



DIVISION OF
CORPORATION FINANCE

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

May 7, 2025

Lyuba Goltser
Weil, Gotshal & Manges LLP

Re: The Kroger Co. (the "Company")
Incoming letter dated February 24, 2025

Dear Lyuba Goltser:

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

The Proposal requests that the board of directors commission an audit on the impact of the Company's policies and practices on the safety and well-being of workers.

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

Copies of all of the correspondence on which this response is based will be made available on our website at <https://www.sec.gov/corpfin/2024-2025-shareholder-proposals-no-action>.

Sincerely,

Rule 14a-8 Review Team

cc: Laura Campos
The Nathan Cummings Foundation

Weil, Gotshal & Manges LLP

767 Fifth Avenue
New York, NY 10153-0119
+1 212 310 8000 tel
+1 212 310 8007 fax

Lyuba Goltser
lyuba.goltser@weil.com

February 24, 2025

SUBMITTED ONLINE (www.sec.gov/forms/shareholder-proposal)

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

**Re: The Kroger Co.
 2025 Annual Meeting Omission of Shareholder Proposal of the Nathan
 Cummings Foundation
 Securities Exchange Act of 1934 – Rule 14a-8**

Ladies and Gentlemen:

This letter is submitted on behalf of 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 (the “Proposal”) submitted by The Nathan Cummings Foundation (the “Proponent”) for inclusion in the Company’s form of proxy, proxy statement and other proxy materials (together, the “2025 Proxy Materials”) for its 2025 annual meeting of shareholders (the “2025 Annual Meeting”). In reliance on Rule 14a-8 under the Exchange Act, the Company intends to omit the Proposal from the 2025 Proxy Materials for the reasons discussed below. 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 2025 Proxy Materials.

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

- Electronically submitted this letter with the Staff no later than eighty (80) calendar days before the Company intends to file the 2025 Proxy Materials in definitive form with the Commission; and
- Concurrently sent copies of this correspondence to the Proponent.

Rule 14a-8(k) and Staff Legal Bulletin No. 14D (November 7, 2008) (“SLB 14D”) provide that stockholder proponents are required to send companies a copy of any

correspondence that the proponents elect to submit to the Commission or 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 that correspondence should be sent at the same time to the undersigned on behalf of the Company pursuant to Rule 14a-8(k) and SLB 14D.

THE PROPOSAL

The Company received the Proposal, accompanied by a cover letter from the Proponent, via FedEx on January 14, 2025.

The Proposal states:

RESOLVED

Shareholders of The Kroger Co. (“Kroger”) request that the Board of Directors commission an audit on the impact of the company’s policies and practices on the safety and well-being of workers. A report on the audit, prepared at reasonable cost and omitting proprietary information, should be made available on the company’s website. The scope of the requested audit would exclude heat stress.

The Proposal, along with a statement in support of the Proposal (the “2025 Supporting Statement”), are attached to this letter as Exhibit A.

BASES FOR EXCLUSION

We hereby respectfully request that the Staff concur in Kroger’s view that it may exclude the Proposal from the 2025 Proxy Materials pursuant to Rule 14a-8(i)(7), because the Proposal deals with matters relating to the Company’s ordinary business operations.

BACKGROUND

Managing associates’ personal health and safety is one of Kroger’s longstanding values and is imperative to the Company’s success. The Company has established comprehensive systems, policies and processes to ensure extensive oversight of associate safety across its operations and retail locations. Kroger’s operating unit leaders and executive leadership team are responsible for the Company’s management approach to associate health and safety, with additional oversight from the Public Responsibilities Committee of the board of directors. Business units and administrative functions follow an established approach to help protect associates’ health and safety. Specifically, Kroger follows established policies and standards to meet or exceed relevant Occupational Safety and Health Administration (OSHA) requirements, including comprehensive hazard communications and lockout/tagout plans, as well as guidelines for emergency evacuation, personal safety and personal protective equipment (PPE).

Safety measures are included in prioritized metrics for facility operations. The Company has established an internal safety program, AllSafe!, for associates across operations. The program is designed to increase associates' awareness and attention to personal safety and well-being. AllSafe! is grounded in four principles:

- Nothing we do is worth risking injury
- Accidents can be prevented
- Safety will be managed
- Safe behavior is a condition of employment for all associates

Kroger has detailed requirements and processes in place to minimize, review and address safety concerns in stores. Through clearly communicated expectations, routine monitoring and regular safety behavior training and reinforcement, the Company continues to reduce the number of injuries and accidents in its stores. The Company provides PPE for associates where appropriate, and requires store leaders to conduct a thorough PPE assessment at least annually to verify it is available and in use. Any accidents are reviewed within 24 hours to determine the root cause. Dedicated on-site safety teams meet routinely to review recent injury root causes and safety audit results, and to resolve any issues.

In 2023, Kroger launched AllSafe! Interactions, which enables associates to be observed and coached in real time on safety best practices and behaviors through store handheld devices. This replaced a paper-based observation process and focuses on more detailed and meaningful interactions with associates. In addition, in 2024, retail stores began using the Think AllSafe! web-based platform, which houses store-related OSHA training courses to promote safety, including but not limited to: Emergency Plans and Procedures; Hazard Communications (Chemical Safety); Hazardous Energy Lockout/Tagout Safety Plans; and Powered Industrial Truck Safety (Safe Forklift Operations). Think AllSafe! enables stores to use a digital entry and tracking system to manage OSHA compliance. The new platform offers greater visibility to store compliance and makes it easier to provide required information during OSHA inspections. Kroger continually strives to improve its safety practices to help ensure its associates' wellbeing. To that end, in 2023, Kroger improved safety performance company-wide versus the prior year. Key metrics show improvement in company-wide OSHA reportable injuries, which declined 7.2%, driven by a 9.3% reduction in injuries in supermarket operations, which is reflective of the Company's declining trend in OSHA reportable injuries in supermarket operations over the last 14 years.

ANALYSIS

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

(a) Overview of Rule 14a-8(i)(7)

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

In the 1998 Release, the Commission identified the two central considerations underlying the general policy for the ordinary business exclusion. The first consideration relates to the subject matter of the proposal. The Commission stated that, "[c]ertain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight." *Id.* 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. 14M ("SLB 14M"). The term "ordinary business" is rooted in the fundamental "corporate law concept providing management with flexibility in directing certain core matters involving the company's business and operations." 1998 Release (citing Release No. 12999 (Nov. 22, 1976)). Examples of the tasks cited by the Commission include "management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers." 1998 Release.

(b) The Proposal May Be Excluded Under Rule 14a-8(i)(7) Because it Relates to Workplace Safety

When evaluating a proposal that relates to a company engaging in an assessment of risk, the Staff has focused on the subject matter to which the risk pertains, or that gives rise to the risk, to determine whether the proposal relates to the company's ordinary business. *See* Staff Legal Bulletin No. 14E (Oct. 27, 2009) ("SLB 14E"). Here, the Proposal requests an "audit on the impact of the company's policies and practices on the safety and well-being of workers." The purpose of such audit is clearly to evaluate the Company's risk management practices with regards to workplace safety. As discussed below, the subject matter underlying the Proponent's request—workplace safety—relates to management's ability to run the Company on a day-to-day basis, and as such, cannot, as a practical matter, be subject to shareholder oversight.

The Staff has consistently recognized that proposals relating to a company's safety initiatives, including those relating to workplace safety, are a matter of ordinary business and are excludable under Rule 14a-8(i)(7). In *The Chemours Co.* (Jan. 17, 2017), the proposal requested a board report "on the steps the [c]ompany has taken to reduce the risk of accidents" and stated that "[t]he report should describe the [b]oard's oversight of Process Safety Management; staffing levels; inspection and maintenance of facilities and other equipment." The supporting statement to *The Chemours Co.* proposal cited a number of industrial accidents at the company's facilities, and cited significant regulatory fines that had been assessed against the company and one of its corporate predecessors for various safety violations. The company argued that the proposal was excludable under Rule 14a-8(i)(7) because it related to the company's workplace safety, which was "a significant component of the design and operation of the [c]ompany's production facilities," and that such decisions were central to the company's core business activities. The Staff concurred in the exclusion, noting that "the proposal relate[d] to workplace safety." *See also Amazon.com, Inc.* (Apr. 1, 2020) (concurring in the exclusion of a proposal substantially similar to *The Chemours Co.*). In *Pilgrim's Pride Corp.* (Feb. 25, 2016), the proposal requested that the company publish a report describing the company's policies, practices, performance and improvement targets related to occupational health and safety. Once again, the supporting statement noted that workers in the company's industry suffer injury and illness at five times the national average, and claimed that the company had repeatedly violated occupational health and safety requirements, for which the company had been fined. The company noted that workplace safety is at the core of its business operations, and that "[t]he design and operation of the [c]ompany's production facilities center on workplace safety and efficiency." In light of this, the company argued that the broad report requested by the proposal "implicates every aspect of the [c]ompany's workplace safety efforts" and therefore related to the Company's ordinary business operations. The Staff concurred, noting that the proposal "relates to workplace safety." The Staff's determinations in the foregoing recent precedent are consistent with decades-old precedent concurring with the exclusion of proposals addressing workplace safety issues as implicating a company's ordinary business operations. *See also Chevron Corp.* (Feb. 22, 1988) (concurring in the exclusion of a proposal as relating to ordinary business because it pertained to the safety of company employees); *Union Pacific Corp.* (Feb. 25, 2008), (concurring in the exclusion of a proposal requesting disclosures of the company's efforts to safeguard the company's operations from terrorist attacks and other homeland security incidents because Union Pacific's efforts to implement security precautions and protocols were at the core of its business operations); and *AMR Corp. (Farquhar)* (Apr. 2, 1987), (concurring in the exclusion of a proposal requesting that the board of directors review and issue a report regarding the safety of the company's airline operations because "determining the nature and extent of review of the safety" of AMR's airline operations was a matter of the company's ordinary business).

The Proposal here seeks an audit of "the impact of the company's policies and practices on the safety and well-being of workers." In the Supporting Statement, the Proponent recommends that the Company conduct an audit evaluating "management and business practices that contribute to an unsafe environment, including staffing capacity." Similar to the proposals cited above, the Supporting Statement cites regulatory fines that have been assessed against

Kroger for alleged workplace safety issues, and surveys and studies that purport to demonstrate a link between lower annual labor hours per store and workplace safety concerns across national retailers. As explained above, workplace safety is a key focus of the Company. The Company devotes significant resources and effort to ensure the safety of its employees, and to that regard, has established policies, practices and procedures to ensure associates' safety. To further safeguard the care of its associates, the Company frequently reviews, updates and adjusts its policies as needed to stay compliant with changing regulations and applicable laws and to address associates' needs and wellbeing. The matter at the heart of the Proposal, workplace safety, is integrally related to the management of the Company's operations, the design of the Company's facilities, and many other aspects of the Company's day-to-day operations, including employment staffing levels and the extent to which the Company invests in technology such as self-checkout machines, which the Proposal mentions, as well as compliance with varying regulations governing workplace safety and attracting, training and retaining employees. Thus, because workplace safety is an integral and routine element of the Company's ordinary business operations, the Proposal should be excluded under Rule 14a-8(i)(7).

(c) The Proposal Does Not Raise a "Significant Policy Issue"

The well-established precedents set forth above demonstrate that the Proposal addresses ordinary business matters, and therefore is excludable under Rule 14a-8(i)(7). The Commission has stated, however, that proposals relating to such matters but focusing on a significant policy issue generally are not excludable under the first consideration "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. In SLB 14M, the Staff rescinded Staff Legal Bulletin No. 14L and clarified the Commission's views on the scope and application of the significant policy analysis in Rule 14a-8(i)(7). The Staff explained that whether or not a proposal relates to a company's ordinary business operations is "made on a case-by-case basis, taking into account factors such as the nature of the proposal and the circumstances of the company to which it is directed." The decision to apply the significant policy exception "depends on the particular policy issue raised by the proposal and its significance in relation to the company." The Staff further stated that it will "take a company-specific approach in evaluating significance, rather than focusing solely on whether a proposal raises a policy issue with broad societal impact or whether particular issues or categories of issues are universally 'significant.'" See SLB 14M. Accordingly, a policy issue that is significant to one company may not be significant to another, if the policy issue does not have a sufficient nexus to the particular company.

The Staff has consistently permitted the exclusion of shareholder proposals focused on the ordinary business matter of workplace safety, even though such proposals also related to potentially significant policy issues. For example, the proposal in *Union Pacific Corp.* (Feb. 25, 2008) addressed safety concerns in the course of the company's operations and requested disclosures of the company's efforts to safeguard the company's operations from terrorist attacks and "other homeland security incidents." The company argued that the proposal was excludable because the proposal related to the company's day-to-day efforts to safeguard its operations—

including not only terrorist attacks, but also earthquakes, floods, and other routine operating risks that were overseen by the Department of Homeland Security but were incident to the company's ordinary business operations. The Staff's response noted that the proposal was excludable because it "include[d] matters relating to [the company's] ordinary business operations." See also *PetSmart, Inc.* (Mar. 24, 2011) (concurring in the exclusion of a proposal requesting the board require suppliers to certify that they had not violated animal cruelty-related laws, finding that while animal cruelty is a significant policy issue, the scope of laws covered by the proposals was too broad).

Similarly to the precedents cited above, the issue at the heart of the Proposal does not transcend the Company's ordinary business. The Company acknowledges that workplace safety is important, and to that end, has established policies and procedures to ensure associates' safety and well-being, as part of the Company's management of its workforce. The fact that the Supporting Statement cites alleged workplace safety concerns does not make workplace safety transcendent to Kroger's day-to-day operations, as the supporting statements in each of *Amazon.com, Inc.*, *The Chemours Co.* and *Pilgrim's Pride Corp* also cited past workplace incidents. Simply referencing aspects of an expansive topic that might include significant social policy issues does not transform an otherwise ordinary business proposal into one that transcends ordinary business. Nothing about the Proposal, which refers to a broad array of workplace issues such as reduced store-level staffing, health violations, "customers bullying workers and failing to treat workers with respect," among others, is unique to Kroger or its operations. The Proposal's broad invocation of "safety and well-being" of employees encompasses matters incident to the Company's ordinary business operations, ranging from employee injury, to matters relating to employee monitoring and supervision, employee policies and practices (including those related to health and safety), legal and regulatory compliance, and other matters that are directly tied to the Company's management of its workforce and its day-to-day operations.

Accordingly, we request that the Staff concur with our view that the Proposal should be excluded from Kroger's 2025 Proxy Materials pursuant to Rule 14a-8(i)(7) as relating to its ordinary business operations.

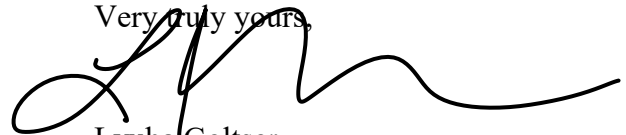
CONCLUSION

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 2025 Proxy Materials.

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

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

Very truly yours,

A handwritten signature in black ink, appearing to read 'Lyuba Goltser', with a long, wavy horizontal line extending to the right.

Lyuba Goltser
Partner

Enclosures

cc:

Christine Wheatley
Stacey Heiser
The Kroger Co.

Laura Campos
The Nathan Cummings Foundation

Exhibit A

2025 Proposal

January 7, 2025

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

Re: Shareholder proposal for 2025 Annual Shareholder Meeting

Dear Ms. Wheatley,

The Nathan Cummings Foundation is submitting the attached proposal (the "Proposal") pursuant to the Securities and Exchange Commission's Rule 14a-8 to be included in the proxy statement of The Kroger Co. (the "Company") for its 2025 annual meeting of shareholders. The Nathan Cummings Foundation is the lead filer of the Proposal.

The Nathan Cummings Foundation has continuously beneficially owned at least \$25,000 worth of the Company's common stock for at least one year as of the date hereof. Verification of this ownership, provided by our custodian, is included herewith. The Nathan Cummings Foundation intends to continue to hold these shares through the date of the Company's 2025 annual meeting of shareholders.

A representative of the Nathan Cummings Foundation is available to meet with the Company on January 21, between 2:00 pm and 4:30 pm Eastern, or on January 24, between 1:00 and 3:30 pm Eastern.

Please send me future correspondence and communications regarding this proposal at

[REDACTED]

Sincerely,



Laura Campos
Senior Director, Economic Justice

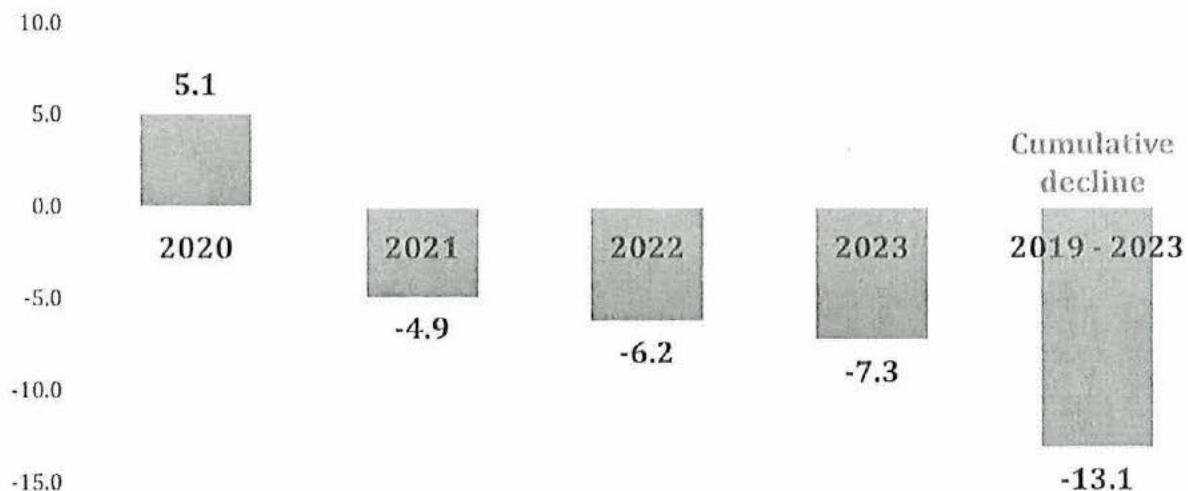
Resolved: Shareholders of The Kroger Co. ("Kroger") request that the Board of Directors commission an audit on the impact of the company's policies and practices on the safety and well-being of workers. A report on the audit, prepared at reasonable cost and omitting proprietary information, should be made available on the company's website. The scope of the requested audit would exclude heat stress.

Supporting Statement: At company discretion, the proponents recommend that an audit include:

- Evaluation of management and business practices that contribute to an unsafe environment, including staffing capacity;
- Meaningful consultation with workers and customers to inform appropriate solutions; and
- Recommendations for actions and regular reporting with progress on identified actions.

Whereas: Kroger is the ninth largest private employer in the United States,¹ operating 2,722 supermarkets with 414,000 full- and part-time employees.² According to data reported by the company to the Occupational Safety and Health Administration ("OSHA"), Kroger has significantly reduced store-level staffing over the last several years, even while the company has added significant new e-commerce related tasks to employees' workloads. In fact, between 2019 and 2023 labor hours per store have fallen by over 13%.

Kroger: % change in annual labor hours per store OSHA



A recent national survey of retail workers found that a majority of those workers were concerned about workplace safety and 63% said staffing shortages have made it harder to keep their stores safe.³

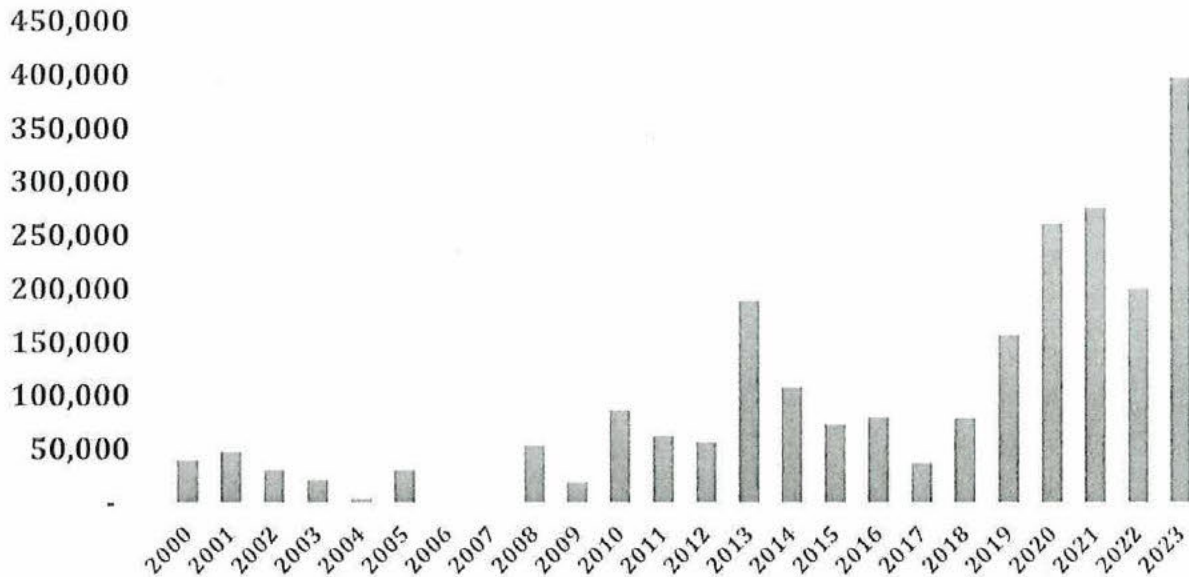
¹ <https://stockanalysis.com/list/most-employees/>

² <https://d18rn0p25nwr6d.cloudfront.net/CIK-0000056873/6b0fa036-24ed-4c1e-b7de-e02ca22d356c.pdf>

³ <https://www.businesswire.com/news/home/20240521425456/en/80-of-Retail-Workers-Feel-Unsafe-While-on-the-Job-New-Theatro-Study-Shows>

Since 2000, OSHA has issued Kroger \$2.3 million in penalties for 175 workplace safety or health violations.⁴ During the last four years, concurrent with the period of significant declines in staffing, Kroger has been fined significantly larger aggregate penalties by OSHA for a variety of health and safety violations.

Kroger: Annual OSHA Penalties (dollars)



A 2022 survey of Kroger workers identified insufficient COVID-19 protections, dealing with angry and abusive customers, insufficient security, and short staffing as top concerns impacting worker and customer safety.⁵

The growing adoption of self-checkout machines to lower labor costs and reduce customer wait times has had unintended consequences for retailers through negative impacts on job quality, customer experience, and financial performance. Self-checkout machines are not a replacement for cashiers and require troubleshooting from workers to appease often frustrated customers who require assistance. Since 2021 Kroger has increased the use of self-checkout scanners in its stores.⁶ A 2024 study by the Shift Project found that workers in stores with self-checkouts reported higher rates of understaffing and that understaffed stores had higher rates of customers bullying workers and failing to treat workers with respect.⁷

⁴

https://violationtracker.goodjobsfirst.org/?company_op=starts&company=kroger&offense_group=&agency_code=OSHA&order=pen_year&sort=asc

⁵ <https://economicrt.org/publication/hungry-at-the-table/>

⁶ <https://cw33.com/news/local/self-checkout-yay-or-nay-walmart-kroger-say-nay/>

⁷ https://shift.hks.harvard.edu/wp-content/uploads/2024/08/Selfcheckout_Layout_V8.pdf



The Northern Trust Company
333 S. Wabash Avenue, WB-42
Chicago, Illinois 60604

January 7, 2025

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

Re: Shareholder proposal submitted by the Nathan Cummings Foundation

Dear Ms. Wheatley:

I write concerning a shareholder proposal (the "Proposal") submitted to The Kroger Co. (the "Company") by the Nathan Cummings Foundation.

Northern Trust:

As of January 7, 2025, the Nathan Cummings Foundation beneficially owned and had beneficially owned continuously for at least one year, shares of the Company's common stock worth at least \$25,000 (the "Shares").

Northern Trust has acted as the record holder of the Shares and is a DTC participant. The Shares are held by the Bank through DTC Account # [REDACTED]. If you require any additional information, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in cursive script that reads 'Ryan Stack'.

Ryan Stack
Vice President
Northern Trust

April 11, 2025

Via Shareholder Proposal Portal

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

Re: Request by The Kroger Co. to omit proposal submitted by Nathan Cummings Foundation

Ladies and Gentlemen,

Pursuant to Rule 14a-8 under the Securities Exchange Act of 1934, the Nathan Cummings Foundation (the “Foundation” or the “Proponent”) submitted a shareholder proposal (the “Proposal”) to The Kroger Co. (“Kroger” or the “Company”). The Proposal asks Kroger’s board to commission an audit on the impact of the Company’s policies and practices on the safety and well-being of workers.

In a letter to the Division dated February 24, 2025 (the “No-Action Request”), Kroger stated that it intends to omit the Proposal from its proxy materials to be distributed to shareholders in connection with the Company’s 2025 annual meeting of shareholders. Kroger argues that it is entitled to exclude the Proposal in reliance on Rule 14a-8(i)(7), as relating to the Company’s ordinary business operations. As discussed more fully below, Kroger has not met its burden of proving its entitlement to exclude the Proposal on that basis, and the Proponent respectfully requests that the Company’s request for relief be denied.

The Proposal

The Proposal states:

Shareholders of The Kroger Co. (“Kroger”) request that the Board of Directors commission an audit on the impact of the company’s policies and practices on the safety and well-being of workers. A report on the audit, prepared at reasonable cost and omitting proprietary information, should be made available on the company’s website. The scope of the requested audit would exclude heat stress.

Ordinary Business

Rule 14a-8(i)(7) allows exclusion of proposals related to a company’s ordinary business operations. The Commission’s 1998 release reversing its policy on employment-related proposals¹ (the “1998 Release”) explained 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.” The 1998 Release reiterated the standard, articulated in a 1976 release,² that proposals on subjects that would otherwise be viewed as implicating day-to-day matters would nonetheless not be excludable if they raise sufficiently significant social policy issues.

Under the Division’s recent guidance in Staff Legal Bulletin 14M (“SLB 14M”),³ a proposal subject’s status as a significant social policy issue rests not on whether the issue has a “broad societal impact”—the standard under the now-rescinded Staff Legal Bulletin 14L (“SLB 14L”)—but on whether the subject is a significant social policy issue for the specific company where the proposal was submitted. Given the importance of worker health and safety generally, as well as for the grocery industry and Kroger, the Proposal is not excludable under SLB 14M’s standard.

Kroger’s argument proceeds in two parts. First, Kroger urges that the subject of worker health and safety is off limits because it “relates to management’s ability to run the Company on a day-to-day basis, and as such, cannot, as a practical matter, be subject to shareholder oversight.”⁴ Put another way, Kroger claims that worker health and safety can never transcend a company’s ordinary business. That is not the case.

In Amazon (2022),⁵ a proposal similar to the Proposal asked Amazon’s board to commission an independent audit and report of the working conditions and treatment that company warehouse workers face, including the impact of its policies, management, and performance targets. Amazon argued that the proposal addressed its ordinary business operations because it dealt with worker health and safety and workforce management, both of which Amazon claimed were ordinary business matters.

Like Kroger, Amazon cited Amazon (2020)⁶ for the proposition that proposals on worker health and safety necessarily relate to a company’s ordinary business operations. The proposal at issue in Amazon (2020) sought a report on workplace accident prevention, a narrower subject that implicates day-to-day management more than a general worker health and safety proposal. And, as Kroger does here, Amazon relied on Pilgrims Pride⁷ and Chemours.⁸ The Staff declined to concur with Amazon, explaining that the proposal “transcends ordinary business matters.” It is worth noting that the determination did not state that the proposal transcended ordinary business because it addressed a human capital matter with “broad societal impact.” Thus, Amazon (2022) did not explicitly depend on SLB 14L.

¹ Exch. Act Rel. No. 40018 (May 21, 1998)

² Exch. Act Rel. No. 12999 (Nov. 22, 1976) (announcing that henceforth, “certain matters which have significant policy, economic or other implications inherent in them” would no longer be considered ordinary business)

³ Staff Legal Bulletin 14M (Feb. 12, 2025)

⁴ No-Action Request, at 4

⁵ Amazon.com, Inc. (Apr. 6, 2022)

⁶ Amazon.com, Inc. (IBT General Fund) (Apr. 1, 2020, recon. denied, Apr. 9, 2020)

⁷ Pilgrim’s Pride Corp. (Feb. 25, 2016)

⁸ The Chemours Co. (Jan. 17, 2017)

The Union Pacific⁹ and PetSmart¹⁰ determinations Kroger cites are not applicable here, as they involved proposals whose subjects combined a significant social policy issue with an issue that did not rise to that level. In PetSmart, the proposal asked the company to require its suppliers to attest that they had not violated certain laws related to animal cruelty. PetSmart urged that the laws in question governed not only animal cruelty, a significant policy issue, but also mundane matters such as record keeping. The Staff concurred and granted relief, citing the breadth of the laws referenced in the proposal. The Union Pacific proposal's request for information about the company's efforts to protect against terrorist attacks and other homeland security incidents was deemed to encompass natural disasters and other matters overseen by the Department of Homeland Security. In other words, the subjects of the Union Pacific and PetSmart proposals were broad enough to encompass matters that were not significant social policy issues. That is not the case here.

The second part of Kroger's argument is that the Proposal does not address a significant social policy issue for Kroger, as required by SLB 14M. Here, Kroger tries to have it both ways, asserting both that worker health and safety is "imperative to the Company's success"¹¹ and that the "alleged workplace safety concerns" cited in the Proposal are insufficient to make the Proposal significant to Kroger's business.¹² But SLB 14M does not require that the Proposal's subject be "unique to Kroger or its operations,"¹³ as Kroger suggests, only that the subject be a significant one for Kroger.

A proposal can be significant to a company even without a controversy related to the proposal's subject. For example, in TJX,¹⁴ the company requested to exclude on ordinary business subject matter grounds a proposal asking for an analysis of the risks of doing business without an animal welfare policy. The proponent argued that there were animal welfare risks associated with several of TJX's supply chains, including fur, leather, wool, and exotic skins, but did not point to any TJX-specific controversies over any of them. Instead, the proponent relied on the lax state of animal welfare protections in the countries where vendors procured the high-risk commodities and the fact that other brands and stores had done more on animal welfare. The Staff declined to grant relief.

A risk or controversy related to a proposal's subject can be shared by many companies in a company's industry—or even multiple industries—and still qualify as a significant social policy issue for that company. In Walgreens,¹⁵ the proposal asked the company to report to shareholders on the corporate governance changes implemented since 2012 to more effectively monitor and manage financial and reputational risks related to the opioid crisis. Walgreens urged that the proposal's subject was the sale of products, which wasn't a significant social policy issue. Although the proposal's supporting statement described fines Walgreens had paid for Controlled Substances Act violations, the proponents' arguments in response to Walgreens' request focused on the opioid crisis in the U.S. generally and the roles played not only by retailers like Walgreens but also by manufacturers and distributors of opioids. The Staff denied Walgreens' request, stating that "we are

⁹ Union Pacific Corp. (Feb. 25, 2008)

¹⁰ PetSmart Inc. (Mar. 24, 2011)

¹¹ No-Action Request, at 2

¹² No-Action Request, at 7

¹³ No-Action Request, at 7

¹⁴ The TJX Companies Inc. (Apr. 9, 2020)

¹⁵ Walgreens Boots Alliance (Nov. 20, 2018)

unable to conclude that this particular proposal is not sufficiently significant to the Company's business operations such that exclusion would be appropriate.”

In any event, there is no question that worker health and safety is a significant issue for Kroger. As the Proposal highlights, aggregate OSHA penalties levied against Kroger have increased significantly in the past 10 years. Kroger tries to downplay the significance of the issue by touting recent safety improvements, claiming: “[I]n 2023, Kroger improved safety performance company-wide versus the prior year. Key metrics show improvement in company-wide OSHA reportable injuries, which declined 7.2%, driven by a 9.3% reduction in injuries in supermarket operations, which is reflective of the Company’s declining trend in OSHA reportable injuries in supermarket operations over the last 14 years.”¹⁶

Based on an analysis of the Injury Tracking Application (ITA) data reported to OSHA,¹⁷ Kroger-owned establishments reported 2,991 injuries and illnesses in 2023, a 5% increase over the 2,849 injuries and illnesses that were reported in 2022. It is unclear whether the discrepancy between the figures Kroger cites in the No-Action Request and the data available on the OSHA website is due to the latter’s inclusion of illnesses along with injuries while the former apparently excludes them, or whether Kroger is making a distinction between “reportable injuries” and the injuries and illnesses that were actually reported to OSHA. As the Proposal is concerned with all of the potential health and safety risks facing employees at Kroger—including injuries and illnesses—the Foundation views the OSHA data as more on point than Kroger’s.

As well, the Foundation notes that the OSHA data indicating a 5% increase in illnesses and injuries from 2022 to 2023 also shows that this increase occurred during a period when total hours worked and average annual employees declined by 7% and 1.6%, respectively (see table below). This suggests that the actual frequency of injuries and illnesses was increasing at a rate that was higher than 5% during this period. The Proposal’s supporting statement recommends that the requested audit analyze whether the reduction in staffing shown by this data undermines efforts to keep workers safe.

<u>Kroger ITA data</u>	<u>2022</u>	<u>2023</u>	<u>% change</u>
Injuries & illnesses	2,849	2,991	5.0%
Total hours worked	531,912,327	494,514,556	-7.0%
Avg annual employees	376,729	370,669	-1.6%

The apparent discrepancy between the numbers Kroger cites in the No-Action Request and the data available on the OSHA website reinforces the need for the independent audit on the impact of the company's policies and practices on the safety and well-being of workers sought in the Proposal.

Worker health and safety is a significant issue for the grocery industry more generally. Grocery workers have “especially high rates” of musculoskeletal disorders (“MSDs”).¹⁸ One study found the prevalence of MSDs in a medium-sized grocery chain to be 78%, with the majority

¹⁶ No-Action Request, at 3

¹⁷ <https://www.osha.gov/Establishment-Specific-Injury-and-Illness-Data>

¹⁸ <https://www.sciencedirect.com/science/article/abs/pii/S0169814116300415#>

experiencing lower back and foot symptoms.¹⁹ A majority of cashiers in another study reported MSD symptoms in at least one body region, most commonly the neck and lower back.²⁰ Indeed, “cashiers are among the top 10 occupations with a heightened susceptibility to [MSDs].”²¹ Eighty-eight percent of grocery material handlers--those involved in receiving, stocking, and moving products—reported experiencing lower back pain in the previous year.²²

Finally, a March 2025 survey of grocery workers²³ found lasting impacts from the COVID-19 pandemic. Workers reported negative mental health effects persisting long after the pandemic ended, including PTSD, in addition to physical impairment from long COVID. They also described post-pandemic short-staffing as contributing to work-related stress.

Because the Proposal addresses a significant social policy issue for the Company, Kroger has not met its burden of showing that it is entitled to exclude the Proposal in reliance on Rule 14a-8(i)(7), and the Proponent respectfully asks that its request be denied.

* * *

The Foundation appreciates the opportunity to be of assistance in this matter. If you have any questions or need additional information, please don't hesitate to contact me at (212) 787-7300.

Sincerely,



Laura Campos

cc: Lyuba Goltser
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¹⁹ <https://www.sciencedirect.com/science/article/abs/pii/S0169814116300415#>

²⁰ <https://pmc.ncbi.nlm.nih.gov/articles/PMC7763189/>

²¹ <https://www.mdpi.com/2313-576X/10/1/21>

²² <https://iopscience.iop.org/article/10.1088/1757-899X/226/1/012027>

²³ <https://www.ufcw770.org/news-internal/5thanniversaryofcovid03102025>