



April 22, 2022

Gurbir Grewal, Director  
Division of Enforcement  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

*Submitted via SEC TCR portal at <https://www.sec.gov/tcr>.*

**Re: Request for Investigation into McDonald's Corporation Pursuant to Securities Anti-Deception Rules 10b-5 and 14a-9**

Dear Director Grewal and Enforcement Staff,

The Humane Society of the United States (“HSUS”) requests the Securities and Exchange Commission (“Commission”) investigate and take any action deemed warranted concerning McDonald’s Corporation’s (“McDonald’s” or “the Company”) dissemination of false or misleading information. As discussed in detail below, this complaint concerns misrepresentations—and omissions of material facts necessary to prevent deception—relating to Environmental, Social, and Governance (“ESG”) claims around a significant animal welfare policy issue, specifically the housing of pregnant pigs in its supply chain in near-immobilizing enclosures called gestation crates.<sup>1</sup> At a time when major companies are widely making lofty ESG claims, including about animal welfare, McDonald’s has published a series of communications that misrepresent to shareholders and the public generally its policies and actions taken with respect to this issue. Importantly, the misrepresentations at issue do not turn on nuanced interpretations of the ethics of housing pigs in such restrictive enclosures. Nor do they turn on the Company’s revisionist claims that its decade-old pledge to “end” the use of gestation crates wasn’t really a pledge to end the use of gestation crates. Instead, the deception here—which appears in releases, SEC filings, and now national media—arises from the Company’s adoption of a self-created and biologically nonsensical modification of the term

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<sup>1</sup> See *The Wendy’s Corporation* (Mar. 16, 2022) (expressing the view that a shareholder proposal calling for disclosures relating to sow gestation crate confinement “transcends ordinary business matters”), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2022/humanewendy031622-14a8.pdf>; see also *Bob Evans Farms, Inc.* (June 6, 2011) (expressing the view that a proposal calling for an increase in cage-free eggs “focuses on the significant policy issue of the humane treatment of animals”), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2011/humansociety060611-14a8.pdf>.

“gestation” (i.e., pregnancy). A determination in this matter will not require battles of experts or surveys of stakeholder opinion, but merely a copy of any standard dictionary.

On February 20, 2022, McDonald’s posted to its website and released to national media a statement that by the end of this year, it expects 85% to 90% of its U.S. pork to be sourced “*from sows not housed in gestation crates during pregnancy.*”<sup>2</sup> Two days later, the Company filed the same statement with the Commission pursuant to Rule 14a-12.<sup>3</sup> Gestation crates are individual, typically concrete-floored metal enclosures so restrictive that the pigs cannot even turn around, take more than a step or two forward or back, groom themselves, lie down comfortably, or engage in nearly any other natural behaviors.<sup>4</sup>

Unsurprisingly, the Company’s public statement was widely reprinted by the country’s major media outlets. *See Associated Press*, “Investor pushes McDonald’s to change the way it buys pork,” Feb. 20, 2022 (McDonald’s “expects to source 85 to 90% of its U.S. pork from pigs *not housed in gestation crates during pregnancy* by the end of this year.”); *New York Times*, “Carl Icahn Pushes McDonald’s to Change Way It Sources Its Pork,” Feb. 20, 2022 (“By the end of this year, McDonald’s said, it expects to source 85 to 90 percent of its U.S. pork from sows *not housed in gestation crates during pregnancy.*”); *Reuters*, “Icahn nominates two members to McDonald’s board to challenge pig policy,” Feb. 20, 2022 (McDonald’s “expects to source 85% to 90% of its U.S. pork volumes from sows *not housed in gestation crates during pregnancy* by the end of 2022.”); *Barron’s*, “Carl Icahn Presses McDonald’s on How It Sources Pork. Chain Says it Will Evaluate His Director Nominees.” Feb. 20, 2022 (“By the end of 2022, McDonald’s says it expects to source 85% to 90% of its U.S. pork volumes from sows *not housed in gestation crates during pregnancy.*”); *Business Insider*, “McDonald’s goes on the defense against activist investor Carl Icahn in escalating battle over pork production,” Feb. 21, 2022 (McDonald’s “expects to source 85 to 90% of its US pork from sows *not housed in gestation crates during pregnancy.*”); *Bloomberg*, “Icahn’s Board Fight at McDonald’s Pivots on Pigs in Tight Crates,” Feb. 22, 2022 (McDonald’s says that “by the end of the year, 85% to 90% of its U.S. pork will come from ‘sows *not housed in gestation crates during pregnancy.*’”)<sup>5</sup>

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<sup>2</sup> See [corporate.mcdonalds.com/corpmcd/en-us/our-stories/article/press-releases.response-carl-icahn.html](https://corporate.mcdonalds.com/corpmcd/en-us/our-stories/article/press-releases.response-carl-icahn.html), [www.prnewswire.com/news-releases/mcdonalds-board-of-directors-issues-statement-in-response-to-carl-icahn-301486183.html](http://www.prnewswire.com/news-releases/mcdonalds-board-of-directors-issues-statement-in-response-to-carl-icahn-301486183.html). (Emphasis added.)

<sup>3</sup> DEFA14A, “Additional definitive proxy soliciting materials and Rule 14(a)(12) material,” [www.sec.gov/Archives/edgar/data/63908/000095010322002878/dp167476\\_defa14a.htm](http://www.sec.gov/Archives/edgar/data/63908/000095010322002878/dp167476_defa14a.htm).

<sup>4</sup> “An HSUS Report: Welfare Issues with Gestation Crates for Pregnant Sows,” Feb. 2013; [www.humanesociety.org/sites/default/files/docs/hsus-report-gestation-crates-for-pregnant-sows.pdf](http://www.humanesociety.org/sites/default/files/docs/hsus-report-gestation-crates-for-pregnant-sows.pdf).

<sup>5</sup> (All emphasis added.) See <https://apnews.com/article/business-carl-icahn-e0e3b931f110b294ae086d4889365954>; <https://www.nytimes.com/2022/02/20/business/dealbook/mcdonalds-pork-carl-icahn.html>; <https://www.reuters.com/business/retail-consumer/mcdonalds-says-carl-icahn-nominates->

But despite its unequivocal claim that its pork will come from pigs *not housed in gestation crates during pregnancy*, the Company actually means something very different. What wasn't made clear to the millions of stakeholders seeing the suddenly ubiquitous claim, is that the Company's statement excludes from its undisclosed reinterpretation of "pregnancy" as much as six full weeks of a pig's 16-week gestation period, during which sows will still be kept in gestation crates.<sup>6</sup> **That is, of the 85 to 90% of pork from "pigs not housed in gestation crates during pregnancy," nearly all of this pork will come from pigs who are, in fact, confined in gestation crates during as much as 40% of their pregnancies.**<sup>7</sup>

How has the Company attempted to harmonize its claim that pigs are "not housed in gestation crates during pregnancy" while still housing pigs in gestation crates during pregnancy? Stealthily. And falsely, both by commission and by omission of material facts that would reveal the deception to shareholders and regulators.

Although it isn't explained in the Company's release or Rule 14a-12 filing—nor consequently in the widespread media coverage—McDonald's has claimed that, regardless of the date of conception, until its pork suppliers positively *confirm* a pig's pregnancy, they are not yet identified as "gestating" and are not considered to be *pregnant pigs housed in gestation stalls* (although as a matter of basic fact that is exactly what they are).<sup>8</sup> And the Company's suppliers don't perform tests to confirm pregnancies for as many as six weeks after conception. Yet, according to McDonald's, it is only at this point—near the middle of her pregnancy—that suppliers first choose to confirm a pig is pregnant and it is at that point—according to the Company—that she is arbitrarily first deemed a "gestating sow."<sup>9</sup>

But as any standard dictionary would inform, "gestation" doesn't begin when producers decide to test for it, but comprises the entire pregnancy "from conception until birth."<sup>10</sup> Or, short of a dictionary, McDonald's could consult the U.S. Department of Agriculture, which also affirms the "gestation period" for swine to be

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two-members-board-2022-02-20/; <https://www.barrons.com/articles/carl-icahn-presses-mcdonalds-on-how-it-sources-pork-chain-says-it-will-evaluate-his-director-nominees-51645396661>; <https://www.businessinsider.com/mcdonalds-defends-itself-against-carl-icahn-in-escalating-animal-rights-war-2022-2>; <https://www.bloomberg.com/news/articles/2022-02-22/mcdonald-s-faces-fight-from-activist-carl-icahn-over-fight-for-animal-rights>.

<sup>6</sup> See Cara Lombardo, The Wall Street Journal, "Carl Icahn's Other Campaign: Pushing McDonald's to Treat Pigs Better," Feb. 8, 2022.

<sup>7</sup> *Id.*

<sup>8</sup> See Attachment 2.

<sup>9</sup> *Id.*

<sup>10</sup> See, e.g., *American Heritage® Dictionary of the English Language, Fifth Edition*. (2011); see also *Collins English Dictionary – Complete and Unabridged, 12th Edition* 2014.

from “conception to birth” and states that amounts to about 16 weeks.<sup>11</sup> Even the industry’s major producers themselves recognize gestation begins with conception, not confirmation.<sup>12</sup> Common understanding, as evidenced by these sources, is therefore inconsistent with the statements McDonald’s is making—no one would reasonably assume that inseminated pigs are not actually pregnant until an arbitrary date at which a confirmation determination is made. The Company’s game of labels cannot be seriously defended.

Just a few weeks before the February 20 release (and subsequent Rule 14a-12 filing), a Wall Street Journal article reported that the Company’s suppliers do, in fact, keep pregnant pigs in gestation crates, removing them “only after confirming they’re pregnant” and that producers may “wait to do so until the sows are four to six weeks into their 16-week pregnancies.”<sup>13</sup> The article reported that McDonald’s provided the Journal a written statement that claimed, by the end of the year, as much as 90% of its U.S. pork will be “sourced from ‘confirmed pregnant sows’ not housed in gestation crates.”<sup>14</sup> But as media interest and pressure from investors and consumers mounted in the following weeks, the Company would issue its Rule 14a-12 release to national media coverage, omitting entirely any mention of the weeks it knows its suppliers keep pigs in gestation crates and removing the “confirmed” qualifier from its percentage forecast.<sup>15</sup> The result is an unqualified solicitation statement that the Company “expects to source 85% to 90% of its U.S. pork volumes *from sows not housed in gestation crates during pregnancy.*”<sup>16</sup> But unless McDonald’s can get buy-in from the Oxford English Dictionary on changing the definition of “pregnancy” to begin at six weeks after conception, the company’s statement is objectively false.

Finally, on April 8, 2022, McDonald’s filed its Definitive Proxy Statement, which contains a revealing disclosure, yet also repeats misleading claims

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<sup>11</sup> Overview of the U.S. Hog Industry (October 2015), p. 15, USDA, National Agricultural Statistics Service, <https://downloads.usda.library.cornell.edu/usda-esmis/files/rr171x21v/cz30pw658/js956j577/hogview-10-29-2015.pdf>.

<sup>12</sup> *See, generally*, Attachment 2 (providing definitions from McDonald’s supplier, Smithfield, and other large industry producers).

<sup>13</sup> *See* Wall Street Journal, *supra* n. 6.

<sup>14</sup> *Id.*

<sup>15</sup> DEFA14A, “Additional definitive proxy soliciting materials and Rule 14(a)(12) material,” [www.sec.gov/Archives/edgar/data/63908/000095010322002878/dp167476\\_defa14a.htm](http://www.sec.gov/Archives/edgar/data/63908/000095010322002878/dp167476_defa14a.htm).

<sup>16</sup> *Id.* (emphasis added). McDonald’s hints at its deception by employing the phrase “confirmed pregnant” in the subheading of the 14a-12 release, but doesn’t explain its meaning anywhere in the release and, in fact, omits it altogether from its lofty percentage expectations for pork sourced “from sows not housed in gestation crates during pregnancy.” The subheading is plainly insufficient, as proxy statements “should inform, not challenge the reader’s critical wits.” *Shaev v. Saper*, 320 F.3d 373, 379 (3d Cir. 2003); *see also Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097 (1991).

throughout.<sup>17</sup> As discussed in detail below, in a brief paragraph of the proxy statement, McDonald's publicly confirms what it had privately admitted to HSUS, that its gestation crate policy does in fact permit pregnant sows to be kept for weeks in gestation crates, and that only once a sow is "confirmed to be pregnant" is a producer "required to remove that sow from a gestation stall and place it in group housing."<sup>18</sup> Yet despite this short, direct acknowledgment that the Company's U.S. pork supply is sourced from pigs who spend as much as 40% of their pregnancies in restrictive and isolated gestation crates, the rest of the proxy statement is riddled with misleading statements, similar to the one in the February release and Rule 14a-12 filing, deceptively omitting this critical fact.<sup>19</sup>

### **I. For a Decade, McDonald's Pledged and Widely Broadcast a Commitment to "End" Confinement of Pigs in Gestation Crates**

Ten years ago, McDonald's set itself on a course of reputational goodwill by committing to end the confinement of pigs in gestation crates in its supply chain. On February 13, 2012, McDonald's and HSUS issued a joint press release announcing the Company's intent to bring about the "end of sow confinement in gestation stalls in [its] supply chain."<sup>20</sup> A few months later, on May 31, 2012, McDonald's publicly released what it called a "10-Year Plan for Ending Gestation Stall Use."<sup>21</sup> After consulting with "suppliers, pork producers and animal welfare experts," McDonald's announced its goal was "to source all pork for its U.S. business from *producers that do not house pregnant sows in gestation stalls* by the end of 2022."<sup>22</sup> The company pledged to "work with producers and suppliers to develop needed traceability systems that will verify pork sourced from *non-gestation stall supply chains*."<sup>23</sup>

After McDonald's initially announced this ESG policy to eliminate these crates from its supply chain, the Company continuously advertised the policy to shareholders (and potential shareholders), and consumers by way of its website and annual corporate responsibility reports for years, thus assuring stakeholders that McDonald's remained committed to its initial pledge to end the use of gestation crates in its supply chain by 2022.

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<sup>17</sup> DEFC14A, "Definitive proxy statement, contested solicitations," [www.sec.gov/Archives/edgar/data/63908/000120677422001058/mcd3962181-defc14a.htm](http://www.sec.gov/Archives/edgar/data/63908/000120677422001058/mcd3962181-defc14a.htm).

<sup>18</sup> *Id.* at 18.

<sup>19</sup> *Id.* at 3, 11, 51, 101, 102.

<sup>20</sup> See *McDonald's Takes Action Toward Ending Gestation Stall Use; Humane Society of the United States Supports Effort*, February 13, 2012, [corporate.mcdonalds.com/corpmcd/en-us/our-stories/article/ourstories.gestation\\_stall.html](http://corporate.mcdonalds.com/corpmcd/en-us/our-stories/article/ourstories.gestation_stall.html).

<sup>21</sup> See *McDonald's USA Outlines 10-Year Plan for Ending Gestation Stall Use*, May 31, 2012, [www.globenewswire.com/en/news-release/2012/05/31/1103959/0/en/McDonald-s-USA-Outlines-10-Year-Plan-for-Ending-Gestation-Stall-Use.html](http://www.globenewswire.com/en/news-release/2012/05/31/1103959/0/en/McDonald-s-USA-Outlines-10-Year-Plan-for-Ending-Gestation-Stall-Use.html).

<sup>22</sup> *Id.* (Emphasis added.)

<sup>23</sup> *Id.* (Emphasis added.)

But as 2022 edged closer, seeds of doubt began to sprout and grow. In 2019, McDonald's was among the companies HSUS surveyed for its "Food Industry Scorecard."<sup>24</sup> The report was an effort to evaluate animal welfare promises made—and kept or broken—by companies in the food industry. The survey provided to McDonald's expressly requested that companies distinguish their policies between eliminating the use of gestation crates entirely or just reducing that use by moving pigs to group housing later in their pregnancies. McDonald's did not return the survey, nor did it add any qualifications to its 2012 commitment (or to its yet-to-be-publicly-revealed interpretation of what period of housing in a pig's gestation qualifies as "during pregnancy"). Instead, the Company sent HSUS a letter that, with respect to crates, stated only that it is working with its U.S. suppliers to "phase out the use of gestation stalls for pregnant sows by 2022."<sup>25</sup>

The following year, McDonald's would again publicly use this language to seemingly indicate it was eliminating gestation crates from its U.S. supply chain, rather than just reducing the length of time pigs were enclosed within them. In 2020, McDonald's elected to report its "material" ESG issues using the framework established by the Sustainability Accounting Standards Board ("SASB").<sup>26</sup> The Company adopted the SASB framework as "an important step" in its ESG practices to "communicate [the Company's] progress in a transparent and standardized manner for investors and other important stakeholders."<sup>27</sup> SASB Accounting Metric FB-RN-430a.2 calls for reporting entities to disclose "the percentage of pork that was produced *without the use of gestation crates*."<sup>28</sup> Invoking this standard, McDonald's claimed it was working with its U.S. suppliers "to phase out the use of gestation stalls (small, enclosed pens) for housing pregnant sows by 2022."<sup>29</sup> Further, the Company astoundingly reported the percentage called for by the Accounting Metric was then "tracking at around 50%."<sup>30</sup> In other words, the Company's idea of "transparent and standardized" stakeholder communications was to proclaim that as much as half of its U.S. pork supply came from systems *that did not use* gestation crates, when in fact this was flatly not true.

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<sup>24</sup> <https://www.humanesociety.org/resources/food-industry-scorecard>.

<sup>25</sup> See Attachment 4, Letter from Marion Gross, McDonald's Senior Vice President and Chief Sustainability Officer, North America, to HSUS, July 3, 2019.

<sup>26</sup> McDonald's Sustainability Accounting Standards Board (SASB) Index 2020, [https://corporate.mcdonalds.com/content/dam/gwscorp/assets/ourpurposeimpact/McDonalds\\_PurposeImpact\\_SASBIndex\\_2020.pdf](https://corporate.mcdonalds.com/content/dam/gwscorp/assets/ourpurposeimpact/McDonalds_PurposeImpact_SASBIndex_2020.pdf).

<sup>27</sup> *Id.*

<sup>28</sup> Restaurants: Sustainability Accounting Standard, SASB, October 2018, p. 29-30, *see* <https://www.sasb.org/standards>.

<sup>29</sup> McDonald's Sustainability Accounting Standards Board (SASB) Index 2020, p. 4.

<sup>30</sup> *Id.*

## II. When McDonald's Equivocated, HSUS Filed a Shareholder Proposal Seeking Clear Disclosures

McDonald's was reporting lofty percentages of its gestation crate phase-out, while simultaneously declining to clearly state whether it was actually eliminating their use entirely or just for certain portions of a pig's pregnancy. The percentages seemed dubious and the Company's failure to explain them suspicious. After unsuccessfully attempting to engage McDonald's directly on the issue, on November 9, 2021, HSUS filed a shareholder proposal ("Proposal") to compel a truthful and unambiguous disclosure about the Company's actual commitment and status with respect to its pledge to eliminate gestation crates.

The Proposal, the full text of which is attached, detailed the 2012 pledge to end the use of gestation crates within ten years and the concerns that McDonald's is stealthily equivocating about whether it remains committed to that goal and its claims of progress.<sup>31</sup> Given the Company's own recognition of the importance of ESG transparency, the Proposal called for clear and complete disclosures:

Shareholders request McDonald's confirm that the confinement of gestating pigs in individual stalls will be ended in its U.S. pork supply chain by 2022. If McDonald's cannot so confirm, shareholders request disclosure of: 1) the percentage of pork in its U.S. supply produced without locking gestating pigs in solitary confinement stalls, and 2) the risks McDonald's may face over the disparity between its gestation stall pledges/reporting and the reality within its supply chain.<sup>32</sup>

After the Proposal was filed, McDonald's communicated with HSUS via phone and email exchanges. It was during these exchanges that McDonald's first advanced its novel (and non-public) position that, regardless of the date of conception, until its suppliers positively *confirm* a pig's pregnancy, they should not yet be called "gestating" and are not considered to be *pregnant pigs housed in gestation stalls*.<sup>33</sup> And the Company's suppliers don't perform tests to confirm pregnancies for as many as six weeks after conception. Yet, according to McDonald's, it is only at this point—near the middle of her pregnancy—that suppliers first confirm a pig is pregnant and it is at that point—according to the Company—that she is deemed a "gestating sow."<sup>34</sup>

HSUS provided several written responses to McDonald's explaining that its position is biologically and semantically insupportable because "gestation" doesn't begin when producers decide to test for it, but comprises the entire 16-week

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<sup>31</sup> See Attachment 1, HSUS Shareholder Proposal submitted for inclusion in the 2022 proxy statement for the McDonald's annual meeting.

<sup>32</sup> *Id.*

<sup>33</sup> See Attachment 2.

<sup>34</sup> *Id.*

pregnancy from conception until birth.<sup>35</sup> Perhaps knowing that its position was indefensible, late in January 2022, McDonald’s began changing the wording of its gestation crate commitment, albeit only marginally at first. Sometime in late January 2022, the Company amended its website.<sup>36</sup> Although the policy still stated the Company was progressing in phasing out “the use of gestation crates for pregnant sows,” it for the first time stated that its policy “was guided by industry- and American Association of Swine Veterinarians (AASV)-endorsed definition for group housing for pregnant sows.”<sup>37</sup> Nowhere on the Company’s website was that definition given, but there was a link to an AASV page that defines such housing as an “environment for more than one sow where, after confirmed pregnant, they have the ability to lie down and stand up unimpeded and to turn around.”<sup>38</sup> Importantly though, the one-sentence AASV definition gives no indication as to when pregnancy is typically confirmed. Thus, even inquisitive shareholders would have no way of knowing, based on the AASV definition and McDonald’s other statements, that a sow in McDonald’s supply chain will spend as much as a month and a half essentially immobilized before her pregnancy is confirmed.<sup>39</sup> And McDonald’s continued to deceptively assert without clear qualification that more than half of its “U.S. pork supply chain has phased out the use of gestation stalls for *pregnant sows*.”<sup>40</sup>

Under increasing public scrutiny over its claims, on February 11, 2022, McDonald’s provided HSUS with a draft of a “proposed gestation crate update” to be

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<sup>35</sup> See, generally, Attachment 2; see also *American Heritage® Dictionary of the English Language, Fifth Edition*. (2011); *Collins English Dictionary – Complete and Unabridged, 12th Edition* 2014.

<sup>36</sup> Compare Internet Archive site captures from January 21 and February 13, 2022: <https://web.archive.org/web/20220121231638/https://corporate.mcdonalds.com/corpmcd/our-purpose-and-impact/food-quality-and-sourcing/animal-health-and-welfare.html>; <https://web.archive.org/web/20220213150709/https://corporate.mcdonalds.com/corpmcd/our-purpose-and-impact/food-quality-and-sourcing/animal-health-and-welfare.html>

<sup>37</sup> *Id.*

<sup>38</sup> See <https://aasv.org/aasv/definition-grouphousing.php>. (McDonald’s offers no explanation—and none appears on the AASV site—as to why the definition of “group housing” should be a specialized term that applies only to groups of “confirmed pregnant” pigs, but not other pigs housed in groups. The agency need not resolve that issue for purposes of an anti-deception analysis, but only note the additional layer of unconventional and counter-intuitive definitions that shareholders would have to pierce through with respect to the Company’s gestation crate claims.)

<sup>39</sup> See [corporate.mcdonalds.com/corpmcd/our-purpose-and-impact/food-quality-and-sourcing/animal-health-and-welfare.html](https://corporate.mcdonalds.com/corpmcd/our-purpose-and-impact/food-quality-and-sourcing/animal-health-and-welfare.html). Compare, e.g., the clarity with which gestation crate policy is explained by Denny’s, using the term “confirmed” pregnant in its reporting, explaining specifically what that means, and aiming ultimately to eliminate crates entirely: [www.dennys.com/our-food](https://www.dennys.com/our-food).

<sup>40</sup> See [corporate.mcdonalds.com/corpmcd/our-purpose-and-impact/food-quality-and-sourcing/animal-health-and-welfare.html](https://corporate.mcdonalds.com/corpmcd/our-purpose-and-impact/food-quality-and-sourcing/animal-health-and-welfare.html) (emphasis added).

published on the “Animal Welfare section of [its] corporate website.”<sup>41</sup> The update read very differently than the Company’s previous public statements, stating that “[b]y the end of 2022, roughly 85-90% of our U.S. pork will come from pregnant sows housed in groups.”<sup>42</sup> Gone was the claim that McDonald’s was sourcing a large percentage of its pork from pigs that were not housed in gestation crates during pregnancy. Additionally, the draft policy update included what appeared to be the Company’s first direct acknowledgement that the lofty phase-out percentages it was touting included “windows (generally 4 to 6 weeks) when sows can spend time in crates in the early days of pregnancy.”<sup>43</sup> Given this “window” McDonald’s acknowledges, in which even group-housed sows are kept in gestation crates during their pregnancy, the one thing the Company absolutely cannot truthfully say is that its U.S. pork comes from *sows not housed in gestation crates during pregnancy*. Yet just a week later, that is exactly what the Company did say.

The draft policy update McDonald’s provided HSUS was never published. Instead of committing to transparency on the issue of confinement practices in its supply chain, the Company perpetuated its obfuscation. On February 20, 2022, the Company issued a national press release proclaiming that it “expects to source 85% to 90% of its U.S. pork volumes *from sows not housed in gestation crates during pregnancy*.”<sup>44</sup> On February 22, the Company repeated the claim by filing the same statement with the Commission pursuant to regulations for solicitations.<sup>45</sup> Additionally, the Company’s release/solicitation framed its 2012 pledge as a “commitment to source from producers who do not use gestational crates for pregnant sows.”<sup>46</sup> Nowhere in the nationally broadcast statement does McDonald’s reveal what it affirmed in its earlier draft to HSUS, that the 90% of “sows not housed in gestation crates during pregnancy” actually *are housed in gestation crates* during their pregnancies for as many as six weeks, or nearly 40% of their terms. Consequently, as noted above, nearly every major media outlet covering the McDonald’s release—comprising a total circulation of tens of millions—printed the Company’s unconditional claim that sows are not housed in gestation crates during pregnancy. But, as is now crystal clear, that statement is a deception, and a violation of federal securities laws.

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<sup>41</sup> See Attachment 3, Email and proposed gestation crate update from McDonald’s Chief Global Impact Officer to HSUS, February 11, 2022.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See [corporate.mcdonalds.com/corpmcd/en-us/our-stories/article/press-releases.response-carl-icahn.html](https://corporate.mcdonalds.com/corpmcd/en-us/our-stories/article/press-releases.response-carl-icahn.html); [www.prnewswire.com/news-releases/mcdonalds-board-of-directors-issues-statement-in-response-to-carl-icahn-301486183.html](https://www.prnewswire.com/news-releases/mcdonalds-board-of-directors-issues-statement-in-response-to-carl-icahn-301486183.html). (Emphasis added.) The release is styled as related to a director nomination, but McDonald’s expressly connects it to an “issue regarding the Company’s pork commitment, which [HSUS] has already introduced through a shareholder proposal.”

<sup>45</sup> DEFA14A, “Additional definitive proxy soliciting materials and Rule 14(a)(12) material,” [www.sec.gov/Archives/edgar/data/63908/000095010322002878/dp167476\\_defa14a.htm](https://www.sec.gov/Archives/edgar/data/63908/000095010322002878/dp167476_defa14a.htm).

<sup>46</sup> *Id.*

### III. The Company's Definitive Proxy Statement Adds to its Pattern of Deceptive Communications, but also Includes Revealing Disclosures

On April 8, 2022, McDonald's filed its Definitive Proxy Statement.<sup>47</sup> In one short paragraph on page 18 of the 136-page document (under the nondescript heading "Background of the Solicitation)," McDonald's reveals that its sow housing policy does in fact permit pregnant pigs to be kept for as many as six weeks in gestation crates.<sup>48</sup> What McDonald's was telling its suppliers is that only once "a sow was confirmed to be pregnant, *then* the producer would be required to remove that sow from a gestation stall and place it in group housing."<sup>49</sup>

Yet despite this brief, but critical, revelation that the Company's U.S. pork supply is sourced from pigs who spend as much as 40% of their pregnancies in restrictive and isolated gestation crates, the rest of the proxy statement is riddled with misleading statements omitting this critical qualifying fact:

- Under the heading, "[c]ontinuing to earn trust with meaningful action and accountability," the Company's board chairman states that "in 2012 we became the first major brand to make a commitment to source from U.S. producers who *do not use gestational crates for pregnant sows* ... We are on track to achieve it by the end of 2024, and expect to reach 85% to 90% of our goal by the end of 2022." P. 3 (emphasis added).
- On pages touting its ESG activity, McDonald's restates its "commitment to phasing out the use of gestation stalls *for housing pregnant sows* in the U.S. P. 11, 51 (emphasis added).
- Later in the proxy statement, in opposition to the HSUS shareholder proposal, the Company repeats its claim, this time in bold print, that it was "the first Quick Service Restaurant brand to commit to *phase out the use of gestation stalls for pregnant sows*." P. 101 (emphasis added).
- In the same section, also in bold print, "McDonald's remains committed to sourcing all pork for our U.S. business from *producers that do not house pregnant sows in gestation stalls*." P. 102 (emphasis added).

Contrary to the repeat impression these statements convey, the Company's gestation crate policies do not apply to "pregnant" sows, but only to "confirmed

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<sup>47</sup> DEFC14A, "Definitive proxy statement, contested solicitations," [www.sec.gov/Archives/edgar/data/63908/000120677422001058/mcd3962181-defc14a.htm](http://www.sec.gov/Archives/edgar/data/63908/000120677422001058/mcd3962181-defc14a.htm).

<sup>48</sup> *Id.* at 18.

<sup>49</sup> *Id.* (emphasis added).

pregnant” sows. The Company’s brief gloss on the truth of its gestation crate policies, in a single paragraph of a lengthy document, only serves to highlight the egregiousness of the omissions in the rest of its communications.

In its opposition to the HSUS proposal, McDonald’s again references the issue of pigs being housed in gestation crates, though this section is markedly more opaque than the admission found more than 80 pages earlier in the proxy statement.<sup>50</sup> In variations of the above theme, McDonald’s makes statements claiming that most of its U.S. pork comes from pigs raised in “group housing systems.”<sup>51</sup> But the Company here is not relying on a common understanding of “group housing,” but on a specialized definition (see Section II above) that arbitrarily applies only to pigs kept in groups *after* they’ve been confirmed pregnant—something that may not happen until nearly halfway through pregnancy. McDonald’s doesn’t directly provide this unique definition of “group housing” in the proxy statement, but instead directs shareholders to external, third-party websites listed in footnote on page 102. Later in the same section, McDonald’s discusses the advantages of group housing, but also suggests that “some separation from a group environment during the *early days* of gestation is important for the health and safety of the sows.”<sup>52</sup> Unsurprisingly, HSUS disagrees with this attempted justification of separation (and notes that, in any case, a need for separation doesn’t justify extreme restriction in gestation crates).<sup>53</sup> But while McDonald’s is entitled to differences of opinion on this issue, what it cannot lawfully do is describe the initial 40% of a sow’s 16-week pregnancy as “*early days*.”

Finally, McDonald’s cryptically suggests it sees future “opportunities to better define and standardize current approaches to confirmation of pregnancy.”<sup>54</sup> But “confirmation of pregnancy” doesn’t need better definition, just better disclosure. McDonald’s should stick with precise and complete language, using standard definitions that are well-established and easily understood by reasonable shareholders. This would be demonstrably easy to do in this context, yet McDonald’s has chosen not to, and instead has taken a path that requires departing from common definitions and common sense in favor of creative—albeit deceptive—wordsmithing.

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<sup>50</sup> Because the Company’s admission on page 18 reveals the primary information HSUS called for in its proposal—confirmation that McDonald’s is not, in fact, sourcing pork from sows *not housed in gestation crates during pregnancy*—there is no longer a need for a shareholder vote to compel such disclosure. HSUS has, therefore, withdrawn its proposal. Misleading statements in the Company’s opposition, however, remain relevant to an assessment under the anti-deception laws of its various gestation crate communications.

<sup>51</sup> *Id.* at p. 102-03.

<sup>52</sup> *Id.* at p. 103 (emphasis added).

<sup>53</sup> It is important to note that the primary issue under the anti-deception laws is truthful and complete disclosure. Thus, regardless of the claimed reason the Company’s suppliers keep pigs in crates for four to six weeks after insemination, McDonald’s cannot give stakeholders the impression that such crating either does not occur or that it amounts to significantly less time than the four to six weeks it is.

<sup>54</sup> *Id.*

The Company should not be permitted to file a proxy statement that repeatedly omits material facts and, at best, contains only hints from which the most discerning shareholders might discover how to make its half-truths whole. Moreover, the Company has not retracted any of its public assertions that the majority of pregnant pigs in its supply chain are not housed in gestation crates. The anti-fraud laws protect against placing the onus on shareholders to understand the implications of a company's admissions as to a few specific details relative to its broad and continuing false claims and omissions.

#### **IV. The Company's Statements and Omissions Violate the Anti-Deception Protections of Rules 10b-5 and 14a-9**

It is a violation of federal securities law "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading."<sup>55</sup>

With respect to solicitations, Rule 14a-9 similarly protects against false or misleading statements:

- (a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.<sup>56</sup>

##### **1. The Deceptive Statements and Omissions Relate to Material Facts**

The statements and omissions discussed above are unquestionably material facts. Major financial advice and management companies recognize the significance of business practices with respect to animal welfare policies and disclosures. Glass Lewis, the prominent proxy advisory firm, has recognized the "exposure to regulatory,

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<sup>55</sup> 17 C.F.R. § 240.10b-5(b); *see also* 15 U.S.C. § 78j(b). Rule 10b-5 applies to communications "in connection with purchase or sale of any security," which the Commission has interpreted broadly to give stakeholders maximum protection against fraud. *See SEC v. Hasho*, 784 F.Supp. 1059, 1106 (S.D.N.Y.1992) (explaining that "[a]ny statement that is reasonably calculated to influence the average investor satisfies the 'in connection with' requirement of Rule 10b-5.")

<sup>56</sup> 17 C.F.R. § 240.14a-9; *see also* 15 U.S.C. § 78n(a).

legal and reputational risk” that arise from a company’s “animal welfare policies and practices.”<sup>57</sup> Citigroup concludes that “headline risks” endangering companies include concerns over animal cruelty.<sup>58</sup> Northern Trust—a financial advisor with more than \$1 trillion in assets under management—has reported that it, “generally votes for proposals requesting increased disclosure or reporting regarding animal treatment issues that may impact a company’s operations and products...especially in relation to food production.”<sup>59</sup> And the World Bank’s International Finance Corporation has warned that failure to “keep pace” on animal welfare issues is a risk factor that “could put companies and their investors at a competitive disadvantage.”<sup>60</sup>

The use of gestation crates is one of the key animal welfare policies informing the advice and actions of investors and financial advisors. These concrete-floored metal enclosures are so restrictive that the pigs cannot even turn around, take more than a step or two forward or back, groom themselves, lie down comfortably, or engage in many other natural behaviors.<sup>61</sup> Crated sows suffer a number of significant welfare problems, including elevated risk of urinary tract infections, weakened muscles and bones, overgrown hooves, lameness, behavioral restriction, and stereotypies.<sup>62</sup> The restrictive cages are widely considered so cruel and out-of-favor with consumers, that many companies have pledged to ban them entirely from their supply chains, and several U.S. states have banned their use and/or the sale of pork that is produced using them.<sup>63</sup>

The McDonald’s statements appear carefully designed to reach the concerns of stakeholders—investors, potential investors, customers, etc.— that sows and other animals might suffer to produce food products served at its restaurants. This issue is of particular interest to both stakeholders concerned about the treatment of animals and to those concerned about the financial damage to the business should it be revealed that animals were being treated less than humanely, as reflected in the statements of the financial analyst firms above. The Company’s deceptive

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<sup>57</sup> See [www.greencentury.com/wp-content/uploads/2018/06/Glass-Lewis\\_Tyson\\_Report.pdf](http://www.greencentury.com/wp-content/uploads/2018/06/Glass-Lewis_Tyson_Report.pdf).

<sup>58</sup> Tiffany Hsu. “Animal Cruelty: Why McDonald’s, In-N-Out, Wall Street Now Say No.” Los Angeles Times. August 23, 2012, <https://www.latimes.com/business/la-fi-mo-mcdonalds-animal-cruelty-20120823-story.html>.

<sup>59</sup> “Proxy Voting Policies, Procedures, and Guidelines,” Northern Trust, Dec. 12, 2019, p. 21.

<sup>60</sup> International Finance Corporation, “Animal Welfare in Livestock Operations,” Good Practice Note, October 2006, p. 21.

<sup>61</sup> “An HSUS Report: Welfare Issues with Gestation Crates for Pregnant Sows,” Feb. 2013; [www.humanesociety.org/sites/default/files/docs/hsus-report-gestation-crates-for-pregnant-sows.pdf](http://www.humanesociety.org/sites/default/files/docs/hsus-report-gestation-crates-for-pregnant-sows.pdf); see also Restaurants: Sustainability Accounting Standard, SASB, October 2018, p. 29-30 (defining gestation crate as an “enclosure for housing an individual breeding sow, where the enclosure fulfills the animal’s static space requirements but does not allow for dynamic movement, such as turning around, and is typically non-bedded, with concrete floors and metal stalls”).

<sup>62</sup> *Id.*

<sup>63</sup> See, e.g., <https://cratefreefuture.com>.

communications have real world implications, especially given that other major companies actually are sourcing pork produced entirely without housing pigs in gestation crates for weeks on end. There's ample evidence that many stakeholders are concerned enough about animal welfare to alter their purchasing and/or investing decisions on the basis of representations such as those made by McDonald's here.<sup>64</sup>

For example, voters in California recently overwhelmingly voted to make the use of gestation crates a criminal offense. *See Prevention of Cruelty to Farm Animals Act*, 2018 Cal. Legis. Serv. Prop. 12.<sup>65</sup> That state law also prohibits the sales of food products resulting from such prohibited confinement. The Company's solicitation statements and omissions about its practices relating to intense animal confinement are material to investors and other stakeholders. An omission "is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."<sup>66</sup> The Company's deceptive response to the exact subject matter questioned by the shareholder proposal omits critically important information shareholders need to make an informed vote at the upcoming meeting.

## **2. The Deceptive Statements and Omissions Were Made with the Required Mental States**

While Rules 10b-5 and 14a-9 incorporate different states of mind for a violation to be found, the misrepresentations and omissions at issue far exceed the requirements of either rule. A Rule 10b-5 violation involves an intentional or reckless act to deceive or manipulate.<sup>67</sup> This mental state can be shown by circumstances that companies "knew facts or had access to information suggesting that their public statements were not accurate" or "failed to check information they had a duty to monitor."<sup>68</sup> A Rule 14a-9 violation requires no intent to deceive, but only a showing of negligence, which is easily satisfied by a corporate proxy solicitation "containing

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<sup>64</sup> *See, e.g.*, Anne D'innocenzio, "Wal-Mart is pushing its suppliers to be nicer to animals bred for consumption," Associated Press, May 23, 2015 ("Wal-Mart said its own research showed 77 percent of its shoppers said they will increase their trust and 66 percent will increase their likelihood to shop at a retailer that improves the treatment of livestock."), <https://www.businessinsider.com/wal-mart-is-pushing-its-suppliers-to-be-nicer-to-animals-bred-for-consumption-2015-5>.

<sup>65</sup> Codified as Cal. Health & Safety Code §§ 25990-25994.

<sup>66</sup> *TSC Industries, Inc v. Northway, Inc*, 426 U.S. 438, 449 (1976); *see also Basic Inc. v. Levinson*, 485 U.S. 224, 232 (1988) (establishing that the materiality standard *TSC Industries* set in the proxy-solicitation context also applies to the § 10(b) and Rule 10b-5 context).

<sup>67</sup> *See SEC v. McNulty*, 137 F.3d 732, 741 (2d Cir. 1998); *S.E.C. v. Steadman*, 967 F.2d 636, 641 (D.C. Cir. 1992).

<sup>68</sup> *See SEC v. Fiore*, 416 F. Supp. 3d 306, 324 (S.D.N.Y. 2019) (citation and internal quotation marks omitted).

materially false or misleading statements or omitting a material fact.”<sup>69</sup>

As detailed above, there is evidence McDonald’s was aware of the misstatements and omissions relating to its ESG gestation crate policies. Instead of responding to the Food Industry Scorecard survey, which expressly provided an opportunity for McDonald’s to remove any confusion about its sow housing policy, the Company refused the survey and instead issued a written statement indicating it was working to “phase out” crates (withholding the fact that it was *not* working to eliminate crates for as much as 40% of a pig’s pregnancy). In 2020, McDonald’s touted the importance of ESB transparency, yet misused SASB accounting metrics to deceptively imply that 50% of the Company’s pork was produced *without the use of gestation crates*.

Further, after HSUS filed its shareholder proposal to clarify the company’s position, McDonald’s stepped up its word play—most notably by adopting the private position that until a pig is confirmed to be pregnant, she cannot yet be called a gestating pig and the cage in which she is housed cannot be called a “gestation crate.” Based on this definitional manipulation, the Company would make its dubious public claims that pigs were not housed in gestation crates during their pregnancies, even though biologically and factually they were.

Perhaps most revealing, though, are the Company’s actions in mid-February, as national public scrutiny over its gestation crate policy was substantially increasing. McDonald’s provided HSUS a draft statement that expressly and directly acknowledged the high conversion percentages it was claiming were only for sows moved to group housing after spending up to six weeks of their pregnancies in gestation crates. Yet, when it published its public release and solicitation just a week later, the Company deleted all mention of the weeks of early crate housing and instead deceptively claimed its high conversion percentage was for pork that comes “*from sows not housed in gestation crates during pregnancy*.”<sup>70</sup> When perceptive Bloomberg reporters directly questioned McDonald’s whether its figures included sows kept in gestation crates for the early weeks of their pregnancies, rather than ensure complete and truthful disclosure (as is required by law) the Company simply chose not to respond.<sup>71</sup>

Despite being made aware of the stakeholder interest and confusion, McDonald’s has passed over repeat opportunities to be aboveboard and candid with

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<sup>69</sup> See *Wilson v. Great Am. Indus., Inc.*, 855 F.2d 987, 995 (2d Cir.1988); see also *Beck v. Dobrowski*, 559 F.3d 680, 682 (7th Cir. 2009).

<sup>70</sup> DEFA14A, “Additional definitive proxy soliciting materials and Rule 14(a)(12) material,” [www.sec.gov/Archives/edgar/data/63908/000095010322002878/dp167476\\_defa14a.htm](http://www.sec.gov/Archives/edgar/data/63908/000095010322002878/dp167476_defa14a.htm). (Emphasis added.)

<sup>71</sup> Deena Shanker and Leslie Patton, “Icahn’s Board Fight at McDonald’s Pivots on Pigs in Tight Crates.” Bloomberg, February 22, 2022.

its shareholders and the public about its 2012 pledge to end the use of gestation crates for pregnant pigs, and the Company's current interpretation of that pledge. Instead it has opted for evasion and ambiguity at multiple turns by publishing misleading, incomplete, or outright false statements. Even now that its proxy statement demonstrates that HSUS (and the Bloomberg reporters) were right to publicly challenge the Company's gestation crate claims, McDonald's still infused that lengthy document with material omissions throughout. And the Company hasn't taken any action to correct its false February 2020 solicitation, which was covered by media throughout the country. Nor has the Company revised or supplemented its website to remedy its misleading statements and omissions of material fact (discussed in Section II above).<sup>72</sup>

McDonald's pattern of hiding or obscuring material facts that were well within the Company's knowledge easily satisfies Rule 14a-9's negligence standard, and satisfies Rule 10b-5, as well.

## **V. Stakeholders are Particularly Vulnerable to Deceptive Statements and Omissions Relating to Internal Company Policies**

Congress recognized the importance of clear and complete investment information when enacting federal securities anti-fraud laws, explaining "the hiding and secreting of important information obstructs the operation of the markets as indices of real value."<sup>73</sup> Moreover, the Commission's Enforcement Division recently issued a risk alert report, noting the increased investor interest in ESG factors, and of the need for clarity and completeness when advising about ESG securities matters.<sup>74</sup> Issues of animal welfare, extreme confinement, and factory farming are increasingly coming under scrutiny in this area. And for advisors to comply with the clarity and completeness called for by the Enforcement Division, they must at minimum receive clear and complete—and wholly accurate—information from public companies. McDonald's cannot enjoy the ESG reputational advantage gained from public claims of eliminating intensive sow housing in its supply chain, while stealthily continuing such practices for nearly 40% of a pig's pregnancy.

Stakeholders concerned about the treatment of animals are almost totally dependent on the company's truthfulness. If stakeholders have concerns about corporate finances or governance, they can independently review publicly filed records. If they have concern about the quality of whatever product the company is manufacturing, they can get a sample and have it independently tested. If, however,

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<sup>72</sup> See [corporate.mcdonalds.com/corpmcd/our-purpose-and-impact/food-quality-and-sourcing/animal-health-and-welfare.html](https://corporate.mcdonalds.com/corpmcd/our-purpose-and-impact/food-quality-and-sourcing/animal-health-and-welfare.html).

<sup>73</sup> H.Rep. No. 1383, 73d Cong., 2d Sess., 11 (1934).

<sup>74</sup> See, e.g., Risk Alert: The Division of Examinations' Review of ESG Investing, April 9, 2021, [www.sec.gov/files/esg-risk-alert.pdf](https://www.sec.gov/files/esg-risk-alert.pdf).

they have a concern about how the company treats animals used for production, they have no means of independently observing that and so are wholly dependent on the company's clarity of communication and fulfillment of its commitments.

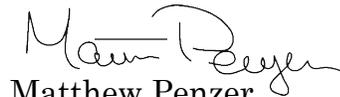
This information gap cannot be satisfied by the Company's sparse assortment of vague and incomplete hints about its true policies, such as links to third-party websites or inconsistent insertions of—and without explanation of its meaning—the phrase “confirmed pregnant” while omitting it from the most critical statements of policy (e.g., McDonald's “expects to source 85% to 90% of its U.S. pork volumes from sows not housed in gestation crates during pregnancy”<sup>75</sup>). Proxy statements are meant to inform shareholders, not serve as research assignments to decipher the truth.<sup>76</sup>

Where, as here, there is strong evidence that a company is misleading stakeholders as to its internal policies—particularly against a baseline crate-free backdrop of the company's own creation—action to protect stakeholders from deception is warranted.

## **Conclusion**

For the foregoing reasons, we respectfully ask that the Commission investigate the McDonald's statements and omissions set out above and take appropriate enforcement action to protect stakeholders and the integrity of the market.

Respectfully,



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<sup>75</sup> DEFA14A, “Additional definitive proxy soliciting materials and Rule 14(a)(12) material,” [www.sec.gov/Archives/edgar/data/63908/000095010322002878/dp167476\\_defa14a.htm](http://www.sec.gov/Archives/edgar/data/63908/000095010322002878/dp167476_defa14a.htm).

<sup>76</sup> See *Shaev v. Saper*, 320 F.3d 373, 379 (3d Cir. 2003); see also *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097 (1991).