



DIVISION OF
CORPORATION FINANCE

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

April 7, 2022

Ronald O. Mueller
Gibson, Dunn & Crutcher LLP

Re: Lowe's Companies, Inc. (the "Company")
Incoming letter dated January 24, 2022

Dear Mr. Mueller:

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

The Proposal would have the board prepare a report on the financial, reputational, and human rights risks resulting from the use in the Company's supply chain and distribution networks of companies that misclassify employees as independent contractors.

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

Copies of all of the correspondence on which this response is based will be made available on our website at <https://www.sec.gov/corpfin/2021-2022-shareholder-proposals-no-action>.

Sincerely,

Rule 14a-8 Review Team

cc: Cornish F. Hitchcock
Hitchcock Law Firm PLLC

January 24, 2022

VIA E-MAIL

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

Re: *Lowe's Companies, Inc.*
Shareholder Proposal of the International Brotherhood of Teamsters General Fund
Securities Exchange Act of 1934—Rule 14a-8

Ladies and Gentlemen:

This letter is to inform you that our client, Lowe's Companies, Inc. (the "Company"), intends to omit from its proxy statement and form of proxy for its 2022 Annual Meeting of Shareholders (collectively, the "2022 Proxy Materials") a shareholder proposal (the "Proposal") and statement in support thereof (the "Supporting Statement") received from the International Brotherhood of Teamsters General Fund (the "Proponent").

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

- filed this letter with the Securities and Exchange Commission (the "Commission") no later than eighty (80) calendar days before the Company intends to file its definitive 2022 Proxy Materials with the Commission; and
- concurrently sent a copy of this correspondence to the Proponent.

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

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THE PROPOSAL

The Proposal states:

RESOLVED: That Lowe's Companies, Inc.'s (the "Company") Board of Directors prepare a report on the financial, reputational, and human rights risks resulting from the use in Lowe's supply chain and distribution networks of companies that misclassify employees as independent contractors. The report should be prepared at reasonable cost, omitting proprietary information and be available at least 90 days prior to the 2023 annual shareholders meeting.

A copy of the Proposal and the Supporting Statement is attached to this letter as Exhibit A.

BASIS FOR EXCLUSION

We hereby respectfully request that the Staff concur with our view that the Proposal may be excluded from the 2022 Proxy Materials pursuant to Rule 14a-8(i)(7) because the Proposal deals with matters relating to the Company's ordinary business operations and does not focus on a significant social policy issue.

ANALYSIS

The Proposal May Be Excluded Pursuant To Rule 14a-8(i)(7) Because It Deals With Matters Related To The Company's Ordinary Business Operations.

A. Background On The Ordinary Business Standard.

Rule 14a-8(i)(7) permits a company to omit from its proxy materials a shareholder proposal that relates to the company's "ordinary business" operations. According to the Commission's release accompanying the 1998 amendments to Rule 14a-8, the term "ordinary business" "refers to matters that are not necessarily 'ordinary' in the common meaning of the word," but instead the term "is rooted in the corporate law concept providing management with flexibility in directing certain core matters involving the company's business and operations." Exchange Act Release No. 40018 (May 21, 1998) (the "1998 Release"). In the 1998 Release, the Commission stated that 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," and identified two central considerations that underlie this policy. As relevant here, one of the considerations is that "[c]ertain tasks are so

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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 such tasks cited by the Commission include “management of the workforce.” *Id.*

A shareholder proposal being framed in the form of a request for a report does not change the nature of the proposal. The Commission has stated that a proposal requesting the dissemination of a report may be excludable under Rule 14a-8(i)(7) if the subject matter of the proposed report is within the ordinary business of the issuer. *See* Exchange Act Release No. 20091 (Aug. 16, 1983).

A proposal’s request for a review of certain risks also does not preclude exclusion if the underlying subject matter of the proposal is ordinary business. In Staff Legal Bulletin No. 14E (Oct. 27, 2009) (“SLB 14E”), the Staff explained how it evaluates shareholder proposals relating to risk:

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

Consistent with its positions in SLB 14E, the Staff has repeatedly concurred in the exclusion of shareholder proposals seeking risk assessments when the subject matter concerns ordinary business operations. *See, e.g., The TJX Companies, Inc.* (avail. Mar. 29, 2011) (concurring in exclusion under Rule 14a-8(i)(7) of a proposal requesting an annual assessment of the risks created by the actions the company takes to avoid or minimize U.S. federal, state and local taxes and provide a report to shareholders on the assessment); *Amazon.com, Inc.* (avail. Mar. 21, 2011) (same); *Wal-Mart Stores, Inc.* (avail. Mar. 21, 2011) (same); *Lazard Ltd.* (avail. Feb. 16, 2011) (same); *Pfizer Inc.* (avail. Feb. 16, 2011) (same).

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B. The Proposal Is Excludable Because It Relates To The Company's Relationships With Its Suppliers.

The Proposal may be excluded pursuant to Rule 14a-8(i)(7) as relating to the Company's ordinary business operations because it impacts the Company's relationships with its suppliers. In the 1998 Release, the Commission included "the retention of suppliers" in a list of examples of "tasks that are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight." Similarly, the Staff has long viewed decisions relating to a company's relationship with its suppliers as a matter of ordinary business. *See, e.g., Duke Energy Corp.* (avail. Jan. 24, 2011) (concurring with the exclusion of a proposal to strive to purchase a very high percentage of "Made in USA" goods and services and noting that "the proposal relates to decisions relating to supplier relationships"); *Southwest Airlines Co.* (avail. Mar. 19, 2009) (concurring with the exclusion of a proposal regarding aircraft maintenance facilities on the basis that it related to "decisions relating to vendor relationships"); *PepsiCo, Inc.* (avail. Feb. 11, 2004) (concurring with the exclusion of a proposal to, in part, "stop favoring one bottler over the other" as relating, in part, to "decisions relating to vendor relationships").

As with the precedents cited above, the Proposal impacts decisions related to supplier relationships. Notably, the Proposal does not address the use of misclassified employees within the Company's supply chain and distribution network. Instead, it addresses whether the Company, in the course of contracting with companies to support its supply chain and distribution network, might have utilized the services of another company that in some context may have misclassified employees (regardless of whether those workers were employed within the Company's supply chain). As such, because the Proposal addresses which companies are utilized within the Company's supply chain, the Proposal relates to the Company's selection of suppliers, which is an ordinary business matter that is properly excludable under Rule 14a-8(i)(7).

C. The Proposal Is Excludable Because It Relates To The Company's General Legal Compliance.

The Proposal requests that the Company "prepare a report on the . . . risks resulting from the use in Lowe's supply chain and distribution networks of companies that misclassify employees as independent contractors." The Supporting Statement notes that it "is illegal for a company to 'misclassify' workers as self-employed 'independent contractors' if the company controls the manner and means of work, sets hours and wages and otherwise treats them as 'employees,' who are entitled to . . . benefits and rights guaranteed employees under

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federal and state law.” The Supporting Statement also states that “[m]isclassification risk extends to retailers,” given recent California legislation which “makes customers of a port trucking company jointly liable for future violations of labor, employment, and health and safety law by a trucking company that the Labor Commissioner’s office has publicly identified as having previously violated these laws.” These statements make clear that the Proposal primarily relates to the Company’s compliance with laws and regulations governing its contractors’ classification of employees—issues that are core components of the Company’s ordinary business operations.

The Staff has consistently concurred with the exclusion of proposals concerning a company’s legal compliance program as relating to matters of ordinary business pursuant to Rule 14a-8(i)(7). *See, e.g., Navient Corp.* (avail. Mar. 26, 2015, recon. denied Apr. 8, 2015) (concurring with the exclusion of a proposal requesting “a report on the company’s internal controls over student loan servicing operations, including a discussion of the actions taken to ensure compliance with applicable federal and state laws” as “concern[ing] a company’s legal compliance program”); *Raytheon Co.* (avail. Mar. 25, 2013) (concurring with the exclusion of a proposal requesting a report on “the board’s oversight of the company’s efforts to implement the provisions of the Americans with Disabilities Act, the Fair Labor Standards Act, and the Age Discrimination in Employment Act” with the Staff noting that proposals concerning a company’s legal compliance program are generally excludable under Rule 14a-8(i)(7)); *Sprint Nextel Corp.* (avail. Mar. 16, 2010, recon. denied Apr. 20, 2010) (concurring with the exclusion of a proposal requesting that the board explain why it has failed to adopt an ethics code designed to, among other things, promote securities law compliance since proposals relating to “adherence to ethical business practices and the conduct of legal compliance programs are generally excludable under [R]ule 14a-8(i)(7)”; *The AES Corporation* (avail. March 13, 2008) (concurring with the exclusions of a proposal seeking “an independent investigation of management’s involvement in the falsification of environmental reports” as relating to the company’s “general conduct of a legal compliance program”); *The Coca-Cola Co.* (avail. Jan. 9, 2008) (concurring with the exclusion of a proposal seeking an annual report comparing independent laboratory tests of the company’s product quality against applicable national laws and the company’s global quality standards because the proposal related to the ordinary business matter of the “general conduct of a legal compliance program”); *Halliburton Co.* (avail Mar. 10, 2006) (concurring with exclusion of a proposal requesting a report on policies and procedures to reduce or eliminate the reoccurrence of certain violations and investigations as relating to ordinary business operations “(i.e., general conduct of a legal compliance program”).

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The Staff also has previously concurred with the exclusion of proposals relating to the classification of employees and independent contractors under federal and state laws as relating to matters of ordinary business pursuant to Rule 14a-8(i)(7). In *FedEx Corp.* (avail. July 14, 2009), the company received a proposal requesting a report on “the compliance of both the [c]ompany and its contractors with state and federal laws governing proper classification of employees and independent contractors.” The company argued that its practices relating to compliance with laws governing the classification of employees and independent contractors were “fundamental elements of [the company’s] . . . responsibility for the day-to-day operation” of its business and were “an integral part of [the company’s] legal compliance program . . .” The Staff concurred with the exclusion of the proposal on the grounds that proposals concerning a legal compliance program are generally excludable under Rule 14a-8(i)(7). In *Lowe’s Companies, Inc.* (avail. Mar. 12, 2008), the Company received a proposal requesting a report on the “compliance of both the Company and its contractors—particularly those contractors and subcontractors performing store construction work for the company—with state and federal laws governing proper classification of employees and independent contractors.” The Company argued that its “practices to ensure compliance with laws governing the proper classification of employees and independent contractors is a fundamental aspect of the Company’s day-to-day business operations, including management’s determination of the appropriate means by which to comply with applicable law.” The Company argued that classification of its employees and contractors “is implemented in the ordinary course of business and is an integral part of the Company’s legal compliance program.” The Staff concurred with the exclusion of the proposal under Rule 14a-8(i)(7) as relating to the Company’s “ordinary business operations (i.e., general legal compliance program).”

Here, even if the Proposal is viewed as relating to workers within the Company’s supply chain and distribution network, the Proposal requests a report on how the Company is managing a particular aspect of its legal compliance program with respect to such workers. As the references in the Supporting Statement to “misclassification,” laws and legislation indicate, the Proposal thus relates to the Company’s compliance with laws and regulations governing the classification of workers. Determinations regarding the Company’s legal compliance and business practices require complex analysis, extensive knowledge and understanding of the employment laws and regulations in multiple jurisdictions, and judgments as to the role and responsibilities of different workers. These matters are multifaceted, complex, and based on factors that are not appropriate for shareholder voting or reporting to shareholders, reflecting the varied legal jurisdictions and competitive landscapes in which the Company operates. Thus, a report on the Company’s legal compliance program with respect to laws governing the classification of employees and contractors used in its

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supply chain and distribution network relates squarely to the Company's ordinary business operations is properly excludable under Rule 14a-8(i)(7).

D. The Proposal Does Not Focus On A Significant Social Policy Issue That Transcends The Company's Ordinary Business Operations.

In the 1998 Release, the Commission reaffirmed the standards for when proposals are excludable under the "ordinary business" provision that the Commission had initially articulated in Exchange Act Release No. 12999 (Nov. 22, 1976) (the "1976 Release"). In the 1998 Release, the Commission also distinguished proposals pertaining to ordinary business matters that are excludable under Rule 14a-8(i)(7) from those that "focus on" significant social policy issues. The Commission stated, "proposals relating to [ordinary business] 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." 1998 Release. When assessing proposals under Rule 14a-8(i)(7), the Staff considers the terms of the resolution and its supporting statement as a whole. See Staff Legal Bulletin No. 14C, part D.2 (June 28, 2005) ("In determining whether the focus of these proposals is a significant social policy issue, we consider both the proposal and the supporting statement as a whole.").

In contrast, proposals that reference or touch in passing upon topics that might raise significant social policy issues, but which do not focus on or have only tangential implications for such issues, do not transform an otherwise ordinary business proposal into one that transcends ordinary business, and remain excludable under Rule 14a-8(i)(7). For example, in *Dominion Resources, Inc.* (avail. Feb. 3, 2011), a proposal requested that the company promote "stewardship of the environment" by initiating "a program to provide financing to home and small business owners for installation of rooftop solar or wind power renewable generation" Even though the proposal touched upon environmental matters, the Staff concluded that the subject matter of the proposal actually related to "the products and services offered for sale by the company" and therefore determined that the proposal could be excluded under Rule 14a-8(i)(7). Similarly, in *PetSmart, Inc.* (avail. Mar. 24, 2011), the Staff concurred with the exclusion of a proposal requesting the board require its suppliers to certify they had not violated "the Animal Welfare Act, the Lacey Act, or any state law equivalents" because "[a]lthough the humane treatment of animals is a significant policy issue, . . . the scope of the laws covered by the proposal is 'fairly broad in nature from serious violations such as animal abuse to violations of administrative matters such as record keeping.'"

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In Staff Legal Bulletin No. 14L (Nov. 3, 2021) (“SLB 14L”), the Staff stated that it “will realign its approach for determining whether a proposal relates to ‘ordinary business’ with the standard the Commission initially articulated in [the 1976 Release], which provided an exception for certain proposals that raise significant social policy issues, and which the Commission subsequently reaffirmed in the 1998 Release.” As such, the Staff stated that it will focus on the issue that is the subject of the shareholder proposal and determine whether it has “a broad societal impact, such that [it] transcend[s] the ordinary business of the company.” The Staff noted further that “proposals squarely raising human capital management issues with a broad societal impact would not be subject to exclusion solely because the proponent did not demonstrate that the human capital management issue was significant to the company” (citing to the 1998 Release and *Dollar General Corp.* (avail. Mar. 6, 2020) and providing “significant discrimination matters” as an example of an issue that transcends ordinary business matters).

Here, the Proposal and its Supporting Statement do not focus on human capital management issues that implicate a significant social policy, such as discrimination. Although the Proposal mentions “human rights risks,” it refers to this issue in the context of “financial, reputational, and human rights risks resulting from the use . . . of companies that misclassify employees as independent contractors.” The Supporting Statement demonstrates that the Proposal addresses potential economic implications to the Company, and does not focus on human rights of workers of companies that are used by the Company. Specifically, the Supporting Statement discusses the potential implications for the Company’s legal compliance program, including the risks of fines. The Supporting Statement itself states that the Proponent is concerned not just with whether the Company should be addressing human rights considerations with respect to such companies, “but also [the Company’s] exposure to reputational and financial risks.”

The Staff consistently has concurred in the exclusion of stockholder proposals that ask the company to prepare a report that addresses the financial and economic risks associated with its operations. For example, in *Amazon.com, Inc.* (avail. Apr. 10, 2018), the Staff concurred in exclusion under Rule 14a-8(i)(7) of a proposal requesting that the company issue a report on company-wide efforts to assess, reduce and optimally manage food waste, where the company argued that the proposal related to the economic implications of food waste, which implicated the company’s ordinary business. In *CVS Health Corp.* (avail. Mar. 8, 2016) the shareholder proposal at issue requested the company set targets to increase renewable energy sourcing or production, followed by several statements pointing to cost savings as a driving factor for the targets. The Staff concurred with exclusion under Rule 14a-8(i)(7), reflecting the company’s argument that the supporting statements to the proposal “reveal a central

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theme of financial management” in the form of cost savings. In *Exxon Mobil Corp.* (avail. Mar. 6, 2012), the company received a proposal requesting a report on “possible short and long term risks to the company’s finances and operations” related to the company’s oil sands operation. The proposal sought a review of the risks “posed by the environmental, social and economic challenges associated with the oil sands.” The company argued that “[a]ssessing financial and operational risks posed by the challenges associated with oil sands [was] an intricate process” and decisions related to the oil sands were “fundamental to management’s ability to run the Company on a day-to-day basis” The Staff permitted the exclusion of the proposal because it “addresse[d] the ‘economic challenges’ associated with the oil sands and [did] not, in [the Staff’s] view, focus on a significant policy issue.”

Moreover, the human rights issues mentioned in the Supporting Statement are whether workers at companies that are utilized by the Company are being deprived of “minimum wage, overtime pay protections, and other benefits and rights guaranteed employees under federal and state law.” In other words, the Proposal relates to legal compliance, not to a significant human rights policy issue.

As the Supporting Statement itself acknowledges, the Company has a human rights policy that encompasses its supply chain workers, and has programs in place to monitor and address human rights concerns within its supply chain. But here, the Proposal is not limited to those actually working in the Company’s supply chain, and implicates many aspects of the Company’s ordinary business operations, including the vendor relationships, legal compliance issues, employment wage and benefit issues, and potential legal, financial, and reputational considerations. As such, the Proposal does not focus on a significant social policy issue, but instead seeks a report on aspects of the Company’s ordinary business operations. As with *Dominion Resources, Inc.*, *PetSmart, Inc.*, *Amazon.com, Inc.* (avail. Apr. 10, 2018), *Exxon Mobil Corp.* and the other precedent cited above, the references here to human rights do not focus on a specific significant social policy issue and accordingly the Proposal may properly be excluded under Rule 14a-8(i)(7).

CONCLUSION

Based upon the foregoing analysis, the Company intends to exclude the Proposal from its 2022 Proxy Materials, and we respectfully request that the Staff concur that the Proposal may be excluded under Rule 14a-8(i)(7).

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter

GIBSON DUNN

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should be sent to shareholderproposals@gibsondunn.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 955-8671.

Sincerely,



Ronald O. Mueller

Enclosures

cc: Beth R. MacDonald, Esq., Lowe's Companies, Inc.
Ken Hall, International Brotherhood of Teamsters
Louis Malizia, International Brotherhood of Teamsters

EXHIBIT A

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

JAMES P. HOFFA
General President

25 Louisiana Avenue, NW
Washington, DC 20001



KEN HALL
General Secretary-Treasurer

202.624.6800
www.teamster.org

December 6, 2021

VIA E-MAIL: bill.w.mccanless@lowes.com

VIA UPS GROUND

Ross W. (Bill) McCanless, Esq.
General Counsel and Corporate Secretary
Lowe's Companies, Inc.
1000 Lowe's Boulevard
 Mooresville, NC 28117

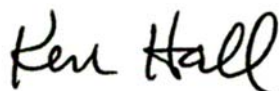
Dear Mr. McCanless:

On behalf of the International Brotherhood of Teamsters General Fund (the "Fund"), I am hereby submitting the enclosed proposal (the "Proposal"), pursuant to the Securities and Exchange Commission's Rule 14a-8, to be included in the proxy statement of Lowe's Companies, Inc., (the "Company") for its 2022 annual meeting of shareholders.

The Fund has continuously beneficially owned, for at least one year as of the date hereof, at least \$2,000.00 worth of the Company's common stock. Verification of this ownership is enclosed. The Fund intends to continue to hold such shares through the date of the Company's 2022 annual meeting of shareholders.

I have instructed Louis Malizia of Teamsters Capital Strategies Department to clear his schedule to meet with you via teleconference on January 3, 2022, between 2:00 p.m. and 5:00 p.m. (E.D.T), and on January 18, 2022, from 1:30 p.m. to 4:30 p.m. (E.D.T), to discuss this proposal. You may contact Mr. Malizia directly by telephone at: [REDACTED] or by email at: [REDACTED], to decide on a mutually agreeable time.

Sincerely,



Ken Hall
General Secretary-Treasurer

KH/lm
Enclosures

RESOLVED: That Lowe’s Companies, Inc.’s (the “Company”) Board of Directors prepare a report on the financial, reputational, and human rights risks resulting from the use in Lowe’s supply chain and distribution networks of companies that misclassify employees as independent contractors. The report should be prepared at reasonable cost, omitting proprietary information and be available at least 90 days prior to the 2023 annual shareholders meeting.

SUPPORTING STATEMENT:

Lowe’s *Human Rights Policy* states Lowe’s “focuses on promoting fundamental rights through associates, customers, communities and supply chain workers.” Notwithstanding that *Policy*, we are concerned Lowe’s fails to address an issue affecting not just human rights, but also Lowe’s exposure to reputational and financial risks.

Supply chain disruptions are a major challenge facing retailers as the nation recovers from the COVID-19 pandemic. Exacerbating this is the fact some of the trucking companies used by retailers to move goods may misclassify their drivers as “independent contractors” rather than “employees.”

It is illegal for a company to “misclassify” workers as self-employed “independent contractors” if the company controls the manner and means of work, sets hours and wages and otherwise treats them as “employees,” who are entitled to a minimum wage, overtime pay protections, and other benefits and rights guaranteed employees under federal and state law. The forgone wages amount to “wage theft.”

Misclassification is a significant problem as some trucking companies misclassify drivers hauling goods from U.S. ports as well as “last mile” delivery drivers.

Following an award-winning, investigative series by *USA Today*, the paper’s editorial board compared exploitive independent contractor arrangements at southern California ports to “modern-day ... indentured servitude,” prompting four U.S. Senators to demand major U.S. retailers cut ties with trucking companies showing such a “brazen disregard for ... workers’ safety and rights.” The southern California ports process 40% of all U.S. shipping container traffic.

In response to this situation, the California Labor Commissioner’s office has over the past decade awarded more than \$50 million to misclassified port drivers, while millions of dollars have been awarded in private litigation involving port drivers. According to a 2014 report by the National Employment Law Project, the Californian port trucking industry is potentially liable for \$850 million in wage theft each year from misclassification. (<https://www.nelp.org/wp-content/uploads/2015/03/Big-Rig-Overhaul-Misclassification-Port-Truck-Drivers-Labor-Law-Enforcement.pdf>)

Misclassification risk extends to retailers, given recent Californian legislation. A 2021 law, SB 338, indicates there could be 16,000 misclassified drivers in California's ports and calls this largely "immigrant workforce" the "last American sharecroppers." The law makes customers of a port trucking company jointly liable for future violations of labor, employment, and health and safety law by a trucking company that the Labor Commissioner's office has publicly identified as having previously violated these laws.

Lowe's *Human Rights Policy* states Lowe's tracks events affecting Lowe's human rights commitment and "publicly report on progress on an annual basis in Lowe's Corporate Sustainability Report," yet its 2020 report contains no discussion of this issue.

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CORNISH F. HITCHCOCK
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22 February 2022

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

By electronic mail: shareholderproposals@sec.gov

Re: Shareholder proposal to Lowe's Companies, Inc. from
International Brotherhood of Teamsters General Fund

Dear Counsel:

This is a response on behalf of the International Brotherhood of Teamsters General Fund (the "Fund") to the letter ("Lowe's Letter") from counsel for Lowe's Companies, Inc. ("Lowe's" or the "Company") dated 24 January 2022, in which the Company advises of its intent to omit the Fund's shareholder proposal (the "Proposal") from Lowe's 2022 proxy materials. For the reasons below, we respectfully ask you to advise Lowe's that the Division does not concur with the Company's view that the Proposal may be excluded from Lowe's proxy materials.

The Proposal.

The Proposal states:

RESOLVED: That Lowe's Companies, Inc.'s (the "Company") Board of Directors prepare a report on the financial, reputational, and human rights risks resulting from the use in Lowe's supply chain and distribution networks of companies that misclassify employees as independent contractors. The report should be prepared at reasonable cost, omitting proprietary information and be available at least 90 days prior to the 2023 annual shareholders meeting.

The Supporting Statement notes that Lowe's has a *Human Rights Policy* that "focuses on promoting fundamental rights through associates, customers,

communities and supply chain workers.” Notwithstanding that *Policy*, the Supporting Statement notes the current supply chain disruptions that are challenging retailers, adding that the situation is exacerbated by the fact that some of the trucking companies that retailers use to move goods may misclassify their drivers as “independent contractors” rather than “employees.” Such misclassification can deprive drivers of a minimum wage, overtime pay protections and other rights and benefits under federal and state law.

The Supporting Statement states that misclassification is a significant problem at some companies that haul goods from U.S. ports, as well as “last mile” deliveries. Following an award-winning, investigative series by *USA Today*, the paper’s editorial board compared exploitive independent contractor arrangements at southern California ports to “modern-day ... indentured servitude,” prompting four U.S. Senators to demand major U.S. retailers cut ties with trucking companies showing such a “brazen disregard for. . . workers’ safety and rights.” The Supporting Statement notes the millions of dollars awarded to misclassified drivers in recent years and the estimated potential liability of \$850 million a year based on the “wage theft” that comes from misclassification.

Misclassification poses a risk to trucking companies that extends to retailers such as Lowe’s, the Supporting Statement continues. Southern California ports process 40% of all U.S. shipping container traffic, and a 2021 California law makes customers of a port trucking company jointly liable for future violations of labor, employment, and health and safety law by a trucking company if the Labor Commissioner’s office has publicly identified that company has having violated these laws. That statute states that there could be 16,000 misclassified drivers in California ports and calls this largely “immigrant workforce” the “last American sharecroppers.”

Lowe’s Human Rights Policy states that Lowe’s tracks events affecting human rights, yet there is no mention of this topic in Lowe’s most recent sustainability report.

Lowe’s response to the Proposal was to seek no-action relief under the “ordinary business” exemption in Rule 14a-8(i)(7), arguing that the Proposal improperly (a) seeks a risk assessment, (b) relates to Lowe’s relationship to its suppliers; (c) relates to Lowe’s “general legal compliance,” and (d) does not focus on a significant policy issue that transcends Lowe’s day-to-day operations.

At bottom, Lowe’s arguments rest on a view that the Proposal deals with a topic that is lacking in policy significance that transcends the realm of Lowe’s “ordinary business.” We therefore start with a discussion of the factual background giving rise to the Proposal and then respond to Lowe’s specific claims.

Factual discussion.

Misclassification in the retail supply chain presents a significant human rights issue that transcends ordinary business.

“Indentured servitude.”

“Sharecroppers.”

If America’s largest legislature and America’s largest newspaper were to use those terms to describe worker exploitation in another country, the matter would surely be viewed as raising significant human rights concerns. Such concerns are no less salient when such exploitation occurs within the United States, and that is the issue addressed by this Proposal.

In June 2017 *USA Today* published a four-part series entitled *Rigged*, which shined a spotlight on the issues faced by “drayage” drivers at the Southern California ports that handle 40 percent of the country’s containerized cargo shipments.¹ The series opened:

Samuel Talavera Jr. did everything his bosses asked.

Most days, the trucker would drive more than 16 hours straight hauling LG dishwashers and Kumho tires to warehouses around Los Angeles, on their way to retail stores nationwide.

He rarely went home to his family. At night, he crawled into the back of his cab and slept in the company parking lot.

For all of that, he took home as little as 67 cents a week.

Then, in October 2013, the truck he leased from his employer, QTS, broke down.

When Talavera could not afford repairs, the company fired him and seized the truck -- along with \$78,000 he had paid towards owning it.

Talavera was a modern-day indentured servant. And there are hundreds, likely thousands more, still on the road, hauling containers

¹ Brett Murphy, *Rigged: Forced into debt. Worked past exhaustion. Left with nothing*, USA Today (June 2017), available at <https://www.usatoday.com/pages/interactives/news/rigged-forced-into-debt-worked-past-exhaustion-left-with-nothing/>.

for trucking companies that move goods for America's most beloved retailers, from Costco to Target to Home Depot.

These port truckers -- many of them poor immigrants who speak little English -- are responsible for moving almost half of the nation's container imports out of Los Angeles' ports. They don't deliver goods to stores. Instead they drive them short distances to warehouses and rail yards, one small step on their journey to a store near you.

Sixty-seven cents a week. In 21st century America.

The *USA Today* series, which followed a year-long investigation, added these specifics:

- Trucking companies force drivers to work against their will -- up to 20 hours a day -- by threatening to take their trucks and keep the money they paid toward buying them. Bosses create a culture of fear by firing drivers, suspending them without pay or reassigning them the lowest-paying routes.
- To keep drivers working, managers at a few companies have physically barred them from going home. More than once, Marvin Figueroa returned from a full day's work to find the gate to the parking lot locked and a manager ordering drivers back to work. "That was how they forced me to continue working," he testified in a 2015 labor case. Truckers at two other companies have made similar claims.
- Employers charge not just for truck leases but for a host of other expenses, including hundreds of dollars a month for insurance and diesel fuel. Some charge truckers a parking fee to use the company lot. One company, Fargo Trucking, charged \$2 per week for the office toilet paper and other supplies.
- Drivers at many companies say they had no choice but to break federal safety laws that limit truckers to 11 hours on the road each day. Drivers at Pacific 9 Transportation testified that their managers dispatched truckers up to 20 hours a day, then wouldn't pay them until drivers falsified inspection reports that track hours. Hundreds of California port truckers have gotten into accidents, leading to more than 20 fatalities from 2013 to 2015, according to the USA TODAY Network's analysis of federal crash and port trade data.
- Many drivers thought they were paying into their truck like a mortgage. Instead, when they lost their job, they discovered they also lost their truck, along with everything they'd paid toward it. Eddy Gonzalez

took seven days off to care for his dying mother and then bury her. When he came back, his company fired him and kept the truck. For two years, Ho Lee was charged more than \$1,600 a month for a truck lease. When he got ill and missed a week of work, he lost the truck and everything he'd paid.

- Retailers could refuse to allow companies with labor violations to truck their goods. Instead they've let shipping and logistics contractors hire the lowest bidder, while lobbying on behalf of trucking companies in Sacramento and Washington D.C. Walmart, Target and dozens of other Fortune 500 companies have paid lobbyists up to \$12.6 million to fight bills that would have held companies liable or given drivers a minimum wage and other protections that most U.S. workers already enjoy.

Following publication of this series, *USA Today* editorialized that while many consumers “care deeply about the way their products are made,” they “might not know is that some highly deplorable conditions exist right here in America, in the transport of goods rather than their manufacture.”² Continuing, *USA Today* wrote:

A huge volume of the nation's imports arrive by container ship in Southern California, where short-haul truckers take the merchandise to nearby rail yards or storage depots, a key step in the goods' journey to some of the nation's leading retail stores. A year-long investigation by the USA TODAY Network found that a good chunk of the port trucking industry relies heavily on a modern-day form of indentured servitude.³

A separate study summarized the demographics of these drivers as follows:

There are approximately 12,000 port truck drivers that haul goods to and from the Ports of Los Angeles and Long Beach. Most are working-class, Latino immigrants. Eighty five percent are foreign born and 91% are originally from Latin America. The majority of drivers do not have a higher education. They work for one of the over 1,000 trucking companies that are registered to do business at the ports.⁴

² *Rigged System Rips Off Port Truckers*, USA TODAY (20 June 2017), available at <https://www.usatoday.com/story/opinion/2017/06/20/rigged-system-rips-off-port-truckers-editorials-debates/103015290/>.

³ Id.

⁴ Los Angeles Alliance for a New Economy, *Out of Step: How Skechers Harms its California Supply Chain Workers* (2014), available at <https://www.laane.org/wp-content/uploads/2014/06/Skechers-Report.pdf>.

Why is this happening? As the Proposal points out, the reason stems from the fact that many of these drivers are misclassified as “independent contractors” rather than “employees.” As a result, they are not entitled to a minimum wage, overtime, unemployment compensation and other legal benefits that are associated with employee status; the average work week for port drivers may approach 60 hours, with median net earnings 20% below that of employees, and a requirement to pay all truck-related expenses such as fuel, repairs and maintenance.⁵

Ironically, this situation has exacerbated the supply chain crisis that has been much in the news over the past year. Citing University of Pennsylvania economic sociologist Steve Viscelli, NBC News explained the economics this way:

In the port ecosystem, truck drivers are paid by the load, not by the hour, making them some of the most vulnerable workers, Viscelli said.

Other port workers get overtime pay and belong to unions, but truckers are classified as independent contractors. As such, they aren’t considered employees and don’t get any of the benefits or protections associated with that status.

“Truck drivers are the shock absorbers,” he said. “If the cranes are running behind, you can just keep the trucker there idle. You can back them up for hours, because they’re not being paid.”

Because of how they’re classified and compensated, truck drivers wait around until they’re needed, at no cost to the shipping companies. That means there’s little incentive to change and use them more efficiently, Viscelli said.

In contrast, efforts to reduce inefficiencies in other areas of the ports continue and have been successful. For instance, the ports of Los Angeles and Long Beach announced a plan last month to fine shipping companies that leave their cargoes on the docks for too long. The promise of fines proved so successful that the ports have delayed implementing them because early compliance led to a 26 percent drop in lingering containers.

If truckers were considered employees, their employers might be less inclined to let them sit idle for hours, because it would cost them in

⁵ A study cited in both the Proposal and recent California legislation on this topic (see pp. 8-9, *infra*) explains in more detail the differentials in this area between an independent contractor and an employee. National Employment Law Project, *The Big Rig Overhaul* at pp. 1, 7, 12 (February 2014), available at <https://www.nelp.org/wp-content/uploads/2015/03/Big-Rig-Overhaul-Misclassification-Port-Truck-Drivers-Labor-Law-Enforcement.pdf>

hourly wages and overtime, Viscelli said. Instead, the trucker-related inefficiencies in the supply chain and at the ports most severely cost the drivers themselves.

“They may wait hours to get there, wait hours to get a chassis they can use, and then if the port says, ‘No, we don’t want that load,’ that driver who gets \$150 per load now has to find somewhere else to drop it, and a six-hour job turns into 10,” Viscelli said. “The system is designed with that flexible free truck driver labor assumed.”⁶

Another story published earlier this month estimated that 7,000 of the 12,000 drivers who serve Southern California ports are misclassified and that conditions have deteriorated to the point that, according to the Executive Director of the Port of Los Angeles:

[F]ully 30 percent of the port’s 12,000 drivers no longer show up on weekdays, a percentage that rises to 50 percent on weekends. Once the waits exceed six hours, as they now sometimes do, drivers would run the risk of exceeding the 11-hour federal limit on trucker workdays if they then were to actually get a load—which means the port must turn them away, and they’ll have spent an entire workday for no pay at all.⁷

Other media reports have described these conditions and how they contribute to the current supply chain crisis.⁸

⁶ NBC News, *Poor conditions and low pay for truckers helped fuel supply chain crisis* (22 November 2021), available at <https://www.nbcnews.com/business/poor-conditions-low-pay-truckers-helped-fuel-supply-chain-crisis-rcna6216>.

⁷ Harold Meyerson, *Why Trucking Can’t Deliver the Goods*, THE AMERICAN PROSPECT (7 February 2022), available at <https://prospect.org/economy/why-trucking-cant-deliver-the-goods/>. Similarly, a guest column by an academic in *The Washington Post* stated that the treatment of independent contractors is part of a “fundamental and long-term crisis,” as drivers are paid poorly to begin with and are not paid for time waiting for a shipment to be ready; he added that current practices are “increasingly unsustainable for workers and the environment.” Benjamin L. McKean, *Delayed Christmas gifts are just the beginning. The supply chain crisis isn’t going away soon*, THE WASHINGTON POST (21 December 2021), available at <https://www.washingtonpost.com/politics/2021/12/21/supply-chain-christmas-workers-climate/>.

⁸ Alana Semuels, *The Truck Driver Shortage Doesn’t Exist. Saying There Is One Makes Conditions Worse for Drivers*, TIME (12 November 2021), available at <https://time.com/6116853/truck-driver-shortage-supply-chain/>; *Black Friday’s Supply*

What goes on in Southern California ports may seem far removed from a retailer such as Lowe's. The Supporting Statement points out that trucking companies that misclassify drivers may face significant liabilities, but isn't misclassification their problem? The answer is "no."

Last year the California legislature passed and the governor signed S.B. 338,⁹ which took effect on 1 January 2022 and which makes retailers such as Lowe's jointly and severally liable for liabilities and taxes owed by suppliers who misclassify port drivers. The legislative findings in that law underscore the policy significance of the human rights issues here.

Section 1(b) of S.B. 338 calls California's port drayage drivers "the last American sharecroppers, held in debt servitude and working dangerously long hours for little pay." Citing the *USA Today* series and several of the articles cited in this letter, A.B. 338 summarizes the practices cited there, adding that misclassification of a "largely immigrant workforce that is "particularly vulnerable to labor exploitation" can contribute to "wage theft and leaves drivers in a cycle of poverty." S.B. 338, § 1(c) – (h).

Despite prior legislative efforts to regulate the issue, S.B. 338 states (§ 1(k)) that misclassification "remains endemic in the industry." The findings continue:

(q) Customers of port drayage are some of the world's largest retail and manufacturing companies. After more than a decade of rulings, media stories, and independent reports, they should be aware of the widespread labor violations in the drayage industry.

Chain Problems Are Really Labor Problems, THE NEW REPUBLIC (25 November 2021), available at <https://newrepublic.com/article/164523/black-friday-supply-chain-workers>.

The misclassification of employees in the "gig economy" has been a policy issue in other areas as well, most notably in California, which has been embroiled in a multi-year "unending battle" over the status of Uber and Lyft drivers as independent contractors; a 2019 law declared those drivers to be employees, an industry-backed proposition overturned that statute, and a subsequent lawsuit declared the proposition to be invalid. The issue is being debated in other state legislatures. Maeve Allsup and Joyce E. Cutler, *Feud Over Uber-Lyft Worker Law Will Ripple Beyond California (1)*, BLOOMBERG LAW (24 August 2021), available at <https://news.bloomberglaw.com/us-law-week/feud-over-uber-lyft-worker-law-will-ripple-beyond-california>.

⁹https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=20212022_0SB338.

(r) Customers of port drayage represent some of the wealthiest companies in the world. Many of these companies have reported record profits even in the midst of a pandemic that has devastated businesses in other sectors and has resulted in employees across the country – including port truck drivers – losing work and having to rely on the social safety nets that motor carriers do not contribute to when they misclassify their drivers.

(s) The Legislature established, with the enactment of Assembly Bill 1897 in 2014, that business entities that are provided workers from subcontractors can be jointly liable for the nonpayment of wages and failure to provide unemployment insurance by the subcontractor.

(t) Holding customers of trucking companies jointly liable for future labor, employment, and health and safety law violations by port drayage motor carriers whom they engage and of whose prior violations of labor, employment, or health and safety laws the customers received advance notice will exert pressure across the supply chain to protect drayage drivers from further exploitation.

(u) Customers have the market power to exert meaningful change in the port drayage industry that has eluded California drivers for more than a decade.

As summarized in the digest accompanying S.B. 338, *supra* note 9, prior law required the state Division of Labor Standards Enforcement to post on its website a list of port drayage truckers with unpaid final judgments for wage theft and similar offenses, with joint and several liability for the trucker and its customers to satisfy those judgments. S.B. 338 strengthened the law to require posting the name of a prior offender who has a subsequent violation, even if the time for appeals had not expired – thus making information available within weeks, not years. S.B. 338 also expanded a customer’s liability to include legal liability owed to the state for violations that resulted in a failure to pay employment taxes (unemployment compensation) and for a failure to comply with health and safety laws.

* * *

The issue in the Proposal is too significant to be ignored. The discussion here surely demonstrates that the Proposal presents substantially more than a question of labor relations or legal compliance. A 2019 report from an international human rights organization summarized the issue this way:

The proper classification of workers – which determines what rights and benefits they are legally entitled to – lies at the heart of business’s

responsibility to respect human rights.¹⁰

Analysis.

There is thus a solid factual basis for viewing the Proposal as raising “significant” and “transcendent” policy issues involving fundamental human rights. The issues here may superficially appear to involve only two ports, but it is important to recall that 40% of the containerized cargo that comes into this country arrives at those ports. The practices described here are thus hugely relevant to large retailers such as Lowe’s.

The Division has in the past recognized the policy significance of human rights violations in a company’s supply chain, including a company’s contractors and subcontractors. Consider, for example, *Nucor Corp.* (6 March 2008), where the proposal sought a review of company policy relating to “global operations and supply chain to assess areas where the company needs to adopt and implement additional policies to ensure the protection of fundamental human rights.” The concern there was Nucor was making pig iron using charcoal from a supplier who engaged in slave labor. Nucor argued that any such violations were too far away in the supply chain to affect Nucor, that the issue merely involved “remote producers of charcoal located deep in the Amazon jungle who sell charcoal to the Brazilian pig iron producers who in turn sell their pig iron to brokers in the United States from which the Company makes its purchases, not the pig iron producers themselves and not direct vendors of pig iron to Nucor, who have been identified by Brazilian labor officials as using slave labor.” *Id.* at p. 5. Nonetheless the Division denied relief. See also *PPG Industries, Inc.* (22 January 2001) (denying relief as to proposal seeking adoption of International Labor Organization human rights standards.)

Here, one need not travel to the jungles of Brazil to find human rights violations; one need only visit the ports of Los Angeles and Long Beach.

Lowe’s advances four arguments as to why the Proposal relates to Lowe’s “ordinary business, but those claims all rest on the same view namely, that the human rights violations at stake here have no broader policy significance. We take Lowe’s points in the order presented.

A. The issue here involves more than ordinary risk assessment.

Lowe’s quotes *Staff Legal Bulletin 14E* (27 October 2009) for the proposition

¹⁰ Business and Human Rights Resource Centre, *The Future of Work*, at p. 8, available at https://media.business-humanrights.org/media/documents/files/documents/CLA_Annual_Briefing-FINAL.pdf.

that the Division has “repeatedly concurred in the exclusion of shareholder proposals seeking risk assessment when the subject matter concerns ordinary business.” Lowe’s Letter at p. 3. What Lowe’s fails to note is that *Staff Legal Bulletin 14E* liberalized prior interpretations of the “ordinary business” exemption as applied to shareholder proposals entailing a risk assessment. Part B states:

On a going-forward basis, rather than focusing on whether a proposal and supporting statement relate to the company engaging in an evaluation of risk, we will instead focus on the subject matter to which the risk pertains or that gives rise to the risk. The fact that a proposal would require an evaluation of risk will not be dispositive [Instead] we will consider whether the underlying subject matter of the risk evaluation involves a matter of ordinary business to the company. In those cases in which a proposal's underlying subject matter transcends the day-to-day business matters of the company and raises policy issues so significant that it would be appropriate for a shareholder vote, the proposal generally will not be excludable under Rule 14a-8(i)(7) as long as a sufficient nexus exists between the nature of the proposal and the company.

The factual discussion above plainly demonstrates that the subject of the Proposal involves a matter of policy significance. The letters cited by Lowe’s all predated the events described above, and the proposals there related to the specific topic of a company’s tax strategy and compliance with applicable tax laws, topics that the Division has traditionally viewed as an “ordinary business” concern and lacking in a “significant” policy component.¹¹

B. The human rights issue transcends ordinary supplier relationship issues.

Lowe’s argues that the Proposal does not deal with the Company’s practices, but the practices of companies utilized by Lowe’s, and thus the Proposal “relates to the Company’s selection of suppliers,” which is a matter of “ordinary business.” Lowe’s Letter at p. 4.

The problem with this argument is that when, as here, the supply chain presents serious human rights issues, those issues take the Proposal out of the “ordinary business” realm and into the “policy” realm, as discussed in greater length at part A of this letter. If there any doubt about that point, consider Lowe’s own words on the topic, as expressed in the Company’s *Lowe’s Human Rights Policy*:

Lowe’s seeks to respect and promote human rights when engaging with

¹¹ Lowe’s Letter at p. 3, citing *The TJX Companies, Inc.* (29 March 2011); *Amazon.com, Inc.* (21 March 2011); *Wal-Mart Stores, Inc.* (21 March 2011); *Lazard Ltd.* (16 February 2011); *Pfizer Inc.* (16 February 2011).

associates, subcontractors, suppliers, customers, and other partners. Lowe's expects the same from its vendors. We will do this, as appropriate, through proactive engagement, monitoring, certification, and contractual provisions. Suppliers operating in or procuring from areas where we identify our most severe risks will be the key focus of this engagement. With this commitment, Lowe's adopted this Human Rights Policy ("Policy") and supports the fundamental principles of Human Rights, as defined by the "Universal Declaration of Human Rights". In addition, Lowe's aligns with the principles set forth in the United Nations Global Compact, the International Bill of Human Rights (including the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR)), and the International Labor Organizations (ILO) Declaration on Fundamental Principles and Rights at Work. This Policy applies to all associates, vendors, suppliers, customers, subcontractors, and other partners who provide services and goods to Lowe's.¹²

The letters cited by Lowe's involved proposals that did not come remotely close to dealing with the sort of supplier relationship we have here.¹³

C. The Proposal does not relate to Lowe's "general legal compliance."

Lowe's argues that the Proposal's citation of California law makes it clear that the Proposal relates to compliance regarding proper classification of employees, an issue that Lowe's sees as a core component of Lowe's ordinary business practices. Lowe's Letter at p. 5. The problem with this argument is that the letters cited at p. 5 of Lowe's letter involved proposals where compliance was an end in itself. To that end, the proposals asked the company to adopt a protocol or issue a report that would promote compliance with the law.¹⁴

¹² *Lowe's Human Rights Policy*, available at <https://corporate.lowes.com/our-responsibilities/corporate-responsibility-reports-policies/lowes-human-rights-policy> (emphasis added).

¹³ *Duke Energy Corp.* (24 January 2011) (no overriding policy goal cited in proposal that company should buy "Made in USA" products); *Southwest Airlines Co.* (19 March 2009) (domestic and foreign aircraft maintenance facilities should meet the same operational standards); *PepsiCo., Inc.* (24 February 2004) (no overriding policy component in proposal urging company not to favor one bottler over another).

¹⁴ *Navient Corp.* (26 March 2015) (seeking a report on whether internal controls were sufficient to satisfy applicable laws); *Raytheon Co.* (25 March 2013) (seeking report on board oversight of compliance with anti-discrimination laws); *Sprint Nextel Corp.* (16 March 2010, *reconsideration denied*, 20 April 2010) (seeking

In making this argument we acknowledge that the Lowe's Letter cites (at p. 6) two decisions more than a decade old in which the Division concurred with the company as to proposals dealing with the classification of employees and independent contractors.¹⁵ Even so, the proposals there still fall into the same category as the other ones Lowe's cites, in that they focused on compliance as an end in itself. Indeed, as the proponent argued in the latter case, shareholders "should be allowed to seek compliance to prospectively prevent violations."¹⁶

Moreover, and far more importantly, neither of those proposals addressed the overriding human rights issues that have been identified with respect to the port drayage drivers discussed here. The situations in those cases did not involve the sort of "indentured servitude" or "sharecropper" relationships that lie at the heart of the concern in the present Proposals.

D. The Proposal does not focus on a significant social policy concern.

We come at last to the argument that a "significant" policy issue is absent here. Lowe's at pp. 7-9. This argument is simply more of the same.

Lowe's starts by citing letters indicating that proposals that "touch in passing" on a significant issue, but do not "focus on" that issue may be excluded. Lowe's Letter at p. 7. Cited as examples are proposals that urged a utility to provide financing to encourage renewable energy generation and urged a pet supply store to have its suppliers certify that they were in compliance with laws regarding the humane treatment of animals.¹⁷ Neither situation is on a par with what we have here. Whether to offer financing to one's customers, even for a socially useful product or service, is certainly not on a par with the sort of broader human rights

an ethics code to promote compliance with laws); *The AES Corp.* (13 March 2008) (seeking independent investigation of possible false environmental reports); *The Coca-Cola Co.* (9 January 2008) (seeking independent lab tests of company's product quality); *Halliburton Co.* (10 March 2006) (seeking report on steps to eliminate recurrence of certain violations).

¹⁵ *FedEx Corp.* (14 July 2009) (*Trowel Trades*) (seeking report on company's compliance with applicable labor laws, citing pending investigations); *Lowe's Companies, Inc.* (12 March 2008) (seeking report to promote compliance with applicable labor laws, citing concerns about contractors used for store construction work).

¹⁶ *Lowe's*, *supra* note 15, at p. 11.

¹⁷ *Dominion Resources, Inc.* (3 February 2011); *PetSmart, Inc.* (24 March 2011).

concerns we see here. Similarly, abuse of animals may be an important issue, however, the proposal in the latter example focused on compliance as an end in itself and, as written, would have required reporting even of recordkeeping and administrative matters.

Lowe's next faults the Proposal for not having a "focus on human capital management issues that have a significant social policy, such as discrimination. Lowe's Letter at p. 8. To that we respond that paying someone to endure exploitative working conditions for the munificent sum of 67 cents a week falls well outside the boundaries of human capital "management."

Lowe's grudgingly acknowledges that the Proposal "mentions" human rights concerns, but seems to minimize the point, claiming that the Proposal is simply about addressing "financial and economic risks associated with its operations." Id. Here again, however, the letters cites deal with concerns that hardly rise to the policy significance the Proposal identifies here.¹⁸

Conclusion.

For these reasons, we respectfully ask the Division to advise Lowe's Companies that the Division does not concur with the Company's view that the proposal may be omitted from the Company's proxy materials.

Thank you for your consideration of these points. Please do not hesitate to contact me if there is any further information we can provide.

Respectfully submitted,



Cornish F. Hitchcock

cc: Ronald O. Mueller

¹⁸ *Amazon.com, Inc.* (10 April 2018) (seeking report on efforts to manage food waste); *CVS Health Corp.* (8 March 2016) (urging retailer to increase renewable energy sourcing to achieve cost savings); *Exxon Mobil Corp.* (6 March 2012) (seeking report on oil company's oil sands operation, given risks from environmental regulations, possible litigation and public opposition).

March 9, 2022

VIA E-MAIL

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

Re: *Lowe's Companies, Inc.*
Shareholder Proposal of the International Brotherhood of Teamsters General
Fund
Securities Exchange Act of 1934—Rule 14a-8

Ladies and Gentlemen:

This letter relates to the no-action request (the “No-Action Request”) submitted to the staff of the Division of Corporation Finance (the “Staff”) on January 24, 2022 on behalf of our client, Lowe’s Companies, Inc. (“Lowe’s” or the “Company”), in response to the shareholder proposal (the “Proposal”) and statement in support thereof (the “Supporting Statement”) received from the International Brotherhood of Teamsters General Fund (the “Proponent”).

The Proposal requests that the Company “prepare a report on the financial, reputational, and human rights risks resulting from the use in Lowe’s supply chain of companies that misclassify employees as independent contractors.” In the No-Action Request, the Company demonstrated that the Proposal is properly excludable from the Company’s proxy statement and form of proxy for its 2022 Annual Meeting of Shareholders (collectively, the “2022 Proxy Materials”) pursuant to Rule 14a-8(i)(7) because the Proposal deals with matters relating to the Company’s ordinary business operations, including the Company’s relationships with its suppliers and the Company’s general legal compliance, and does not focus on a significant social policy issue.

The Proponent submitted a letter dated February 22, 2022, setting forth arguments opposing the No-Action Request (the “Proponent’s Letter”). The Proponent’s Letter sets forth a number of arguments “for viewing the Proposal as raising ‘significant’ and ‘transcendent’ policy issues involving fundamental human rights.” However, the lengths to which the Proponent’s Letter stretches to claim this point clearly demonstrate that the Proposal does not focus on a significant social policy issue and instead, that the Proposal’s main focus is on legal compliance and the management of the Company’s suppliers.

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The narrow, singular focus of the Proponent’s Letter mischaracterizes the Proposal and Supporting Statement. First, the issue that is the subject of the Proposal – the classification of workers as either employees or independent contractors – is not of itself a human rights issue. Phrased differently, being classified, or even misclassified, as an independent contractor instead of as an employee does not automatically mean that a worker is a victim of human rights abuses. Consistent with this fundamental distinction, Lowe’s Human Rights Policy focuses on all “supply chain workers,” not on whether those workers are classified as employees or independent contractors. But instead of addressing the human rights conditions of workers employed by companies used in Lowe’s supply chain, the Proposal and Supporting Statement address the legal distinction of whether workers are classified as employees or independent contractors.

Second, the Proposal itself is not limited to human rights issues. Instead, it expressly requests “a report on ... financial, reputational, and human rights risks.” Indeed, much of what the Proponent’s Letter addresses are financial and legal compliance risks. For example, at page 8, the Proponent’s Letter references California legislation that “makes retailers such as Lowe’s jointly and severally liable for liabilities and taxes owed by suppliers who misclassify port drivers.” Notably, however, as discussed in the No-Action Request, the Proposal is not even focused on whether there are misclassified workers directly in the Company’s supply chain, but instead, on whether other companies used in Lowe’s supply chain may misclassify any of their workers, regardless of whether or not those workers themselves are part of Lowe’s supply chain.

Finally, even the carefully tailored discussion in the Proponent’s Letter of the classification of truck drivers operating at southern California ports demonstrates that the Proposal and Supporting Statement do not focus on a significant social policy issue that transcends the Company’s ordinary business:

- The Proponent’s Letter, as with one paragraph in the Supporting Statement, relies on newspaper articles describing working conditions that existed at least five or more years ago.¹
- As the Proponent’s Letter itself indicates, there have been extensive efforts by legislators and companies to address the conditions faced by workers since the sources in the Proponent’s Letter were published in 2017 and 2014.

¹ See Footnotes 1 and 2 in the Proponent’s Letter citing worker conditions from 2017, and Footnotes 4 and 5 in the Proponent’s Letter citing worker conditions from 2014.

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- The Proponent’s Letter concedes that even focusing on the specific situation of misclassification of truck drivers working in southern California ports, only slightly more than one half of the truck drivers who serve southern California are potentially misclassified, and “The issues here ... involve only two ports.”²

While the Proponent’s Letter strives to connect these topics to the present by claiming that misclassification of truck drivers at these two ports “has exacerbated the supply chain crisis that has been much in the news over the past year,” global supply chain delays are a business concern, not a significant social policy concern. Moreover, it is clear that the global supply chain delays that companies in every industry currently are facing are not solely, or even primarily, attributable to worker misclassification in the supply chain.³

The foregoing demonstrates that the Proposal is not focused on, and at most may tangentially touch, a significant social policy issue. While the Proponent’s Letter exclusively addresses the specific situation of working conditions for some percent of the truck drivers who service two southern California ports, the Proposal, as discussed above, is much broader. Likewise, the Supporting Statement is not focused on human rights issues, but instead on financial and legal compliance issues (“It is illegal for a company to ‘misclassify’ workers...”, “‘employees’ ... are entitled to a minimum wage, overtime pay protections, and other benefits and rights” and “The law makes customers of a port trucking company jointly liable”) and on the selection of suppliers (“Supply chain disruptions are a major challenge facing retailers ... Exacerbating this is the fact some of the trucking companies used by retailers ... may misclassify their drivers”).

In this respect, *PetSmart, Inc.* (avail. Mar. 24, 2011), cited in the No-Action Request, is directly on point. In *PetSmart*, the company addressed a proposal involving compliance with animal rights laws and argued that, although some animal rights law violations could raise a significant social policy issue, the proposal was not focused on those specific instances, and was excludable because the proposal was “fairly broad in nature from serious violations such as animal abuse to violations of administrative matters such as record keeping.” The staff concurred with the exclusion of the proposal, demonstrating that proposals that may implicate significant social policy issues, but which do not focus directly on such issues, do not transcend ordinary business. Here, the same situation as in *PetSmart* exists. Even if one were to concede that worker misclassification contributes to some of the concerns discussed in the Proponent’s Letter, it is not

² Proponent’s Letter at 7 and 10.

³ For example, the Proponent’s Letter cites an 11-hour federal limit on truck driver workdays in the text of Footnote 7 to support its assertion that working conditions for truck drivers are contributing to the supply chain crisis. However, the 11-hour limit applies regardless of whether a driver is categorized as an employee or an independent contractor (see 49 C.F.R. §§ 395.2-395.3).

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automatically the case that the legal compliance issue addressed in the Proposal and Supporting Statement – the use of suppliers who may misclassify some of their workers – implicates (much less focuses on) what typically would be viewed as human rights abuses.

In Staff Legal Bulletin 14L (Nov. 3, 2021), the Staff stated that it will “focus on the social policy significance of the issue that is the subject of the shareholder proposal” and “will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.” As discussed above, the subject and focus of the Proposal and Supporting Statement is on the Company’s selection of suppliers, compliance with laws and regulations governing its contractors’ classification of employees, and financial and legal compliance considerations—all issues that are core components of the Company’s ordinary business operations. The attenuated issue singularly discussed in the Proponent’s Letter does not reflect the actual wording and focus of the Proposal and Supporting Statement, and does not demonstrate that the Proposal transcends the Company’s ordinary business. Thus, the Proposal and Supporting Statement are properly excludable under Rule 14a-8(i)(7).

CONCLUSION

Based upon the foregoing analysis, the Company intends to exclude the Proposal from its 2022 Proxy Materials, and we respectfully request that the Staff concur that the Proposal may be excluded under Rule 14a-8(i)(7).

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to shareholderproposals@gibsondunn.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 955-8671.

Sincerely,



Ronald O. Mueller

Enclosures

cc: Beth R. MacDonald, Esq., Lowe’s Companies, Inc.
Ken Hall, International Brotherhood of Teamsters
Louis Malizia, International Brotherhood of Teamsters