March 4, 2020

Office of Chief Counsel
Division of Corporate Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
(Via e-mail: shareholderproposals@sec.gov)

Re: CVS Health Corporation
Shareholder Proposal of Comptroller of the City of New York on Behalf of Certain New York City Public Retirement Systems

Ladies and Gentlemen:

This letter relates to the response letter (the "Response Letter") submitted by the Comptroller of the City of New York on behalf of the New York City Employees' Retirement System, the New York City Teachers' Retirement System, the New York City Police Pension Fund and the New York City Fire Pension Fund (the "Proponent"), dated February 14, 2020, in response to the no-action request (the "No-Action Request") submitted by CVS Health Corporation, a Delaware corporation (the "Company"), to the Staff (the "Staff") of the Division of Corporation Finance of the Securities and Exchange Commission (the "Commission") on January 14, 2020. The No-Action Request pertains to the Proponent's request to include a shareholder proposal in the Company's 2020 proxy materials (the "Proxy Materials") regarding a report concerning the Company's use of contractual provisions requiring employees to arbitrate employment-related claims (the proposal and the supporting statement together, the "Proposal").

For the reasons set forth below and in the No-Action Request, the Company respectfully requests confirmation that the Staff will not recommend enforcement action if, in reliance on Rule 14a-8 of the Securities Exchange Act of 1934, as amended, the Company omits the Proposal from its Proxy Materials.

DISCUSSION

I. The Company Continues to Maintain that the Proposal Relates to the Ordinary Business Operations of the Company and Therefore May be Excluded Pursuant to Rule 14a-8(i)(7)

The Response Letter states that the Proposal should not be excluded under the ordinary business matter exception because it focuses on a "significant policy issue" for the Company. The Proponent argues that the Proposal is in-line with the proposal submitted to CBRE Group, Inc. in 2019, in which the Staff was "unable to concur" with CBRE's contention that a proposal requesting a report on the impact of mandatory arbitration policies on its employees, which included an evaluation of the risks that may result from the company's mandatory arbitration program on claims of sexual harassment, was excludable on ordinary business grounds. See CBRE Group, Inc. (Mar. 6, 2019) ("CBRE Group"). However, unlike the proposal in CBRE Group, this Proposal could be read to request a report on any and every contractual provision requiring employees of the Company to arbitrate employment-related claims. The Proposal focuses on wide-ranging employee relations issues, which renders the Proposal more aligned with the subject matter underlying the proposals submitted in 2019 to Amazon.com, Inc., Yum! Brands, Inc. and XPO Logistics, Inc. (collectively, the "Inequitable Employment Practices Proposals"). For each of the Inequitable Employment Practices Proposals, the Staff did not recognize mandatory arbitration with employees as a practice that raises a significant policy issue. See Amazon.com, Inc. (Mar. 6, 2019) (concurring in the exclusion of a proposal requesting that the board adopt a policy that the Company will not engage in any "Inequitable Employment Practice," including mandatory arbitration of employment-related claims); Yum! Brands, Inc. (Mar. 6, 2019) (same); and XPO Logistics, Inc. (Mar. 6, 2019) (same).
The Proponent asks the Staff to ignore its determinations in the Inequitable Employment Practices Proposals by pointing to "further developments in the past year" that demonstrate that the matter has now evolved into one involving a significant policy.\(^1\) The Proponent cites to several articles to support these "further developments," but many of the references and events cited in the Response Letter are dated (or at least originated) prior to March 6, 2019—the date the Staff responded to the Inequitable Employment Practices Proposals. The Company acknowledges that the matter has continued to receive some level of media attention, but a continued discussion regarding mandatory arbitration from one year to the next does not alone make it a significant policy issue.

As discussed in the No-Action Request, even if the Proposal touches on a significant policy issue, which the Company strongly contends that it does not, the Proposal is excludable as relating to the Company’s ordinary business operations because it relates to the Company’s management of its workforce generally and its workplace practices.\(^2\)

Accordingly, we continue to maintain that the Proposal is properly excludable under Rule 14a-8(i)(7).

II. The Company Continues to Maintain that the Proposal is Inherently Vague and Therefore May be Excluded Pursuant to Rule 14a-8(i)(3)

The Response Letter claims that the Proposal makes evident what is being requested of the Board, that is, to produce a report on the "use of contractual provisions requiring employees . . . to arbitrate employment-related claims (emphasis added),"\(^3\) and that the Proposal is "directed at the Company's employee arbitration policy (emphasis added)."\(^4\) The Proponent attempts to support this position by stating that "it is clear that the Proposal is not directed at bespoke, one-off arbitration provisions 'specifically negotiated and agreed upon' by CVS and individual employees" and that "[t]here is nothing in the [Proposal] that remotely suggests that the Proposal concerns such contractual provisions (emphasis added)."\(^5\) The Company only uses arbitration provisions that are specifically negotiated and agreed upon by the Company and individual employees. There are no other kinds of contractual provisions requiring arbitration of employment-related claims. Therefore, if the Proponent was not referring to individually negotiated arbitration provisions, it is unclear what the requested report on the use of "contractual arbitration provisions requiring employees of CVS to arbitrate employment-related claims" is supposed to encompass because the Company’s arbitration program is voluntary.

Even if the Proposal was supposed to be directed only at the Company’s voluntary arbitration program (which does not require arbitration), and not all contractual arbitration provisions, the Proponent failed to demonstrate such intent. For example, the very first sentence of the Proposal refers to "contractual provisions requiring employees of CVS to arbitrate employment-related claims" and there is only a single reference to the Company’s voluntary arbitration program, which is in the second to last paragraph of the supporting statement to the Proposal.\(^6\) Accordingly, if the Proponent was only concerned with the Company’s voluntary arbitration program, it could have, with ease, actually stated that in the resolution it requests the Board to adopt.

Moreover, the Response Letter suffers from the same vagueness defect as the Proposal. The Proponent discusses the purported differences between what is "mandatory" and what is not "mandatory" in terms of contractual arbitration provisions. The Response Letter states that "the Company does not have a 'mandatory arbitration policy'—in the sense of an arbitration policy that must be accepted by its employees with no right to opt-out' and that it "acknowledge[d] that CVS’s 'mandatory arbitration policy' is described as 'voluntary' because it ostensibly permits employees to opt out of the arbitration requirement,\(^7\)

\(^1\) See Response Letter, p. 6.
\(^2\) See No-Action Request, pp. 3-7.
\(^3\) See Proposal, p. 1; Response Letter, p. 18.
\(^4\) See Response Letter, p. 16.
\(^5\) See Response Letter, p. 18.
but ‘only by complying with onerous requirements.’ Based on this, as well as other language in the Response Letter, it is unclear what specific type of ‘mandatory arbitration’ provisions is the subject of the Proposal. It is even more ambiguous as to whether the Proponent considers the Company’s voluntary arbitration program as “mandatory” in the same sense as used in the numerous supporting articles and statements cited in the Response Letter. The Proponent could be asserting that the so-called “onerous” opt-out requirements in the Company’s voluntary arbitration program convert the program into one that is “mandatory.” However, the opt-out requirements in the voluntary arbitration program are simply not onerous. Under the Company’s voluntary arbitration program, any employee who wishes to opt out may send a note or letter to a specified address within 30 days of receiving the Company’s written program and a voluntary arbitration guide, indicating that they are opting out. That is it, nothing more. The opt out mechanism requires no more effort than that required to send a post-card, a mail-in voting ballot, a birthday card, a rent payment or anything else that is typically sent by mail. Accordingly, any argument that the Company’s voluntary arbitration program should be deemed “mandatory” because of the requirement to opt out is merely an effort to lump the Company’s program in with other traditional broad-based mandatory arbitration programs.

Therefore, without further clarification from the Proponent regarding the scope of “contractual arbitration provisions requiring employees of CVS to arbitrate employment-related claims” to be included in the requested report and the lack of clarity as to what the Proponent considers “mandatory,” it is likely that the Company and its shareholders could interpret the Proposal differently, resulting in action by the Company that departs from those actions envisioned by the shareholders voting on the Proposal.

Accordingly, we continue to maintain that the Proposal is properly excludable under Rule 14a-8(i)(3).

CONCLUSION

Based upon the foregoing analysis, and our arguments set forth in the No-Action Request, we reiterate our request that the Staff take no action if the Company excludes the Proposal from its Proxy Materials. Please call the undersigned at (401) 770-5409 or Colleen McIntosh at (401) 770-5177 if you should have any questions or need additional information.

Respectfully yours,

Thomas S. Moffatt
Vice President, Assistant Secretary
and Assistant General Counsel

cc: Michael Garland, Assistant Comptroller, The Comptroller of the City of New York
    Colleen M. McIntosh, SVP and Chief Governance Officer, CVS Health Corporation
    Doreen E. Lilienfeld, Shearman & Sterling LLP

---

7 See Response Letter, p. 19.
8 For example, the Response Letter quotes three candidates for the Democratic presidential nomination on the topic of mandatory arbitration. Senator Elizabeth Warren is quoted as referring to signed employment contracts that force employees into arbitration. Similarly, former Vice President Joe Biden is quoted as saying that “[s]ixty million workers have been forced to sign contracts waiving their rights to sue their employer and nearly 25 million have been forced to waive their right to bring class action lawsuits or joint arbitration (emphasis added).” The Company’s voluntary arbitration program is clearly distinguishable from the foregoing mandatory arbitration practices.
9 The definition of “onerous” is instructive. According to Cambridge’s Online Dictionary, “onerous” means “causing great difficulty or trouble.” Oxford’s Online Dictionary defines “onerous” to mean, “needing great effort; causing trouble or worry.” The fact that thousands of the Company’s employees have actually managed to opt out of the voluntary arbitration program clearly demonstrates that there is nothing onerous about the program’s opt-out requirement.
February 14, 2020

By e-mail: shareholderproposals@sec.gov

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

Re: Response to CVS Health Corporation’s
January 14, 2020 No-Action Request

Dear Counsel:

I write on behalf of the New York City Employees’ Retirement System, the New York City Teachers’ Retirement System, the New York City Police Pension Fund and the New York City Fire Pension Fund (collectively, the “Systems”) in response to the letter from CVS Health Corporation (“CVS” or the “Company”), dated January 14, 2020, seeking confirmation from the staff of Office of Chief Counsel of the Division of Corporate Finance (“Staff”) that it will not recommend enforcement action if the Company omits the Systems’ shareholder proposal (“Proposal”) from its 2020 proxy materials (the “No-Action Request”). CVS has not met its burden of establishing that the Proposal may be excluded as pertaining to ordinary business operations under Rule 14a-8(i)(7) or for being so inherently vague or indefinite as to be materially false or misleading under Rule 14a-8(i)(3). The subject matter of the Proposal—the use of contractual provisions requiring employees to arbitrate employment-related claims—has itself recently emerged as a significant policy issue that transcends CVS’s ordinary business operations, and the report requested by the Proposal in no way micromanages the Company. Moreover, the Proposal is more than sufficiently clear with respect to the contents of the report that it requests. Accordingly, the Proposal cannot be excluded under either Rule 14a-8(i)(7) or Rule 14a-8(i)(3). The Systems respectfully request that the Staff deny CVS’s No-Action Request.

1 The Comptroller of the City of New York is the custodian, investment advisor, and a trustee of the Systems, and the Systems’ Boards of Trustees have authorized the Comptroller to file the Proposal on their behalf.
The Proposal and Supporting Statement

The Proposal\(^2\) states:

“RESOLVED that shareholders of CVS Health Corporation. [sic] (“CVS”) urge the Board of Directors to report to shareholders, at reasonable cost and omitting confidential and proprietary information, on the use of contractual provisions requiring employees of CVS to arbitrate employment-related claims. The report should specify the proportion of the workforce subject to such provisions; the number of employment-related arbitration claims initiated and decided in favor of the employee, in each case in the previous calendar year; and any changes in policy or practice CVS has made, or intends to make, as a result of California’s ban on agreeing to arbitration as a condition of employment.”

The Supporting Statement helps explain why the Proposal presents a significant policy issue for CVS. Contractual provisions requiring employees to arbitrate employment-related claims—which CVS makes widespread use of—preclude “employees from suing in court for wrongs like wage theft, discrimination and harassment, and require[] them to submit to private arbitration.” Because arbitration is private and contractual in nature, and often subject to confidentiality requirements, the arbitration of “employment-related claims can allow a toxic culture to flourish, increasing the severity of eventual consequences and harming employee morale.” Various high-profile sexual harassment cases at large employers such as Fox News, Google and Uber have served to focus “public attention … on the use by companies of agreements requiring employees to pursue employment-related claims, including sexual harassment claims, through arbitration.” In response to these cases, a “robust public debate has ensued, including responses by legislators, regulators and state attorneys general.”

The Analytical Framework

A. The Ordinary Business Exclusion under Rule 14a-8(i)(7)

The “ordinary business” exception permits a company to exclude a proposal that “deals with a matter relating to the company’s ordinary business operations.”\(^3\) The applicability of this exception rests on “two central considerations”: (1) the “proposal’s subject matter,” and (2) “the degree to which the proposal ‘micromanages’ the company.”\(^4\)

With respect to subject matter, shareholder proposals are excludable if they “raise matters so fundamental to management’s ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight.”\(^5\) However, “[t]he fact that a proposal relates to ordinary business matters does not conclusively establish that a company may exclude the proposal from its proxy materials.”\(^6\) Rather, proposals that relate to ordinary

\(^2\) CVS has attached the Proposal and Supporting Statement, as submitted to the Company, as Exhibit A to the No-Action Request.

\(^3\) Rule 14a-8(i)(7).


\(^6\) Staff Legal Bulletin 14A (July 12, 2002) (“SLB 14A”).
business matters, but which nevertheless “focus[,] on a significant policy issue,” are not excludable “because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.” In determining whether a policy issue has become “sufficiently significant,” the Staff examines “the proposal and the supporting statement as a whole,” and determines whether there is “widespread public debate regarding [the] issue.” The subject matter of a proposal can become a significant policy issue in just a matter of months. Additionally, whether a proposal satisfies the significant policy exception “depends, in part, on the connection between the significant policy issue and the company’s business operations.” The Staff thus “takes a company-specific approach in evaluating significance,” where the focus is “on whether the proposal deals with a matter relating to that company’s ordinary business operations or raises a policy issue that transcends that company’s ordinary business operations.” If a proposal appears to raise a significant policy issue, “a company’s no-action request should focus on the significance of the issue to that company. If the company does not meet that burden, the staff believes the matter may not be excluded under Rule 14a-8(i)(7).”

With respect to micromanagement, the analysis “rests on an evaluation of the manner in which a proposal seeks to address the subject matter raised, rather than the subject matter itself.” Thus, “two proposals focusing on the same subject matter may warrant different outcomes based solely on the level of prescriptiveness with which the proposals approach that subject matter.” A proposal is overly prescriptive where it “supplant[s] the judgment of management and the board” by “seek[ing] intricate detail or impos[ing] a specific strategy, method, action, outcome or timeline for addressing an issue.” In contrast, where a proposal is “framed as a request that the company consider, discuss the feasibility of, or evaluate the potential for a particular issue” it generally will “not be viewed as micromanaging matters of a complex nature.”

B. The Vagueness Exclusion under Rule 14a-8(i)(3)

Rule 14a-8(i)(3) “permits [a] company to exclude a proposal or a statement that is contrary to any of the proxy rules, including rule 14a-9, which prohibits materially false or misleading statements.” The company challenging the proposal “bears the burden of demonstrating that a proposal or statement may be excluded,” and thus must “demonstrate[] objectively that the proposal or statement is materially false or misleading.” One such basis for

7 SLB 14K at § B.2. (quoting the 1998 Release).
8 Staff Legal Bulletin 14C at § D.
9 SLB 14A.
10 See id. (“We believe that the public debate regarding shareholder approval of equity compensation plans has become significant in recent months.”).
11 SLB 14K at § B.2.
12 Id.
13 Id.
14 Id. at § B.4.
15 Id.
16 Id.
17 Id.
19 Id. (emphasis in original).
exclusion under this rule is vagueness or indefiniteness. However, the standard for exclusion on this ground is high: the resolution contained in the proposal must be “so inherently vague or indefinite that neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires.”

In evaluating whether a proposal is excludable on this basis, the Staff considers “the information contained in the proposal and supporting statement and determine[s] whether, based on that information, shareholders and the company can determine what actions the proposal seeks.”

The Proposal Focuses on a Significant Policy Issue for the Company that Transcends Ordinary Business

CVS contends that the Proposal is excludable under Rule 14a-8(i)(7) because it relates to the management of the Company’s workforce and does not identify or relate to a sufficiently significant policy issue. Even though the subject matter of the Proposal concerns a particular type of contractual device used by companies to require their employees to arbitrate their employment-related claims, it is precisely the pervasive use of this device by CVS and other large employers that has become a significant policy issue that transcends ordinary business operations. As discussed in greater detail below, whether the largely unconstrained and expanding use of this device should continue unabated is a hotly-debated issue by politicians at the highest levels of federal and state government, legal academics and researchers, and mainstream news organizations. The widespread public debate that has emerged, particularly in the past year, has transformed this into a significant policy issue that transcends ordinary business operations. Because CVS is an employer of over 290,000 employees and has made widespread use, since at least 2014, of an expansive employee arbitration policy that imposes mandatory arbitration requirements on its employees unless they engage in onerous opt-out requirements, the subject matter of this Proposal presents a policy issue that is significant for CVS. The Proposal is, therefore, not excludable under Rule 14a-8(i)(7).

A. The Mere Fact that the Proposal Relates to CVS’s Management of its Workforce does not Compel the Exclusion of the Proposal

CVS first argues that the Proposal should be excluded “as relating to the Company’s ordinary business operations because it relates to the Company’s management of its workplace practices, including general employee compensation matters.” The Systems do not dispute that the Staff has previously concurred with the exclusion of proposals that concern subjects focused on the nuts and bolts of workforce management, such as leave of absence policies, retirement

---

20 Id. (emphasis added).
22 See Garren v. CVS Health Corp., 17-cv-149, 2018 WL 3377327 (E.D. Tenn. July 11, 2018) (discussing the introduction of CVS’s employee arbitration policy in October 2014, the breadth of employment-related claims covered by the policy, how the policy becomes binding on employees by being made aware of the policy and continuing in their employment with CVS, and the requirements that must be complied with in order to opt-out of the policy).
23 No-Action Request at 3.
24 Wal-Mart, Inc. (Apr. 8, 2019).
plan options, revisions to a company’s code of conduct, the financial impact of an ethics policy, the terms of a conflict of interest policy, compensation to be paid to employees generally, procedures for hiring and promoting employees, procedures for hiring and training employees, management succession planning, and the termination of excess personnel supervisors. However, “[t]he fact that a proposal simply relates to ordinary business matters does not conclusively establish that a company may exclude the proposal from its proxy materials.” To the contrary, if a proposal focuses on a “significant policy issue” for the company, it is not excludable because the proposal would “transcend … day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.” In light of the widespread public debate concerning the pervasive use by companies of contractual provisions requiring the arbitration of employment-related claims (which we discuss in detail below), and the direct relevance of this debate to the Company, this is a significant policy issue for the Company. The Systems thus have a right for the Proposal to be included in the Company’s proxy materials.

B. CVS has not Demonstrated that the Proposal Fails to Focus on a Significant Policy Issue that Transcends the Company’s Ordinary Business Operations

CVS next contends that the Proposal should be excluded because it does not focus on a sufficiently significant policy issue that transcends the Company’s ordinary business operations. Although CVS discusses several previous no-action determinations to support its contention, only four of these—CBRE Group, Inc. (Mar. 6, 2019), Amazon.com, Inc. (Mar. 6, 2019), Yum! Brands, Inc. (Mar. 6, 2019) and XPO Logistics, Inc. (Mar. 6, 2019)—address

25 FedEx Corp. (July 7, 2016).
26 Costco Wholesale Corp. (Sept. 26, 2014).
27 Willis Group Holdings Public Limited Co. (Jan. 18, 2011).
28 Honeywell International Inc. (Feb. 1, 2008).
29 Apple, Inc. (Nov. 16, 2015).
30 Merck & Co., Inc. (Mar. 6, 2015).
33 Consolidated Edison, Inc. (Feb. 24, 2005).
34 SLB 14A.
35 SLB 14K, § B.2. (quoting the 1998 Release). We note that CVS cites United Technologies (Feb. 19, 1993) as support for its argument that proposals directed at employment policies and practices are, as “a general rule,” excludable. However, the guidance in United Technologies is nearly identical to that found in Cracker Barrel Old Country Stores, Inc. (Oct. 13, 1992), which was specifically reversed by the 1998 Release.
36 CVS argues at length that the Proposal can be excluded because “it deals with compensation of non-executive employees.” See No-Action Request at 4-5. However, there is absolutely nothing in the Proposal that concerns non-executive compensation. The only (dubious) connection that CVS can come up with between the Proposal and non-executive compensation is a hypothetical scenario in which “a company may agree to provide specific consideration that is conditioned on the employee agreeing to arbitrate employment-related claims.” No-Action Request at 5. We are not aware of any no-action determination by the Staff that has excluded a Proposal based on such a tenuous argument. Certainly, none of the prior no-action determinations cited by CVS supports an exclusion here, as those determinations all concerned proposals directly addressing monetary or other forms of employee compensation. Regardless, even if CVS has in the past provided specific consideration (i.e., compensation or other benefits) conditioned on the employee agreeing to forego litigation and instead arbitrate any employment-related claims, CVS’s right to compel arbitration is something of value that it receives from the employee, not compensation paid to the employee.
37 No-Action Request at 5-7.
proposals that concern a company’s use of mandatory arbitration provisions. Accordingly, only these four determinations are potentially relevant here.

In CBRE Group, Inc., the Staff was “unable to concur” with the company’s contention that a proposal requesting a report on the impact of mandatory arbitration policies on its employees that included an evaluation of the risks that may result from the company’s mandatory arbitration policy on claims of sexual harassment was excludable on ordinary business grounds. Instead, the Staff found that the proposal “transcends ordinary business matters.”

Amazon.com, Inc., Yum! Brands, Inc. and XPO Logistics, Inc. all concerned a proposal that urged directors to adopt a policy that the company would not “engage in any Inequitable Employment Practice.” One of the several practices identified as being an “Inequitable Employment Practice” was “mandatory arbitration of employment-related claims.” In all three, the Staff concluded that the proposal “relates generally to the Company’s policies concerning its employees, and does not focus on an issue that transcends ordinary business matters.”

None of these four no-action determinations is dispositive here. CBRE Group, Inc. certainly makes clear that proposals concerning the use of mandatory arbitration provisions are not excludable simply because they involve or touch upon an “ordinary business” concern, like a company’s management of its workface. In fact, the Staff’s determination in CBRE Group, Inc. shows that the use of mandatory arbitration provisions can present a sufficiently significant policy issue that transcends ordinary business operations. However, what remains unclear from CBRE Group, Inc. is whether the Staff found the proposal to transcend ordinary business because its focus was limited to the use of mandatory arbitration (as opposed to the more varied assortment of employment-related policies at issue in Amazon.com, Inc., Yum! Brands, Inc. and XPO Logistics, Inc.), or because the focus on mandatory arbitration was itself further linked to the risks created by the use of such provisions in connection with sexual harassment claims. Likewise, it is not clear from Amazon.com, Inc., Yum! Brands, Inc. and XPO Logistics, Inc. whether the proposals were excludable because one or more of the various employment policies identified were significant policy issues, but had been lumped together with others polices that presented only ordinary business concerns, or because each and every employment policy identified was a matter of ordinary business. Regardless, even if the Staff was not prepared to find that the use of mandatory arbitration provisions presented a significant policy issue when it decided Amazon.com, Inc., Yum! Brands, Inc. and XPO Logistics, Inc. in March 2019, further developments in the past year demonstrate that the issue has now become a significant policy issue.

C. The Widespread Use of Contractual Provisions Requiring Employees to Arbitrate Employment-Related Claims Has Itself Become a Significant Policy Issue

The SEC recognized in its 1998 Release that there was a deep interest “among shareholders in having an opportunity to express their views to company management on

38 As CVS notes, the Staff has found proposals excludable where a proposal implicates both a significant policy issue and ordinary business matters. See No-Action Request at 6-7.
employment-related proposals that raise sufficiently significant social policy issues.” Since that time, the touchstone for whether a shareholder proposal raises a significant policy issue is whether the issue has emerged “as a consistent topic of widespread public debate.” As set forth below, there is more than sufficient evidence for the Staff to now conclude that the use of contractual provisions requiring employees to arbitrate their employment-related claims has become a consistent topic of widespread public debate, and thus an issue that transcends ordinary business operations. As one recent article noted, “[s]tate legislative enactments prohibiting the use of mandatory arbitration with employees continue to roll out as legislatures face pressure from their constituents. The pressure is also erupting in recent headlines, which put a spotlight on mandatory arbitration provisions. Arguments against the use of mandatory arbitration provisions have now even made their way into the Presidential debates. Undoubtedly, in light of pressure from employees, scrutiny from the public, and the increasing litany of statutory prohibitions, some employers—such as Google, Uber (for sexual misconduct claims), and Microsoft (for gender discrimination and harassment)—are eliminating or reducing mandatory arbitration of discrimination claims.”

1. Why is the Use of Arbitration Provisions in Employment Contracts So Controversial?

Before reviewing evidence that the use of contractual provisions requiring employees to arbitrate their employment-related claims has emerged as a consistent topic of widespread public debate, it is helpful to understand some of the reasons why this issue has attracted so much recent public attention.

First, employees who are subject to these provisions are generally barred from having their employment-related claims heard in court. For example, CVS has an employee arbitration policy that requires the arbitration of “any and all legal claims, disputes or controversies that CVS Health may have, now or in the future, against an Employee or that an Employee may have, now or in the future, against CVS Health … or one of its employees or agents, arising out of or related to the Employee’s employment with CVS Health or the termination of the Employees employment.” Included as covered claims are “disputes regarding ... leaves of absence, harassment, discrimination, retaliation and termination arising under the Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act ... and other federal, state and local statutes, regulations and other legal authorities relating to employment.” This is significant because research has shown that the two forums—court vs. arbitration—are not equal, as “employees are less likely to win arbitration cases and they recover lower damages in mandatory employment arbitration than in

39 1998 Release at § III.
40 Id.
42 Garren, 2018 WL 3377327 at *1.
43 Id.
the courts. Indeed, employers have a significant advantage in the process given that they are the ones who define the mandatory arbitration procedures and select the arbitration providers.”

Second, contractual arbitration provisions funnel disputes into “hermetically-sealed, secret proceedings” that deny the public (and other employees who may have similar experiences and claims) “the transparency, openness and accountability that are central to our civil justice system.” As a result of the “profound secrecy it offers to entities eager to avoid both liability and bad press, forced arbitration allows wrongful conduct to continue undetected and unremedied long after such illegality would otherwise come to light.” The secrecy of arbitration is especially troubling “when companies use forced arbitration clauses to conceal pervasive sexual harassment,” which has the effect of “allowing sexual predators to operate with virtual impunity.” CVS itself has successfully compelled the arbitration of sexual harassment claims.

Third, nearly all employee arbitration agreements “bar class and collective litigation—procedures established for the very purpose of enabling victims of small-value harms to band together to vindicate their rights.” This means that a company can effectively eliminate its liability for certain types of smaller, individual claims as long as it does not make financial sense for an employee to pursue such a claim individually. CVS’s standard employee arbitration policy appears to bar class and collective litigation. CVS is not alone in this practice though, as it is now estimated that over 23% of private-sector nonunion employees, or 24.7 million American workers, “no longer have the right to bring a class action claim if their employment rights have been violated.”

Fourth, despite the risks and controversy surrounding the arbitration of employment-related claims, the use of such provisions continues to grow unchecked. In 1992, just 2% of the American workforce was subject to mandatory arbitration. By the early 2000s, that figure had increased to almost a quarter of workforce. It now exceeds 55%. For employers with over

46 Id. at 4.
47 Id. at 6.
49 Id. at 2-3.
50 See Cabrera v. CVS Rx Services, Inc., 17-cv-05803, 2018 WL 1367323, *1 (N.D. Cal. Mar. 16, 2018) (noting that CVS’s employment arbitration agreements require employees who are bound by the agreement to “bring any Covered Claims in arbitration on an individual basis only”) (emphais in original); Faggiano v. CVS Pharmacy, Inc. 283 F.Supp.3d 33, 35 (E.D.N.Y. 2017) (same).
52 Id. at 1.
5,000 employees—such as CVS—over 67% now require their employees to arbitrate their employment-related claims.\(^\text{53}\)

*Fifth,* the use of contractual provisions requiring employees to arbitrate employment-related claims “is more common in low-wage workplaces. It is also more common in industries that are disproportionately composed of women workers and in industries that are disproportionately composed of African American workers.”\(^\text{54}\)

*Sixth,* the use of contractual provisions requiring arbitration “has a tendency to suppress claims. Attorneys who represent employees are less likely to take on clients who are subject to mandatory arbitration, given that arbitration claims are less likely to succeed than claims brought to court, and, when damages are awarded, they are likely to be significantly smaller than court-awarded damages. Attorney reluctance to handle such claims effectively reduces the number of claims that are brought since, in practice, relatively few employees are able to bring employment law claims without the help of an attorney.”\(^\text{55}\) This is especially true for lower-paid employees, since their potential recovery will be lower in many instances than similar claims for higher-paid employees.

2. Leading Democratic Presidential Candidates and the Trump Administration Have All Articulated Policy Positions in the Public Debate

We now turn to the abundant evidence that the use of contractual provisions requiring employees to arbitrate their employment-related claims has become a consistent topic of widespread public debate. Perhaps no better evidence of this can be found than in the fact that three of the leading candidates for the Democratic presidential nomination—Elizabeth Warren, Joe Biden, and Bernie Sanders—all consider the use of mandatory arbitration provisions to be such a significant policy issue that it warrants inclusion in their official campaign platforms:

- Elizabeth Warren: “Many employers require workers to sign employment contracts that force them into arbitration over any employment-related dispute and prevent them from banding together in class action lawsuits against their employers. These provisions make it harder for workers to challenge wage theft, harassment, and discrimination. I will immediately prohibit federal contractors from including these agreements in their employment contracts, and I will push for a new federal law to ban them for all employers.”\(^\text{56}\)

- Joe Biden: “Sixty million workers have been forced to sign contracts waiving their rights to sue their employer and nearly 25 million have been forced to waive their right to bring class action lawsuits or joint arbitration. These contracts require employees to use individual, private arbitrations when their employer violates federal and state laws. Biden will enact

\(^{53}\) Id. at 6.

\(^{54}\) Id.

\(^{55}\) Id. at 10.

legislation to ban employers from requiring their employees to agree to mandatory individual arbitration and forcing employees to relinquish their right to class action lawsuits or collective litigation, as called for in the PRO Act.”

- Bernie Sanders: “Mandatory arbitration clauses prevent workers and consumers from having their day in court. In 1992, roughly 2 percent of the workforce were bound by mandatory arbitration. By 2000, that number had risen to 25 percent. Now, it’s 55 percent. Nearly two-thirds of workers making less than $13 an hour are subject by mandatory arbitration clauses, including majorities of women, Hispanic, and African-American workers. … As president, Bernie will ban mandatory arbitration clauses.”

Various news outlets have taken notice of the increased focus in the presidential campaign on mandatory arbitration requirements in employment contracts.

The Trump Administration has also joined the public debate by articulating its own policy position. Three days before the House of Representatives passed the Forced Arbitration Injustice Repeal Act (the “FAIR Act”) (discussed in more detail below), the Trump Administration issued a Statement of Administration Policy, announcing:

“The Administration strongly opposes passage of [the FAIR Act]. This bill would prohibit private businesses from entering into predispute arbitration agreements, including those allowing for the use of collective arbitration procedures. These blanket prohibitions will increase litigation, costs, and inefficiency, including by exposing the vast majority of businesses to even more unnecessary litigation. As written, the FAIR Act disregards the benefits of resolving disputes through arbitration, including lower costs, faster resolution, and reduced burden on the judiciary. By limiting contractual options, this bill would hurt businesses and the very consumers and employees it seeks to protect. If [the FAIR Act] were presented to the President in its current form, his advisors would recommend that he veto the bill.”

3. Both the House and the Senate Have Recognized the Significance of the Issue

Additional evidence of the existence of a widespread public debate on the use of contractual provisions requiring employees to arbitrate employment-related claims comes from the fact that there have already been two congressional hearings on this issue in the past year. On April 2, 2019, the Senate Judiciary Committee held a hearing entitled “Arbitration in America,” and on May 16, 2019, the House Committee on the Judiciary held a hearing entitled “Justice Denied: Forced Arbitration and the Erosion of our Legal System.” Both of these hearings included substantial testimony on the widespread use of contractual provisions requiring employees to arbitrate their employment-related claims.

These two hearings followed upon the February 28, 2019 introduction in the House of Representatives of the FAIR Act (with 147 co-sponsors) and a companion bill in the Senate (with 34 co-sponsors). Among other things, the FAIR Act would prohibit a pre-dispute arbitration agreement from being valid or enforceable if it requires the arbitration of an employment dispute. On September 27, 2019, the House voted 225 to 186 to pass the FAIR Act and it is currently pending in the Senate.

The FAIR Act did not come out of the blue. In February 2018, every attorney general in America signed a letter sent to House and Senate leaders calling for legislation that would bar employers from requiring the arbitration of sexual harassment claims. A year later, in February 2019, Illinois Representative Cheri Bustos, with bipartisan sponsorship, introduced the Ending Forced Arbitration of Sexual Harassment Act of 2019, which would prohibit pre-dispute arbitration agreements from being valid or enforceable if they required arbitration of a sexual discrimination claim.

As these various Congressional actions demonstrate, members of Congress clearly recognize the pressing significance and public outcry concerning the issues raised by the use of contractual provisions requiring employees to arbitrate their employment-related claims.

---


4. States have Passed Legislation Limiting or Barring Mandatory Arbitration

Not willing to wait for a federal solution to the pressing issues presented by the use of arbitration provisions in the employment context, numerous states have stepped into the public debate and enacted legislation limiting or banning mandatory arbitration of employment-related claims. Such actions further demonstrate that the issue has become sufficiently significant to transcend ordinary business operations.

On October 10, 2019, California Governor Gavin Newsom signed into law Assembly Bill 51, which prohibits employers within California from “requiring any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act or other specific statutes governing employment as a condition of employment, continued employment, or the receipt of any employment-related benefit.” 68 The enactment of this law attracted significant national attention.69

California’s recent actions follow upon similar measures taken in other states. In 2018, New York enacted legislation restricting the use of mandatory arbitration clauses in connection with claims of sexual harassment.70 In March 2018, Washington enacted legislation voiding provisions in employment contracts that required employees to waive their right to publicly pursue a discrimination claim under state or federal law, as well as provisions that required an employee to resolve discrimination claims in a confidential dispute resolution process.71

Maryland, New Jersey and Vermont have also passed legislation targeted at the use of mandatory arbitration in the employment context.72

5. Mandatory Arbitration is a Topic of Widespread Debate in the News Media and among Legal Academics and Researchers

Finally, the use of contractual provisions requiring employees to arbitrate their employment-related claims has been the subject of a wealth of news coverage, as well as legal

---

and academic research. The following is just a small sample of some of that recent coverage and research, and serves to further substantiate the conclusion that the subject matter of the Proposal has become a significant policy issue.

- Editorial/Opinion Articles:
- General News Articles:
  o Andrew Keshner, “The number or workers suing their employers fell last year for the first time in 16 years – why you should be concerned,” *MarketWatch* (Jan. 8, 2020), *available at* https://www.marketwatch.com/story/employees-arent-suing-their-workplaces-as-often-as-they-used-to-but-is-that-necessarily-a-good-thing-2020-01-07
  o Michael Hobbes, “It’s shockingly easy for your boss to steal from you and get away with it,” *HuffPost* (June 8, 2019), *available at* https://www.huffpost.com/entry/wage-theft-employers-stealing_n_5cfa7c1ae4b045133e6057a1


**Legal and Academic Research**


D. The Use of Contractual Provisions Requiring Employees to Arbitrate Employment-Related Claims is a Significant Policy Issue for CVS

As noted above, the Staff “takes a company-specific approach in evaluating significance,” and “a policy issue that is significant to one company may not be significant to another.” Here, publicly available information concerning CVS’s specific use of contractual provisions requiring employees to arbitrate employment-related claims demonstrates that the significant policy issue concerning the use of such provisions is also significant for the Company.

The No-Action Request states that the Company has more than 290,000 employees and operates in all 50 states. In October 2014, CVS rolled out a company-wide “Arbitration of Workplace Legal Disputes Policy” that applied to “CVS Health (including its subsidiaries) and its Employees.” CVS employees were deemed to have “accept[ed]” the policy simply “by continuing their employment after becoming aware of the policy.” Although CVS employees could easily acknowledge and agree to the policy by clicking “Yes” at the bottom of an instructional slide on the Company’s computerized training course, no similarly easy opt-out option was provided; instead, the only way to opt-out of the policy was to “mail a written, signed, and dated letter, stating clearly that [the employee] wish[es] to opt out of [the] Policy to CVS Health … which must be postmarked no later than 30 days after the date [the employee] first received or viewed a copy of [the] Policy.” Given the ease with which an employee becomes subject to the arbitration policy—and the unnecessary burdens put in place to make opt-outs more difficult—it is quite likely that the vast majority of the Company’s 290,000 employees are now forced to individually arbitrate any employment-related claim covered by the Company’s arbitration policy.

CVS also categorically asserts that “employees of the Company have not raised concerns about the Company’s use of arbitration provisions and policies.” However, it appears that shortly after the policy was rolled-out, a former 20-year CVS employee spoke out publicly.

73 SLB 14K at § B.2.
74 No-Action Request at 4.
75 Garren, 2018 WL 3377327 at *1.
76 Id.
77 Id.
78 CVS states that “thousands” of CVS employees have opted out of the employee arbitration policy (No-Action Request at 6, fn.1), but CVS does not provide a precise figure.
79 No-Action Request at 6.
against the policy.\textsuperscript{80} That former employee stated that the roll-out of the policy “created an uproar within the ranks of pharmacists, pharmacy interns, pharmacy techs and front-store employees.”\textsuperscript{81} This concern seems to be echoed by other persons that appear to be CVS employees in an online forum.\textsuperscript{82} Further, the \textit{Wall Street Journal} specifically referenced CVS in an article about companies “quietly eliminating a long-held employee privilege: the right to band together to take the boss to court.”\textsuperscript{83} Finally, CVS employees have also raised concerns about the Company’s arbitration policy in litigation with the Company.\textsuperscript{84} Accordingly, CVS’s claim that no employee has voiced concerns over its employee arbitration policy seems dubious at best.

Given that CVS’s employee arbitration policy likely applies to the vast majority of its employees (some of whom appear to have voiced concerns about it), and the recent legislative efforts to ban or curb the use of arbitration in the employment context, CVS’s continued use of contractual provisions requiring employees to arbitrate employment-related claims presents a significant policy issue for the Company that transcends its ordinary business.

\textbf{The Proposal Does Not Micromanage CVS}

CVS also argues that the Proposal can be excluded under Rule 14a-8(i)(7) because it micromanages the Company’s business. This argument is without merit. Where a proposal asks for a report, it may only be excluded on micromanagement grounds if the requested report is “intricately detailed” or “relates to the imposition or assumption of specific timeframes or methods for implementing complex policies,”\textsuperscript{85} or “supplant[s] the judgment of management and the board” by “seek[ing] intricate detail or impos[ing] a specific strategy, method, action, outcome or timeline for addressing an issue.”\textsuperscript{86} Where a proposal is “framed as a request that the company consider, discuss the feasibility of, or evaluate the potential for a particular issue” it generally will “not be viewed as micromanaging matters of a complex nature.”\textsuperscript{87}

Here, there is nothing “intricately detailed” about the report requested by the Proposal. The requested report simply seeks the proportion of the workforce subject to contractual provisions requiring the arbitration of employment-related claims and the number of employment-related claims initiated and decided in factor of the employee in the previous calendar year. There is no imposition of any specific timeframe on the Company in connection with the production of the requested report, nor is there any method imposed for the implementation of a complex policy. In fact, the Proposal makes no policy recommendations to the Company at all. Accordingly, the Proposal does not micromanage the Company.

\textsuperscript{81} Id.
\textsuperscript{85} Staff Legal Bulletin 14J (Oct. 23, 2018) at § C.2.
\textsuperscript{86} Id. at § B.4.
\textsuperscript{87} Id.
The Proposal is not Excludable under Rule 14a-8(i)(3) as Inherently Vague or Indefinite

Lastly, CVS argues that the Proposal may be excluded under Rule 14a-8(i)(3) because it is inherently vague and indefinite.88 This argument also fails. Far from being “so inherently vague or indefinite” that it is impossible to “determine with any reasonable certainty exactly what actions or measures the proposal requires,”89 the Proposal, when read in conjunction with the Supporting Statement (as it must be),90 makes clear that the Proposal reference to CVS’s “use of contractual provisions requiring employees … to arbitrate employment-related claims” is directed at the Company’s employee arbitration policy, to which the vast majority of CVS’s employees are likely subject.

In SLB 14B, the Staff lamented the overuse of Rule 14a-8(i)(3), which had been used to “assert deficiencies in virtually every line of a proposal’s supporting statement as a means to justify exclusion of the proposal in its entirety.”91 Here, in acting as if it is equally possible that the Proposal could refer to (1) “mandatory policies pursuant to which the employee has no ability to negotiate or opt-out of,” (2) “specifically negotiated and agreed upon arbitration provisions in employment and other similar arrangements,” or (3) “voluntary arbitration programs, such as the program implemented by the Company,”92 CVS is trying to “assert deficiencies” where there are none.

First, it is clear that the Proposal is not directed at bespoke, one-off arbitration provisions “specifically negotiated and agreed upon” by CVS and individual employees.93 There is nothing in the Supporting Statement that remotely suggests that the Proposal concerns such contractual provisions. To the contrary, the Supporting Statement refers to CVS’s “mandatory arbitration policy” and its “onerous [opt-out] requirements.” An arbitration provision that had been individually negotiated as part of an arms-length employment, termination or separation agreement would likely not contain an opt-out right, nor would it be considered part of a “mandatory arbitration policy” that had been implemented Company-wide. Further, such bespoke contractual provisions have not been part of the “public debate” specifically discussed in the Supporting Statement. Accordingly, there is no reason to interpret the Proposal as encompassing such provisions.

Second, there is no reason to interpret the Proposal as being directed at “mandatory policies pursuant to which the employee has no ability to negotiate or opt out of.” This is because CVS acknowledges that it has no such policy.94 Thus, it is not reasonable to interpret the Proposal as seeking information on a non-existent policy. While it is true that the Supporting

88 No-Action Request at 8-9.
89 SLB 14B at § B.4.
90 See SLB 14G at § D.1 (“In evaluating whether a proposal may be excluded [as vague and indefinite], we consider only the information contained in the proposal and supporting statement and determine whether, based on that information, shareholders and the company can determine what actions the proposal seeks.”).
91 SLB 14B at § B.3.
92 No-Action Request at 9.
93 Id.
94 For example, CVS states that it is false “that the Company maintains a mandatory arbitration policy” because “employees are permitted to opt out.” No Action-Request at 6.
Statement makes reference to “mandatory arbitration,” this phrase is not used to refer to requirements that an employee has no ability to negotiate or opt out of. Rather, the phrase refers to contractual provisions that mandate arbitration once accepted (or, as here, deemed accepted once the employee becomes aware of the requirement but fails to opt-out). In other words, it is a distinction is between (a) being forced to accept a provision that requires arbitration of employment-related claims, and (2) accepting (or at least being aware, but not exercising the right to opt out, of) a provision that requires arbitration of employment-related claims. The Supporting Statement acknowledges that CVS’s “mandatory arbitration policy” is described as “voluntary” because it ostensibly permits employees to opt out of the arbitration requirement, but “only by complying with onerous requirements.” And CVS itself notes that the “program implemented by the Company” is voluntary because employees are permitted to opt out of the policy. Given that the Company does not have a “mandatory arbitration policy”—in the sense of an arbitration policy that must be accepted by its employees with no right to opt-out—there is no reason to interpret the Proposal as seeking information on a non-existent policy.

Having eliminated two of the three interpretations proposed by CVS, all that remains is what CVS refers to as its “voluntary arbitration programs.” As just noted above, the Supporting Statement accompanying the Proposal refers to those programs and the contractual arbitration provisions that they impose, as “mandatory” because once a CVS employee is deemed to have accepted or become bound by the terms of the policy or program, arbitration of that employee’s employment-related claims is required (i.e., “mandatory”). Based on the foregoing, its abundantly clear that the Proposal’s reference to the Company’s “use of contractual provisions requiring employees of CVS to arbitrate employment-related claims” is directed at the Company’s employee arbitration policies and programs.

Accordingly, the Proposal and Supporting Statement are not so inherently vague or indefinite as to permit exclusion under Rule 14a-8(i)(3).
Conclusion

For the reasons set forth above, CVS has not satisfied its burden of showing that it is entitled to omit the Proposal in reliance on Rule 14a-8(i)(7) or Rule 14a-8(i)(3). The Systems thus respectfully request that CVS’s No-Action Request be denied.

The Systems appreciate the opportunity to be of assistance in this matter. If you have any questions or need additional information, please contact me at (212) 669-2065.

Respectfully submitted,

Kathryn E. Diaz

cc: Colleen M. McIntosh, Senior Vice President, Chief Governance Officer, Corporate Secretary & Assistant General Counsel, CVS Corporation
    Doreen E. Lilienfeld, Shearman & Sterling LLP
January 14, 2020

Office of Chief Counsel  
Division of Corporate Finance  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549  
(Via e-mail: shareholderproposals@sec.gov)

Re: CVS Health Corporation  
Shareholder Proposal of Comptroller of the City of New York on Behalf of Certain New York City Public Retirement Systems

Ladies and Gentlemen:

CVS Health Corporation, a Delaware corporation (the “Company”), in accordance with Rule 14a-8(j) under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), is filing this letter with respect to the shareholder proposal and supporting statement (the “Proposal”) submitted by the Comptroller of the City of New York on behalf of the New York City Employees’ Retirement System, the New York City Teachers’ Retirement System, the New York City Police Pension Fund and the New York City Fire Pension Fund (the “Proponent”) in a letter dated November 13, 2019. The Proponent seeks inclusion of the Proposal in the proxy materials that the Company intends to distribute in connection with its 2020 Annual Meeting of Shareholders (the “2020 Proxy Materials”).

A copy of the Proposal and all related correspondence with the Proponent are attached hereto as Exhibit A. The Company hereby requests confirmation that the staff of the Office of Chief Counsel (the “Staff”) of the Division of Corporation Finance of the Securities and Exchange Commission (the “Commission”) will not recommend enforcement action if, in reliance on Rule 14a-8 of the Exchange Act, the Company omits the Proposal from its 2020 Proxy Materials.

Pursuant to Rule 14a-8(j), this letter is being filed with the Commission no later than 80 calendar days before the Company files its definitive 2020 Proxy Materials. Pursuant to Staff Legal Bulletin No. 14D (Nov. 7, 2008) (“SLB 14D”), this letter is being submitted to the Commission via e-mail to shareholderproposals@sec.gov.

Rule 14a-8(k) and Section E of SLB 14D provide that shareholder proponents are required to send companies a copy of any correspondence the Proponent elects to submit to the Commission or the Staff. Accordingly, we are hereby informing the Proponent that if the Proponent elects to submit additional correspondence to the Commission or the Staff with respect to this Proposal, a copy of that correspondence should be furnished concurrently to the Company.

Pursuant to Rule 14a-8(j), a copy of this submission is being sent simultaneously to the Proponent as notification of the Company’s intention to omit the Proposal from its 2020 Proxy Materials. This letter constitutes the Company’s statement of the reasons that it deems the omission of the Proposal to be proper.
I. The Proposal

The Proposal states: “RESOLVED that shareholders of CVS Health Corporation [sic] (‘CVS’) urge the Board of Directors to report to shareholders, at reasonable cost and omitting confidential and proprietary information, on the use of contractual provisions requiring employees of CVS to arbitrate employment-related claims. The report should specify the proportion of the workforce subject to such provisions; the number of employment-related arbitration claims initiated and decided in favor of the employee, in each case in the previous calendar year; and any changes in policy or practice CVS has made, or intends to make, as a result of California’s ban on agreeing to arbitration as a condition of employment.”

II. Statement of Reasons to Exclude

The Company believes that the Proposal may be properly excluded from the 2020 Proxy Materials under both Rule 14a-8(i)(7) and Rule 14a-8(i)(3) because (1) it deals with a matter relating to the Company’s ordinary business operations and (2) is inherently vague and indefinite and thus contrary to Rule 14a-9.

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

Rule 14a-8(i)(7) permits a company to omit from its proxy materials a shareholder proposal that relates to the company’s “ordinary business operations.” The Commission stated that the underlying policy of the ordinary business exclusion is “to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting.” See Exchange Act Release No. 34-40018 (May 21, 1998) (the “1998 Release”). In the 1998 Release, the Commission further stated that the policy underlying the ordinary business exclusion rests on two central considerations. The first recognizes that certain tasks are so fundamental to management’s ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct stockholder oversight. The second consideration relates to the degree to which the proposal seeks to “micro-manage” the company by probing too deeply into matters of a complex nature upon which stockholders, as a group, would not be in a position to make an informed judgment. As the Commission has explained, a proposal may probe too deeply into matters of a complex nature if it “involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies.” Id.

The Commission has stated that a proposal requesting the dissemination of a report is excludable under Rule 14a-8(i)(7) if the substance of the proposal involves a matter of ordinary business of the company. See Exchange Act Release No. 34-20091 (Aug. 16, 1983) (the “1983 Release”) (“[T]he staff will consider whether the subject matter of the special report or the committee involves a matter of ordinary business; where it does, the proposal will be excludable under Rule 14a-8(c)(7).”). See also, e.g., Rite Aid Corp. (Apr. 17, 2018) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting a report on the feasibility of adopting company-wide goals for increasing energy efficiency and use of renewable energy, in which the Staff determined that the proposal focused “primarily on matters relating to the Company’s ordinary business operations”); and Netflix, Inc. (Mar. 14, 2016) (permitting exclusion under Rule 14a-8(i)(7) of a proposal that requested a report relating to the company’s assessment and screening of “inaccurate portrayals of Native Americans, American Indians and other indigenous peoples,” in which the Staff determined that the proposal
related to the ordinary business matter of the “nature, presentation and content of programming and film production”).

A. The Proposal Is Excludable Because It Relates to the Management of the Company’s Workforce.

The Proposal is excludable as relating to the Company’s ordinary business operations because it relates to the Company’s management of its workplace practices, including general employee compensation matters, which is fundamental to management’s ability to run the Company on a day-to-day basis. The Staff has long recognized that proposals that attempt to govern business conduct involving internal and employment-related policies and practices and the terms thereof (ranging from benefit plans to ethics, conflict of interest and other policies concerning employees) may be excluded pursuant to Rule 14a-8(i)(7) because they infringe on management’s core functions. For example, a proposal to Walmart, Inc. (Apr. 4, 2019) requested that the board evaluate the risk of discrimination that may result from the company’s policies and practices of hourly workers taking absences from work for personal or family illness. The Staff concurred that the proposal could be excluded under Rule 14a-8(i)(7) because it dealt with “management of [the company’s workforce].” See also FedEx Corp. (Jul. 7, 2016) (concurring in the exclusion of a proposal relating to the terms of the company’s employee retirement plans); Costco Wholesale Corp. (Sept. 26, 2014) (concurring in the exclusion of a proposal relating to the company’s policies concerning its employees, specifically, a revised Code of Conduct that includes an anti-discrimination policy); Willis Group Holdings Public Limited Co. (Jan. 18, 2011) (concurring in the exclusion of a proposal relating to the terms of the company’s ethics policy under Rule 14a-8(i)(7)); and Honeywell International Inc. (Feb. 1, 2008) (concurring in the exclusion of a proposal relating to the company’s terms of its conflicts of interest policy).

In addition, as noted in the 1998 Release, “the management of the workforce, such as the hiring, promotion, and termination of employees” is a matter that is “so fundamental to management’s ability to run a company on a day-to-day basis that [it] could not, as a practical matter, be subject to direct shareholder oversight.” The Staff has consistently concurred with the exclusion of proposals relating to workforce management, including those related to hiring and terminating employees. See, e.g., Apple, Inc. (Nov. 16, 2015) (allowing the exclusion of a proposal asking Apple’s compensation committee to adopt new compensation principles responsive to the U.S.’s “general economy, such as unemployment, working hours and wage inequality”); Merck & Co. Inc. (Mar. 6, 2015) (proposal to fill entry level positions only with outside candidates excludable under Rule 14a-8(i)(7) where the Staff noted that “the proposal relates to procedures for hiring and promoting employees. Proposals concerning a company’s management of its workforce are generally excludable under rule 14a-8(i)(7)”); Starwood Hotels & Resorts Worldwide, Inc. (Feb. 14, 2012) (proposal that, by a certain date, management verify United States citizenship for certain workers excludable under Rule 14a-8(i)(7), noting that “[p]roposals concerning a company’s management of its workforce are generally excludable under rule 14a-8(i)(7)”); National Instruments Corp. (Mar. 5, 2009) (proposal to adopt detailed succession planning policy is excludable); and Consolidated Edison, Inc. (Feb. 24, 2005) (concurring that a proposal requesting the termination of certain supervisors could be excluded as it related to “the termination, hiring, or promotion of employees”). In United Technologies (Feb. 19, 1993), the Staff stated the following:

As a general rule the staff views proposals directed at a company’s employment policies and practices with respect to its non-executive workforce to be uniquely matters relating to the conduct of the company’s ordinary business operations. Examples of the categories of proposals that have been deemed to
be excludable on this basis are: employee health benefits, general compensation issues not focused on senior executives, management of the workplace, employee supervision, labor-management relations, employee hiring and firing, conditions of the employment and employee training and motivation.

The Company is the nation’s premier health innovation company, employing approximately 290,000 individuals and operating in all 50 states. The Proposal, which requests a report on the use of contractual provisions requiring arbitration of employment-related claims, focuses on the Company’s management of its workforce by eliciting information regarding the Company’s practices and outcomes related to the way the Company contracts with and manages disputes with and among its entire workforce. The Company’s decisions with respect to the management of its workforce, including whether and under what circumstances to enter into contractual arrangements with employees, are fundamental and inextricably linked to the way the Company manages its workforce. See Chevron Corp. (Mar. 19, 2013) (excluding a proposal as relating to the company’s ordinary business operations (i.e., litigation strategy) where the proposal requested that the company review and provide a report regarding its “legal initiatives against investors”). Moreover, these contractual provisions and policies have long been utilized by many businesses, including the Company, to manage the costs and risks associated with employing an extensive workforce. This is especially the case for the Company given that it has an extensive workforce spread across the entire country.

The Proposal may also be excluded because it deals with compensation of non-executive employees. The Staff has consistently permitted the exclusion of proposals addressing the compensation of non-executive employees, as relating to the company’s ordinary business operations. See SLB No. 14J (stating that “[c]onsistent with this guidance, proposals that relate to general employee compensation and benefits are excluded under Rule 14a-8(i)(7)”). See also, e.g., CVS Health Corp. (Mar. 1, 2017) (concurring in the exclusion of a proposal to adopt and publish principles for minimum wage reform, “noting that the proposal relates to general compensation matters, and does not otherwise transcend day-to-day business matters); Microsoft Corp. (Sept. 17, 2013) (concurring in the exclusion of a proposal asking the board to limit the average individual total compensation for senior management, executives and “all other employees the board is charged with determining compensation for” to one hundred times the average individual total compensation paid to the remaining full-time, non-contract employees of the company); ENGlobal Corp. (Mar. 28, 2012) (concurring in the exclusion of a proposal that sought to amend the company’s equity incentive plan, noting that “the proposal relates to compensation that may be paid to employees generally and is not limited to compensation that may be paid to senior executive officers and directors”); and Amazon.com, Inc. (Mar. 7, 2005) (concurring in the exclusion of a proposal requesting that the board adopt and disclose a new policy on equity compensation, and cancel a certain equity compensation plan potentially affecting all employees).

Additionally, in determining whether a compensation-related proposal may be excluded as relating to ordinary business, the Staff has applied a bright-line test: a proposal may be excluded if it “relate[s] to general employee compensation matters” but not if it “concern[s] only senior executive and director compensation.” Staff Legal Bulletin No. 14A (Jul. 12, 2002) (emphasis in original). A number of Staff letters state that a proposal that relates to a compensation matter will be excludable as relating to ordinary business if the proposal applies to any person who is not a senior executive officer or a director. See The Goldman Sachs Group (Mar. 8, 2010) (proposal applied to named executive officers and the 100 most highly-compensated employees); 3M Company (Mar. 6, 2008) (proposal related to compensation of “high-level 3M employees”); and Comshare, Inc. (Sept. 5, 2001) (proposal related to compensation of “senior management”)
2001) (proposal requested that the “Board improve disclosure of its strategy for awarding stock options to top executives and directors,” but also implicated the stock option plan available to general employees).

In this case, the Proposal urges the Board to produce a report detailing the Company’s use of contractual provisions requiring all 290,000 employees of the Company, not just executive level employees, to arbitrate employment-related claims. Such provisions can be a matter of broad corporate employment policy or can be part of the individually negotiated terms of employment, or may arise in the context of an individually negotiated separation agreement in connection with a termination of employment in return for negotiated consideration. For example, in connection with negotiating the terms of an employee’s resignation or termination, a company may agree to provide specific consideration that is conditioned on the employee agreeing to arbitrate employment-related claims. In these cases, the contractual provisions requiring employees of the Company to arbitrate employment-related claims are directly related to and conditioned upon compensation decisions. Accordingly, the Proposal asks shareholders to vote on a matter relating to general employee compensation matters—an outcome that the Staff has consistently not supported as within the scope of a matter proper for stockholder consideration.

In accordance with the 1983 Release, because the Proposal requests a report, the relevant inquiry is whether the subject matter of the report involves a matter of the Company’s ordinary business. See 1983 Release. The Proposal requests a report detailing the “use of contractual provisions requiring employees of CVS to arbitrate employment-related claims.” As discussed above, contractual provisions requiring employees of the Company to arbitrate employment-related disputes are inextricably linked and fundamental to the Company’s policies regarding the resolution of matters relating to the ongoing employment and termination of employees, and, more generally, the way the Company manages its workforce.

For the reasons set forth above, we respectfully request that the Staff concur in our view that the Proposal may be excluded under Rule 14a-8(i)(7) as it implicates the Company’s ordinary business operations.

B. The Proposal Is Excludable Because It Relates to the Company’s Ordinary Business Operations and Does Not Identify or Relate to a “Sufficiently Significant Social Policy Issue”

The Commission indicated in the 1998 Release that proposals that relate to ordinary business matters, but that focus on “sufficiently significant social policy issues . . . generally would not be considered to be excludable [under Rule 14a-8(i)(7)] because the proposals would transcend the day-to-day business matters.” See, e.g., CBRE Group, Inc. (Mar. 6, 2019) ("CBRE Group") (not allowing exclusion of a proposal requesting a report on the impact of “mandatory arbitration policies on the Company’s employees” on the grounds that the proposal transcends ordinary business matters (emphasis added)).

As an initial matter, unlike the proposal in CBRE Group, the Proposal here could be read to request a report on any and every contractual provision requiring employees of the Company to arbitrate employment-related claims, which would include arbitration provisions that are specifically negotiated terms of employment or termination of employment (see Section IV below (arguing for exclusion on the basis that the Proposal is vague and indefinite since it is unclear whether the Proposal relates to mandatory arbitration policies or all policies and contractual provisions requiring
arbitration), as opposed to traditional mandatory arbitration policies that require arbitration without the ability to negotiate or opt out.1 Further, the proponent in CBRE Group connected the subject matter of the proposal (i.e., sexual harassment in the workplace) as an unlawful form of employment discrimination based on sex, which is a federally-protected class. Id. By contrast, the Proposal fails to focus on any significant policy issue at all, and instead raises wide-ranging issues such as “wage theft,” “toxic cultures,” employee morale and the effects of confidentiality provisions, in addition to sexual harassment, all in support of obtaining a report that the Proponent asserts “would allow shareholders to assess the proportion of the workforce subject to mandatory arbitration . . . together with the risks posed by the use of such provisions.” (For a discussion of similar proposals found excludable by the Staff, see Amazon.com, Inc. (Mar. 6, 2019) and other letters cited below). The Proposal’s main focus is related to the management of the Company’s entire workforce regardless of context or category of claim, which is clearly a matter of ordinary business. The fact that the Proponent has attempted to tie recent high-profile social issues to the Proposal, including one that the Staff has found to be significant for a different company, is not a basis to disqualify the Proposal from exclusion under Rule 14a-8(i)(7).

As further support that the Proposal does not touch upon a significant policy issue, we note that the Company’s stockholders, other than the Proponent, have not requested the type of assessment requested by the Proposal nor have they raised issues related to the use of contractual provisions requiring employees to arbitrate employment-related claims. The Company maintains proactive and on-going engagement with its investors. As part of the Company’s stockholder engagement efforts over the last few years, investors have not raised issues related to the use of arbitration provisions as an issue and it has not formed part of the discussions that the Company has had with investors. See Comcast Corp. (Feb. 15, 2011) (concurring in the exclusion of the proposal under Rule 14a-8(i)(7), noting that it is not sufficient that the topic of the proposal may have “recently attracted increasing levels of public attention,” but instead it must have “emerged as a consistent topic of widespread public debate”). Moreover, employees of the Company have not raised concerns about the Company’s use of arbitration provisions and policies in connection with the Company’s onboarding processes, exit procedures or employee feedback processes or surveys. Similarly, the use of arbitration provisions in severance and other similar arrangements has also not raised concerns for employees.

Even assuming that the Proposal does touch upon a significant policy issue, that alone is not sufficient to avoid the application of Rule 14a-8(i)(7) when a proposal implicates ordinary business matters. Even where a proposal references or addresses a significant policy issue within the meaning of the Staff’s interpretations of Rule 14a-8(i)(7), the Staff has expressed the view that proposals relating to both ordinary business matters and significant social policy issues may be excluded in their entirety in reliance on Rule 14a-8(i)(7) when it also involves ordinary business issues. See 1998 Release. See also Walmart Inc. (Apr. 13, 2018) (concurring with the exclusion of a proposal requesting a report on the risks associated with public policies on the gender pay gap and risks related to recruiting and retaining female talent); Lowes Companies, Inc. (Jan. 30, 2017) (concurring in exclusion of proposal that requesting a report on risks and costs caused by pressure campaigns to

1 Additionally, the Proponent falsely states that the Company maintains a mandatory arbitration policy. In fact, as the Proponent’s supporting statement goes on to acknowledge, the Company’s policy is voluntary and employees are permitted to opt out. The Proponent claims, without support, that the policy is not voluntary because it imposes onerous opt out requirements on employees. In fact, thousands of employees have opted out of the arbitration policy—including unionized personnel.
oppose religious freedom laws and strategies to defend the company’s against related discrimination and harassment; JPMorgan Chase & Co. (Mar. 9, 2015) (concurring in the exclusion of a proposal that requested that the company amend its human rights-related policies “to address the right to take part in one’s own government free from retribution,” and also included examples of companies that had adopted non-retaliation policies to protect employees’ expressed political views and contributions in its supporting statement, because the proposal related to “[the company’s] policies concerning its employees”); CVS Health Corp. (Feb. 27, 2015) (concurring in the exclusion of a proposal requesting the company “to amend its policies to explicitly prohibit discrimination based on political ideology, affiliation or activity,” finding that it did not focus on a significant social policy issue, as it related to the company’s policies “concerning its employees”); and Deere & Co. (Nov. 14, 2014, recon. denied Jan. 5, 2015) (concurring in the exclusion of a proposal requesting the implementation and enforcement of a company-wide employee code of conduct that included an antidiscrimination policy as the proposal related to the company’s “policies concerning its employees,” an ordinary business matter).

Notwithstanding the Staff’s view in CBRE Group, which as noted above involved a proposal that is distinguishable from the Proposal here, the Staff has recently not recognized mandatory arbitration with employees as a practice that raises significant policy issues. See Amazon.com, Inc. (Mar. 6, 2019) (concurring in the exclusion of a proposal requesting that the board adopt a policy that the Company will not engage in any “Inequitable Employment Practice,” including mandatory arbitration of employment-related claims. The Staff noted that the proposal “does not focus on an issue that transcends ordinary business matters”; Yum! Brands, Inc. (Mar. 6, 2019) (exclusion of a proposal the same as that in Amazon.com, supra, on the same basis); and XPO Logistics, Inc. (Mar. 6, 2019) (exclusion of a proposal the same as that in Amazon.com, supra, on the same basis). The underlying consideration of the Proposal is on the Company’s ordinary business operations because the Proposal’s focus is on provisions in the Company’s employment arrangements and policies as they relate to employee dispute resolution. The Proponent describes the Proposal as focused on a variety of recently high-profile employment-related issues and concludes by stating that “[t]he information sought in this Proposal would allow shareholders to assess the proportion of the workforce subject to mandatory arbitration of employment-related claims together with the risks posed by the use of such provisions.” However, by doing so, the Proposal shows that its intent and scope directly relates to the management of the Company’s workforce and not a particular significant policy issue. Therefore, we respectfully request that the Staff concur in our view that it is excludable under Rule 14a-8(i)(7).

C. The Proposal Is Excludable Because It Attempts to Micromanage the Company’s Business

The Proposal is excludable as relating to the Company’s ordinary business operations because it attempts to micromanage the Company’s business. The Proposal’s intrusion into the contractual provisions governing the relationship between the Company and its employees is an inappropriate veiled attempt to micro-manage the Company because decisions and policies involving employment arrangements and policies and intra-personnel matters implicate a wide variety of different types of considerations and involve “matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment.” See 1998 Release. As noted above, the Company is the nation’s premier health innovation company, employing approximately 290,000 individuals and operating in all 50 states, each of which has its own employment law regime. The relationship between the Company and its employees in multiple and varied jurisdictions constitutes a critical component of its day-to-day management. Decisions concerning employee relations and
workplace conditions, such as decisions regarding the strategies the Company may deploy with respect to terms of employment and addressing employment-related claims are multi-faceted, complex and based on a range of factors. See, e.g., Chevron Corp. (Mar. 19, 2013) (excluding a proposal as relating to the company’s ordinary business operations (i.e., litigation strategy) where the proposal requested that the company review and provide a report regarding its “legal initiatives against investors”); and CMS Energy Corp. (Feb. 23, 2004) (excluding a proposal requiring the company to void any agreements with two former members of management and initiate action to recover all amounts paid to them, where the Staff noted that the proposal related to the “conduct of litigation”). These are fundamental business matters for the Company’s management and require an understanding of the business implications that could result from changes made to workforce policies. The Commission identified that a proposal could “probe too deeply” where “the proposal involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies.” See 1998 Release. The Staff recently reiterated its view and application of this standard of assessing whether a proposal micro-manages in Staff Legal Bulletin No. 14J (Oct. 23, 2018) ("SLB No. 14J"). The complexity of the type of assessment the Proposal request is simply beyond the knowledge and expertise of the stockholders of the Company and therefore seeks to micro-manage the Company.

Accordingly, it is clear that the Proposal involves the Company’s day-to-day business operations and we respectfully request that the Staff concur in our view that the it is therefore excludable under Rule 14a-8(i)(7).

IV. The Proposal May Be Excluded Because the Proposal and Supporting Statement Are Inherently Vague and Indefinite and Thus Contrary to Rule 14a-9

Rule 14a-8(i)(3) permits the exclusion of a stockholder proposal if the proposal or supporting statement is contrary to any of the Commission’s proxy rules, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials. The Staff has interpreted Rule 14a-8(i)(3) to mean that vague and indefinite stockholder proposals may be excluded because “neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires.” Staff Legal Bulletin No. 14B (Sept. 15, 2004) ("SLB No. 14B"). A proposal is sufficiently vague and indefinite to justify exclusion where a company and its stockholders might interpret the proposal differently, such that “any action ultimately taken by the company upon implementation of the proposal could be significantly different from the actions envisioned by the shareholders voting on the proposal.” Fuqua Industries, Inc. (Mar. 12, 1991). In the case of NYC Employees’ Retirement System v. Brunswick Corp., 789 F. Supp. 144, 146 (S.D.N.Y. 1992) ("NYCERS"), the court stated “the Proposal as drafted lacks the clarity required of a proper shareholder proposal. Shareholders are entitled to know precisely the breadth of the proposal on which they are asked to vote.” Further, the Staff consistently has permitted the exclusion of stockholder proposals when such proposals have failed to define certain terms necessary to implement them or where the meaning and application of key terms or standards under the proposal could be subject to differing interpretations. See The Boeing Company (Mar. 2, 2011) (allowing exclusion of a proposal requesting, among other things, that senior executives relinquish certain “executive pay rights” without explaining the meaning of the phrase); General Motors Corp. (Mar. 26, 2009) (concurring with the exclusion of a proposal to “eliminate all incentives for the CEO and the Board of Directors” that did not define “incentives”); and Verizon Communications Inc. (Feb. 21,
2008) (proposal prohibiting certain compensation unless Verizon’s returns to stockholders exceeded those of its undefined “Industry Peer Group” was excludable).

As noted above, the Proposal urges the Board to produce a report on the use of contractual provisions requiring employees of the Company to arbitrate employment-related claims. The Proposal does not, however, specify whether this is limited to “mandatory arbitration provisions,” as referenced throughout the supporting statement, which such provisions are distinguishable from specifically negotiated and agreed upon arbitration provisions in employment and other similar arrangements and voluntary arbitration programs, such as the program implemented by the Company. Without further explanation, it is unclear whether the Proponent is requesting a report on all arbitration provisions and policies or only mandatory policies pursuant to which the employee has no ability to negotiate or opt out of. See NYCERS (“Shareholders are entitled to know precisely the breadth of the proposal on which they are asked to vote.”); and Occidental Petroleum Corp. (Feb. 11, 1991) (“The staff, therefore, believes that the proposal may be misleading because any action(s) ultimately taken by the company upon implementation of this proposal could be significantly different from the action(s) envisioned by shareholders voting on the proposal.”). Even more confusing is that fact that the Proponent acknowledges that the Company’s policy is voluntary and that employees are permitted to opt out, but claims, without any support, that it imposes onerous requirements on employees.

For these reasons, “any action ultimately taken by the Company upon implementation [of the Proposal] could be significantly different from the actions envisioned by the shareholders voting on the Proposal.” Fuqua Industries, Inc. (Mar. 12, 1991)). Accordingly, the Company believes the Proposal is properly excludable under Rule 14a-8(i)(3).

V. Conclusion

For the reasons discussed above, the Company respectfully requests the Staff’s concurrence with its decision to omit the Proposal from the 2020 Proxy Materials and further requests the confirmation that the Staff will not recommend any enforcement action in connection with such omission. Please call the undersigned at (401) 770-5177 if you should have any questions or need additional information or as soon as a Staff response is available.

Respectfully yours,

Colleen M. McIntosh
Senior Vice President, Chief Governance Officer, Corporate Secretary and Assistant General Counsel

Attachments

cc w/ att: Michael Garland, Assistant Comptroller, The Comptroller of the City of New York
Doreen E. Lilienfeld, Shearman & Sterling LLP
Exhibit A

Copy of the Proposal and Accompanying Correspondence
November 13, 2019

Colleen M. McIntosh
Senior Vice President, Corporate Secretary and Chief Governance Officer
CVS Health Corporation
One CVS Drive
Woonsocket, Rhode Island 02895

Dear Ms. McIntosh:

I write to you on behalf of the Comptroller of the City of New York, Scott M. Stringer. The Comptroller is the custodian and a trustee of the New York City Employees’ Retirement System, the New York City Teachers’ Retirement System, the New York City Police Pension Fund and the New York City Fire Pension Fund (the “Systems”). The Systems’ boards of trustees have authorized the Comptroller to file this resolution and to inform you of their intention to present the enclosed proposal for the consideration and vote of stockholders at the Company’s next annual meeting.

Therefore, we offer the enclosed proposal for the consideration and vote of shareholders at the Company’s next annual meeting. It is submitted to you in accordance with Rule 14a-8 of the Securities Exchange Act of 1934, and I ask that it be included in the Company’s proxy statement.

Letters from State Street Bank and Trust Company certifying the Systems’ ownership, for over a year, of shares of CVS Health Corporation common stock are enclosed. Each System intends to continue to hold at least $2,000 worth of these securities through the date of the Company’s next annual meeting.

We would welcome the opportunity to discuss the proposal with you. Should the Board of Directors decide to endorse its provision as corporate policy, we will withdraw the proposal from consideration at the annual meeting.

Please feel free to contact me at (212) 669-2517 if you would like to discuss this matter.

Sincerely,

Michael Garland
Enclosures
RESOLVED that shareholders of CVS Health Corporation. (“CVS”) urge the Board of Directors to report to shareholders, at reasonable cost and omitting confidential and proprietary information, on the use of contractual provisions requiring employees of CVS to arbitrate employment-related claims. The report should specify the proportion of the workforce subject to such provisions; the number of employment-related arbitration claims initiated and decided in favor of the employee, in each case in the previous calendar year; and any changes in policy or practice CVS has made, or intends to make, as a result of California’s ban on agreeing to arbitration as a condition of employment.

SUPPORTING STATEMENT

In recent years, public attention has focused on the use by companies of agreements requiring employees to pursue employment-related claims, including sexual harassment claims, through arbitration. High-profile sexual harassment cases involving Fox News, Google and Uber highlighted the impact of these agreements. A robust public debate has ensued, including responses by legislators, regulators and state attorneys general.

Mandatory arbitration precludes employees from suing in court for wrongs like wage theft, discrimination and harassment, and requires them to submit to private arbitration, which has been found to favor companies and discourage claims.

CVS has forced its employees to arbitrate claims regarding alleged wage and hour violations (see https://scholar.google.com/scholar_case?case=17879381085277442407&q=Aaron+Elmore+v.+CVS+Pharmacy+Inc.&hl=en&as_sdt=2006). Wage theft from low-wage employees is widespread; a study estimated that wage theft costs low-wage workers in three large U.S. cities $3 billion per year.¹

Sexual harassment is an urgent concern across industries. A bill to end mandatory arbitration of sexual harassment claims bill passed in the U.S. House of Representatives in September 2019, and 56 state and territorial attorneys general voiced support for it. A 2019 article characterized the “movement to end forced arbitration” as having “swept Silicon Valley,” with employee walk-outs and company policy changes.² California recently banned the practice of requiring arbitration agreements as a condition of employment and Washington State enacted a law in 2018 invalidating contracts requiring arbitration of sexual harassment or assault claims.

Finally, because arbitration is private and contractual, arbitrating employment-related claims can allow a toxic culture to flourish, increasing the severity of eventual consequences and harming employee morale. Confidentiality provisions can prevent an employee's lawyer from using knowledge of wrongdoing to identify other victims.

CVS describes its mandatory arbitration policy as voluntary and employees are permitted to opt only by complying with onerous requirements that we believe are designed to deter such voluntary action.

The information sought in this Proposal would allow shareholders to assess the proportion of the workforce subject to mandatory arbitration of employment-related claims together with the risks posed by the use of such provisions.

We urge shareholders to vote for this Proposal.
November 13, 2019

Re: New York City Teachers' Retirement System

To whom it may concern,

Please be advised that State Street Bank and Trust Company, under DTC number 997, held in custody continuously, on behalf of the New York City Teachers' Retirement System, the below position from October 31, 2018 through today as noted below:

Security: CVS HEALTH CORP
Cusip: 126650100
Shares: 711,579

Please don't hesitate to contact me if you have any questions.

Sincerely,

Derek A. Farrell
Assistant Vice President
November 13, 2019

Re: New York City Police Pension Fund

To whom it may concern,

Please be advised that State Street Bank and Trust Company, under DTC number 997, held in custody continuously, on behalf of the New York City Police Pension Fund, the below position from October 31, 2018 through today as noted below:

Security: CVS HEALTH CORP

Cusip: 126650100

Shares: 540,059

Please don’t hesitate to contact me if you have any questions.

Sincerely,

Derek A. Farrell
Assistant Vice President
November 13, 2019

Re: New York City Fire Pension Fund

To whom it may concern,

Please be advised that State Street Bank and Trust Company, under DTC number 997, held in custody continuously, on behalf of the New York City Fire Pension Fund, the below position from October 31, 2018 through today as noted below:

Security: CVS HEALTH CORP
Cusip: 126650100
Shares: 169,328

Please don't hesitate to contact me if you have any questions.

Sincerely,

Derek A. Farrell
Assistant Vice President

Information Classification: Limited Access
November 13, 2019

Re: New York City Employee’s Retirement System

To whom it may concern,

Please be advised that State Street Bank and Trust Company, under DTC number 997, held in custody continuously, on behalf of the New York City Employee’s Retirement System, the below position from October 31, 2018 through today as noted below:

Security: CVS HEALTH CORP
Cusip: 126650100
Shares: 805,366

Please don’t hesitate to contact me if you have any questions.

Sincerely,

Derek A. Farrell
Assistant Vice President