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

DIVISION OF
CORPORATION FINANCE

April 8, 2024

Ronald O. Mueller
Gibson, Dunn & Crutcher LLP

Re: Lowe's Companies, Inc. (the "Company")
Incoming letter dated January 26, 2024

Dear Ronald O. Mueller:

This letter is in response to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by National Center for Public Policy Research for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

The Proposal requests that the board of directors adopt a policy, and amend the bylaws if and as necessary, requiring directors to disclose their expected allocation of hours among all formal commitments set forth in the director's official bio on a weekly, monthly, or annual basis.

There appears to be some basis for your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, the Proposal seeks to micromanage the Company. Accordingly, we will not recommend enforcement action to the Commission if the Company omits the Proposal from its proxy materials in reliance on Rule 14a-8(i)(7). In reaching this position, we have not found it necessary to address the alternative basis for omission upon which the Company relies.

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/2023-2024-shareholder-proposals-no-action.

Sincerely,

Rule 14a-8 Review Team

cc: Scott Shepard
National Center for Public Policy Research

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January 26, 2024

VIA ONLINE PORTAL SUBMISSION

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 National Center for Public Policy Research
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 2024 Annual Meeting of Shareholders (collectively, the "2024 Proxy Materials") a shareholder proposal (the "Proposal") and statement in support thereof (the "Supporting Statement") received from the National Center for Public Policy Research (the "Proponent").

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

- filed this letter with the Securities and Exchange Commission (the "Commission") no later than eighty (80) calendar days before the Company intends to file its definitive 2024 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.

THE PROPOSAL

The Proposal, which is captioned "Board of Directors Accountability and Transparency Amendment," states:

> **RESOLVED**
>
> Shareholders request the Board of Directors to adopt a policy, and amend the bylaws if and as necessary, requiring Company directors to disclose their expected allocation of hours among all formal commitments set forth in the director's official bio. Allocation may be on a weekly, monthly, or annual basis. This policy would be phased in for the next election of directors in 2025.

A copy of the Proposal and the Supporting Statement, as well as related correspondence with the Proponent, is attached to this letter as Exhibit A.

BASES FOR EXCLUSION

We hereby respectfully request that the Staff concur in our view that the Proposal may be excluded from the 2024 Proxy Materials pursuant to:

- Rule 14a-8(b) and Rule 14a-8(f)(1) because the Proponent failed to provide the requisite proof of continuous stock ownership in response to the Company's proper request for that information; and
- Rule 14a-8(i)(7) because the Proposal deals with a matter relating to the Company's ordinary business operations and the Proposal seeks to micromanage the Company.

ANALYSIS

I. The Proposal May Be Excluded Under Rule 14a-8(b) And Rule 14a-8(f)(1) Because The Proponent Failed To Establish Eligibility To Submit The Proposal Despite Proper Notice

A. Background Facts

The Proposal was submitted to the Company by Stefan Padfield on behalf of the Proponent on December 12, 2023 (the "Submission Date") via FedEx and received by the Company on December 13, 2023. *See* Exhibit A. Mr. Padfield's submission did not include any

documentary evidence of the Proponent's ownership of Company shares. In addition, the Company reviewed its stock records, which did not indicate that the Proponent was a record owner of Company shares. Accordingly, the Company properly sought verification of stock ownership and other documentary support from the Proponent. Specifically, the Company sent the Proponent a letter, dated December 27, 2023, identifying a proof of ownership deficiency, notifying the Proponent of the requirements of Rule 14a-8 and explaining how the Proponent could cure the procedural deficiencies identified (the "First Deficiency Notice").

The First Deficiency Notice, attached hereto as Exhibit B, provided detailed information regarding the "record" holder requirements, as clarified by Staff Legal Bulletin No. 14F (Oct. 18, 2011) ("SLB 14F") and Staff Legal Bulletin No. 14L (Nov. 3, 2021) ("SLB 14L"), and attached a copy of Rule 14a-8, SLB 14F and SLB 14L. Specifically, the First Deficiency Notice stated:

- the ownership requirements of Rule 14a-8(b);
- that, according to the Company's stock records, the Proponent was not a record owner of sufficient Company shares;
- that, as of the date of the First Deficiency Notice, the Company had not received any documentation evidencing the Proponent's proof of continuous ownership, as required under Rule 14a-8(b);
- the type of statement or documentation necessary to demonstrate beneficial ownership under Rule 14a-8(b), including "a written statement from the 'record' holder of the Proponent's shares (usually a broker or a bank) confirming its status as the 'record' holder of the Proponent's shares and verifying that, at the time the Proponent submitted the Proposal (the Submission Date), the Proponent continuously held through the record holder the requisite amount of Company shares to satisfy at least one of the [o]wnership [r]equirements" of Rule 14a-8(b);
- that, "if the Proponent's shares were held by more than one 'record' holder over the course of the applicable one-, two-, or three-year ownership period, then confirmation of ownership must be obtained from each record holder with respect to the time during which it held the shares on the Proponent's behalf, and those documents must collectively demonstrate the Proponent's continuous ownership of sufficient shares to satisfy at least one of the [o]wnership [r]equirements" of Rule 14a-8(b); and
- that any response had to be postmarked or transmitted electronically no later than 14 calendar days from the date the Proponent received the First Deficiency Notice.

The Company sent the First Deficiency Notice to the Proponent via email and UPS overnight delivery on December 27, 2023, which was within 14 calendar days of the Company's receipt of the Proposal. *See* Exhibit B.

Subsequently, on January 1, 2024, the Company received an email from Stefan Padfield, on behalf of the Proponent (the "First Response Email"), stating, "[p]lease find attached our proof of ownership." *See* Exhibit C. Attached to the email were (1) a letter from Wells Fargo Advisors dated December 27, 2023 (the "Wells Fargo Letter"), and (2) a letter from UBS Financial Services Inc. dated December 4, 2023 (the "UBS Letter"). The Wells Fargo Letter stated:

> As of December 27, 2023, the National Center for Public Policy Research holds, and has held continuously since December 11, 2020, more than $2,000 of Lowe's Companies Inc common stock. This continuous ownership was established as part of the cost-basis data that UBS transferred to us along with this and other NCPPR holdings. This information routinely transfers when assets are transferred. Wells Fargo N.A. is record owner of these shares.

The Wells Fargo Letter did not contain any indication that Wells Fargo Advisors or Wells Fargo N.A. were affiliated with UBS or were otherwise authorized to speak on behalf of UBS, and did not confirm that Wells Fargo Advisors or Wells Fargo N.A. had continuously served as record holder for the Proponent of sufficient shares to satisfy at least one of the ownership requirements of Rule 14a-8(b). The UBS Letter stated:

> Please accept this letter as a confirmation of the following facts:
>
> - During the month of October 2023, the National Center for Public Policy Research transferred assets, including 95 individual equity positions, from UBS Financial Services account [redacted] to Wells Fargo account [redacted].
>
> - As part of this transfer UBS Financial Services transmitted cost basis data, including purchase date and purchase price, for each of these 95 equity positions transferred to Wells Fargo.
>
> - UBS has reviewed a copy of the October 2023 Wells Fargo statement for account [redacted] and has confirmed the original purchase dates and purchase prices which were transmitted by UBS Financial Services to Wells Fargo are being accurately and correctly reported on this statement.

As discussed in more detail below, the Wells Fargo Letter and the UBS Letter (collectively, the "Financial Institution Letters"), both individually and collectively, are insufficient to cure the ownership deficiency because they are not statements from the

record holders of the Proponent's securities verifying that as of the Submission Date the Proponent had satisfied any of the continuous ownership requirements of Rule 14a-8(b)(1) for any of the full time periods set forth in the rule (specifically, the three-year holding period as the Financial Institution Letters purport to verify holdings of "more than $2,000").

Accordingly, the Company again properly sought verification of share ownership from the Proponent. Specifically, and in accordance with SLB 14L, on January 5, 2024, which was within 14 calendar days of the Company's receipt of the Financial Institution Letters, the Company sent a second deficiency notice (the "Second Deficiency Notice") via email and UPS overnight delivery to the Proponent, which explained that the Financial Institution Letters did not cure the previously identified proof of ownership deficiency, reiterated the requirements of Rule 14a-8, and explained how the Proponent could cure the procedural deficiency. *See* Exhibit D. The Second Deficiency Notice also included a copy of Rule 14a-8, SLB 14F and SLB 14L. Specifically, the Second Deficiency Notice stated:

> The Wells Fargo Letter is insufficient to satisfy proof of ownership under Rule 14a-8. Specifically, the Wells Fargo Letter does not confirm that Wells Fargo Advisors has been the "record" holder of the Proponent's shares continuously during all or a specific portion of the full three-year time period preceding and including the Submission Date. By stating that it relies on "cost-basis data" provided by UBS, the Wells Fargo Letter suggests that UBS was the "record" holder for some unspecified portion of the three years preceding and including the Submission Date.
>
> . . .
>
> The UBS Letter does not confirm that UBS has been the "record" holder of Company shares on behalf of the Proponent continuously during all or any portion of the three-year period preceding and including the Submission Date. Thus, both individually and collectively the Wells Fargo Letter and the UBS Letter are insufficient to satisfy proof of ownership under Rule 14a-8 because they fail to verify the Proponent's continuous ownership of sufficient shares to satisfy at least one of the Ownership Requirements.
>
> To remedy this defect, the Proponent must obtain new proof of ownership verifying that such Proponent has satisfied at least one of the Ownership Requirements. As explained in Rule 14a-8(b) and in SEC staff guidance, sufficient proof must be in the form of either:
>
> (1) a written statement from the "record" holder of the Proponent's shares (usually a broker or a bank) confirming its status as the "record" holder of the

> Proponent's shares and verifying that, at the time the Proponent submitted the Proposal (the Submission Date), the Proponent continuously held through the record holder the requisite amount of Company shares to satisfy at least one of the Ownership Requirements above; . . .
>
> As explained in the [First] Deficiency Notice, if the Proponent's shares were held by more than one "record" holder over the course of the applicable one-, two-, or three-year ownership period, then confirmation of ownership needs to be obtained from each record holder with respect to the time during which it held the shares on the Proponent's behalf, and those documents must collectively demonstrate the Proponent's continuous ownership of sufficient shares to satisfy at least one of the Ownership Requirements.

On January 5, 2024, the Company received an email from Mr. Padfield stating, "[t]he Wells Fargo Letter satisfies our obligation to prove the requisite ownership. Accordingly, we will not be providing any additional proof-of-ownership documentation." *See* Exhibit E. On January 9, 2024, the Company received another email from Mr. Padfield stating, "[f]ollowing up on the below: We are willing to consider providing additional proof of ownership if you can identify precisely the information that you claim to lack, the provision of SEC or Staff rules that require us to provide you that information in that form, and its practical relevance to establishing that we've owned the requisite stock for the relevant three years." *See* Exhibit F. However, the Second Deficiency Notice fully addressed and provided information on each of these points, including specifically addressing the actions necessary to cure the deficiency.

As of the date of this letter, the Company has not received any further proof of ownership from the Proponent.

B. Rule 14a-8(b)(1)

The Company may exclude the Proposal under Rule 14a-8(f)(1) because the Proponent failed to substantiate its eligibility to submit the Proposal under Rule 14a-8(b). Rule 14a-8(b)(1) provides, in part, that to be eligible to submit a proposal, a shareholder proponent must have continuously held:

> (A) at least $2,000 in market value of the company's securities entitled to vote on the proposal for at least three years preceding and including the Submission Date;
>
> (B) at least $15,000 in market value of the company's securities entitled to vote on the proposal for at least two years preceding and including the Submission Date; or

(C) at least $25,000 in market value of the company's shares entitled to vote on the proposal for at least one year preceding and including the Submission Date.

Each of these ownership requirements were specifically described by the Company in both the First Deficiency Notice and the Second Deficiency Notice.

Rule 14a-8(f) provides that a company may exclude a shareholder proposal if the proponent fails to provide evidence of eligibility under Rule 14a-8, including the beneficial ownership requirements of Rule 14a-8(b), provided that the company timely notifies the proponent of the problem and the proponent fails to correct the deficiency within the required time. Staff Legal Bulletin No. 14 (Jul. 13, 2001) ("SLB 14") specifies that when the shareholder is not the registered holder, the shareholder "is responsible for proving his or her eligibility to submit a proposal to the company," which the shareholder may do by one of the ways provided in Rule 14a-8(b)(2). *See* Section C.1.c, SLB 14.

SLB 14F explains that proof of ownership letters may fail to satisfy Rule 14a-8(b)(1)'s requirement if they do not verify ownership "for the entire one-year period preceding and including the date the proposal [was] submitted." This may occur if the letter verifies ownership as of a date before the submission date (leaving a gap between the verification date and the submission date) or if the letter "fail[s] to verify the [shareholder's] beneficial ownership over the required full one-year period preceding the date of the proposal's submission." SLB 14F. SLB 14F further notes, "The shareholder will need to obtain proof of ownership from the DTC participant through which the securities are held."[1] The guidance in SLB 14F remains applicable even though Rule 14a-8 has since been amended to provide the tiered ownership thresholds described above. In each case, consistent with the Staff's guidance in SLB 14F and as required by Rule 14a-8(b), a shareholder proponent must submit adequate proof from the record holder of its shares demonstrating such proponent's continuous ownership of the requisite amount of company shares for the requisite time period.

As discussed in the "Background" section above, the Financial Institution Letters, taken together or separately, do not satisfy what SLB 14F describes as the "highly prescriptive" requirements of Rule 14a-8(b), and the Proposal may therefore be excluded. After receiving the Financial Institution Letters, the Company timely provided the Second Deficiency Notice, which, consistent with SLB 14L, identified the specific defects in the

[1] In Staff Legal Bulletin No. 14G (Oct. 16, 2012), the Staff stated its view that a proof of ownership letter from an affiliate of a DTC participant satisfies the requirement to provide a proof of ownership letter from a DTC participant since the affiliate should be in a position to verify its customers' ownership of securities "by virtue of the affiliate relationship."

Proponent's proof of ownership submissions and described how the deficiencies could be remedied. Thereafter, the Proponent failed to timely correct the deficiency.

C. The Financial Institution Letters Fail To Cure The Deficiency Because The Financial Institution Letters Fail To Demonstrate Continuous Ownership Of Company Shares For The Requisite Period

The Financial Institution Letters are insufficient because they do not satisfy Rule 14a-8(b)(2)(ii)'s requirement of a written statement from the "record" holder of the Proponent's securities demonstrating that as of the Submission Date the Proponent had satisfied one of the ownership requirements of Rule 14a-8(b). Specifically, the Wells Fargo Letter confirms that Wells Fargo N.A. is the record holder of the Proponent's Company shares, but does not confirm that Wells Fargo N.A. has been the record holder of the Proponent's shares continuously for the entire period purportedly covered by the letter (i.e., December 11, 2020 through December 27, 2023). In fact, the Wells Fargo Letter explicitly states that the duration of the holdings discussed in the letters is based on information obtained from UBS. As such, Wells Fargo Advisors has failed to provide adequate documentation confirming that it or one of its affiliates has been the record holder of the Proponent's shares continuously for a period sufficient to satisfy one of the ownership requirements of Rule 14a-8(b) and it has not otherwise shown that it is authorized or in a position to independently verify the Proponent's ownership for purposes of Rule 14a-8 with respect to the period during which Wells Fargo N.A. was not the record holder of the Proponent's shares.[2]

Notably, the UBS Letter itself does not provide any identifying information regarding the issuers of the 95 securities purportedly covered, the number of shares purportedly held, or the duration of the purported holdings. In fact, the UBS Letter only purports to verify that the "October 2023 Wells Fargo statement for account [redacted]" accurately reflects the "original purchase dates and purchase prices which were transmitted by UBS Financial Services to Wells Fargo." The UBS Letter does not attach the October 2023 Wells Fargo statement for account [redacted] However, even if the UBS Letter included such an account statement, the Staff has consistently stated that account statements are insufficient to demonstrate continuous ownership. *See* SLB 14 (noting that a shareholder's monthly, quarterly or other periodic investment statements are insufficient to demonstrate continuous ownership of securities). Moreover, the UBS Letter does not address the Proponent's holding of the Company's shares as it does not identify any of the 95 companies in which the Proponent previously held shares at UBS Financial Services.

[2] Although the Wells Fargo Letter states that it is relying on "cost-basis data that UBS transferred to us," that statement does not address the standards of continuous ownership for purposes of Rule 14a-8 and does not indicate that Wells Fargo is authorized to make representations on behalf of UBS regarding the Proponent's ownership of shares.

Finally, the UBS Letter does not confirm that Wells Fargo is authorized to make representations regarding the Proponent's ownership of shares on UBS's behalf.

In this situation, as explained in both the First Deficiency Notice and the Second Deficiency Notice, each record holder must provide proof of ownership for the period in which they held the shares. The Staff has consistently concurred with the exclusion of proposals pursuant to Rule 14a-8(b) and Rule 14a-8(f)(1) where, after receiving proper notice from a company, the proof of ownership submitted failed to establish that as of the date the shareholder submitted the proposal the shareholder had continuously held the requisite amount of company securities for the entire required period. *See Amazon.com, Inc. (Phyllis Ewen Trust)* (avail. Apr. 3, 2023) (concurring in the exclusion of a shareholder proposal when the proponent provided proof of ownership of company shares that covered a holding period of only 122 days); *see also Starbucks Corp.* (avail. Dec. 11, 2014) (concurring with the exclusion of a proposal where the proponent's proof established continuous ownership of company securities for one year as of September 26, 2014, but the proponent submitted the proposal on September 24, 2014); *PepsiCo, Inc. (Albert)* (avail. Jan. 10, 2013) (concurring with the exclusion under Rule 14a-8(b) and Rule 14a-8(f) of a proposal where the proponent's purported proof of ownership covered the one-year period up to and including November 19, 2012, but the proposal was submitted on November 20, 2012); *Union Pacific Corp.* (avail. Mar. 5, 2010) (letter from broker stating ownership for one year as of November 17, 2009 was insufficient to prove continuous ownership as of November 19, 2009); *The McGraw Hill Companies, Inc.* (avail. Jan. 28, 2008) (letter from broker stating ownership for one year as of November 16, 2007 was insufficient to prove continuous ownership for one year as of November 19, 2007).

When a proponent's shares were transferred during the applicable holding period, the proponent can satisfy Rule 14a-8(b)'s requirement to provide sufficient proof of continuous ownership by submitting letters from each record holder demonstrating that there was no interruption in the proponent's chain of ownership. For example, in *Associated Estates Realty Corp.* (avail. Mar. 17, 2014), the proponent submitted letters from its introducing broker and the two record holders that held the proponent's shares during the previous one-year period. The first record holder's letter confirmed that the proponent's account held the company's securities "until December 7, 2012 on which dates the [s]hares were transferred out," and the second record holder's letter confirmed that it "became the registered owner . . . on December 7, 2012 . . . when the shares were transferred . . . at the behest of [the proponent] as a broker to broker transfer between accounts . . . ." Similarly, in *Bank of America Corp.* (avail. Feb. 29, 2012), the proponent provided proof of ownership of the company's shares by submitting letters from TD Ameritrade, Inc. and Charles Schwab & Co. The TD Ameritrade letter confirmed ownership of the company's shares "from December 03, 2009 to April 21, 2011," and the

Charles Schwab letter confirmed that the company's shares "have been held in this account continuously since April 21, 2011." *See also Moody's Corp.* (avail. Jan. 29, 2008) (the proponent's continuous ownership of the company's stock was verified by two letters, with the first letter stating that "[a]ll securities were transferred from Morgan Stanley on November 8, 2007" and the second letter stating that the proponent transferred the company's securities into his account on November 8, 2007); *Eastman Kodak Co.* (avail. Feb. 19, 2002) (the proponent provided letters from Merrill Lynch & Co., Inc. and Salomon Smith Barney Inc. to demonstrate his continuous ownership, with the Merrill Lynch letter stating that the proponent's shares were "transferred to Salomon Smith Barney Inc. on 09-28-2001" and the Salomon Smith Barney letter confirming that the shares were "transferred over from Merrill Lynch on 09/28/01"); *Comshare, Inc.* (avail. Sept. 5, 2001) (the proponent demonstrated sufficient ownership in response to the company's deficiency notice by providing two broker letters, with one letter stating that the proponent owned at least $2,000 of the company's stock "from March 30, 2000 until March 26, 2001 when the account was transferred to Charles Schwab," and the second letter stating that the proponent has held the shares "continuously at Charles Schwab & Co., Inc. since March 26, 2001 to present").

In this instance, consistent with the foregoing precedent, the Proponent was required to provide documentary evidence from each record holder verifying that the end date of the first record holder's holding period matched the start date of the second record holder's holding period, showing that the Proponent maintained continuous ownership throughout the three-year period despite the change in record holders. As such, the Proponent has not demonstrated eligibility under Rule 14a-8 to submit the Proposal because the Proponent failed to provide adequate documentary evidence of ownership of Company shares notwithstanding that the Second Deficiency Notice reiterated the requirements of Rule 14a-8 and explained how the Proponent could cure the procedural deficiency. Accordingly, we ask that the Staff concur that the Company may exclude the Proposal under Rule 14a-8(b) and Rule 14a-8(f)(1).

II. The Proposal May Be Excluded Under Rule 14a-8(i)(7) Because The Proposal Relates To The Company's Ordinary Business Operations

A. Rule 14a-8(i)(7)

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. *Id.* The first of those considerations is 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 concerns "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.* (citing Exchange Act Release No. 12999 (Nov. 22, 1976) (the "1976 Release")).

B. The Proposal May Be Excluded Because Its Subject Matter Relates To Outside Director Activities That Are Not Otherwise Subject To Any Disclosure Rules

The Proposal seeks detailed, personal, and extraneous information on how directors allocate their time among each of their professional activities outside of their service on the Company's Board of Directors (the "Board"). Specifically, the Proposal requests that the Board adopt a policy requiring directors to disclose their expected allocation of hours among all formal commitments set forth in their official biographies, which may be disclosed on a weekly, monthly, or annual basis. The Proposal does not address to whom or where the directors' disclosures are to be made, but the Supporting Statement asserts that, by adopting the Proposal, "the Company can provide material information" and "can allow shareholders to make fully informed decisions regarding the ability of the Company's directors to devote sufficient time to their important duties."

The Staff has repeatedly concurred with the exclusion under Rule 14a-8(i)(7) of proposals that, like the Proposal, seek disclosure of information regarding director activities when that information is not otherwise required to be disclosed under the applicable disclosure requirements of the Securities Exchange Act of 1934, as amended (the "Exchange Act") and rules and regulations promulgated by the Commission and the applicable exchange (together, the "Disclosure Rules"). For example, in *NSTAR* (avail. Jan. 4, 2005), the proposal requested that the company publish in its proxy statement information concerning the personal investments of each member of the board of trustees (the equivalent of the board of directors because the company was a public trust), including for each investment, the company, number of shares, and industry, as well as how each trustee voted his or her personal investments over the past year. The proponent in *NSTAR* argued in the supporting statement that this information was relevant to voting decisions of company shareholders and should consequently be disclosed. In response, the company argued that "[d]isclosure of highly personal information about directors that is [beyond the scope of what is required

by the applicable rules and] completely unrelated to the company's operations, such as the information requested by the [*NSTAR*] [p]roposal, is exactly the type of information the regulatory agencies have determined is best left to the discretion of the board or warrants omission. In other words, these bodies have effectively placed such decisions, including the subject matter of the [p]roposal, within the [c]ompany's ordinary business operations." The Staff concurred with exclusion of the proposal under Rule 14a-8(i)(7) as relating to the company's "ordinary business operations (i.e., the presentation of certain investment information in reports to shareholders)."

Similarly, in *Chittenden Corp.* (avail. Mar. 10, 1987), the proposal requested, among other things, the disclosure in the proxy materials of each director nominee's "beneficial ownership of stock in other business enterprises such as banks, utilities, insurance companies, and the like, as well as partnerships and solely owned businesses." The company argued that the decision to require additional disclosure of information "of questionable value to shareholders" outside of what is required by the Commission's Regulation S-K should be a decision left to the company's board of directors. The Staff agreed and concurred with the exclusion of the proposal under Rule 14a-8(c)(7), noting that the proposal "appear[ed] to deal with matters relating to the conduct of the [c]ompany's ordinary business operations (i.e., decisions regarding the disclosure of biographical information not required by law . . .)."[3]

Furthermore, the Staff has concurred with the exclusion of proposals regarding director or nominee activities and time commitment under Rule 14a-8(i)(7). For example, in *American Electric Power Co.* (avail. Jan. 27, 2003) the Staff concurred with the exclusion of a proposal under Rule 14a-8(i)(7) requiring that each director expend a minimum of twenty

[3] Similarly, the Staff has consistently concurred with the exclusion of proposals requesting additional accounting and financial disclosures or relating to the presentation of such disclosures in filings with the Commission to be excludable under Rule 14a-8(i)(7) as relating to ordinary business. For example, in *AmerInst Insurance Group, Ltd. (Kimball)* (avail. Apr. 14, 2005), the proposal requested that the board of directors provide "a full, complete and adequate disclosure of the accounting, each calendar quarter, of the line items and amounts of Operating and Management expenses" disclosed in the financial statements filed in the company's quarterly reports. In addition, the proponent's supporting statement argued that while the company "may be in compliance with the minimum disclosure requirements required for [the Commission's] purposes, [the] shareholders are interested in, and entitled to, significant detail by which to gauge [the company's] management of [shareholders'] investment." The company argued that the proposal requested financial reporting "in far greater detail than required by GAAP or applicable disclosure standards" and that the "decision relating to the level of detail disclosed in the [c]ompany's financial statements is a part of the [c]ompany's ordinary business operations." The Staff concurred with the exclusion of the proposal under Rule 14a-8(i)(7), finding that the proposal related to "ordinary business operations [of the company] (i.e., presentation of financial information)." *See also NiSource Inc.* (avail. Mar. 10, 2003) (concurring with the exclusion of a proposal under Rule 14a-8(i)(7) requesting disclosure of certain financial information of the company's subsidiaries in its annual report beyond what was required under the applicable Commission rules).

hours each month to attend and prepare for formal monthly board meetings, noting that it related to the company's "ordinary business operations (i.e., restriction on activities of directors)". *See also Naugatuck Valley Financial Corp.* (avail. Feb. 28, 2013) (*recon. denied* Mar. 26, 2013) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal requiring more frequent board meetings); *McKesson Corp.* (avail. Apr. 1, 2004) (concurring with the exclusion of a proposal under Rule 14a-8(i)(7) requesting that the company prepare a report regarding the actions taken by the board and all committees in the prior year, noting that the proposal related to the company's "ordinary business operations (i.e., reporting on board actions related to McKesson's ordinary business operations)"); *Time Warner Inc. (AFSCME Employees Pension Plan)* (avail. Feb. 13. 2004) (same).

The Disclosure Rules are designed to provide investors with information material to investment and voting decisions, including information about directors and director nominees. As the company argued in *NSTAR*, to the extent that the Disclosure Rules do not require disclosure of specific information regarding a company's directors or nominees, "the applicable rulemaking bodies have determined that either i) disclosure of additional information is best left to the discretion of the board as part of its ordinary business operations; or ii) a compelling reason (e.g. confidentiality) warrants its exclusion." Moreover, there are strong policy considerations underlying the Staff's position to treat proposals requesting voluntary disclosure as relating to ordinary business matters. For example, in the context of the Proposal, the Commission's rules require line item disclosures regarding certain biographical and other information relating to directors and director nominees, and also require disclosure of any other material information regarding those individuals.[4] The amount of non-material information that could be provided regarding directors is almost limitless, and could easily obscure the information required under the Disclosure Rules. The fact that the Proponent might find such information of interest does not remove it from the Company's ordinary business.

As with the proposals in *NSTAR* and *Chittenden*, the Proposal requests disclosure of detailed, personal and extraneous information on directors' outside activities that does not directly bear on their service on the Board. The Proposal is not directed at or limited to information on the amount of time that directors devote to Board matters, and because it applies to each director and all of their formal commitments—including for example their principal occupation—the Proposal is not directed at directors who under some definition might be considered "overboarded." As such, the speculative information requested by the Proposal regarding directors' allocation of time among all of their formal commitments

[4] *See* Regulation S-K Item 401(e)(1) ("If material, this disclosure should cover more than the past five years, including information about the person's particular areas of expertise or other relevant qualifications."); Exchange Act Rule 14a-9, which states that a proxy statement may not omit any material fact necessary in order to make the statements therein not false or misleading.

involves highly detailed and personal information about directors that is at most tangentially related to their Board service and is not required to be disclosed under the Disclosure Rules. Whether the Board, when evaluating its director nominees for Board service, goes beyond confirming that the directors are able to devote sufficient time and attention to Board matters and in addition requests information about the expected allocation of their time among their other activities, and whether the Board determines to disclose such information when not required under the Disclosure Rules, are matters that the Company and its Board are best suited to determine, and are not the sort of matters that shareholders are in a position to assess. Therefore, in accordance with *NSTAR* and other precedent cited above, because the Proposal seeks disclosure of director activities beyond what is otherwise required by the already detailed Disclosure Rules, the information requested by the Proposal falls within the Company's ordinary business matters.

C. 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 initially articulated in 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."). Moreover, as Staff precedent has established, merely referencing topics in passing that might raise significant policy issues in other contexts, but which do not define the scope of actions addressed in a proposal and which have only tangential implications for the issues that constitute the central focus of a proposal, does not transform an otherwise ordinary business proposal into one that transcends ordinary business.

The Staff most recently discussed its interpretation of how it will evaluate whether a proposal "transcends the day-to-day business matters" of a company in SLB 14L, stating that it is "realign[ing]" its approach to determining whether a proposal relates to ordinary business with the standards the Commission initially articulated in 1976 and reaffirmed in the 1998 Release. In addition, the Staff stated that it will "no longer tak[e] a company-specific approach to evaluating the significance of a policy issue under Rule 14a-8(i)(7)"

but rather will consider only "whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company." The Staff also stated that, under its new approach, proposals "previously viewed as excludable because they did not appear to raise a policy issue of significance for the company may no longer be viewed as excludable under Rule 14a-8(i)(7)" and 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 does not focus on issues with a broad societal impact that transcends the Company's ordinary business. Rather, as discussed above, the Proposal seeks disclosure of how directors expect to allocate their time among the activities set forth in their biographies. While the Supporting Statement mentions "overboarding," the Proposal would apply to every director regardless of how many, if any, board commitments he or she has. Likewise, while the Supporting Statement mentions the time commitment appropriate for serving on a board, the Proposal seeks information on directors' expected time commitments as to each of the other "formal commitments" listed in their biographies. As such, the Staff's guidance in SLB 14L does not affect the excludability of the Proposal because the Proposal does not raise significant policy issue or focus on any other issue "with a broad societal impact" such that it transcends ordinary business matters.

We are aware that the Staff has been unable to concur with the exclusion of proposals under Rule 14a-8(i)(7) where the proposals related to director qualifications. *See, e.g.*, *Apple Inc.* (avail. Dec. 4, 2018) (proposal requesting a policy to disclose minimum qualifications that must be met by a nominee for director and each nominee's skills, ideological perspectives, and experience presented in a chart or matrix form); *Exxon Mobil Corp.* (avail. Mar. 20, 2018) ("*Exxon Mobil 2018*") (proposal requesting disclosure of each director's/nominee's gender and race/ethnicity, as well as skills, experience and attributes that are most relevant in light of the company's overall business, long-terms strategy and risks); *American International Group, Inc.* (avail. Mar. 6, 2013) (proposal requesting adoption of a bylaw amendment to limit directors to a maximum of three board memberships in companies with sales in excess of $500 million annually). In each of those instances, the proposals directly related to qualifications to serve as director—i.e., information about how directors' skills, experience and attributes relate to their board service, diversity considerations, and imposition of a specific limit on overboarding.[5] Here,

[5] Each of these topics involves matters directly related to the information that is required to be disclosed under the Disclosure Rules. In particular, Item 401(e)(1) of Regulation S-K requires disclosure of "the specific experience, qualifications, attributes or skills that led to the conclusion that the person should serve as a director for the registrant at the time that the disclosure is made, in light of the registrant's

the Proposal is distinguishable from *Apple* and *Exxon Mobil 2018* because the Proposal relates specifically to disclosure of information that is not directly relevant to directors' service on the Board,[6] and instead involves highly detailed and personal information on how each director expects to allocate his or her time among each of his or her outside commitments. The Proposal also is distinguishable from the proposal in *American International Group*, which sought to impose a numerical limit on the directorships a director could hold, whereas here the Proposal would apply regardless of the number of outside commitments listed in a director's biography, and regardless of whether such commitments involve service as director on other corporate boards.[7]

In contrast to *Apple*, *Exxon Mobil 2018* and *American International Group*, the Proposal is comparable to the proposal considered in *Exxon Mobil Corp. (Hild)* (avail. Mar. 24, 2023) ("*Exxon Mobil 2023*"). That proposal requested that management report to shareholders annually regarding all interviews, speeches, writings or other significant communications relating to the company given by members of the board of directors to the media or public. The company argued that although the proposal's "supporting statement references, in passing, concerns about directors acting 'extraneous to their financial duty,' in part based on isolated comments made to the media by one director about climate change goals and energy transition plans," "the [p]roposal's focus [was] not on the nature of fiduciary duties, climate change or any other social policy issue, but rather on the request for shareholder oversight of [b]oard communications," and that "the thrust of the [p]roposal concerns decision-making around public statements made by the [b]oard about the [c]ompany." The Staff concurred with the exclusion of the proposal under Rule 14a-8(i)(7), noting that the proposal "relate[d] to, and [did] not transcend, ordinary business matters." Similarly, while the Proposal touches on directors' activities, it does not transcend the Company's ordinary business operations and, as with the proposal in *Exxon Mobil 2023*, the Proposal may be excluded under Rule 14a-8(i)(7).

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business and structure"; Item 401(e)(2) of Regulation S-K requires disclosure of "any other directorships held, including any other directorships held during the past five years, held by each director or person nominated or chosen to become a director in any company . . . naming such company"; and Item 407(c)(2)(vi) of Regulation S-K requires disclosure of "whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director" and "[i]f the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, . . . how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy."

[6] To the extent that the Proposal could be read to require disclosure that includes directors' expected allocation of time to their service on the Board, the Proposal is not limited to or focused on such information and requires disclosure that goes well beyond such information.

[7] Notably, the Support Statement states that "it is certainly true that not all, or even most, of these competing commitments involve service as a director on other corporate boards (though many do)."

D. The Proposal Is Excludable Because It Seeks To Micromanage The Company

The 1998 Release states that micromanagement "may come into play in a number of circumstances, such as where the proposal involves intricate detail, or seeks to impose specific . . . methods for implementing complex policies." In SLB 14L, the Staff stated that not all "proposals seeking detail or seeking to promote timeframes" constitute micromanagement, and that going forward the Staff "will focus on the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management." To that end, the Staff stated that this "approach is consistent with the Commission's views on the ordinary business exclusion, *which is designed to preserve management's discretion on ordinary business matters* but not prevent shareholders from providing *high-level direction* on large strategic corporate matters." SLB 14L (emphasis added).[8]

In SLB 14L, the Staff also stated that, in order to assess whether a proposal probes matters that are "too complex" for shareholders, as a group, to make an informed judgment, it may consider, among other things, "the robustness of public discussion and analysis on the topic" and "references to well-established national or international frameworks when assessing proposals related to disclosure." *Id.*

In assessing whether a proposal seeks to micromanage a company's ordinary business operations, the Staff evaluates not just the wording of the proposal but also the action called for by the proposal and the manner in which the action called for under a proposal would affect a company's activities and management discretion. *See, e.g.*, *GameStop Corp. (Chiocchio)* (avail. Apr. 25, 2023) (concurring with the exclusion of a proposal requesting the company provide detailed and current information regarding shareholder ownership of the company to the public and also provide a searchable history of this information, noting

[8] While, as discussed above, the Proposal does not focus on a significant social policy issue that transcends the Company's ordinary business operations, a proposal may be excluded under Rule 14a-8(i)(7) if it seeks to micromanage a company regardless of whether it focuses on a significant policy issue or topic that transcends a company's ordinary business. *See* Staff Legal Bulletin No. 14E (Oct. 27, 2009), at note 8, citing the 1998 Release for the standard that "a proposal [that raises a significant policy issue] could be excluded under Rule 14a-8(i)(7), however, if it 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." For example, since the issuance of SLB 14L, the Staff concurred with the exclusion of proposals addressing how companies interact with their shareholders on significant social policy issues because the proposals sought to micromanage how the companies addressed those policy issues. *See The Kroger Co. (Domini Impact Equity Fund)* (avail. Apr. 25, 2023) (concurring with the exclusion of a proposal that micromanaged the company even though the objective of the proposal was to "mitigate severe risks of forced labor and other human rights violations in the [c]ompany's produce supply chain"); *Amazon.com* (avail. Apr. 7, 2023), *recon. denied* (avail. Apr. 20, 2023) (concurring with the exclusion of a proposal addressing climate change goals due to micromanagement); *Chubb Limited (Green Century Equity Fund)* (avail. Mar. 27, 2023) (same).

that the proposal "seeks to micromanage the [c]ompany"); *Verizon Communications, Inc.* (*National Center for Public Policy Research*) (avail. Mar. 17, 2022) (concurring with the exclusion of a proposal requesting the company to annually publish the written and oral content of diversity, inclusion, equity, or related employee-training materials because it probed too deeply into matters of a complex nature); *Deere & Co.* (avail. Jan. 3, 2022) and *The Coca-Cola Co.* (avail. Feb. 16, 2022) (both involving a broadly phrased request that required detailed and intrusive actions to implement). Moreover, "granularity" is only one factor evaluated by the Staff. As stated in SLB 14L, the Staff focuses "on the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management."

In this instance, the Proposal seeks to micromanage the Company by seeking detailed, personal, and extraneous information on how directors allocate their time among other outside commitments. By seeking disclosure of such information, the Proposal probes too deeply into matters that are not appropriate for shareholder consideration. It does so by requesting that the Board adopt a policy to require disclosure of each director's expected allocation of hours among all of the formal commitments set forth in the director's official biography. This request is inappropriate and goes well beyond the type of information that shareholders need in order to be able to assess directors' ability to fulfill their responsibility for service on the Board, and does not conform with any well-established framework for assessing directors.[9] Indeed, the undersigned is not aware of any public company that requires its directors to disclose such detailed and personal information.

Additionally, as discussed above, the Disclosure Rules govern the Company's disclosure of information related to its directors. By requiring additional, extremely detailed and personal information about the Company's directors beyond what is required by the

[9] In this regard, institutional investors, proxy advisory firms and companies have a variety of policies on the topic of director commitments, and proxy advisory firms and institutional investors have reasonable levels of information on which to make voting recommendations or decisions that do not involve the type of information requested in the Proposal. See, for example:

- Institutional Shareholder Services 2023 United States Proxy Voting Guidelines, at 12, available at https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf?v=1;
- Glass Lewis 2024 Benchmark Policy Guidelines – United States, at 32-3, available at https://www.glasslewis.com/wp-content/uploads/2023/11/2024-US-Benchmark-Policy-Guidelines-Glass-Lewis.pdf?hsCtaTracking=104cfc01-f8ff-4508-930b-b6f46137d7ab%7C3a769173-3e04-4693-9107-c57e17cca9f6;
- BlackRock Investment Stewardship – Proxy voting guidelines for U.S. securities (effective January 2024), at 5, available at https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf; and
- Vanguard's Proxy voting policy for U.S. portfolio companies (effective February 1, 2023), at 6, available at https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/policies-and-reports/us_proxy_voting_2023.pdf.

Disclosure Rules and beyond what the Company has decided to voluntarily disclose, the Proposal seeks to micromanage these disclosures by mandating publication of immaterial and extraneous details of directors' outside activities. The Proposal therefore does not provide "*high-level direction* on large strategic corporate matters" (emphasis added) but instead takes a granular approach, requiring detailed and intrusive actions to implement, and probing into matters that are too complex for shareholders, as a group, to assess. Accordingly, the Proposal seeks to micromanage the Company and is therefore excludable under Rule 14a-8(i)(7) on micromanagement grounds.

CONCLUSION

Based upon the foregoing analysis, the Company intends to exclude the Proposal from its 2024 Proxy Materials, and we respectfully request that the Staff concur that the Proposal may be excluded under Rule 14a-8.

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

Sincerely,

Ronald O. Mueller

Enclosures

cc: Beth R. MacDonald, Esq., Lowe's Companies, Inc.
Stefan Padfield, National Center for Public Policy Research

EXHIBIT A

NATIONAL CENTER
FOR PUBLIC POLICY RESEARCH

December 12, 2023

Via FedEx to

Corporate Secretary
Lowe's Companies, Inc.
1000 Lowes Boulevard
Mooresville, North Carolina 28117

Dear Corporate Secretary,

I hereby submit the enclosed shareholder proposal ("Proposal") for inclusion in the Lowe's Companies, Inc. (the "Company" or "Lowe's") proxy statement to be circulated to Company shareholders in conjunction with the next annual meeting of shareholders. The Proposal is submitted under Rule 14(a)-8 (Proposals of Security Holders) of the United States Securities and Exchange Commission's proxy regulations.

I submit the Proposal as an Associate of the Free Enterprise Project of the National Center for Public Policy Research, which has continuously owned Company stock with a value exceeding $2,000 for at least 3 years prior to and including the date of this Proposal and which intends to hold these shares through the date of the Company's 2024 annual meeting of shareholders. A proof of ownership letter is available upon request.

Pursuant to interpretations of Rule 14(a)-8 by the Securities & Exchange Commission staff, I initially propose as a time for a telephone conference to discuss this proposal Jan. 4, 2024, or Jan. 5, 2024, from 9-11:59 a.m. eastern. If that proves inconvenient, I hope you will suggest some other times to talk. Please feel free to contact me at [redacted] so that we can determine the mode and method of that discussion.

Copies of correspondence or a request for a "no-action" letter should be sent to me at the National Center for Public Policy Research, 2005 Massachusetts Ave. NW, Washington, DC 20036 and emailed to [redacted]

Sincerely,

Stefan Padfield

cc: Scott Shepard, FEP Director
Enclosures: Shareholder Proposal

Board of Directors Accountability and Transparency Amendment

RESOLVED

Shareholders request the Board of Directors to adopt a policy, and amend the bylaws if and as necessary, requiring Company directors to disclose their expected allocation of hours among all formal commitments set forth in the director's official bio. Allocation may be on a weekly, monthly, or annual basis. This policy would be phased in for the next election of directors in 2025.

SUPPORTING STATEMENT

Overboarding is an issue specifically addressed by proxy advisors Independent Shareholder Services and Glass Lewis, as well as asset managers BlackRock, Vanguard, and State Street, with none of them recommending more than six board commitments per director.[1] Relatedly, it has been found that "companies with overboarded directors performed worse compared to companies with no overboarded directors."[2] In addition, the oversight duties of directors continue to require significant attention, with a McKinsey interview asserting that even as far back as 2014, "if a potential director can't put in 300 to 350 hours a year, she shouldn't take the job."[3] Meanwhile, potential liability for failures of oversight are significant, with relevant litigation from a few years ago related to Boeing including "US$20 billion in non-litigation costs and more than US$2.5 billion in litigation costs."[4]

Meanwhile, a review of the Company's director bios reveals multiple cases of formal commitments exceeding five, with at least two apparently as high as eight.[5] While it is certainly true that not all, or even most, of these competing commitments involve service as a director on other corporate boards (though many do), the commitments must nonetheless be assumed to be material or else their inclusion in the bios would be potentially misleading.

A related article provides an example of the type of material information this proposal seeks. It involves the case of an individual sitting on four boards in addition to serving as a CEO (at least two Lowe's directors are also CEOs with six or more other commitments). Based on various reasonable assumptions, the article concludes that such an individual "should apparently be working 90.5 hours per week or 13 hours per day Monday thru Sunday."[6] The article goes on to ask:

> [S]hould shareholders really have to perform back-of-the-envelope calculations … to determine whether their directors are reasonably

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[1] https://corpgov.law.harvard.edu/2023/09/25/2023-corporate-governance-developments/
[2] https://corpgov.law.harvard.edu/2019/08/05/director-overboarding-global-trends-definitions-and-impact/
[3] https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/are-you-getting-all-you-can-from-your-board-of-directors
[4] https://www.klgates.com/Approval-of-US2375-Million-Settlement-in-Boeing-Derivative-Action-Demonstrates-Impact-of-Section-220-Demand-in-ESG-Litigation-3-23-2022
[5] https://corporate.lowes.com/investors/corporate-governance/board-of-directors
[6] https://www.newsmax.com/finance/streettalk/woke-capitalism-board-directors/2023/08/24/id/1131957/

> likely to be devoting appropriate time to a job that is supposedly at the heart of a corporation's governance and for which the director is being well-compensated (it has been reported that the average 2022 compensation for an S&P 500 director was $316,091)?[7]

By adopting this proposal, the Company can provide material information that shareholders should not have to, and may not be able to, ferret out themselves. Specifically, the Company can allow shareholders to make fully informed decisions regarding the ability of the Company's directors to devote sufficient time to their important duties.

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[7] Id.

EXHIBIT B

From: Abshez, Natalie <NAbshez@gibsondunn.com>
Sent: Wednesday, December 27, 2023 1:43 PM
To: Stefan Padfield [redacted]
Cc: Mueller, Ronald O. <RMueller@gibsondunn.com>
Subject: Lowe's Companies, Inc. - Deficiency Notice (National Center for Public Policy and Research)

Mr. Padfield,

On behalf of Lowe's Companies, Inc., attached please find correspondence regarding the shareholder proposal you submitted on behalf of National Center for Public Policy and Research. A paper copy of this correspondence is being delivered to you via UPS as well.

We would appreciate you kindly confirming receipt of this correspondence.

Best,

Natalie

Natalie Abshez (She/her/hers)
Associate Attorney

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Ronald O. Mueller
Direct: +1 202.955.8671
Fax: +1 202.530.9569
RMueller@gibsondunn.com

December 27, 2023

VIA OVERNIGHT MAIL AND EMAIL
Stefan Padfield
National Center for Public Policy Research
2005 Massachusetts Ave. NW
Washington, DC 20036
[redacted]

Dear Mr. Padfield:

I am writing on behalf of Lowe's Companies, Inc. (the **"Company"**), which received on December 13, 2023, the shareholder proposal entitled "Board of Directors Accountability and Transparency Amendment" that you submitted via FedEx on December 12, 2023 (the **"Submission Date"**) for inclusion in the proxy statement for the Company's 2024 Annual Meeting of Shareholders on behalf of the National Center for Public Policy Research (the **"Proponent"**) pursuant to Securities and Exchange Commission (**"SEC"**) Rule 14a-8 (the **"Proposal"**).

The Proposal contains certain procedural deficiencies, which SEC regulations require us to bring to your attention and which you and the Proponent should correct as described below if the Company is to consider the Proponent to have properly submitted the Proposal. Rule 14a-8(b) under the Securities Exchange Act of 1934, as amended, provides that a shareholder proponent must submit sufficient proof of its continuous ownership of company shares preceding and including the submission date. Thus, with respect to the Proposal, Rule 14a-8 requires that the Proponent demonstrate that the Proponent has continuously owned at least:

(1) $2,000 in market value of the Company's shares entitled to vote on the Proposal for at least three years preceding and including the Submission Date;

(2) $15,000 in market value of the Company's shares entitled to vote on the Proposal for at least two years preceding and including the Submission Date; or

(3) $25,000 in market value of the Company's shares entitled to vote on the Proposal for at least one year preceding and including the Submission Date (each an **"Ownership Requirement,"** and collectively, the **"Ownership Requirements"**).

The Company's stock records do not indicate that the Proponent is the record owner of sufficient shares to satisfy any of the Ownership Requirements. In addition, to date the

Company has not received proof that the Proponent has satisfied any of the Ownership Requirements.

To remedy this defect, the Proponent must submit sufficient proof that such Proponent has satisfied at least one of the Ownership Requirements. As explained in Rule 14a-8(b) and in SEC staff guidance, sufficient proof must be in the form of either:

(1) a written statement from the "record" holder of the Proponent's shares (usually a broker or a bank) confirming its status as the "record" holder of the Proponent's shares and verifying that, at the time the Proponent submitted the Proposal (the Submission Date), the Proponent continuously held through the record holder the requisite amount of Company shares to satisfy at least one of the Ownership Requirements above; or

(2) if the Proponent was required to and has filed with the SEC a Schedule 13D, Schedule 13G, Form 3, Form 4 or Form 5, or amendments to those documents or updated forms, demonstrating that the Proponent met at least one of the Ownership Requirements above, a copy of the schedule and/or form, and any subsequent amendments reporting a change in the ownership level and a written statement that the Proponent continuously held the requisite amount of Company shares to satisfy at least one of the Ownership Requirements above.

If the Proponent's shares were held by more than one "record" holder over the course of the applicable one-, two-, or three-year ownership period, then confirmation of ownership must be obtained from each record holder with respect to the time during which it held the shares on the Proponent's behalf, and those documents must collectively demonstrate the Proponent's continuous ownership of sufficient shares to satisfy at least one of the Ownership Requirements.

If the Proponent intends to demonstrate ownership by submitting a written statement from the "record" holder of the Proponent's shares as set forth in (1) above, please note that most large U.S. brokers and banks deposit their customers' securities with, and hold those securities through, the Depository Trust Company (**"DTC"**), a registered clearing agency that acts as a securities depository (DTC is also known through the account name of Cede & Co.). Under SEC Staff Legal Bulletin No. 14F, only DTC participants are viewed as record holders of securities that are deposited at DTC. You can confirm whether the Proponent's broker or bank is a DTC participant by asking the Proponent's broker or bank or by checking DTC's participant list, which is available at https://www.dtcc.com/-/media/Files/Downloads/client-center/DTC/DTC-Participant-in-Alphabetical-Listing-1.pdf. If a shareholder's shares are held through DTC, the shareholder needs to obtain and submit to the Company proof of ownership from the DTC participant through which the securities are held, as follows:

(1) If the Proponent's broker or bank is a DTC participant, then the Proponent needs to obtain and submit a written statement from the Proponent's broker or bank verifying that the Proponent continuously held the requisite amount of Company shares to satisfy at least one of the Ownership Requirements above.

(2) If the Proponent's broker or bank is not a DTC participant, then the Proponent needs to obtain and submit proof of ownership from the DTC participant through which the shares are held verifying that the Proponent continuously held the requisite amount of Company shares to satisfy at least one of the Ownership Requirements above. You should be able to find out the identity of the DTC participant by asking the Proponent's broker or bank. If the Proponent's broker is an introducing broker, you may also be able to learn the identity and telephone number of the DTC participant through the Proponent's account statements, because the clearing broker identified on the account statements will generally be a DTC participant. If the DTC participant that holds the Proponent's shares is not able to confirm the Proponent's individual holdings but is able to confirm the holdings of the Proponent's broker or bank, then the Proponent needs to satisfy the proof of ownership requirements by obtaining and submitting two proof of ownership statements verifying that the Proponent continuously held Company shares satisfying at least one of the Ownership Requirements above: (i) one from the Proponent's broker or bank confirming the Proponent's ownership, and (ii) the other from the DTC participant confirming the broker or bank's ownership.

The SEC's rules require that any response to this letter be postmarked or transmitted electronically no later than 14 calendar days from the date you receive this letter. Please address any response to me at 1050 Connecticut Avenue, N.W., Washington, DC 20036-5306. Alternatively, you may transmit any response by email to me at rmueller@gibsondunn.com. Please note that the SEC's staff has stated that a proponent is responsible for confirming our receipt of any correspondence transmitted in response to this letter.

If you have any questions with respect to the foregoing, please contact me at (202) 955-8671. For your reference, I enclose a copy of Rule 14a-8, Staff Legal Bulletin No. 14F and Staff Legal Bulletin No. 14L.

Sincerely,

Ronald O. Mueller

Enclosures

EXHIBIT C

From: Stefan Padfield [redacted]
Sent: Monday, January 1, 2024 8:39 AM
To: Abshez, Natalie <NAbshez@gibsondunn.com>
Cc: Mueller, Ronald O. <RMueller@gibsondunn.com>
Subject: Re: Lowe's Companies, Inc. - Deficiency Notice (National Center for Public Policy and Research)

[WARNING: External Email]

Please find attached our proof of ownership. Please confirm receipt.

Regards,

Stefan

Stefan J. Padfield, JD

Deputy Director

Free Enterprise Project

National Center for Public Policy Research

https://nationalcenter.org/ncppr/staff/stefan-padfield/

WELLS FARGO **Advisors**

1650 Tysons Boulevard
Suite 500
McLean, Virginia 22102

Tel: 703.893.5700
Fax: 703.448.0406

12/27/2023

National Center for Public Policy Research Inc
2005 Massachusetts Avenue NW
Washington DC 20036-1030

RE: Verification of Assets for Account Number ending in [redacted]

To Whom It May Concern:

In connection with your recent request regarding the verification of certain information about your investment account relationship with Wells Fargo Clearing Services, LLC ("Wells Fargo Advisors"), we are providing this letter as confirmation that:

(i) You maintain a Brokerage Cash Service account with Wells Fargo Advisors, number ending in [redacted]

(ii) As of December 27, 2023, the National Center for Public Policy Research holds, and has held continuously since December 11, 2020, more than $2,000 of Lowe's Companies Inc common stock. This continuous ownership was established as part of the cost-basis data that UBS transferred to us along with this and other NCPPR holdings. This information routinely transfers when assets are transferred. Wells Fargo N.A. is record owner of these shares.

This letter is provided for informational purposes and does not represent future Account value, if this said Account will remain with Wells Fargo Advisors in the future, any purposes not mentioned in this letter, or the creditworthiness of the person(s) referenced within. Wells Fargo Advisors will have no liability with any party's reliance on this letter or the information within. This report is not the official record of your account. However, it has been prepared to assist you with your investment planning and is for informational purposes only. Your Wells Fargo Advisors Client Statement is the official record of your account. Therefore, if there are any discrepancies between this report and your Client Statement, you should rely on the Client Statement and call your local Sales Location Manager with any questions. Cost data and acquisition dates provided by you are not verified by Wells Fargo Advisors. Transactions requiring tax consideration should be reviewed carefully with your accountant or tax advisor. Unless otherwise indicated, market prices/values are the most recent closing prices available at the time of this report and are subject to change. Prices may not reflect the value at which securities could be sold. Past performance does not guarantee future results.

Sincerely,

David A. Bos
Senior Vice President - Investments
Branch Manager – Private Client Group
[redacted]

Investment and Insurance Products are:

- **Not Insured by the FDIC or Any Federal Government Agency**
- **Not a Deposit or Other Obligation of, or guaranteed by, the Bank or Any Bank Affiliate**
- **Subject to Investment Risks, Including Possible Loss of the Principal Amount Invested**

UBS Financial Services Inc.
1000 Harbor Blvd
3rd Floor
Weehawken, NJ 07086

ubs.com/fs

Confirmation

National Center for Public Policy Research
2005 Massachusetts Ave NW
Washinton, DC 20036

12/4/2023

Confirmation: Information regarding the account of The National Center for Public Policy Research

Dear Sir,

Please accept this letter as a confirmation of the following facts:

- During the month of October 2023, the National Center for Public Policy Research transferred assets, including 95 individual equity positions, from UBS Financial Services account [redacted] to Wells Fargo account [redacted]
- As part of this transfer UBS Financial Services transmitted cost basis data, including purchase date and purchase price, for each of these 95 equity positions transferred to Wells Fargo.
- UBS has reviewed a copy of the October 2023 Wells Fargo statement for account [redacted] and has confirmed the original purchase dates and purchase prices which were transmitted by UBS Financial Services to Wells Fargo are being accurately and correctly reported on this statement.

Questions
If you have any questions about this information, please contact the UBS Wealth Advice Center at 877-827-7870.

Sincerely,

Evan Yeaw
Head Wealth Advice Center Operations
UBS Financial Services

EXHIBIT D

From: Abshez, Natalie <NAbshez@gibsondunn.com>
Sent: Friday, January 5, 2024 11:23 AM
To: Stefan Padfield [redacted]
Cc: Mueller, Ronald O. <RMueller@gibsondunn.com>
Subject: Lowe's Companies, Inc. - Second Deficiency Notice (National Center for Public Policy Research)

Mr. Padfield,

On behalf of Lowe's Companies, Inc., attached please find follow-up correspondence regarding the shareholder proposal you submitted on behalf of National Center for Public Policy Research. A paper copy of this correspondence will be delivered to you via UPS as well.

We would appreciate you kindly confirming receipt of this correspondence.

Best,

Natalie

Natalie Abshez (She/her/hers)
Associate Attorney

T: +1 415.393.4649 | M: +1 202.768.2268
NAbshez@gibsondunn.com

GIBSON DUNN
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1050 Connecticut Avenue, N.W.
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Ronald O. Mueller
Direct: +1 202.955.8671
Fax: +1 202.530.9569
RMueller@gibsondunn.com

January 5, 2024

VIA OVERNIGHT MAIL AND EMAIL
Stefan Padfield
National Center for Public Policy Research
2005 Massachusetts Ave. NW
Washington, DC 20036
[redacted]

Dear Mr. Padfield:

I am writing on behalf of Lowe's Companies, Inc. (the **"Company"**), which on December 13, 2023, received the shareholder proposal entitled "Board of Directors Accountability and Transparency Amendment" that you submitted via FedEx on December 12, 2023 (the **"Submission Date"**) on behalf of the National Center for Public Policy Research (the **"Proponent"**) for inclusion in the proxy statement for the Company's 2024 Annual Meeting of Shareholders pursuant to Securities and Exchange Commission (**"SEC"**) Rule 14a-8 (the **"Proposal"**). In the deficiency notice the Company sent you on December 27, 2023, we notified you of the requirements of Rule 14a-8 and how to cure the procedural deficiencies associated with the Proposal (the **"Deficiency Notice"**). The purpose of this second deficiency notice is to notify you of the defects associated with the response you provided by email on January 1, 2024, which included letters from Wells Fargo Advisors, dated December 27, 2023 (the **"Wells Fargo Letter"**) and UBS Financial Services Inc., dated December 4, 2023 (the "**UBS Letter**").

As previously noted in the Deficiency Notice, Rule 14a-8(b) under the Securities Exchange Act of 1934, as amended, provides that a shareholder proponent must submit sufficient proof of its continuous ownership of company shares preceding and including the submission date. Thus, with respect to the Proposal, Rule 14a-8 requires that the Proponent demonstrate that the Proponent has continuously owned at least:

(1) $2,000 in market value of the Company's shares entitled to vote on the Proposal for at least three years preceding and including the Submission Date;

(2) $15,000 in market value of the Company's shares entitled to vote on the Proposal for at least two years preceding and including the Submission Date; or

(3) $25,000 in market value of the Company's shares entitled to vote on the Proposal for at least one year preceding and including the Submission Date (each an **"Ownership Requirement,"** and collectively, the **"Ownership Requirements"**).

The Company's stock records do not indicate that the Proponent is the record owner of sufficient shares to satisfy any of the Ownership Requirements. In addition, to date the Company has not received adequate proof that the Proponent has satisfied any of the Ownership Requirements. In this regard, we note that the Wells Fargo Letter asserts the following:

> "(i) [the Proponent] maintain[s] a Brokerage Cash Service account with Wells Fargo Advisors, number ending in [redacted]
>
> (ii) As of December 27, 2023, the National Center for Public Policy Research holds, and has held continuously since December 11, 2020, more than $2,000 of Lowe's Companies Inc common stock. This continuous ownership was established as part of the cost-basis data that UBS transferred to us along with this and other NCPPR holdings. This information routinely transfers when assets are transferred. Wells Fargo N.A. is record owner of these shares.

The Wells Fargo Letter is insufficient to satisfy proof of ownership under Rule 14a-8. Specifically, the Wells Fargo Letter does not confirm that Wells Fargo Advisors has been the "record" holder of the Proponent's shares continuously during all or a specific portion of the full three-year time period preceding and including the Submission Date. By stating that it relies on "cost-basis data" provided by UBS, the Wells Fargo Letter suggests that UBS was the "record" holder for some unspecified portion of the three years preceding and including the Submission Date.

The UBS Letter states the following:

> Please accept this letter as a confirmation of the following facts:
>
> - During the month of October 2023, the National Center for Public Policy Research transferred assets, including 95 individual equity positions, from UBS Financial Services account [redacted] to Wells Fargo account [redacted]
> - As part of this transfer UBS Financial Services transmitted cost basis data, including purchase date and purchase price, for each of these 95 equity positions transferred to Wells Fargo.
> - UBS has reviewed a copy of the October 2023 Wells Fargo statement for account [redacted] and has confirmed the original purchase dates and purchase prices which were transmitted by UBS Financial Services to Wells Fargo are being accurately and correctly reported on this statement.

The UBS Letter does not confirm that UBS has been the "record" holder of Company shares on behalf of the Proponent continuously during all or any portion of the three-year period preceding and including the Submission Date. Thus, both individually and collectively the

Wells Fargo Letter and the UBS Letter are insufficient to satisfy proof of ownership under Rule 14a-8 because they fail to verify the Proponent's continuous ownership of sufficient shares to satisfy at least one of the Ownership Requirements.

To remedy this defect, the Proponent must obtain new proof of ownership verifying that such Proponent has satisfied at least one of the Ownership Requirements. As explained in Rule 14a-8(b) and in SEC staff guidance, sufficient proof must be in the form of either:

(1) a written statement from the "record" holder of the Proponent's shares (usually a broker or a bank) confirming its status as the "record" holder of the Proponent's shares and verifying that, at the time the Proponent submitted the Proposal (the Submission Date), the Proponent continuously held through the record holder the requisite amount of Company shares to satisfy at least one of the Ownership Requirements above; or

(2) if the Proponent was required to and has filed with the SEC a Schedule 13D, Schedule 13G, Form 3, Form 4 or Form 5, or amendments to those documents or updated forms, demonstrating that the Proponent met at least one of the Ownership Requirements above, a copy of the schedule and/or form, and any subsequent amendments reporting a change in the ownership level and a written statement that the Proponent continuously held the requisite amount of Company shares to satisfy at least one of the Ownership Requirements above.

As explained in the Deficiency Notice, if the Proponent's shares were held by more than one "record" holder over the course of the applicable one-, two-, or three-year ownership period, then confirmation of ownership needs to be obtained from each record holder with respect to the time during which it held the shares on the Proponent's behalf, and those documents must collectively demonstrate the Proponent's continuous ownership of sufficient shares to satisfy at least one of the Ownership Requirements.

If the Proponent intends to demonstrate ownership by submitting a written statement from the "record" holder of the Proponent's shares as set forth in (1) above, please note that most large U.S. brokers and banks deposit their customers' securities with, and hold those securities through, the Depository Trust Company (**"DTC"**), a registered clearing agency that acts as a securities depository (DTC is also known through the account name of Cede & Co.). Under SEC Staff Legal Bulletin No. 14F, only DTC participants are viewed as record holders of securities that are deposited at DTC. You can confirm whether the Proponent's broker or bank is a DTC participant by asking the Proponent's broker or bank or by checking DTC's participant list, which is available at https://www.dtcc.com/-/media/Files/Downloads/client-center/DTC/DTC-Participant-in-Alphabetical-Listing-1.pdf. If a shareholder's shares are held through DTC, the shareholder needs to obtain and submit to the Company proof of ownership from the DTC participant through which the securities are held, as follows:

(1) If the Proponent's broker or bank is a DTC participant, then the Proponent needs to obtain and submit a written statement from the Proponent's broker or bank verifying that the Proponent continuously held the requisite amount of Company shares to satisfy at least one of the Ownership Requirements above.

(2) If the Proponent's broker or bank is not a DTC participant, then the Proponent needs to obtain and submit proof of ownership from the DTC participant through which the shares are held verifying that the Proponent continuously held the requisite amount of Company shares to satisfy at least one of the Ownership Requirements above. You should be able to find out the identity of the DTC participant by asking the Proponent's broker or bank. If the Proponent's broker is an introducing broker, you may also be able to learn the identity and telephone number of the DTC participant through the Proponent's account statements, because the clearing broker identified on the account statements will generally be a DTC participant. If the DTC participant that holds the Proponent's shares is not able to confirm the Proponent's individual holdings but is able to confirm the holdings of the Proponent's broker or bank, then the Proponent needs to satisfy the proof of ownership requirements by obtaining and submitting two proof of ownership statements verifying that the Proponent continuously held Company shares satisfying at least one of the Ownership Requirements above: (i) one from the Proponent's broker or bank confirming the Proponent's ownership, and (ii) the other from the DTC participant confirming the broker or bank's ownership.

The SEC's rules require that any response to this letter be postmarked or transmitted electronically no later than 14 calendar days from the date you receive this letter. Please address any response to me at 1050 Connecticut Avenue, N.W., Washington, DC 20036-5306. Alternatively, you may transmit any response by email to me at rmueller@gibsondunn.com. Please note that the SEC's staff has stated that a proponent is responsible for confirming our receipt of any correspondence transmitted in response to this letter.

If you have any questions with respect to the foregoing, please contact me at (202) 955-8671. For your reference, I enclose a copy of Rule 14a-8, Staff Legal Bulletin No. 14F and Staff Legal Bulletin No. 14L.

Sincerely,

Ronald O. Mueller

Enclosures

EXHIBIT E

From: Stefan Padfield [redacted]
Sent: Friday, January 5, 2024 1:50 PM
To: Abshez, Natalie <NAbshez@gibsondunn.com>
Cc: Mueller, Ronald O. <RMueller@gibsondunn.com>
Subject: Re: Lowe's Companies, Inc. - Second Deficiency Notice (National Center for Public Policy Research)

[WARNING: External Email]

Thank you, Natalie.

The Wells Fargo Letter satisfies our obligation to prove the requisite ownership. Accordingly, we will not be providing any additional proof-of-ownership documentation.

Regards,
Stefan

Stefan J. Padfield, JD
Deputy Director
Free Enterprise Project
National Center for Public Policy Research
https://nationalcenter.org/ncppr/staff/stefan-padfield/

EXHIBIT F

From: Stefan Padfield [redacted]
Sent: Tuesday, January 9, 2024 7:19 AM
To: Abshez, Natalie <NAbshez@gibsondunn.com>
Cc: Mueller, Ronald O. <RMueller@gibsondunn.com>
Subject: Re: Lowe's Companies, Inc. - Second Deficiency Notice (National Center for Public Policy Research)

[WARNING: External Email]

Following up on the below: We are willing to consider providing additional proof of ownership if you can identify precisely the information that you claim to lack, the provision of SEC or Staff rules that require us to provide you that information in that form, and its practical relevance to establishing that we've owned the requisite stock for the relevant three years.

Regards,
Stefan

Stefan J. Padfield, JD
Deputy Director
Free Enterprise Project
National Center for Public Policy Research
https://nationalcenter.org/ncppr/staff/stefan-padfield/

February 22, 2024

Via Online Shareholder Proposal Form

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

Re: No-Action Request from Lowe's Companies, Inc., Regarding Shareholder Proposal by the National Center for Public Policy Research ("Proponent")

Ladies and Gentlemen:

This correspondence is in response to the letter of Ronald O. Mueller on behalf of Lowe's Companies, Inc. (the "Company" or "Lowe's") dated January 26, 2024, requesting that your office (the "Commission" or "Staff") take no action if the Company omits our shareholder proposal (the "Proposal") from its 2024 proxy materials for its 2024 annual shareholder meeting.

RESPONSE TO THE COMPANY'S CLAIMS

Our Proposal asks the Company to:

> [A]dopt a policy, and amend the bylaws if and as necessary, requiring Company directors to disclose their expected allocation of hours among all formal commitments set forth in the director's official bio. Allocation may be on a weekly, monthly, or annual basis. This policy would be phased in for the next election of directors in 2025.

The Company seeks to exclude the Proposal from the 2024 Proxy Materials pursuant to Rule 14a-8(b) and Rule 14a-8(f)(1) because the Proponent failed to provide the requisite proof of continuous stock ownership in response to the Company's proper request for that information, and pursuant to Rule 14a-8(i)(7) because the Proposal deals with a matter relating to the Company's ordinary business operations and the Proposal seeks to micromanage the Company.

Under Rule 14a-8(g), the Company bears the burden of persuading the Staff that it may omit our Proposal. The Company has failed to meet that burden.

Rule 14a-8(k) and Section E of Staff Legal Bulletin No. 14D (Nov. 7, 2008) provide that companies are required to send proponents a copy of any correspondence that they elect to submit to the Commission

or the Staff. Accordingly, we remind the Company that if it were to submit correspondence to the Commission or the Staff or individual members thereof with respect to our Proposal or this proceeding, a copy of that correspondence should concurrently be furnished to us.

I. Sequence of Arguments

A. Proof of Ownership

To the best knowledge of Proponent, the portion of the Company's no-action request ("NAR") dealing with proof of ownership is substantively identical to one or more of the following NARs, each of which was submitted by the Company's counsel, Gibson, Dunn & Crutcher LLP, on behalf of the identified clients.

- NAR dated December 30, 2023, submitted on behalf of United Parcel Service, Inc. ("UPS NAR").
- NAR dated January 1, 2024, submitted on behalf of The Kraft Heinz Company ("Kraft NAR").
- NAR dated January 3, 2024, submitted on behalf of PepsiCo, Inc. ("Pepsi NAR").
- NAR dated January 5, 2024, submitted on behalf of General Electric Company ("GE NAR").
- NAR dated January 17, 2024, submitted on behalf of Intel Corporation ("Intel NAR").
- NAR dated January 19, 2024, submitted on behalf of Chevron Corporation ("Chevron NAR").

Accordingly, and in the interest of efficiency, we are attaching here as Appendix I our reply to the UPS NAR. Other than one additional issue discussed below in the paragraph below, Proponent's substantive proof-of-ownership arguments in response to the Company's NAR are fully set forth in Appendix I, and any related factual discrepancies are immaterial beyond the following: The relevant Wells Fargo Letter here, dated December 26, 2023, stated unambiguously that: "As of December 27, 2023, the National Center for Public Policy Research holds, and has held continuously since December 11, 2020, more than $2,000 of Lowe's Companies Inc common stock."[1]

The Company attempts to make much of the fact that Wells Fargo and UBS are not affiliates. However, this is irrelevant because (1) Wells Fargo is the record holder of Proponent's shares, (2) Wells Fargo has unambiguously affirmed Proponent satisfies the relevant holding period, (3) the UBS Letter was provided solely as a courtesy, and (4) neither Wells Fargo nor UBS ever claimed to be affiliated with each other. In other words, status as an affiliate would be relevant if an entity other than the record holder was attempting to prove the requisite ownership, but it is irrelevant here because Wells Fargo is the record holder, Wells Fargo has established the requisite ownership, and no other entity is attempting to speak on behalf of Wells Fargo as an affiliate.

B. Ordinary Business

The Company's argument that the Proposal is excludable because it impermissibly deals with a matter relating to the Company's ordinary business operations is addressed in Part II below.

C. Constitutional and Administrative Law Concerns

Arguments related to the constitutional and administrative law concerns that would arise should the Staff grant no-action relief are addressed in Part III below.

[1] A copy of the relevant Wells Fargo Letter can be found attached as Exhibit C of the Company's NAR.

II. The Proposal Deals with Overboarding, Which Is an Issue the SEC Has Repeatedly Declined to Exclude as Ordinary Business.

A. Ordinary Business

In *American International Group, Inc.* (Mar. 6, 2013), the Staff concluded that the subject matter of overboarding limits relates to director qualifications and is generally not excludable as ordinary business. The analysis should stop there because there is nothing about our proposal that transforms it into anything other than a non-excludable proposal dealing with director qualifications. The Company's arguments to the contrary are unavailing.

The Company tries to distinguish *American International Group, Inc.* (Mar. 6, 2013), which found non-excludable a proposal to limit directors to serving on three boards, by arguing that our proposal "relates specifically to disclosure of information that is not directly relevant to directors' service on the Board, and instead involves highly detailed and personal information on how each director expects to allocate his or her time among each of his or her outside commitments." (The Company also attempts to distinguish *Apple Inc.* (avail. Dec. 4, 2018) and *Exxon Mobil Corp.* (avail. Mar. 20, 2018) on this basis.)

There are two major problems with the Company's argument here. First, directors are subject to a duty of care that requires them to become informed of all material information reasonably available in connection with their decision-making, and this makes the issue of a director's time commitments directly relevant to the director's service on a board because it is impossible to satisfy the duty of care in good faith if one is over-committed. Second, the Company is apparently arguing that listing outside commitments in a director's bio does not involve disclosing highly detailed and personal information, but it suddenly becomes a bridge too far when shareholders ask the very obvious follow-up question about how the director is going to allocate their time across all these commitments – many of which are likely considered full time commitments in their own right. Either these commitments are material, in which case shareholders should be entitled to know how the director intends to manage those competing time commitments without undermining their duty to the Company – or they are immaterial, in which case listing them in the bio raises an issue of misleading disclosures.

Asking how a director plans to meet all the commitments listed in a bio is an obvious question that likely no employer would ignore. Given that the Company's directors work for the Company's shareholders, the question is similarly obviously related to director qualifications. As a recent post on the *Harvard Law School Forum on Corporate Governance* put it: "As board responsibilities grow, so has the focus on director bandwidth; directors should be realistic about their bandwidth when considering new opportunities for board service."[2] Accordingly: "Board roles that may require additional time, such as the board chair and audit committee chair, are now being taken into account when determining whether a director is overboarded."[3]

B. Micromanagement

[2] Martin Lipton, *Thoughts for Boards: Key Issues in Corporate Governance for 2024*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Jan. 3, 2024), https://corpgov.law.harvard.edu/2024/01/03/thoughts-for-boards-key-issues-in-corporate-governance-for-2024/ .
[3] Id .

Our proposal does not constitute micromanagement. Making sure there are enough hours in the day to satisfy the commitments one is taking on is one of the most basic tasks of daily living. Either the Company's directors have already calendared their commitments to ensure they aren't over-extended, or they may be breaching their fiduciary duty to the Company, which requires them to have the time to be able to digest all material information necessary to do their job. Even if the allocation of hours is indeed a new exercise, there is nothing extremely intricate or of a complex nature involved. If directors don't even have a few minutes to ask an assistant to make some estimates of how much time they spend on each of their commitments over a relevant period, then they have made too many commitments and have a sure duty to drop some of them – exposure of this problem being one of the benefits of our Proposal. If the effect of our Proposal is that a director of the Company is so wildly overstretched that they can't conduct this minimally time-consuming responsibility, and hence leaves the Company's board, absolutely all parties involved will benefit from that result.

The no-action letters the Company cites in support of its position might have some bearing, if the task that our Proposal asks directors and potential directors to perform were in any way onerous, but as it is not, they are not. Publishing the written and oral content of any employee-training materials offered to the company's employees, as in *Verizon Communications, Inc. (National Center for Public Policy Research)* (avail. Mar. 17, 2022) or providing detailed and current information regarding shareholder ownership of the company to the public and also providing a searchable history of this information, as in *GameStop Corp. (Chiocchio)* (avail. Apr. 25, 2023), are tasks simply not comparable to a simple request for an estimate of allocation of hours.

Notably, "specific methods, timelines, or detail do not necessarily amount to micromanagement and are not dispositive of excludability."[4] Put another way, "proposals seeking detail … do not per se constitute micromanagement."[5] Rather, the focus is "on the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management."[6] To that end, proposals seeking details do not constitute micromanagement when the level of detail sought is "consistent with that needed to enable investors to assess an issuer's impacts .., risks or other strategic matters appropriate for shareholder input."[7] Overboarding is certainly a matter appropriate for shareholder input and, despite the Company's claims to the contrary, the information sought is not onerous or detailed at all. It's a simple estimate of time commitments. It's about as simple a bit of information as could be imagined, sought without any attempt to prescribe the method of its estimation.

The Company argues that the existence of current policies dealing with overboarding should somehow permit it to exclude our proposal.[8] We note that the Company cites no precedent for such a rule. Let us assume that the Company and the various entities cited as part of this argument are happy with the status quo. But the relevant incentives of the institutions the Company cites should not be assumed to align perfectly with those of the Company's shareholders writ large. Concerns about overboarding

[4] SLB 14L.
[5] Id.
[6] Id.
[7] Id.
[8] Lowe's NAR (Jan. 26, 2024) at n.9 and accompanying text.

include concerns about divided loyalties. Whether this proposal efficiently addresses those concerns is for the shareholders to decide.

In fact, it is not even clear that current approaches to overboarding are as universally approved by institutional stakeholders as the Company suggests. A recent *Harvard Law School Forum on Corporate Governance* post from The Conference Board states in relevant part:[9]

> While companies are moving in the direction of setting a policy limit of three additional board seats, in practice that can still result in overboarding, depending on the circumstances at the companies at which the directors serve. Moreover, while adopting an overboarding policy can be useful, it is more important for boards to have candid conversations about their evolving time requirements and the ability of directors to devote the time necessary to the role. For example, in its *Summary of Material Changes to State Street Global Advisors' 2023 Proxy Voting and Engagement Guidelines*, State Street indicates that starting in 2024 for companies in the S&P 500, it will no longer use numerical limits to identify overcommitted directors and instead "require that companies themselves address this issue in their internal policy on director time commitments and that the policy be publicly disclosed."[10] ...
>
> Overboarding policies are now a predominant practice, embraced by three-quarters of the S&P 500 and over half the Russell 3000 and supported by the proxy advisory firms. But policies alone are insufficient. As part of the annual evaluation process, directors should assess their ability, both on an individual and collective level, to dedicate the necessary time to fulfill their responsibilities effectively and make informed decisions.[11]

Perhaps even more to the point, Vanguard recently pointed out that:

> The role of public company directors is complex and time-consuming, and the funds believe that directors should maintain sufficient capacity to effectively carry out their responsibilities to shareholders. For this reason, the funds look for directors to appropriately limit their board and other commitments to ensure that they are accessible and responsive to both routine and unexpected board matters (including by attending board and relevant committee meetings). The funds look for boards to have in place policies regarding director commitments and capacity and

[9] See Matteo Tonello (The Conference Board), *Driving Board Excellence*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Jan. 31, 2024), available at https://corpgov.law.harvard.edu/2024/01/31/driving-board-excellence/ .
[10] Id. (linking to https://www.ssga.com/library-content/pdfs/asr-library/summary-material-changes-ssga-proxy-voting-and-engagement.pdf).
[11] Id.

> to disclose such policies (and any potential exceptions) to shareholders, as well as how the board oversees and implements the policy.[12]

Also, Weil, Gotshal & Manges LLP recently published a report stating: "The board should assess whether directors that may be overcommitted have sufficient time and ability to take on the significant tasks relating to public company directorship."[13]

Finally, we note that the SEC's own extensive disclosure regime rests heavily on the distinction between disclosure requirements and other types of interventions that reach the internal affairs of the corporation for which the SEC lacks authority.[14] In doing so it bases its own regulatory regime on the premise that disclosure is not micromanagement of a company and is instead properly linked to making markets more accessible and regular for shareholders. In fact, it has made this argument explicitly in its defense of its approval of the NASDAQ rule requiring company disclosure of private information about the surface characteristics of its board members.[15] Those arguments apply to our Proposal, which seeks disclosure as an efficient, inexpensive and non-burdensome way for the Company to provide shareholders information that will help them determine whether the Company is acting prudently – without in any conceivable way micromanaging anything. If the Staff asserts that the relevant disclosures sought by the Proposal constitute micromanagement of the Company, then it has contravened the SEC's own argument in *AFBR v. SEC*.[16]

C. Social Significance

The Company acknowledges that "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." Exchange Act Release No. 40018 (May 21, 1998) (the "1998 Release"). The Company further acknowledges 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." Staff Legal Bulletin No. 14L (Nov. 3, 2021) ("SLB 14L"). Nonetheless, the Company argues that "the Proposal does not focus on issues with a broad societal impact that transcends the Company's ordinary business." However, this ignores the significant

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[12] John Galloway, Global Head of Investment Stewardship at Vanguard, Inc., *Global Proxy Voting Policy for Vanguard-advised funds*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Feb. 8, 2024) (emphasis added), available at https://corpgov.law.harvard.edu/2024/02/08/global-proxy-voting-policy-for-vanguard-advised-funds/ .

[13] Lyuba Goltser & Kaitlin Descovich, *Heads Up for the 2024 Proxy Season: Key Corporate Governance, Disclosure and Engagement Topics* (Jan. 30, 2024), available at https://governance.weil.com/featured/heads-up-for-the-2024-proxy-season-key-corporate-governance-disclosure-and-engagement-topics/ .

[14] Cf. James J. Park, *Reassessing the Distinction Between Corporate and Securities Law*, 64 UCLA L. REV. 116, 128 (2017) ("According to the [U.S. Supreme] Court, securities law is based on a 'philosophy of full disclosure,' while corporate law is about the 'internal affairs of the corporation.'") (quoting *Green*, 430 U.S. at 470); Bus. Roundtable v. SEC, 905 F.2d 406, 411-12 (D.C. Cir. 1990).

[15] Cf. All. for Fair Bd. Recruitment v. Sec. & Exch. Comm'n, 85 F.4th 226, 255 (5th Cir. 2023) ("Nasdaq's disclosure-based framework does not alter the state-federal balance. It is well-established that disclosure rules do not interfere with the role of 'state corporate law' in 'regulat[ing] the distribution of powers among the various players in the process of corporate governance.'") (quoting Bus. Roundtable, 905 F.2d at 411-12.

[16] Id.

social policy issues implicated by over-committed boards. Specifically, it is difficult to come up with a social issue not impacted by corporations. Entire books have been written about the role of corporations in wealth inequality, race and gender equity, religious freedom, and the influence of China and other foreign actors on the U.S.[17] If the directors guiding the boards of our corporations are overcommitted, then they will be unable to efficiently manage the significant societal impacts of the corporations they steward. If human capital management issues standing alone may transcend ordinary business, then the issue of overcommitted directors certainly does because it transcends human capital management issues.

D. Relevance of Disclosure Rules

The Company argues that the Proposal is excludable because its subject matter relates to outside director activities that are not otherwise subject to any disclosure rules. However, none of the no-action letters the Company cites in support of this novel proposition can carry the weight the Company attempts to place on them. Broadly speaking, the no-action letters cited by the Company in the relevant sub-part II.B. of its no-action request can be broken down into three types: (1) proposals dealing with personal financial information such as stock ownership, (2) proposals dealing with company accounting and financial disclosures, and (3) proposals prescribing action rather than disclosure (e.g., requiring more frequent board meetings). None of this precedent is relevant here because (1) asking for an estimate of time allocation across disclosed commitments does not remotely implicate personal information on a par with a disclosure of stock ownership, (2) overboarding is an issue left to shareholder oversight far more than accounting and financial disclosures are, and (3) the disclosures sought here leave the corporation completely free to decide how to respond to those disclosures.

III. Issuing relief to the Company would raise serious constitutional and administrative law concerns.

For the reasons discussed above, our proposal's merits under Commission and Staff rules, interpretations, guidance, and precedent require that Staff deny the Company's request for relief. If the Staff elects to issue relief to the Company despite its clear merits, the Staff's decision would raise a host of constitutional and administrative law issues.

A. The Company is asking the Staff to take arbitrary and capricious action under the Administrative Procedure Act.

If the Staff grants no-action relief to the Company for our proposal, it must explain how our proposal is distinct from prior overboarding disclosure proposals that it has blessed.[18]

Under the Administrative Procedure Act (APA), agency action that is "arbitrary and capricious" may be set aside.[19] The Supreme Court has succinctly explained that "[t]he APA's arbitrary and capricious

[17] See, e.g., Vivek Ramaswamy, WOKE, INC.: INSIDE CORPORATE AMERICA'S SOCIAL JUSTICE SCAM (Center Street 2021); Stephen R. Soukup, THE DICTATORSHIP OF WOKE CAPITAL: HOW POLITICAL CORRECTNESS CAPTURED BIG BUSINESS (Encounter Books 2021). Cf. Ethan Peck, National Center for Public Policy Research, *The Corporate Incest Problem Fueling Woke Business*, HUMAN EVENTS (Oct. 26, 2022) (arguing that overboarding has created "ideological hegemony in the boardroom"), available at https://humanevents.com/2022/10/26/woke-capital-cant-end-until-corporate-incest-does .

[18] See generally, *American International Group, Inc.* (Mar. 6, 2013).

[19] 5 U.S.C. § 706(2)(A).

standard requires that agency action be reasonable and reasonably explained."[20] Under this precedent, in order for action to be reasonable and reasonably explained, the agency must at least consider the record before it and rationally explain its decision.[21]

Additionally, where an agency seeks to change its position from a prior regime, it must "display awareness that it is changing position," "show that there are good reasons for the new policy" and provide an even "more detailed justification" when the "new policy rests upon factual findings that contradict those which underlay its prior policy," and "take[] into account" "reliance interests" on the prior policy.[22]

Given the Staff's prior precedent on overboarding, issuing relief to the Company would undoubtedly be a change in its position. At a bare minimum, the Staff—or the Commission—would have to explain its reasoning for the reversal in position to comply with the APA.

B. The Company is requesting relief the Staff lacks statutory authority to issue.

Regardless, the Staff lacks statutory authority to grant the Company no-action relief. The Company has notice that we intend to submit our proposal, which is valid under state law, for consideration at the annual meeting. The Staff may not give the company its blessing to exclude an otherwise valid proposal from its proxy statement.

Section 14(a) of the Exchange Act prohibits anyone from "solicit[ing] any proxy" "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."[23] While this authority might be read "broadly," "it is not seriously disputed that Congress's central concern [in enacting § 14(a)] was with disclosure."[24] The purpose of Section 14(a) was to ensure that investors had "adequate knowledge" about the "financial condition of the corporation . . . [and] the major questions of policy, which are decided at stockholders' meetings."[25]

While Section 14(a) gave the Commission authority to compel investor-useful disclosures, the substantive regulation of stockholder meetings was left to the "firmly established" state-law jurisdiction over corporate governance.[26] Recognizing that state law provides the "confining principle" to Section 14(a)'s otherwise "vague 'public interest' standard," the D.C. Circuit has held that "the Exchange Act cannot be understood to include regulation of" "the substantive allocation" of corporate governance that is "traditionally left to the states."[27] Under Section 14(a), then, the SEC may compel the disclosure in a company's proxy materials of items that will be before shareholders at the annual meeting.

[20] FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021); see also Motor Vehicle Mfs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983).
[21] See FCC, 141 S. Ct. at 1160.
[22] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).
[23] 15 U.S.C. § 78n(a)(1).
[24] Bus. Roundtable v. SEC, 905 F.2d 406, 410 (D.C. Cir. 1990).
[25] S. Rep. No. 792 at 12 (1934).
[26] Bus. Roundtable, 905 F.2d at 413 (internal citation omitted).
[27] Id.

Under state law, a shareholder proposal may be presented for consideration at the corporation's annual meeting if the proposal is a proper subject for action by the corporation's stockholders.[28] A proposal is a proper subject for action by stockholders if it is within the scope or reach of the stockholders' power to adopt.[29]

Our proposal is valid under state law. Under Section 14(a), the SEC only has power to compel that the Company disclose our proposal in its proxy materials. The Staff therefore may not then give the Company no-action relief to exclude it.

III. Conclusion

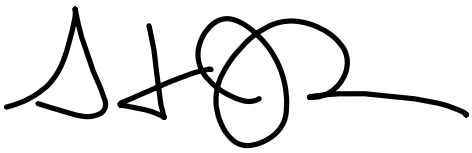
Proponent's overboarding Proposal deals with director qualifications, which is not a matter of ordinary business to be left with the Company but rather is an issue for shareholders. Finally, issuing relief to the Company would raise serious constitutional and administrative law concerns.

Accordingly, the Company has failed to meet its burden under Rule 14a-8(g) to exclude our Proposal. Therefore, based upon the analysis set forth above, we respectfully request that the Staff reject the Company's request for a no-action letter concerning our Proposal.

A copy of this correspondence has been timely provided to the Company. If we can provide additional materials to address any queries the Commission may have with respect to this letter, please do not hesitate to call us at (202) 507-6398 or email us at [redacted] and at [redacted].

Sincerely,

Scott Shepard
FEP Director
National Center for Public Policy Research



Stefan Padfield
FEP Deputy Director
National Center for Public Policy Research

[28] See CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227 (Del. 2008).
[29] Id. at 232.

cc: Ronald O. Mueller ([redacted])

APPENDIX I (below)

January 26, 2024

Via Online Shareholder Proposal Form

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

Re: No-Action Request from United Parcel Service, Inc., Regarding Shareholder Proposal by the National Center for Public Policy Research

Ladies and Gentlemen:

This correspondence is in response to the letter of Elizabeth A. Ising on behalf of United Parcel Service, Inc. (the "Company" or "UPS") dated December 30, 2023, requesting that your office (the "Commission" or "Staff") take no action if the Company omits our shareholder proposal (the "Proposal") from its 2024 proxy materials for its 2024 annual shareholder meeting.

RESPONSE TO THE COMPANY'S CLAIMS

The Company seeks to exclude the Proposal from the 2024 Proxy Materials pursuant to Rule 14a-8(b)(1) and Rule 14a-8(f)(1) because it claims Proponent failed to timely provide proof of the requisite stock ownership.

Under Rule 14a-8(g), the Company bears the burden of persuading the Staff that it may omit our Proposal. The Company has failed to meet that burden.

Rule 14a-8(k) and Section E of Staff Legal Bulletin No. 14D (Nov. 7, 2008) provide that companies are required to send proponents a copy of any correspondence that they elect to submit to the Commission or the Staff. Accordingly, we remind the Company that if it were to submit correspondence to the Commission or the Staff or individual members thereof with respect to our Proposal or this proceeding, a copy of that correspondence should concurrently be furnished to us.

I. The Proponent Timely Provided Proof of the Requisite Stock Ownership

The Company argues it may exclude our Proposal because we did not satisfy the ownership requirements of Rule 14a-8(b). That rule requires in relevant part that we:

> [S]ubmit to the company a written statement from the "record" holder of your securities (usually a broker or bank) verifying that, at the time you

> submitted your proposal, you continuously held at least $2,000, $15,000, or $25,000 in market value of the company's securities entitled to vote on the proposal for at least three years, two years, or one year, respectively.[30]

We have satisfied our obligations under this rule by submitting a timely letter dated December 27, 2023, to the Company from Wells Fargo Advisors (the "Wells Fargo Letter"), which affirmed unambiguously that: "As of December 27, 2023, the National Center for Public Policy Research holds, and has held continuously since November 16, 2020, more than $2,000 of United Parcel Service Inc common stock." The Company's arguments to the contrary are unavailing.[31]

A. The Commission and Staff Have Established the Proof of Ownership That May Be Required of Proponents; it Does Not Include Any Communications from past Record Holders, and Such a Requirement May Not Now Be Invented and Retroactively Applied.

The Company's position finds no support in the text of Rule 14a-8(b). As we have just noted, the rule is that proponents must submit a statement from "the 'record' holder of [our] securities" confirming the relevant value of our ownership over the relevant period. Rule 14a-8(b) (emphasis added). It nowhere adds an additional obligation on proponents that they also provide redundant proof of ownership letters from *former* record holders of the stock – holders with whom the proponents presumably no longer have a business relationship and who therefore have neither motivation nor interest in writing such letters.

For the Staff suddenly to conjure such an additional obligation now, one that should have been included in the express terms of 14a-8(b) if intended, or at least (if perhaps inappropriately) added as an additional requirement in a Staff Legal Bulletin for application after the issuance of such a bulletin,[32] would provide a clear instance of the Staff acting not in fidelity to the rules that it and the Commission have developed, but in an arbitrary, capricious and *ex post* manner. We and others have argued in the past that such behavior is already impermissibly embedded in the no-action review process, which grants the Staff an impermissible amount of opportunity for the application of bias on the basis of the personal policy preferences of the Staff.[33]

Such a decision would undermine the no-action review process in another fundamental way. In recent court filings SEC counsel has argued that the Commission's no-action review process, overseen by unelected and unappointed Staff members without much opportunity for Commissioner review and input, is within the statutory remit of the SEC despite there being no statutory language that either establishes or even hints at such a process.[34] SEC counsel, though, then pivots to say that while the review process is statutorily appropriate, it is so informal as to allow the Staff to issue opinions without

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[30] Rule 14a-8(b)(2)(ii)(A).

[31] The Company received two letters from Wells Fargo, one dated December 27, 2023, and another dated December 6, 2023. The Company's argument does not turn on any distinction between these two letters.

[32] The Company's reliance on language in staff legal bulletins is addressed below.

[33] Brief for Petitioners at 31-32, Nat'l Ctr. for Pub. Pol'y Res. v. SEC, No. 23-60230 (5th Cir. July 14, 2023), ECF No. 62-1.

[34] Brief for SEC at 56-61, Nat'l Ctr. for Pub. Pol'y Res. v. SEC, No. 23-60230 (5th Cir. Sept. 13, 2023), ECF No. 79-1.

explanation or for any reliable route to meaningful review of the decisions to be available.[35] It makes this claim even though the SEC (and its Staff) appears never to have itself treated its no-action decisions as "informal," in that it has never issued a no-action letter but then brought action against a company for having omitted a proposal. A reasonable response to these interlocking but contradictory claims is that the review process is not merely informal; it is *ulta vires*, with the Commission and its staffers not only illegally establishing this process but also themselves treating it not as informal but as binding on all parties and on itself, with rejected proponents facing no option but to incur the vast expense of litigation under often impossible time constraints. And then it compounds the improper nature of its unlawful proceedings by pretending that it treats its unauthorized procedures as informal to excuse the fact that it does not conduct these "informal" procedures with the rigor, regularity, and transparency required of government functions that *actually are authorized*.

This is, to err by delicacy, an attenuated argument that drags in its wake eye-catching implications, such as that if an agency makes up a power not granted to it and so not constrained by any statutory text, it can then apply that unlawful power without safeguards such as those established by the Administrative Procedures Act ("APA"), thereby freeing the unauthorized powers illegally seized by federal agencies to be wielded with the least constraint and therefore potentially for purposes the most inimical to our free republic of constrained and limited government. That is a position that may well give our judicial authorities pause, and perhaps be used as evidence that agencies really ought not to be trusted with any deference whatever in determining their own powers or the constraints on those powers.

Were the Staff to agree here with the Company it would illustrate the fundamental incoherency of the SEC's silently authorized (by the Securities Exchange Act)/statutorily unconstrained (by the APA), formal and final (as to practical effect)/informal and nonbinding (by nominal pretext) position. While the Staff requires shareholder proponents to provide proof of ownership letters from record holders to corporations, it has refused to require those record holders to provide the ownership letters to the proponents in the first instance. Apparently unauthorized powers not granted by statutory rescript can only run so far – far enough to constrain usually not-terribly-well-funded shareholders, but *not* to constrain giant banks and investment houses with large legal staffs and legal budgets, who might long ago have challenged the whole cobbled-together no-action process had the Staff made demands of them.

Among a variety of other problems, this half-way and certainly novel articulation of Staff authority effectively hands to record holders veto power over which proponents may file and which may not. As we have seen repeatedly in recent years, banks and investment houses have shown no shyness whatever in making profound business decisions that appear explicable only as expressions of the personal policy preferences of the corporations' executives (or the executives of the corporations who act as stewards of other people's investments but who arrogate to themselves the power of those clients' money to "force behaviors" that match their political and personal inclinations on companies their clients have invested heavily in).[36] While the Staff's unwillingness or incapacity to require record

[35] Id. at 27-29.

[36] See, e.g., https://www.commerce.senate.gov/2023/9/sen-cruz-s-investigation-leads-intuit-to-end-discriminatory-policy-against-firearms-businesses ; https://www.dailysignal.com/2023/06/21/kentuckys-daniel-cameron-scores-win-threat-banks-cutting-conservatives/ ; https://www.breitbart.com/politics/2023/03/03/donald-trump-jr-wins-pnc-bank-reverses-course-blames-cutting-ties-mxm-news-good-faith-error/ ; https://www.washingtonexaminer.com/opinion/beltway-

holders to issue ownership letters has resulted in proponents regularly facing an often frustrating and time-consuming process to get them, it is reasonable given background financial industry company behavior to consider it probable that some record holder might refuse to issue proof of ownership letters because the company's executives (or whomever held the specific decision-making authority) objected to the concerns that animated the relevant shareholder proponent. In fact, we at NCPPR have significant reason to believe that it has already happened to us.

Were the Staff to take the Company's position, then it would have established that in the shareholder proposal submission process, (1) proponents must provide proof-of-ownership letters issued by parties that themselves have no obligation to issue such letters, giving the issuers arbitrary control over citizens' abilities to exercise statutorily or regulatory explicated civil rights; (2) proponents must also provide proof-of-ownership letters from *former* record holders for a period of years, thus depriving proponents who have been deprived by private issuers of civil rights on partisan grounds even the minimal self-help opportunity of switching record holders, as letters that the initial record holder has already refused to provide on policy grounds will still be required *after* change of record holders; and that (3) this wholly arbitrary and unregulated private restriction on civil rights arises *even though there exists not the slightest legitimate concern that the proof-of-ownership letters issued by the new record holder lack even a soupcon of reliability*, as we will establish in the following section.

It would take some invention to come up with a decision that the Staff could reach that would more elegantly demonstrate systemic arbitrariness, capriciousness, potential for impermissible bias and the fundamental illegitimacy of the whole statutorily unauthorized no-action review process. Too, as a general matter, a regulatory agency that has the power to force A to provide a letter from B to C also enjoys the power to compel B to produce the letter in the first place. The Staff's tacit admission that the SEC lacks the authority to require production of the proof-of-ownership letters *ab initio* appears to provide significant weight to the conclusion that despite its justificatory dance of the butterflies, it does not legally possess any of the powers that it wields in this process, and is in fact a wholly unwonted interloper in the shareholder-proposal process.

B. The Language in Proponent's Proof-Of-Ownership Letter Is Clear and Fully Evidences Our Requisite Minimum Ownership

The Wells Fargo Letter provided in relevant part that: "As of December 27, 2023, the National Center for Public Policy Research holds, and has held continuously since November 16, 2020, more than $2,000 of United Parcel Service Inc common stock."[37] Wells Fargo could not and would not make such an affirmation without a sound basis for doing so, and of course it had such a basis. When investment accounts change hands between brokerages, the holdings are accompanied by "cost basis" information, information that includes both the date of purchase and the size of the initial purchase and any subsequent alterations. This information transfers in the ordinary course of business, and it did so in this case. The whole financial sector relies on this ordinary-course information transfer to be correct and

confidential/2748853/why-is-bank-of-america-canceling-the-accounts-of-religious-organizations/ ; https://www.zerohedge.com/markets/bank-america-other-companies-share-customer-records-fbi-without-warrant-all-time-director ; https://www.newsweek.com/stop-troubling-trend-politically-motivated-debanking-opinion-1787639.

[37] Wells Fargo Letter (Dec. 27, 2023).

trustworthy, and the federal government, particularly in aid of its taxing power, similarly relies on it.[38] The Company has provided no evidence, nor even a credible suggestion, that this normal-course information transfer either did not happen in this instance or that anything happened to cast the slightest doubt on its effectiveness and veracity. And certainly, Wells Fargo would not have placed itself in danger of committing fraud by issuing its proof of ownership letters containing the relevant information if it had borne the slightest concern about the correctness of the cost-basis information it relied on, which had been received by them in the entirely expected manner in the ordinary course of business.

The Company persists in its increasingly meretricious position even in the face of an additional letter from UBS confirming, with regard to every single holding transferred from UBS to Wells Fargo, that the information that Wells Fargo now has, and relies on in its letters, is exactly the same as the information UBS maintained and then transferred to Wells Fargo.[39] This supplemental letter was in no way required under Rule 14a-8(b), as we have seen, but we procured it for the Company in order to foreclose even the faintest possibility that the Company could in honesty and good faith retain the slightest doubt about the correctness and completeness of the Wells Fargo proof-of-ownership letter. As the lacunae in its no-action letter reveal, we were successful in that attempt.

The Company argues that:

> If the Proponent's shares were held by more than one "record" holder over the course of the applicable one-, two-, or three-year ownership period, then confirmation of ownership needs to be obtained from each record holder with respect to the time during which it held the shares on the Proponent's behalf, and those documents must collectively demonstrate the Proponent's continuous ownership of sufficient shares to satisfy at least one of the Ownership Requirements.[40]

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[38] Cf. "The Cost Basis Reporting Service (CBRS) is an automated system that gives financial firms the ability to transfer customer cost basis information from one firm to another on any asset transfer." https://www.dtcc.com/clearing-services/equities-clearing-services/cbrs

[39] The file name for this letter, which was visible as part of the email sent to the Company on December 27, 2023, is "ACAT Cost Basis Confirmation Letter." The "Automated Customer Account Transfer Service (ACATS) is a system that automates and standardizes procedures for the transfer of assets in a customer account from one brokerage firm and/or bank to another." https://www.dtcc.com/clearing-services/equities-clearing-services/acats .

[40] UPS no-action request (Dec. 30, 2023). We note that this quote is taken from the Company's "Second Deficiency Notice" and that the Company's law firm here, Gibson, Dunn & Crutcher LLP, essentially repeated it as follows in an email to Proponent dated January 11, 2024, as part of a correspondence involving the same issue but on behalf of a different client.

> As stated [in our Second Deficiency Notice], Rule 14a-8(b) requires proof of ownership from the "record" holder of the proponent's shares, and "[i]f the Proponent's shares were held by more than one 'record' holder over the course of the applicable one-, two-, or three-year ownership period, then confirmation of ownership must be obtained from each record holder with respect to the time during which it held the shares on the Proponent's behalf, and those documents must collectively demonstrate the Proponent's continuous ownership of sufficient shares to satisfy at least one of the Ownership Requirements."

In support of this proposition, the Company cites Staff Legal Bulletin 14F ("SLB 14F") as follows.[41]

> SLB 14F provides that proof of ownership letters may fail to satisfy Rule 14a-8(b)(1)'s requirement if they do not verify ownership "for the entire one-year period preceding and including the date the proposal [was] submitted." This may occur if the letter verifies ownership as of a date before the submission date (leaving a gap between the verification date and the submission date) or if the letter verifies ownership as of a date after the submission date and only covers a one-year period, "thus failing to verify the [stockholder's] beneficial ownership over the required full one-year period preceding the date of the proposal's submission." SLB 14F. SLB 14F further notes, "The shareholder will need to obtain proof of ownership from the DTC participant through which the securities are held."

The problem with the Company's foregoing reliance on SLB 14F is that Proponent's proof of ownership is consistent with all these requirements. Wells Fargo is "the DTC participant through which the securities are held" (emphasis added) and the Wells Fargo Letter expressly verifies ownership for the entire relevant period with no gap in coverage.

The Company also cites Staff Legal Bulletin 14 ("SLB 14") for the proposition that "a shareowner's monthly, quarterly or other periodic investment statements are insufficient to demonstrate continuous ownership of securities." But again, this proposition is irrelevant because Proponent is not relying on a periodic statement. Rather, Proponent's record holder has expressly verified that Proponent satisfied the relevant ownership requirements for the entire relevant coverage period.

The Company then proceeds to cite eleven no action decisions ostensibly as further support for its proposition that Proponent must provide documentation from every institution that served as record holder during the relevant holding period. The problem with these citations is that, even as described by the Company, not a single one of them stands for that proposition. Rather, they stand for the proposition that (1) a proponent may provide relevant documentation from multiple record holders to satisfy the proof of ownership requirement, or (2) that proof of ownership documentation *expressly setting forth an inadequate holding* period will be deemed insufficient.

In fact, the lead citation of the eleven not only fails to support the proposition for which it is employed, but provides precedent barring the Staff from conjuring from nothing ambiguities or wild conjectures about how impermanence of ownership could have been achieved despite clear record holder assertions of permanence over the relevant period.

The Company asserts that:

(Email on file with Proponent, emphasis added). This language at least suggests that the second quotation, stating that proof of ownership "must" be obtained from all relevant prior record holders, is part of Rule 14a-8(b). While Proponent knows that this language is not part of Rule 14a-8(b), but rather an interpretation of that rule desired by counsel and their clients, a less sophisticated shareholder could have easily been misled by this language.

[41] The Company argues that the guidance in SLB 14F "remains applicable even though Rule 14a-8 has since been amended to provide [new] tiered ownership thresholds."

> [A]s explained in both the First Deficiency Notice and the Second Deficiency Notice, each record holder must provide proof of ownership for the period in which they held the shares, as was done for example by the record holders in *The AES Corp.* (avail. Jan. 21, 2015) (providing one ownership letter from BNY Mellon verifying the proponent's ownership from October 20, 2013 through October 31, 2013 and a second letter from State Street verifying the proponent's ownership from November 1, 2013 through October 20, 2014).[42]

Here (again[43]) we see the Company by counsel striving mightily to create the impression that somewhere, somehow, the Staff had violated the clear and exact directive of Rule 14a-8(b) that a letter from the record holder be provided and had instead determined that letters from *prior* record holders must also – with arbitrary and capricious disregard of the rule – be provided. This time the Company attempts to convey the impression that *The AES Corp.* (avail Jan. 15, 2015), is that vehicle of Staff misapplication of Rule 14a-8(b). That impression, though, is absolutely false. Rather, in *The AES Corp.* the Staff held *against* the company and did not find that the documents that the proponent had provided were insufficient or even that they were all necessary. *It made no determination about minimum documentary requirements at all*, and certainly did not demonstrate that, as the Company claims, "each record holder must provide proof of ownership for the period in which they held the shares."

In fact, the one thing that *The AES Corp.* does stand for is that where there has been presented, as there has in this proceeding, "facially adequate" proof of ownership, the Staff will not condone exclusion on the basis of ludicrous conjectures such as that proponents had for no particular reason sold all of their assets one day and bought them the next – or presumably on the same day. In the instant proceeding, the Company has never even bothered (or perhaps dared) to indicate what specifically it claims to be the ambiguity in the perfectly clear letter from Wells Fargo; rather it just asserts that it is ambiguous … somehow. To be clear, there is no ambiguity in the Wells Fargo Letter because Wells Fargo expressly states Proponent satisfies the ownership requirements, and the reference to UBS merely acknowledges the ordinary course cost basis transfer.

Because the Company fails to identify what it finds ambiguous, it fails also to identify the mechanisms by which non-continuity might have been achieved even under the wildest of presumptions. But what *The AES Corp.* stands for, and all that it stands for, is that even if the Company *were* to articulate its fanciful cogitations about how non-continuity could possibly have been achieved, the Staff would rightly dismiss them as insufficient to undermine a demonstration of ownership that comports completely with the requirements established in Rule 14a-8(b).

Nowhere in its no-action request has Company cited a single Staff decision in which the Staff has violated its basic duty to follow Rule 14a-8(b) by requiring proof of ownership documents from more than the current record holder. Nor has Company's counsel done so while submitting this argument again and again on behalf of a whole series of clients (whose bills for this argument we hope are each very small indeed). No such citation has been possible because no such citation exists. *The Staff, so far as anyone has been able to discover, has never required that proponents must submit proof of ownership*

[42] UPS no-action request (Dec. 30, 2023) at 8.
[43] *See supra* note 11.

letters from former record holders – because the Staff cannot so require even if it wished to burden proponent with such unnecessary additional paperwork. Rather, Company's counsel simply keeps citing itself, again and again, for the proposition upon which its whole argument rests but for which no support exists, and which would constitute a direct violation of the plain language of Rule 14a-8(b) were the Staff to adopt it.

All of this suggests that the Company and its counsel understand full well when statements are and are not ambiguous or misleading. The statement made by our record holder in its proof-of-ownership letter is clear, fully satisfies the requirements of the Rule, and contains no ambiguity. The comparison to the remarkable flexibility of expression and implication demonstrated by the Company per counsel in this proceeding is illuminating.

Proponent here has satisfied the relevant proof-of-ownership burden via the Wells Fargo Letter, which expressly confirms the requisite holding for the requisite period. Nothing else ever has been required by the Staff, nor may it be.

The Staff has previously noted that some companies "apply an overly technical reading of proof of ownership letters as a means to exclude a proposal," but that the Staff "generally do[es] not find arguments along these lines to be persuasive."[44] Specifically, "companies should not seek to exclude a shareholder proposal based on drafting variances in the proof of ownership letter if the language used in such letter is clear and sufficiently evidences the requisite minimum ownership requirements."[45] Here, the Company should have no honest doubt whatever about our holding the appropriate amount of stock throughout the appropriate period in light of (1) the foregoing guidance, (2) the routine nature of the transfers the Company claims to be perplexed by, and (3) Wells Fargo's clear conclusion that we have held "continuously since November 16, 2020, more than $2,000 of United Parcel Service Inc common stock."[46] Rather, the Company is simply asking the Staff to declare in contravention of the regulations and guidance governing this no-action process that we were bound by a never-before-articulated requirement to provide yet another piece of paper that it can add to the already complete, regular and inarguably trustworthy demonstration of proof of ownership.

In short, the Wells Fargo Letter itself fully satisfies our obligation under Rule 14a-8(b), and having fully satisfied our duty we then in the fullness of politesse provided another letter, this one indeed from UBS, confirming that absolutely no possibility of doubt about the propriety of our ownership as averred by Wells Fargo remained.

The Company nevertheless feigned a remnant of doubt because the Wells Fargo Letter "contained an ambiguous representation as to the Proponent's continuous ownership." This is simply false. Again, there is nothing ambiguous about Wells Fargo's representation that we hold and have held "continuously since November 16, 2020, more than $2,000 of United Parcel Service Inc common stock." While the Company claims to have been thrown into confusion by the fact that our account with Wells Fargo was established within the past year, it is again difficult to take this claim seriously in light of the ubiquity of stock transfers – particularly given the sophistication of the Company and its counsel. Beyond that, the supplementary UBS letter to which the Company had no regulatory entitlement, as we

[44] SLB 14L.
[45] Id.
[46] Wells Fargo Letter (Dec. 27, 2023).

have seen, only further undermines any claims to honest doubt. In addition to the confirmation that Wells Fargo's information was the same as UBS's, it essentially restated what is obvious from the Wells Fargo Letter: That we transferred stock to Wells Fargo and that Wells Fargo obtained the requisite cost basis information in connection with that transfer to affirm our relevant ownership, as is routine.

The Company's argument isn't merely empty of material import or good faith; it is fundamentally premised on suggesting that Wells Fargo and UBS are willing to risk their reputations and potentially additional grave consequences to help us to misstate our ownership, or at very least with reckless disregard about the veracity of their assurances about the size and nature of our holdings with them – which would be a particularly bad look for *two banks*.

In addition to everything else, were the SEC to conclude that the Wells Fargo Letter here is insufficient proof of ownership, it would be undermining market efficiency, which includes myriad such transfers on a daily basis, thus violating the core mission of the SEC.

Conclusion

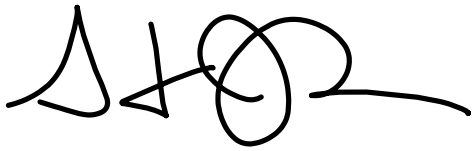
The Wells Fargo Letter states clearly that: "As of December 27, 2023, the National Center for Public Policy Research holds, and has held continuously since November 16, 2020, more than $2,000 of United Parcel Service Inc common stock." This satisfies our proof of ownership obligations. The Company's argument that proponents must provide letters from every record holder covering the relevant holding period is unsupported by the relevant regulatory text and furthermore is so unworkable as to undermine market efficiency in way contrary to the purposes of the Securities Exchange Act.

The Company has failed to meet its burden that it may exclude our Proposal under Rule 14a-8(g). Therefore, based upon the analysis set forth above, we respectfully request that the Staff reject the Company's request for a no-action letter concerning our Proposal.

A copy of this correspondence has been timely provided to the Company. If we can provide additional materials to address any queries the Commission may have with respect to this letter, please do not hesitate to call us at (202) 507-6398 or email us at [redacted] and at [redacted].

Sincerely,

Scott Shepard
FEP Director
National Center for Public Policy Research



Stefan Padfield
FEP Deputy Director
National Center for Public Policy Research

cc: Ryan Swift ([redacted])