decisions regarding its charitable contributions disclosure, it is beyond shareholders' scope to enhance or specify the particular disclosure.

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<sup>10</sup> See SLB 14L.

<sup>11</sup> See The Walt Disney Company "Charitable Giving" webpage, available at <https://impact.disney.com/charitable-giving/>.

<sup>12</sup> See JPMorgan Chase & Co. "Impact" webpage, available at <https://www.jpmorganchase.com/impact>.

For the reasons discussed above, the Proposal may be excluded in reliance on Rule 14a-8(i)(7) because the Proposal seeks to micromanage the Company with regard to its charitable giving disclosures.

***b. The Proposal Does Not Focus on a Significant Policy Issue That Transcends the Company's Ordinary Business Operations***

The 1998 Release also distinguishes proposals pertaining to ordinary business matters from those involving “significant social policy issues.” 1998 Release (citing Exchange Act Release No. 12999 (Nov. 22, 1976)). While “proposals . . . focusing on sufficiently significant social policy issues . . . generally would not be considered to be excludable,” the Staff has indicated that proposals relating to both ordinary business matters and significant social policy issues may be excludable in their entirety in reliance on Rule 14a-8(i)(7) if they do not “transcend the day-to-day business matters” discussed in the proposals. 1998 Release. In SLB 14L, the Staff stated that it will “focus on the social policy significance of the issue that is the subject of the shareholder proposal” and that “in making this determination, the [S]taff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.”

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.

Moreover, as Staff precedent has established, the mere mention of a significant policy issue in a proposal without defining the scope of actions addressed in a proposal and with 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. *See, e.g. Amazon.com Inc.* (Apr. 8, 2022) (permitting exclusion of a proposal requesting a report on the “impact of the [c]ompany’s workforce turnover on the Company’s diversity, equity, and inclusion” (DEI), where the company argued that the focus was actually on management of the company’s operations despite references to DEI). In the Amazon.com proposal, the Staff agreed with the company’s argument that the proposal did not focus on a significant policy issue that transcends the company’s ordinary business operations.

Here, the Proposal does not appear to involve a significant policy issue. The Supporting Statement posits that, “[a]bsent a system of accountability and transparency; some charitable contributions may be made unwisely, potentially harming the Company’s reputation and shareholder value.” The Supporting Statement further notes that disclosure would “provide enhanced feedback opportunities from which our Company could make beneficial choices.” As discussed above, the Company’s website already contains extensive disclosures relating to the Company’s charitable contributions and recipients of corporate donations, in an effort to promote

transparency and engagement with an array of stakeholders. However, the disclosure of charitable contributions in itself does not arise to the level of a significant policy issue as contemplated by the Staff. The Company also has a longstanding history of engaging with shareholders through its investor relations programs and its year-round governance outreach program, which also includes, when appropriate, participation of independent members of the Board. This regular engagement with shareholders covers a range of important topics, including the Company's business strategy, ESG practices and disclosures, Board oversight, executive compensation structure and responses to shareholder proposals.

As discussed above, the Proposal does not focus on a significant policy issue for purposes of Rule 14a-8(i)(7); rather, the subject matter of the Proposal directly relates to the Company's ordinary business operations and policies concerning its charitable giving. Accordingly, the Company believes that the Proposal may properly be excluded from its Proxy Materials.

### **III. Conclusion**

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

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

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

Very truly yours,

Lyuba Goltser  
Partner

Attachments

cc:

Christine Wheatley  
Stacey Heiser  
The Kroger Co.

Louis B. Eichhold

**EXHIBIT A**

**Shareholder Proposal and Related Correspondence**

*The Louis B & Diane R Eichhold Trust*

December 9, 2022

Ms. Christine S. Wheatley  
General Counsel and Secretary  
The Kroger Company  
1014 Vine Street  
Cincinnati, OH 45202-1103

Dear Ms. Wheatley:

I am the trustee for The Louis B & Diane R Eichhold Trust. The trust has continuously owned 300 shares of Kroger for over three years and intends to hold them through the time of our next annual meeting. At that meeting, I will make the following proposal:

**Whereas** the Company's charitable contributions, properly managed, are likely to enhance the reputation of the Company:

Whereas increased disclosure regarding appropriate charitable contributions can create goodwill for our Company.

Whereas making the benefits of our Company's philanthropic programs better known is likely to promote the Company's interests:

Whereas feedback from employees, shareholders, and customers could help guide the Company's future charitable giving process.

**Resolved:** The Proponent requests that the Board of Directors consider listing on the Company website any recipient of \$10,000 or more of direct contributions, excluding employee matching gifts.

## Supporting Statement

Absent a system of accountability and transparency; some charitable contributions may be made unwisely, potentially harming the Company's reputation and shareholder value. Corporate philanthropic gifts should be given as much exposure as possible, lest their intended impact on goodwill is diminished. For example, if we gave to the American Cancer Society, thousands of our stakeholders might potentially approve of our interest in challenging this disease. Likewise, our support of Planned Parenthood could win the praise of millions of Americans who have had an abortion at one of their facilities. Educational organizations like the Southern Poverty Law Center have seen an increase in funding since they included several conservative Christian organizations on their list of hate groups. Our stakeholders and customers might be similarly enthused if we supported them. Be it the Girl Scouts, American Heart Association, Boys and Girls Club of America, Red Cross, or countless other possible recipients, our support should be publicly noted. Those who might disagree with our decisions can play a valuable role also.

Some charities may be controversial. Charitable contributions come from the fruit of our employee's labor and belong to our shareholders. Both groups represent a wide diversity of opinions. More importantly, we market ourselves to the general public and should avoid offending segments of this most critical group. It would be unfortunate if a charitable contribution resulted in lower employee morale and shareholder interest, much less a loss of potential revenue.

Fuller disclosure would provide enhanced feedback opportunities from which our Company could make more beneficial choices.

Regards,



Louis B. Eichhold



COPY

THE KROGER CO. • LAW DEPARTMENT • 1014 VINE STREET • CINCINNATI, OHIO 45202-1100

TELEFAX NUMBER  
513-762-4935

STACEY HEISER, ESQ.

WRITER'S DIRECT DIAL NUMBER  
513-762-1018

December 15, 2022

**Via Federal Express**

Ms. Louis B. Eichhold  
[REDACTED]

Dear Ms. Eichhold:

The Kroger Co. (the "Company") received the shareholder proposal ("Proposal") dated December 9, 2022 submitted on behalf of The Louis B & Diane R Eichhold Trust ("Trust") for inclusion in the proxy statement for the Company's 2023 Annual Meeting of Shareholders.

Under Rule 14a-8, a shareholder is required to show proof of ownership and include a statement that he or she is able to meet with the company, either in person or via teleconference, no less than 10 calendar days, nor more than 30 calendar days, after submission of the shareholder proposal, and provide contact information as well as specific business days and times that the shareholder is available to discuss the proposal with the company. There was no proof of ownership submitted nor did you include the requirement statement of availability to discuss the proposal. Thus, we are required to inform you that the Proposal contains certain procedural deficiencies.

To remedy these defects, you must submit proof of continuous ownership of the Trust's beneficial ownership of the Company's common stock as required by Rule 14a-8. In addition, you must provide statement of your availability to discuss the proposal with the Company.

The SEC's rules require that any response to this letter be postmarked or transmitted electronically no later than 14 calendar days from the date you receive this letter. Please

Ms. Louis B. Eichhold  
December 15, 2022  
Page 2

address any response to Stacey Heiser at The Kroger Co., 1014 Vine Street, Cincinnati, Ohio 45202. Alternatively, you may transmit any response by email to [stacey.heiser@kroger.com](mailto:stacey.heiser@kroger.com).

If these items are not timely received, the Company may exclude the shareholder proposal from its 2023 proxy statement.

Thank you,

A handwritten signature in black ink, appearing to read "Stacey Heiser", written in a cursive style.

Stacey Heiser  
Senior Counsel



*The Louis B & Diane R Eichhold Trust*



December 28, 2022

The Kroger Company  
Stacey Heiser, ESQ.  
1014 Vine Street  
Cincinnati, OH 45202-1100

Dear Ms. Heiser:

Attached you will find a certification of ownership provided by G.A. Repple . This provides adequate proof of ownership of KR shares for more than 3 years.

I am available to meet in person or by teleconferencing between the hours of 10:00 A.M. and 3:00 P.M. on January 5 and 6, 2023. Other times and dates may be available with adequate notice for alternative time blocks.

Regards;

A handwritten signature in cursive script that reads "Louis B. Eichhold".

Louis B. Eichhold



**G.A. REPPLE**

INVEST WHERE IT MATTERS

December 28, 2022

Re: Certification of ownership

To Whom It May Concern:

Please be advised that G. A. Repple & Company through custodian National Financial Services LLC, has held a minimum of \$2,000 in market value of the Kroger, CUSIP 501044101, on behalf of Louis B & Diane R Eichold Trust continuously since June 20th 2017.

National Financial Services LLC is a participant with the Depository Trust and Clearing Corporation.

If there are any questions concerning this matter, please do not hesitate to contact me directly.

Sincerely,

Timothy G. Moyer  
Chief Compliance Officer

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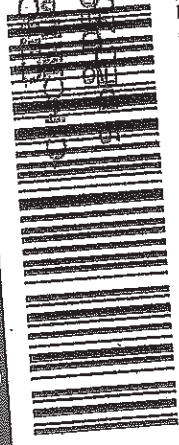
101 Normandy Road, Casselberry, FL 32707

T. 407.339.9090 F. 407.339.9091

[www.GARepple.com](http://www.GARepple.com)

*Securities & Investment Advice Offered by Registered Representatives of G.A. Repple & Company  
A Registered Broker/Dealer & Investment Advisor, Member FINRA & SIPC*

**CERTIFIED MAIL**



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*Ms. Christine S. Whately  
General Counsel & Secretary  
The Kroger Company  
1014 Vine Street  
Cincinnati, OH 45202-1103*

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