

January 13, 2023

VIA E-MAIL

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

*Re: The Home Depot, Inc.
Shareholder Proposal of the National Center for Public Policy Research
Securities Exchange Act of 1934 (“Exchange Act”)—Rule 14a-8*

Ladies and Gentlemen:

This letter is to inform you that our client, The Home Depot, Inc. (the “Company”), intends to omit from its proxy statement and form of proxy for its 2023 Annual Meeting of Shareholders (collectively, the “2023 Proxy Materials”) a purported shareholder proposal (the “Submission”), including statements in support thereof (the “Supporting Statement”) 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 2023 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 proponent elects 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 it elects to submit additional correspondence to the Commission or the Staff with respect to the Submission, a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Company pursuant to Rule 14a-8(k) and SLB 14D.

BACKGROUND

In connection with the Company's 2022 Annual Meeting of Shareholders, the Company received a shareholder proposal pursuant to Rule 14a-8 requesting "the Board of Directors to oversee an independent racial equity audit analyzing Home Depot's adverse impacts on nonwhite stakeholders and communities of color" (the "2022 Racial Equity Audit Proposal"). In accordance with the requirements of Rule 14a-8, the Company included the 2022 Racial Equity Audit Proposal in its proxy statement and on its proxy card for consideration at the Company's 2022 Annual Meeting of Shareholders that was held on May 19, 2022. The 2022 Racial Equity Audit Proposal received support from a majority of the votes cast at the Company's 2022 Annual Meeting of Shareholders.

THE SUBMISSION

The Submission states:

Resolved: Shareholders commit to rescind the 2022 Racial Equity Audit proposal and reject any racially discriminatory practices at the company.

A copy of the Submission and Supporting Statement is attached as Exhibit A.

BASIS FOR EXCLUSION

We respectfully request that the Staff concur in our view that the Submission may be excluded from the Company's 2023 Proxy Materials pursuant to Rule 14a-8(a) because the Submission is not a proposal for purposes of Rule 14a-8.

ANALYSIS

The Submission May be Excluded Pursuant to Rule 14a-8(a) Because the Submission Is Not a Proposal Within the Meaning of the Rule.

The Submission is not a proposal for purposes of Rule 14a-8 because it is not a recommendation or requirement that the Company or its Board of Directors take action, but instead it seeks to allow a shareholder vote as a vehicle to express shareholders' views on a matter previously voted on and supported by the Company's shareholders. Under the Commission's rules, Staff responses to no-action requests under Rule 14a-8(a) and other Staff precedent, such a vote is not a proper subject under Rule 14a-8.

Rule 14a-8(a) defines a shareholder "proposal" for purposes of Rule 14a-8 as a "recommendation or requirement that the company and/or its board of directors take action, which [the shareholder proponent] intend[s] to present at a meeting of the company's shareholders." Rule 14a-8(a) further provides that a shareholder proposal "should state as clearly

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as possible the course of action that [the shareholder proponent] believe[s] *the company* should follow” (emphasis added).

The rulemaking history of Rule 14a-8 also demonstrates that a shareholder proposal must specifically request a company to take an action in order for such proposal to be deemed appropriate for inclusion in a company’s proxy materials. In the Commission’s 1997 release proposing amendments to Rule 14a-8, the Commission stated:

The answer to Question 1 of revised rule 14a-8 would define a “proposal” as a request that the company or its board of directors take an action. *The definition reflects our belief that a proposal that seeks no specific action, but merely purports to express shareholders’ views, is inconsistent with the purposes of rule 14a-8 and may be excluded from companies’ proxy materials.* The Division, for instance, declined to concur in the exclusion of a “proposal” that shareholders express their dissatisfaction with the company’s earlier endorsement of a specific legislative initiative. Under the proposed rule, the Division would reach the opposite result, because the proposal did not request that the company take an action.

Proposing Release, *Amendments to Rules on Shareholder Proposals*, Exchange Act Release No. 39093 (Sept. 18, 1997) (*emphasis added*) (*citations omitted*) (the “1997 Release”).

The Commission subsequently adopted this definition, as proposed, in SEC Release No. 34-40018 (May 21, 1998) (“We are adopting as proposed the answer to Question 1 of the amended rule defining a proposal as a request or requirement that the board of directors take an action.”).

Following adoption of Rule 14a-8(a), the Staff has consistently confirmed that a shareholder submission is excludable if it “merely purports to express shareholders’ views” on a subject matter. For example, in *Longs Drug Stores Corp.* (avail. Jan. 23, 2008), the Staff concurred that a submission seeking to allow a shareholder vote to express displeasure with respect to the company’s general employment and compensation practices, including “hours, benefits, discounts, and morale” could be omitted from the company’s proxy materials under Rule 14a-8(a) because the submission “does not recommend or require that Longs or its board of directors take any action.” *See also Sensar Corp.* (avail. Apr. 23, 2001) (concurring with exclusion under Rule 14a-8(a) where a submission sought to allow a shareholder vote to express shareholder displeasure over the terms of stock options granted to management but did not recommend or require any action by the company or its board of directors); and *CSX Corp.* (avail. Feb. 1, 1999) (concurring with exclusion under Rule 14a-8(a) where a shareholder submitted three poems for consideration but did not recommend or require any action by the company or its board of directors).

The Company believes that it may exclude the Submission under Rule 14a-8(f)(l) because the Submission does not meet the requirements of Rule 14a-8(a). As written, the Submission

does not recommend any action on the part of the Company or its Board of Directors; the Submission instead seeks to allow a shareholder vote as a vehicle to express shareholders' views on a prior shareholder vote regarding a matter that, as a direct result of another shareholder's proper use of the Rule 14a-8 process, was previously submitted to shareholders and approved by a majority of the votes cast at the Company's 2022 Annual Meeting of Shareholders. The Staff has consistently confirmed that a shareholder submission is excludable if it "merely purports to express shareholders' views" on a subject matter. The Submission is exactly of the type directly addressed by the Commission in the 1997 Release and is parallel to the excluded submissions in *Longs Drug Stores* and *Sensar*: it merely provides shareholders an opportunity to express their displeasure on a principle without requesting the Company or its Board of Directors to take a specific action. Contrary to the requirements of Rule 14a-8(a), the Submission neither recommends nor requires that the Company or its Board of Directors take any specific action with respect to the matters discussed therein, but instead requests that the Company's shareholders commit to unknown, future actions to "rescind the 2022 Racial Equity Audit proposal and reject any racially discriminatory practices at the company." The Supporting Statement highlights the parallels to the submissions in *Longs Drug Stores* and *Sensar*, demonstrating the Proponent's objective of seeking to allow a shareholder vote to express displeasure with the 2022 Racial Equity Audit Proposal and a previous shareholder vote by providing background information that serves to promote the Proponent's view that the 2022 Racial Equity Audit Proposal "may jeopardize Home Depot's value..."

Further, the Submission is distinguishable from the proposals in *Capital One Financial Corp.* (avail. Feb. 7, 2007) and *General Electric Co.* (avail. Jan. 10, 2012). In *Capital One Financial Corp.* the proposal requested the board of directors adopt a policy "that company shareholders be given the opportunity at each annual meeting of shareholders to vote on an advisory resolution... to ratify the compensation of named executive officers" set forth in the proxy statement's summary compensation table. In *General Electric Co.* the proposal requested that the board of directors "re-examine the company's dividend policy and consider special dividends as a means of returning excess cash to shareholders." In both instances, the Staff did not concur with the exclusion of the proposal under Rule 14a-8(a) because in the Staff's view, the proposals requested the board of directors to take action. The Submission, by contrast, does not request any action on the part of the Board of Directors or the Company. Instead, the Submission seeks a shareholder vote to express shareholders' views on a matter that was previously submitted to shareholders and approved by a majority of the votes cast at the Company's 2022 Annual Meeting of Shareholders. As noted above, it is precisely the type of matter that the Commission described as "inconsistent with the purposes of rule 14a-8 and may be excluded from companies' proxy materials." Based on the clear language of Rule 14a-8(a) and the precedents cited above, the Submission does not constitute a proposal within the meaning of Rule 14a-8, is not a proper proposal under Rule 14a-8 and may be excluded from the Company's 2023 Proxy Materials.

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CONCLUSION

Based upon the foregoing analysis, we respectfully request that the Staff concur that it will take no action if the Company excludes the Submission from its 2023 Proxy Materials 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) 955-8287, or Stacy S. Ingram, the Company's Associate General Counsel and Deputy Corporate Secretary, at (770) 384-2858.

Sincerely,



Elizabeth A. Ising

Enclosures

cc: Stacy S. Ingram, The Home Depot, Inc.
Ethan Peck, The National Center for Public Policy Research

EXHIBIT A



November 10, 2022

Via FedEx to

Ms. Teresa Wynn Roseborough
Corporate Secretary
The Home Depot Inc.
2455 Paces Ferry Road, Building C-22
Atlanta, Georgia 30339

Dear Ms. Roseborough,

I hereby submit the enclosed shareholder proposal (“Proposal”) for inclusion in The Home Depot Inc. (the “Company”) 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 2023 annual meeting of shareholders. Proof of ownership documents have been included in this package, and we intend to retain ownership of our Company stock through the 2023 shareholder meeting.

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 November 28 or 29, 2022 from 2-5 p.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, [REDACTED] and emailed to [REDACTED].

Sincerely,

A handwritten signature in black ink, appearing to read "Ethan Peck". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Ethan Peck

cc: Scott Shepard, FEP Director
Enclosure: Shareholder Proposal
Proof of ownership documents

Rescission of 2022 “Racial Equity Audit” Proposal

Whereas shareholders adopted in 2022 a “Shareholder Proposal Regarding [a] Racial Equity Audit” that called for the company to “analyz[e] Home Depot’s adverse impacts [exclusively] on nonwhite stakeholders and communities of color,” and whereas racial equity calls for potential discrimination on the basis of race,

Resolved: Shareholders commit to rescind the 2022 Racial Equity Audit proposal and reject any racially discriminatory practices at the company.

Supporting statement: Such an audit may jeopardize Home Depot’s value by elevating divisive identity politics above its commitment to excellence, while also raising serious legal and commercial risks for the company.

Racial equity audits do not benefit the companies that conduct them. They are non-neutral evaluations designed to embarrass the companies who elect to conduct them, and there is no evidence to suggest that such audits increase shareholder value. The 2022 proposal essentially admits as much as the evidence cited for the audit focused on Home Depot’s philanthropic and political donations noting, “Home Depot has donated to police foundations in Detroit and Atlanta... The Atlanta Police Foundation has funded a network of 11,000 surveillance cameras... surveillance technology has been used to target communities of color and nonviolent protestors.” And “[d]uring the 2019-2020 election cycle, Home Depot’s political action committee (“PAC”) gave \$465,000 to 63 Republican Congress members who objected to the 2020 election results, an action some viewed as ‘a direct attack on the voting rights of people of color.’”¹

Racial equity audits also increase in-company racial division rather than ameliorating it. They distract leadership and staff from focusing on core business concerns. They promote claims about “white supremacy” in America that many Home Depot employees, shareholders, and customers don’t accept. They sow division among employees and consumers. They’re also expensive: some auditors reportedly charge more than \$2,000 per hour.

Racial equity audits generally do not help the audited companies: the publication of such reports often trigger more negative news, criticism, and boycotts of the company by certain consumers, while also alienating other consumers who disapprove of the company’s decision to conduct such an audit in the first place. Such reports may also fuel unwarranted government investigations, employee grievances, and meritless discrimination claims.

Home Depot’s board was correct to oppose the 2022 proposal. The board strongly opposed the proposal noting that its firm “commitment to diversity, equity and inclusion for our associates,

¹ https://otp.tools.investis.com/clients/us/home_depot/SEC/sec-show.aspx?FilingId=15708089&Cik=0000354950&Type=PDF&hasPdf=1

customers and the communities we serve.”² Given this commitment, combined with the rest of the board’s opposition statement, conducting such an audit now would not serve a recognizable business interest for Home Depot.

Such an audit is therefore far beyond the Company’s fiduciary remit. That remit requires that Home Depot make decisions so as to maximize the objectively determined and financially measurable return on shareholders’ investment. To the extent that Home Depot hires, promotes, or trains on the basis of any metrics other than merit, it violates its fiduciary duties by privileging considerations that cannot enhance the financially measurable return on shareholder investment.

² *Id.*