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Lyuba Goltser
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February 23, 2023

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

Re: The Kroger Co. – 2023 Annual Meeting Omission of Shareholder Proposal of The Sisters of the Presentation of the Blessed Virgin Mary of Aberdeen, South Dakota Trust Pursuant to Securities Exchange Act of 1934 – Rule 14a-8

Ladies and Gentlemen:

This letter is submitted on behalf of our client, The Kroger Co. (the “Company” or “Kroger”), pursuant to Rule 14a-8 under the Securities Exchange Act of 1934, as amended (the “Exchange Act”). The Company has received the shareholder proposal and related correspondence attached as Exhibit A hereto (the “Proposal”) submitted by The Sisters of the Presentation of the Blessed Virgin Mary of Aberdeen, South Dakota (the “Proponent”) for inclusion in the Company’s form of proxy, proxy statement and other proxy materials (together, the “Proxy Materials”) for its 2023 annual meeting of shareholders (the “2023 Annual Meeting”). In reliance on Rule 14a-8 under the Exchange Act, the Company intends to omit the Proposal from the Proxy Materials pursuant to Rule 14a-8(e), as the Company did not receive the Proposal before the deadline for submitting shareholder proposals to the Company.

We respectfully request the concurrence of the Staff of the Division of Corporation Finance (the “Staff”) of the Securities and Exchange Commission (the “Commission”) that no enforcement action will be recommended if the Company omits the Proposal from the Proxy Materials.

Pursuant to Section C of Staff Legal Bulletin No. 14D (November 7, 2008) (“SLB 14D”), the Company has submitted this letter and the related exhibits to the Staff via email to shareholderproposals@sec.gov. Also, in accordance with Rule 14a-8(j), a copy of this letter and related exhibits is being simultaneously provided by email on this date to the Proponent informing it of the Company’s intention to exclude the Proposal from the Proxy Materials.

The Company agrees to promptly forward to the Proponent any Staff response to the Company’s no-action request that the Staff transmits to the Company by mail, email and/or facsimile. Rule 14a-8(k) and SLB 14D provide that a shareholder proponent is required to send to

the company a copy of any correspondence which the proponent elects to submit to the Commission or the Staff. Accordingly, the Company hereby informs the Proponent that the undersigned on behalf of the Company is entitled to receive from the Proponent a concurrent copy of any additional correspondence submitted to the Commission or the Staff relating to the Proposal.

I. The Proposal

The Proposal sets forth the following resolution to be voted on by shareholders at the 2023 Annual Meeting:

RESOLVED, shareholders ask that the board commission and publish a report on (1) whether the Company participates in compensation and workforce practices that prioritize Company financial performance over the economic and social costs and risks created by income inequality and racial and gender disparities and (2) the manner in which any such costs and risks threaten returns of diversified shareholders who rely on a stable and productive economy

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

I. Background

The Company first became aware of the Proposal on Friday, February 17, 2023, when Christine Wheatley, Group Vice President, Secretary and General Counsel, and Keith Dailey, Group Vice President, Corporate Affairs, received an email from the Proponent (the “February Email”). The February Email included what appeared to be a forwarded email also to Ms. Wheatley and Mr. Dailey dated Friday, December 30, 2022 (the “December Email”) and included several attachments, including the Proposal, Supporting Statement and proof of ownership (see Exhibit A).

After receiving the February Email, Ms. Wheatley and Mr. Dailey each reviewed their email and spam folders to confirm they had not previously received the December Email. Neither Ms. Wheatley nor Mr. Dailey could find any evidence that they had received the December Email or any other correspondence from the Proponent regarding the Proposal prior to their receipt of the February Email on Friday, February 17, 2023.

After finding no evidence of the December Email, the Company reviewed its records to confirm whether a paper copy of the Proposal had been received by mail to the Company’s address, as set forth in the instructions for submission of shareholder proposals in the Company’s proxy statement for the 2022 annual meeting filed with the SEC on May 2, 2022 (the “2022 Proxy Statement”). After review, the Company concluded that it had never received a paper copy of the Proposal.

Ms. Wheatley’s office also directed the Company’s Information Technology (IT) Department to conduct a review of its records with respect to inbound email from the Proponent. Upon review, the Company’s IT Department concluded that the Proponent’s email was not delivered to Ms. Wheatley’s or Mr. Dailey’s email boxes in accordance with the policies of the

Company's email security vendor. Specifically, according to these security policies, emails from domain names that are younger than 30 days are categorized as malicious and are not delivered to recipient inboxes. The Proponent's domain name appears to have been registered 16 days prior to the December Email on December 14, 2022. Accordingly, when the Proponent attempted to send the December Email on December 30, 2022, it was designated as malicious and thus quarantined as potential spam in a "spam hold" according to records that the IT Department was able to retrieve. Because emails subject to a spam hold are automatically deleted by the Company's email security vendor after 30 days, the Company has been unable to retrieve the email, although records of an email from the Proponents having been quarantined on December 30, 2022 and then permanently deleted on January 30, 2023 have been identified by the Company's IT Department. Because the domain was in existence for more than 60 days on February 17, 2023, the February Email was not designated as malicious and therefore was received by Ms. Wheatley and Mr. Dailey in their inboxes, prompting the review described above.

II. Basis for Exclusion

(A) The Proposal May be Excluded Pursuant to Rule 14a-8(e) Because the Company Did Not Receive the Proposal Before the Deadline for Submitting Shareholder Proposals

The Company respectfully requests that the Staff concur with its view that the Proposal may be excluded from the Proxy Materials pursuant to Rule 14a-8(e) because the Company did not receive the Proposal from the Proponents at its principal executive offices before the January 2, 2023 deadline for submitting shareholder proposals to the Company. The deadline and method of submission were clearly disclosed in the Company's 2022 Proxy Statement:

"Pursuant to Rule 14a-8 under the Securities Exchange Act of 1934, as amended, shareholder proposals intended for inclusion in the proxy material relating to Kroger's annual meeting of shareholders in June 2023 should be addressed to Kroger's Secretary and must be received at our executive offices not later than January 2, 2023."

[...]

"Shareholder proposals, director nominations, including, if applicable pursuant to proxy access, and advance notices must be addressed in writing, and addressed and delivered timely to: Corporate Secretary, The Kroger Co., 1014 Vine Street, Cincinnati, Ohio 45202-1100."

However, the Proponent did not send a hard copy to the Corporate Secretary at the Company's headquarters. Furthermore, Staff Legal Bulletin No. 14 emphasizes that "[t]o avoid exclusion on the basis of untimeliness, a shareholder should submit his or her proposal well in advance of the deadline...." Staff Legal Bulletin No. 14C states that "[a] shareholder proponent is encouraged to submit a proposal...by means that allows him or her to determine when the proposal or response was received by the company." The Staff further noted in Staff Legal Bulletin No. 14L ("SLB 14L") that "email delivery confirmations and company server logs may not be sufficient to prove receipt of emails as they only serve to prove that emails were sent. In addition, spam filters...can prevent an email from being delivered to the appropriate recipient." As such, in SLB

14L, the Staff suggested that senders should seek a reply email from the intended recipient acknowledging receipt. The December Email, which was sent on the last business day prior to the deadline, did not request acknowledgment of receipt, and the Proponent did not follow up with the Company until February 17, 2023, six weeks after the January 2, 2023 submission deadline.

In *Charles River Laboratories International Inc.* (Mar. 17, 2021), the Staff concurred in the exclusion of a proposal where the company did not receive a proposal submitted by email from the proponent where the email was blocked by the email security vendor as a potentially malicious email. *See also Teladoc Health, Inc.* (Mar. 20, 2020) (same). The Staff has concurred in other instances where the submission of a shareholder proposal by email was not properly received (e.g., *Discover Financial Services* (Mar. 20, 2020) (the proponent submitted the proposal via email to two company employees who no longer worked for the company and to an email address that did not belong to Discover); *Sprint Corp.* (Aug. 1, 2018) (the proponent submitted the proposal via email to a company employee who no longer worked for the company and to an employee who was not an attorney); *Alcoa, Inc.* (Jan. 12, 2009) (the proponent submitted a proposal by email to the company's investor relations department and by facsimile to a number that was not in the company's principal executive offices)). In this case, the Proponent's use of a newly registered email domain caused the email to be marked as malicious and therefore prevented delivery.

Importantly, the Company did not receive any indication that the Proponent had sent a shareholder proposal and, as discussed above, neither Ms. Wheatley nor Mr. Dailey received any request for confirmation or other communication from the Proponent or any other inquiry that would suggest that the Proposal had been submitted to them until Friday, February 17, 2023, which was six weeks after the January 2, 2023 deadline for submission of proposals had passed. The Proponent did not submit the proposal "well in advance of the deadline" or by means that allow him or her to determine when the Proposal or response was received by the Company," in accordance with Staff Legal Bulletin No. 14 and Staff Legal Bulletin No. 14C. When the Proponent did not receive confirmation of receipt from the Company within a reasonable timeframe, the Proponent should have followed up with the Company to confirm that the Proposal had been properly submitted before the expiration of the January 2, 2023 deadline.

In addition, as noted above, the Proponent did not send a hard copy to the Corporate Secretary at the Company's Headquarters, as set forth in the Company's 2022 Proxy Statement. The Company received several other proposals for its upcoming 2023 Annual Meeting, all of which were submitted as hard copies to the address set forth in the 2022 Proxy Statement, and some by electronic delivery as well.

Finally, Rule 14a-8(f) states that "[a] company need not provide [the proponent with] such notice of a deficiency if the deficiency cannot be remedied, such as if you fail to submit a proposal by the company's properly determined deadline." Because the failure to timely submit a shareholder proposal is a deficiency that cannot be remedied, the Company is not required to

provide the Proponent with the 14-day notice and an opportunity to cure under Rule 14a-8(f) in order to exclude the proposal under Rule 14a-8(e).

The Company therefore requests that the Staff concur that the Proposal may properly be excluded from the Proxy Materials because it was not properly submitted to the Company within the time frame required under Rule 14a-8(e).

III. Request for Waiver Under Rule 14a-8(j)(1)

The Company further respectfully requests that the Staff waive the 80-day filing requirement set forth in Rule 14a-8(j) for good cause. Rule 14a-8(j)(1) requires that, if a company “intends to exclude a proposal from its proxy materials, it must file its reasons with the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission.” However, Rule 14a-8(j)(1) allows the Staff, in its discretion, to permit a company to make its submission later than 80 days before the filing of its definitive proxy statement if the company demonstrates good cause for missing the deadline. The Company is currently preparing its proxy statement in connection with the 2023 Annual Meeting (the “2023 Proxy Statement”) and intends to file the 2023 Proxy Statement with the Commission during the second or third week of May, and as early as May 11, 2023, in which case the filing date may be less than 80 calendar days from the date of this letter.

As explained above, the Company did not become aware of the shareholder proposal until Friday, February 17, 2023 at 2:13 pm. In response to receiving the electronic copy of the December email, the Company extensively reviewed both email and paper mail records to confirm that it was not in receipt of the Proponent’s proposal, as discussed above. Furthermore, 80 days prior to a May 11, 2023 potential filing date for its definitive proxy materials was February 20, 2023, which was a federal holiday during which the Commission was closed. This letter was submitted to the Commission for consideration as promptly as practicable under the circumstances. Accordingly, we believe the Company has “good cause” for its inability to meet the 80-day requirement, and we respectfully request that the Staff waive the 80-day requirement with respect to this letter in the event that the 2023 Proxy Statement is filed less than 80 days from the date hereof.

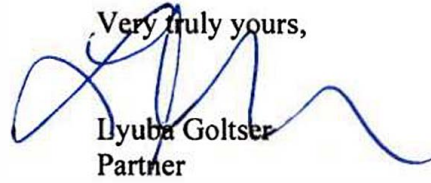
IV. Conclusion

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

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

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

Very truly yours,



Lyuba Goltser
Partner

Attachments

cc:

Christine Wheatley
Stacey Heiser
The Kroger Co.

Sister Pegge Boehm, PBVM

EXHIBIT A

Shareholder Proposal and Related Correspondence



Via email: Christine Wheatley
Keith Dailey



December 30, 2022

Christine S. Wheatley
Office of the Corporate Secretary
The Kroger Company
1014 Vine Street
Cincinnati, OH 45202-1100

Re: Shareholder Proposal for 2023 Annual Shareholder Meeting on Income Inequity


Dear Ms. Wheatley,

The Sisters of the Presentation of the Blessed Virgin Mary of Aberdeen, South Dakota (“Proponent”) is submitting the attached proposal (the “Proposal”) pursuant to the Securities and Exchange Commission’s Rule 14a-8 to be included in the proxy statement of The Kroger Company (the “Company”) for its 2023 annual meeting of shareholders. I am the lead filer for the proposal and may be joined by other shareholders as co-filers.

The Proponent has continuously beneficially owned, for at least three years as of the date hereof, at least \$2000 worth of the Company’s common stock. Verification of this ownership will be sent under separate cover. The Proponent intends to continue to hold such shares through the date of the Company’s 2023 annual meeting of shareholders. A representative of the Proponent will attend the stockholders’ meeting to move the resolution as required.

We recognize that the Company has a purpose to “feed the human spirit.” A proposal on Workforce Strategy voted on at the company’s 2022 annual meeting received a 29.5% vote. And since, inflation has adversely impacted the price of food for the consumer. We are concerned for the extreme pressure placed on the consumer’s pocketbook, while our primary concern continues to be the workers. We are still concerned about starting wages retention rate, and further transparency on wages across all demographics. The company has yet to engage the proponent on this issue and we believe that conversations seeking for mutual understanding are an integral component of our relationship with you as shareholder.

We hope to reach a mutual agreement which would convince the Proponent and co-filers to withdraw this Proposal. I am available to meet with the Company via teleconference on January 10, 10:00 am – 5:00 pm ET or January 13, 10:00 am – 1:00 pm ET or January 17, 10:00 am – 5:00 pm ET or at another mutually agreeable time. Co-filers have been asked to authorize the Proponent to conduct the initial engagement meeting, but may participate subject to their availability.


Please let me know that you have received this document. Please send future correspondence and questions regarding this Proposal to my representative, Natalie Wasek, Seventh Generation Interfaith Inc., who can be contacted at 

Sincerely,

Sr. Pegge Boehm, PBVM

Sister Pegge Boehm, PBVM
Socially Responsible Investment Coordinator

Enclosures: Shareholder Proposal
 Proof of Ownership

cc: Natalie Wasek 

RESOLVED, shareholders ask that the board commission and publish a report on (1) whether the Company participates in compensation and workforce practices that prioritize Company financial performance over the economic and social costs and risks created by income inequality and racial and gender disparities and (2) the manner in which any such costs and risks threaten returns of diversified shareholders who rely on a stable and productive economy

WHEREAS:

Kroger employs nearly 420,000 associates and while the company has raised wages and expanded benefits for associates in 2022, Kroger's *average* hourly wage is only \$17,¹ with no disclosure of the number, or demographics, of associates earning at or above this amount. This puts the company behind an increasing number of retailer peers who have raised their *starting* wages to at least \$15 an hour.² The 2021 total compensation of Kroger's median associate was \$26,763.³ While the company's workforce is 50.4% female and 38.5% minority, these groups only make up only 33% and 26% of store leaders.⁴

More than half the U.S. population fails to earn a living wage.⁵ According to MIT, the national average living wage is \$17.46 per hour – or \$36,311 annually.⁶ The current federal minimum wage stands at \$7.25 and applies in 20 states.

A JUST Capital poll shows that 87% of Americans say large U.S. companies have responsibility to regularly increase wages to keep up with the rising cost of living⁷.

Increasing wages for those earning the least is fundamental to ensuring an equitable economy that leaves no one behind while promoting shared prosperity, and helpful in closing gender and racial pay gaps.⁸

The Congressional Budget Office estimates that income inequality has risen between 1979 and 2019, even after accounting for transfers and taxes.⁹

Research reveals that:

- Income inequality slows U.S. economic growth by reducing demand by 2 to 4 percent.¹⁰

¹ <https://www.thekrogerco.com/wp-content/uploads/2022/08/Kroger-Co-2022-ESG-Report.pdf>

² <https://www.cnbc.com/2021/12/29/minimum-wage-employers-moving-faster-than-states-to-raise-hourly-pay.html>

³ <https://d18rn0p25nwr6d.cloudfront.net/CIK-0000056873/638cf5c4-bc98-48d2-95bc-e236a21fec76.html>

⁴ <https://www.thekrogerco.com/wp-content/uploads/2022/08/Kroger-Co-2022-ESG-Report.pdf>

⁵ <https://livingwageforum.org/living-wage-for-us-data-shows-over-half-of-americans-earning-less-than-a-living-wage/>

⁶ <https://justcapital.com/reports/living-wage-guide-for-business-just-jobs-explained/#:~:text=The%20national%20average%20living%20wage,per%20hour%20%E2%80%93%20or%20%2436%2C311%20annually.> ; <https://livingwage.mit.edu/articles/99-a-calculation-of-the-living-wage>

⁷ <https://justcapital.com/reports/2022-survey-workers-and-wages-are-more-important-than-ever-to-the-american-public/>

⁸ <https://www.nelp.org/publication/what-a-15-minimum-wage-means-for-women-and-workers-of-color/>

⁹ The Distribution of Household Income, 2019 (cbo.gov) <https://www.cbo.gov/system/files/2022-11/58353-HouseholdIncome.pdf>

¹⁰ <https://www.epi.org/publication/secular-stagnation/>

- A 1% increase in inequality leads to a 1.1% per capita GDP loss.¹¹

Excessive inequality increases health costs and decreases the value of human capital.¹² By paying its employees less than a living wage, the Company increases its margins and thus financial performance. But gains in Company profits that come at the expense of society and the economy is a bad trade for most Company shareholders, who are diversified and rely on broad economic growth to achieve their financial objectives. The costs and risks created by inequality will directly reduce long-term diversified portfolio returns.

Kroger's 10-K, reports operating profit of \$3.5 billion and lists labor costs and inflation among risks that could adversely affect the company's financial position,¹³ but fails to consider the costs that their compensation practices has on the broader economy and for the diversified investor.

¹¹ <https://www.pionline.com/sponsored-content/facing-hard-truths-material-risk-rising-inequality>

¹² <https://www.pionline.com/sponsored-content/facing-hard-truths-material-risk-rising-inequality>

¹³ <https://d18m0p25nwr6d.cloudfront.net/CIK-0000056873/107badbb-3656-4d1e-8e88-bede8ee11566.pdf>

December 30, 2022

Christine S. Wheatley
Corporate Secretary
The Kroger Company
1014 Vine Street
Cincinnati OH 45202-1100

Dear Ms. Wheatley:

I write concerning a shareholder proposal (the “Proposal”) submitted to The Kroger Co. (the “Company”) by the Sisters of the Presentation of the Blessed Virgin Mary of Aberdeen, South Dakota (the “Proponent”).

As of December 30, 2022, the Proponent beneficially owned, and had beneficially owned continuously for at least three years, shares of the Company’s common stock worth at least \$2,000 (the “Shares”).”

Fifth Third Bank has acted as record holder of the Shares and is a DTC participant. If you require any additional information, please do not hesitate to contact me at [REDACTED] or [REDACTED]

Regards,



Patrick Blom
Vice President
Fifth Third Institutional Services
Relationship Manager Team Lead
Ph: [REDACTED]
Email: [REDACTED]

Subject: FW: Shareholder Proposal on Income Inequity
Date: Tuesday, February 21, 2023 2:21:19 PM
Attachments: [Kroger 2023 PBVM.pdf](#)
[Kroger 2023 Proposal.pdf](#)
[Presentation Sisters - Kroger Certification 123022.pdf](#)

From: Pegge Boehm [REDACTED]
Sent: Friday, February 17, 2023 2:13 PM
To: Wheatley, Christine S <[REDACTED]>; Dailey, Keith G
[REDACTED]>
Cc: Natalie Wasek [REDACTED]
Subject: Fw: Shareholder Proposal on Income Inequity

[EXTERNAL EMAIL]: Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear Christine - I hope you are receiving the attachments now. Thanks.

From: Pegge Boehm [REDACTED] g>
Sent: Friday, December 30, 2022 6:37 PM
To: [REDACTED]
[REDACTED]
Cc: [REDACTED]
Subject: Shareholder Proposal on Income Inequity

Dear Ms. Wheatley -

On behalf of the Sisters of the Presentation of the Blessed Virgin Mary of Aberdeen, SD, I submit this shareholder proposal on Income Inequity.

I look forward to hearing back from you as to when we can meet and reach a mutual agreement.

New Year Blessings,

Sister Pegge Boehm, PBVM
Socially Responsible Investment Coordinator
Sisters of the Presentation of the BVM of Aberdeen, SD

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