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

DIVISION OF
CORPORATION FINANCE

March 15, 2022

Thomas S. Moffatt
CVS Health Corporation

Re: CVS Health Corporation (the "Company")
Incoming letter dated January 7, 2022

Dear Mr. Moffatt:

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

The Proposal requests that the board commission and publish a report on (1) the link between the public-health costs created by the Company's food, beverage, and candy business and its prioritization of financial returns over its healthcare purpose and (2) whether such prioritization threatens the returns of diversified shareholders who rely on a productive economy to support their investment portfolios.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(5) because we are unable to conclude that the Proposal is not otherwise significantly related to the Company's business.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, the Proposal transcends ordinary business matters.

Copies of all of the correspondence on which this response is based will be made available on our website at https://www.sec.gov/corpfin/2021-2022-shareholder-proposals-no-action.

Sincerely,

Rule 14a-8 Review Team

cc: Sara E. Murphy
The Shareholder Commons

♥CVSHealth

Thomas S. Moffatt
Vice President, Asst. Secretary &
Sr. Legal Counsel

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thomas.moffatt@cvshealth.com

January 7, 2022

VIA E-MAIL (shareholderproposals@sec.gov)

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

Re: CVS Health Corporation
Stockholder Proposal by The Shareholder Commons on behalf of Myra K. Young
Securities Exchange Act of 1934 – Rule 14a-8

Ladies and Gentlemen:

CVS Health Corporation, a Delaware corporation (the "**Company**" or "**CVS Health**"), pursuant to Rule 14a-8(j) under the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"), submits this letter to inform the Staff of the Division of Corporation Finance (the "**Staff**") of the U.S. Securities and Exchange Commission (the "**Commission**") of the Company's intention to omit from its proxy statement and form of proxy (collectively, the "**2022 Proxy Materials**") the stockholder proposal (the "**Proposal**") and the statement in support thereof submitted by The Shareholder Commons (the "**Representative**") on behalf of Myra K. Young (the "**Proponent**"). A copy of the Proposal and the statement in support thereof received on December 1, 2021 is attached to this letter as Exhibit A. The Company respectfully requests that the Staff concur with the Company's view that the Proposal may properly be excluded from the Company's 2022 Proxy Materials pursuant to Rule 14a-8.

Pursuant to Rule 14a-8(j) under the Exchange Act, we have:

- filed this letter with the Commission no later than eighty (80) calendar days before the Company intends to file its definitive 2022 Proxy Materials with the Commission; and

- concurrently sent copies of this correspondence to the Representative on behalf of the Proponent.

Pursuant to Staff Legal Bulletin No. 14D (Nov. 7, 2008) ("**SLB 14D**"), we are submitting this request for no-action relief under Rule 14a-8 through the Commission's email address, shareholderproposals@sec.gov (in lieu of providing six additional copies of this letter pursuant to Rule 14a-8(j)), and the undersigned has included his name, telephone number and e-mail address both in this letter and the cover email accompanying this letter.

Rule 14a-8(k) under the Exchange Act and SLB 14D provide that shareholder proponents are required to send the company a copy of any correspondence that the proponents elect to submit to the Commission or Staff. Accordingly, we are taking this opportunity to inform the Proponent that if the Proponent or the Representative on the Proponent's behalf elect to submit additional correspondence to the Commission or Staff with respect to the Proposal, a copy of that correspondence should concurrently be furnished to the undersigned on behalf of the Company pursuant to Rule 14a-8(k) and SLB 14D.

THE PROPOSAL

The Proposal requests that the Company's stockholders approve the following resolution:

> RESOLVED, shareholders ask that the board commission and publish a report on (1) the link between the public-health costs created by the Company's food, beverage, and candy business and its prioritization of financial returns over its healthcare purpose and (2) whether such prioritization threatens the returns of diversified shareholders who rely on a productive economy to support their investment portfolios.

A complete copy of the Proposal and supporting statement is attached to this letter as Exhibit A.

BASIS FOR EXCLUSION

The Company believes that the Proposal may properly be excluded from the 2022 Proxy Materials under both Rule 14a-8(i)(5) and Rule 14a-8(i)(7) because (1) the Proposal relates to operations which account for less than 5% of the Company's total assets at the end of its most recent fiscal year, and for less than 5% of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the Company's business; and (2) the Proposal deals with a matter relating to the Company's ordinary business operations.

ANALYSIS

I. The Proposal may be properly excluded from the Company's 2022 Proxy Materials pursuant to Rule 14a-8(i)(5) because the subject matter of the Proposal is not economically or otherwise significant to the Company's business and the Company is not primarily engaged in nor is a meaningful contributor to the broad social or ethical concerns raised by the Proposal.

Rule 14a-8(i)(5) provides that a shareholder proposal may be omitted from a proxy statement "[i]f the proposal relates to operations which account for less than 5% of the company's total assets at the end of its most recent fiscal year, and for less than 5% of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business."

The Staff has previously concurred with the exclusion of shareholder proposals pursuant to Rule 14a-8(i)(5) when the proposals concerned insignificant portions of a company's business. For example, a proposal to *Dunkin' Brands Inc.* requested that its board of directors issue a report assessing the environmental impact of continuing to use K-Cup Pods brand packaging. The Staff concurred that the proposal could be excluded under Rule 14a-8(i)(5) because (1) it related to operations that account for less than 5% of Dunkin Brands' total assets at the end of its most recent fiscal year, and for less than 5% of its net earnings and gross sales for its most recent fiscal year, (2) "the [p]roposal's significance to [Dunkin' Brands'] business was not apparent on its face," and (3) the "[p]roponent did not demonstrate that it is otherwise significantly related to [Dunkin Brands'] business" *Dunkin' Brands Inc.* (Feb. 22, 2018). *See also Reliance Steel & Aluminum Co.* (Apr. 2, 2019) (concurring in the exclusion of a proposal that the company issue a report on political contributions and expenditures because the proposal related to operations that account for less than 5% of the Company's total assets, net earnings and gross sales for its most recent fiscal year).

A. Food Sales Account for Less than 5% of the Company's Business.

The Proposal is excludable under Rule 14a-8(i)(5) because it relates to a portion of business that is not economically significant to the Company. The Company reported total revenues of approximately $268.7 billion for the fiscal year ended December 31, 2020 and total assets of approximately $230.7 billion as of December 31, 2020. *See* pages 69 and 103 of the Company's Annual Report on Form 10-K for the fiscal year ended December 31, 2020 (the "**Annual Report**"). The Company has four reportable segments: Pharmacy Services, Retail/Long Term Care ("**Retail**"), Health Care Benefits and Corporate/Other.

The Proposal relates to the Company's "food, beverage and candy business," which is part of the Company's Retail segment.

Within the Retail segment, the Company tracks certain sales of products under a broad "consumables/general merchandise" category ("**Consumables**"), which includes, among other products and product lines, the following: beverages (including water, teas, juices, etc.); dairy (including milk and milk alternatives, creamers, cheese, eggs, etc.); grocery (including breakfast, cereals, coffee, soup, baking supplies, condiments, etc.); snacks (including candy, nuts, salty snacks, nutrition bars, etc.); soda; flowers and fresh produce; beer, wine and spirits; baked goods (including bread, pastry, etc.); and frozen foods. Items that are consumed for a medicinal, therapeutic or other health-related reasons, such as vitamins and cough or cold medicines or treatments, are not included as part of Consumables. Although the Proposal does not define what is included in "the Company's food, beverage, and candy business," we believe that the food and beverages in the Consumables category within the Company's Retail segment, which include many items that the Company believes promote good health and a balanced diet, best covers the focus of the Proposal.

According to the Company's internal reporting, food and beverages in the Consumables category generated significantly less than 5% of the Company's total revenue in 2020. Inventory associated with food and beverages in the Consumables category, which is a reasonable approximation of total assets, represented significantly less than 5% of the Company's total assets in 2020. As a component of gross profit (revenue less cost of products sold), food and beverages in the Consumables category generated significantly less than 5% of the Company's

$49.0 billion gross profit in 2020. The Company expects that these percentages will remain significantly below 5% for the fiscal year ended December 31, 2021.[1]

Therefore, as none of the reported quantifiable results exceed any of the 5% thresholds set forth in 14a-8(i)(5) for 2020 and because the Company expects the results to continue to be significantly below the 5% thresholds in 2021, the Proposal is excludable from the 2022 Proxy Materials pursuant to Rule 14a-8(i)(5).

B. <u>The Proposal is Not Otherwise Significantly Related to the Company's Business.</u>

We note that the Staff has issued updated guidance regarding its application of Rule 14a-8(i)(5) in November 2021. In Staff Legal Bulletin No. 14L (Nov. 3, 2021) ("**<u>SLB 14L</u>**"), the Staff stated that proposals that raise "issues of broad social or ethical concern related to the company's business may not be excluded, even if the relevant business falls below the economic thresholds of Rule 14a-8(i)(5)". In SLB 14L, the Staff, in its discussion of Rule 14a-8(i)(5), referenced the *Lovenheim v. Iroquois Brands, Ltd.* decision, which stated that proposals would not be excludable even if they did not reach the specified economic thresholds if there was a significant relationship to the issuer's business. While the Proposal refers to an important issue of broad social concern, namely the public health costs associated with the consumption of unhealthy foods and its contribution to the obesity epidemic, the Company is not primarily engaged in the business of selling food and, specifically, the types of food and beverages identified in the Proposal, nor is it a meaningful contributor to the broad policy concerns raised by the Proposal. Thus, the Proposal does not meet the standard that it must otherwise be significantly related to the Company's business.

The Company is a diversified health services company united around a common purpose of helping people navigate the health care system through every meaningful moment of their health. The Company operates approximately 9,900 retail drugstore locations across the country, approximately 1,200 walk-in medical clinics and is a leading pharmacy benefits manager with approximately 110 million plan members. Approximately 85% of the U.S. population lives within ten miles of a Company retail drugstore location and the Company takes that responsibility seriously. The primary purpose of the Company's retail drugstore locations is to serve the health needs of the Company's customers and to use the Company's vast retail footprint to increase access to health care in the areas where it operates and, most importantly, in the communities that need access to health care the most. The Company believes its prescription services, as well as its MinuteClinic® and HealthHUB® offerings, which leverage its retail drugstore locations, are the focus of the Company's business in the retail space.[2] In fact, the Company has been at the forefront of providing more than 50 million doses of COVID-19 vaccines and safe, accessible and effective COVID-19 testing solutions as a critical component of its broader response to the pandemic. While the Company's retail drugstore locations do offer a range of non-health care products, including many in the Consumables category, the Company views the food and

[1] The Company considers the specific percentages associated with food and beverages in its Consumables category to be highly competitively sensitive information.

[2] As disclosed in the Company's <u>Annual Report</u> (PDF p.18), approximately 76.9% of the Company's revenues in the Retail segment are from its pharmacies, and 23.1% are from the <u>entirety</u> of the "front store", and the delta has increased in each of the past three years.

beverages it offers to its customers as a necessary and natural component of its retail drugstore business to address a complementary need of a customer and to encourage members of the community to consider using the Company's retail pharmacy locations for their health care needs. Additionally, at its recent Investor Day conference, the Company announced its intention to focus further on delivery of health care services, including primary care, as the centerpiece of its revised strategy. Food and beverage sales simply do not form a significant part of the Company's long-term business plan.

The Company appreciates and values the Proponent's overall objective of drawing attention to the public health costs of the Company's "food, beverages and candy business." As a company that provides diversified health services to its customers and the communities in which it operates, CVS Health seriously considers the need to address obesity as an important public health issue in the United States, and its effects on rising rates of severe chronic diseases, including Type 2 diabetes and hypertension. The Company does not believe that its food and beverage sales at its retail drugstore locations are a meaningful contributor to the rise in obesity rates in the United States, due to the limited amount of its food and beverage sales, and the fact that the Company has taken meaningful efforts to increase the healthy alternatives available as part of its food and beverage offerings. The Company's Gold Emblem® and Gold Emblem Abound® brands are part of a broader initiative to offer wider and more varied selections of healthy food alternatives that contain carefully sourced, nutritious ingredients. Gold Emblem® and Gold Emblem Abound® brands include products that are organic, gluten-free, contain low/no sodium, no added sugar or are a good source of fiber or protein, with relevant nutritional benefits typically shown in bold lettering and often circled in yellow. The Company has considered and implemented consumer feedback when making such labeling choices, which allow consumers to quickly and easily identify the nutritional and health benefits of the products. Although the Company offers products that are available at traditional retail convenience stores, it increasingly offers fresh fruit and healthy food alternatives. The Company estimates that at least one-third of all its food and beverage sales could be based on sales of food and beverage products characterized as healthy.

Despite the Proposal's reference to public health costs from unhealthy foods, based on the foregoing information and in light of the lack of economic relevance of the subject matter of the Proposal, the Company has determined that the Proposal is not otherwise significantly related to its business since the Company is not primarily engaged in the business of selling unhealthy foods nor is it a meaningful contributor to the broad policy concerns raised by the Proposal. Accordingly, the Proposal may be excluded under Rule 14a-8(i)(5).

II. The Proposal may be properly excluded from the Company's 2022 Proxy Materials pursuant to Rule 14a-8(i)(7) because it deals with matters relating to the Company's ordinary business operations.

Rule 14a-8(i)(7) provides that a shareholder proposal may be omitted from a proxy statement "[i]f the proposal deals with a matter relating to the company's ordinary business operations."

The Commission's Release No. 34-40018 (May 21, 1998) (the "**<u>1998 Release</u>**") described two "central considerations" for the exclusion of a proposal under the ordinary business exception. First, certain tasks are "so fundamental to management's ability to run a company on a day-to-day basis" that they could not be subject to direct shareholder oversight may be excluded. *See* 1998 Release. 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 shareholders, as a group, would not be in a position to make an informed judgment." *Id.*

We respectfully advise the Staff that on March 22, 2021 it concurred with the exclusion of a substantially similar proposal submitted to the Company and, on March 30, 2021, subsequently issued a letter in which the Staff denied request for reconsideration (the "Denial Letter"). In the Denial Letter, the Staff had stated that "the Proposal does not demonstrate how external public health costs created by the Company's retail food business are sufficiently significant to the Company, such that they transcend the Company's ordinary business operations and would be appropriate for a shareholder vote".

Under SLB 14L, the Staff stated that it will "focus on the social policy significance of the issue that is the subject of the shareholder proposal" and that "in making this determination, the [S]taff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company".

The Staff has consistently concurred with the exclusion of shareholder proposals pursuant to Rule 14a-8(i)(7) as matters that deal with the company's ordinary business when the proposals requested reports concerning the sale of particular products by a company. For example, in *Wal-Mart Stores, Inc.* (Mar. 24, 2006), *recon. denied* (Apr. 13, 2006), a shareholder proposal requested a report evaluating the company's policies and procedures for minimizing customers' exposure to toxic substances in the products that it stocks. The Staff concurred in excluding the proposal based on the company's assertion that "[t]he handling of inventory involves complex business decisions and falls within the Company's ordinary business operations." *See also Family Dollar* (Nov. 6, 2007), *recon. denied* (Nov. 20, 2007) (concurring in the exclusion of a similar proposal because it related to the company's product sales).

Further, the Staff has also concurred with the exclusion of shareholder proposals pursuant to Rule 14a-8(i)(7) as matters that deal with the company's ordinary business when proposals relating to particular products, services or practices raised public health concerns related to the company but nevertheless did not transcend day-to-day business matters. In *Viacom Inc.* (Dec. 18, 2015), the proposal requested the company's board of directors issue a report assessing the company's policy responses to public concerns regarding linkages of food and beverage advertising to childhood obesity, diet-related diseases and other impacts on children's health. The Staff concurred that the proposal could be excluded under Rule 14a-8(i)(7) because it related to the company's "nature, presentation and content of advertising," which was part of its ordinary business operations. *See also McDonald's Corp.* (Mar. 12, 2019) (permitting exclusion of a proposal under Rule 14a-8(i)(7) that sought to create a special board committee on food integrity because it related to the company's ordinary business operations).

Consistent with *Wal-Mart Stores*, *Family Dollar* and *Viacom*, the Proposal requires that the Company publish a report on the public health costs created by the Company's food, beverage, and candy business, which interferes with the Company's management of a routine part of its business: identifying which products to sell in its stores.

The Proposal seeks to have stockholders dictate the types of products the Company choses to sell in its retail pharmacy locations. Decisions regarding the particular products or services the Company chooses to offer to its customers is inherently in the realm of the Company's ordinary business operations. The decision regarding what products and services the Company offers to its customers is a complex one for a diversified health services company. In doing so, the Company needs to consider the types of products and services it needs to offer to best serve the community's health care needs. This means not only providing the necessary health and wellness products and services, but also meeting its customers' need for convenience and ease of accessibility. The Company's selection of items to offer in its Consumables category, as with its other products and services, is designed to strengthen the role the Company's retail pharmacy locations play in the communities in which they are located.

The primary focus of the Proposal is on selecting the particular food and beverage products that the Company decides to offer to its customers, which is clearly related to day-to-day business matters of the Company. Accordingly, the Proposal may be excluded under Rule 14a-8(i)(7).

CONCLUSION

For the reasons discussed above, the Company respectfully requests the Staff's concurrence with its decision to omit the Proposal from the 2022 Proxy Materials and further requests the confirmation that the Staff will not recommend any enforcement action in connection with such omission.

In the event the Staff disagrees with any conclusion expressed herein, or should any information in support or explanation of the Company's position be required, we would appreciate an opportunity to confer with the Staff before issuance of its response. If the Staff has any questions regarding this request or requires additional information, please contact the undersigned at (401) 770-5409 or Thomas.Moffatt@CVSHealth.com.

We appreciate your attention to this request.

Respectfully yours,

Thomas S. Moffatt
Vice President, Assistant Secretary and Senior Legal Counsel

cc: The Shareholder Commons, on behalf of Myra K. Young

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

Lona Nallengara, Shearman & Sterling LLP

EXHIBIT A

From:	Sara Murphy <sara@theshareholdercommons.com>
Sent:	Wednesday, December 01, 2021 5:48 PM
To:	McIntosh, Colleen
Cc:	Moffatt, Thomas S.
Subject:	[EXTERNAL] Rule 14a-8 Proposal (CVS)
Attachments:	CVS Representative Filing for Young - TSC.pdf; 2022 CVS Proposal.pdf; CVS Young TSC Representative Authorization US Rule 14a-8 Proposals.pdf

****** External Email - Use Caution ******

Dear Ms. McIntosh,

Please see the attached Rule 14a-8 proposal requesting that CVS publish a report disclosing the external public-health costs arising from the Company's food, beverage, and candy business, and the impact of those costs on the Company's diversified shareholders.

You will also find attached a letter from the proponent delegating me to act on her behalf on all matters concerning this proposal.

I will forward a broker letter shortly under separate cover.

Sincerely,
Sara

The Shareholder Commons

SUBSCRIBE TO OUR MONTHLY NEWSLETTER

Sara E. Murphy
Chief Strategy Officer
The Shareholder Commons

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sara@theshareholdercommons.com
Follow us on Twitter @universal_owner

Myra K. Young
[redacted]

December 1, 2021

CVS Health Corporation
One CVS Drive
Woonsocket, Rhode Island 02895
Via: colleen.mcintosh@cvshealth.com

Attn: Colleen M. McIntosh
Senior Vice President, Corporate Secretary and Chief Governance Officer

I hereby authorize The Shareholder Commons to file a shareholder resolution on my behalf for CVS Health Corporation's ("the Company") 2022 annual shareholder meeting. The proposal specifically requests that the Company publish a report disclosing the external public health costs arising from the Company's food, beverage, and candy business, and the impact of those costs on the Company's diversified shareholders.

I support this proposal because it would help to curb activities on the part of the Company that may undermine the value of my broader portfolio. I specifically authorize The Shareholder Commons to engage with CVS Health Corporation on my behalf regarding the proposal and the underlying issues, and to negotiate a withdrawal of the proposal as The Shareholder Commons sees fit.

I understand that I may be identified on the corporation's proxy statement as the filer of the aforementioned resolution.

Sincerely,

Myra K Young

Myra K. Young

cc: Thomas S. Moffatt <Thomas.moffatt@cvshealth.com>

Via electronic mail
December 1, 2021

CVS Health Corporation
One CVS Drive
Woonsocket, RI 02895

Attn: Colleen M. McIntosh
Senior Vice President, Corporate Secretary and Chief Governance Officer

RE: Rule 14a-8 shareholder proposal for 2022 Annual Shareholder Meeting

Dear Ms. McIntosh,

The Shareholder Commons ("TSC") is filing a shareholder proposal on behalf of Myra K. Young, a shareholder of CVS Health Corporation (the "Company"), for action at the next Company annual meeting. The Proponent submits the enclosed shareholder proposal for inclusion in the Company's 2022 proxy statement, for consideration by shareholders, in accordance with Rule 14a-8 of the General Rules and Regulations of the Securities Exchange Act of 1934.

The Proponent has continuously beneficially owned, for at least 3 years as of the date hereof, at least $2,000 worth of the Company's common stock. Verification of this ownership will be sent under separate cover. The Proponent intends to continue to hold such shares through the date of the Company's 2022 annual meeting of shareholders.

A letter from the Proponent authorizing TSC to act on her behalf is enclosed. A representative of the Proponent will attend the stockholders' meeting to move the resolution as required.

The Proponent and I are available to meet with the Company via teleconference on December 15, 2021, at 4:00 p.m. EST or 4:30 p.m. EST. In SLB 14L Section F, SEC Staff "encourages both companies and shareholder proponents to acknowledge receipt of emails when requested." Please acknowledge receipt of this proposal, and kindly indicate whether you wish to accept either of our proposed meeting times.

The proponent can be reached at myk@corpgov.net. I can be contacted at +1.202.578.0261 or sara@theshareholdercommons.com. Please address any future correspondence regarding the proposal to me. I am available to discuss this issue and would welcome the opportunity to engage.

Sincerely,

Sara E. Murphy

Sara E. Murphy

[CVS Health Corporation: Rule 14a-8 Proposal, December 1, 2021]
[This line and any line above it – *Not* for publication.]
ITEM 4*: Report on Effect of Junk Food Sales on Diversified Portfolios

***RESOLVED**, shareholders ask that the board commission and publish a report on (1) the link between the public-health costs created by the Company's food, beverage, and candy business and its prioritization of financial returns over its healthcare purpose and (2) whether such prioritization threatens the returns of diversified shareholders who rely on a productive economy to support their investment portfolios.*

Supporting Statement:

The Company's website emphasizes health:

Our purpose:

Helping people on their path to better health.

This purpose is belied by the unhealthful foods, beverages, and candy that feature prominently on the Company's store shelves,[1] which are among the top culprits in the obesity epidemic.[2] In its quest for sales, the Company is willing to force customers with type-two diabetes or hypertension to run a gauntlet of sugar and salt to obtain their prescriptions.

The World Health Organization assesses the unpriced social burdens of obesity as almost three percent of global GDP.[3] Yet the Company does not disclose any methodology to address the public-health costs of its "front-store" business, which promotes consumption of chips, soda, cookies, and candy. This is a good strategy for growing profits: on a recent earnings call, the CEO highlighted strong revenue growth in the category that includes these items: "Front store sales [showed] revenue growth of 13%. . . . with . . . volume increases across most front store categories."[4]

But it is a bad strategy for putting people on a better path to health:

> *The point of purchase is the setting where people are challenged to either follow through on their long-term goals to stay healthy or are tempted to buy and consume foods that will increase the risk of weight gain, hypertension, diabetes, and cancer.*[5]

Promoting junk food isn't only bad for customers—it hurts most of the Company's owners as well because a gain in revenue that comes at the expense of public health is a bad trade for most Company shareholders, who are diversified and rely on broad economic growth to achieve their financial objectives. A strategy that increases Company financial returns but that contributes to obesity runs counter to the

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[1] https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/youngcvs032221-14a8.pdf
[2] https://www.hsph.harvard.edu/nutritionsource/healthy-drinks/sugary-drinks/
[3] https://www.schroders.com/en/sysglobalassets/digital/insights/2019/pdfs/sustainability/sustainex/sustainex-short.pdf
[4] https://www.fool.com/earnings/call-transcripts/2021/11/03/cvs-health-cvs-q3-2021-earnings-call-transcript/
[5] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5406228/

interests of most Company shareholders: a reduction in GDP created by public-health costs reduces diversified portfolio returns over the long term.[6]

This proposal asks the Board to commission a report that analyzes the trade-offs the Company makes by prioritizing its financial returns over public-health risks and the global economy, taking the perspective of its diversified shareholders, whose portfolios are at risk from public-health threats.

The report will help shareholders determine whether Company policies serve their best interests and whether the Company should prioritize certain public-health issues over financial returns.

Please vote for: Report on Effect of Junk Food Sales on Diversified Portfolios – Proposal 4*

[This line and any below are *not* for publication]
[*Number to be assigned by the Company]

The graphic above is intended to be published with the rule 14a-8 proposal. The graphic would be the same size as the largest management graphic (and accompanying bold or highlighted management text with a graphic) or any highlighted management executive summary used in conjunction with a management proposal or a rule 14a-8 shareholder proposal in the 2021 proxy.

The proponent is willing to discuss mutual elimination of both shareholder graphic and any management graphic in the proxy in regard to this specific proposal.

Reference SEC Staff Legal Bulletin No. 14I (CF)

[16] Companies should not minimize or otherwise diminish the appearance of a shareholder's graphic. For example, if the company includes its own graphics in its proxy statement, it should give similar prominence to a shareholder's graphics. If a company's proxy statement appears in black and white, however, the shareholder proposal and accompanying graphics may also appear in black and white.

Notes: This proposal is believed to conform with Staff Legal Bulletin No. 14B (CF), September 15, 2004, including (emphasis added):

Accordingly, going forward, we believe that it would not be appropriate for companies to exclude supporting statement language and/or an entire proposal in reliance on rule 14a-8(i)(3) in the following circumstances:

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[6] https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf

- the company objects to factual assertions because they are not supported;
- the company objects to factual assertions that, while not materially false or misleading, may be disputed or countered;
- the company objects to factual assertions because those assertions may be interpreted by shareholders in a manner that is unfavorable to the company, its directors, or its officers; and/or
- the company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such.

We believe that it is appropriate under rule 14a-8 for companies to address these objections in their statements of opposition.

See also Sun Microsystems, Inc. (July 21, 2005).

I also remind you of the SEC's recent guidance and my request that you acknowledge receipt of this shareholder proposal submission. SLB 14L Section F, https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals, Staff "encourages both companies and shareholder proponents to acknowledge receipt of emails when requested."

Frederick H. Alexander
info@theshareholdercommons.com
+1.302.485.0497

February 1, 2022

Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

RE: *Shareholder proposal of Myra Young to CVS Health Corporation regarding externalized public-health costs*

Division of Corporate Finance Staff Members:

Myra Young (the "Proponent") is beneficial owner of CVS Health Corporation (the "Company" or "CVS Health") common stock and has submitted a shareholder proposal (the "Proposal") to the Company. The Proponent has asked me to respond to the letter dated January 7, 2022 ("Company Letter") that Thomas Moffat ("Company Counsel") sent to the Securities and Exchange Commission (the "SEC"). In that letter, the Company contends the Proposal may be excluded from the Company's 2022 proxy statement. A copy of the Proposal is attached to this letter.

Based on the Proposal, as well as the letter the Company sent, we respectfully submit that the Proposal must be included in the Company's 2022 proxy materials and is not excludable under Rule 14a-8. A copy of this letter is being emailed concurrently to Company Counsel.

SUMMARY

The Proposal requests a study of the external public-health costs associated with the Company's retail food business, and how such costs affect the vast majority of its shareholders who rely on overall market returns. CVS Health asserts the Proposal is excludable because it is not economically or otherwise significant to CVS Health (Rule 14a-8(i)(5)) and because it relates to ordinary business (Rule 14a-8(i)(7)).

The Proposal is not excludable under Rule 14a-8(i)(7) because it is directed to a significant policy issue posed by the Company's ongoing business, namely the question of how a corporation accounts for the costs it imposes on stakeholders when it prioritizes the interests of its shareholders, in this instance by increasing the public health costs associated with the sale of unhealthful food to consumers seeking health products and services. When a proposal addresses a significant policy issue that transcends a company's business, it will not be excluded, even if it relates to the company's ordinary business.

CVS Health itself has recognized the importance of the question, recently signing on to the Business Roundtable ("BRT") Statement on the Purpose of a Corporation (the "Statement"), which purports to make significant commitments to stakeholders. This issue has been the focus of legislative action, policy debate, and the Company's own public commitments. The Proposal relates solely to this critical policy issue and contains no specific direction with respect to particular products and services or any other ordinary business of CVS Health. In addition, CVS Health's decision to promote and sell unhealthful products to improve its financial return implicates a second significant policy issue: the growing obesity epidemic and its relationship to poor diet, including excessive sugar intake.

Moreover, when a significant policy issue is involved, the proposal will not be excluded under Rule 14a-8(i)(5) if it is related to the company's business, even if it does not meet the economic thresholds set forth in that provision. Here, the Proposal does address a significant policy issue and is clearly related to the Company's business—CVS Health does not deny that it promotes and sells unhealthful products to customers entering its store to fill prescriptions, get vaccinated, or buy over-the-counter health products.

ANALYSIS

1. Background

A. The Proposal

The Proposal is as follows:

> *RESOLVED, shareholders ask that the board commission and publish a report on (1) the link between the public-health costs created by the Company's food, beverage, and candy business and its prioritization of financial returns over its healthcare purpose and (2) whether such prioritization threatens the returns of diversified shareholders who rely on a productive economy to support their investment portfolios.*

As the supporting statement explains, the Proposal does not simply concern the advisability of selling certain products, but rather addresses the critical policy question of whether companies should be prioritizing their own profits over broad public interests:

> *This proposal asks the Board to commission a report that analyzes the trade-offs the Company makes by prioritizing its financial returns over public-health risks and the global economy…*
>
> *The report will help shareholders determine whether Company policies… should prioritize certain public-health issues over financial returns.*

B. Commission and Staff Guidance

The Staff has indicated that a shareholder proposal that might otherwise be excludable as relating to ordinary business under Rule 14a-8(i)(7) is not excludable if it raises significant social policy issues.[1] In explaining ordinary business, the Release noted:

> *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 shareholder oversight. Examples include the management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers. However, proposals relating to such matters but focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.*

Staff Legal Bulletin 14A (July 12, 2002) noted that public debate indicated the presence of a significant policy issue:

> *The Division has noted many times that the presence of widespread public debate regarding an issue is among the factors to be considered in determining whether proposals concerning that issue "transcend the day-to-day business matters."*

The Staff has also indicated that shareholder proposals involve significant social policies if they involve issues that engender widespread debate, media attention, and legislative and regulatory initiatives.[2]

The Staff had also announced a policy of concurring in the exclusion of proposals that raised a significant policy issue if the proposal did not have significant nexus to the company. However, the Staff recently announced its intention to eliminate the nexus analysis and refocus on the significant social policy exception, in order to conform to the Commission's originally articulated standard:

> *Going forward, the staff will realign its approach for determining whether a proposal relates to "ordinary business" with the standard the Commission initially articulated in 1976, which provided an exception for certain proposals that raise significant social policy issues, and which the Commission subsequently reaffirmed in the 1998 Release. This exception is essential for preserving shareholders' right to bring important issues*

[1] Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018 (May 21, 1998).

[2] JD Supra, *SEC Staff's Latest Guidance Presents Dilemma for Companies Seeking to Exclude Shareholder Proposals on Environmental and Social Issues* (January 4, 2018) ("In a June 30, 2016 stakeholder meeting, the Staff indicated that significant policy issues are matters of widespread public debate, which include legislative and executive attention and press attention.")

> *before other shareholders by means of the company's proxy statement, while also recognizing the board's authority over most day-to-day business matters. For these reasons, staff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal. In making this determination, the staff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.*

A recent Staff announcement emphasized that this change means proposals involving a significant policy issue will no longer be excluded simply because the issue is not significant for the company:

> *Under this realigned approach, proposals that the staff previously viewed as excludable because they did not appear to raise a policy issue of significance* ***for the company*** *may no longer be viewed as excludable under Rule 14a-8(i)(7). For example, proposals squarely raising human capital management issues with a broad societal impact would not be subject to exclusion solely because the proponent did not demonstrate that the human capital management issue was significant to the company.*[3]

In addition to eliminating the nexus test, *SLB L* also limited the analysis as to whether a proposal related to a significant policy issue would "micromanage" the company. As one commentator described the change:

> *The new bulletin resets the interpretation of micromanagement to focus on whether the granularity of the proposal is consistent with shareholders' capacity to understand and deliberate; i.e., proponents are expected to tailor proposals to a level of inquiry that is consistent with the current state of investor discourse and knowledge.*[4]

As the quoted language from *SLB L* makes clear, the elimination of the extra hurdles would apply even if the proposal related to the otherwise ordinary business described in the 1998 Release. Thus, an otherwise eligible proposal that relates to ordinary business, including products and services, can no longer be excluded if those issues have "a broad societal impact."

SLB L also limited the circumstances in which a proposal that constitutes a significant policy issue could be excluded under Rule 14a-8(i)(5), the "relevance" exception, which generally permits a proposal to be

[3] Shareholder Proposals: Staff Legal Bulletin No. 14L (CF) (emphasis added) ("SLB L").
[4] Sanford Lewis, *SEC Resets the Shareholder Proposal Process,* Harvard Law School Forum on Corporate Governance (December 23, 2021).

excluded if it relates to less than 5 percent of a company's business and "is not otherwise significantly related to the company's business." Specifically, *SLB L* stated that:

> *proposals that raise issues of broad social or ethical concern related to the company's business may not be excluded, even if the relevant business falls below the economic thresholds of Rule 14a-8(i)(5).*

In reaching this conclusion, the Staff cited *Lovenheim v. Iroquois Brands, Ltd.*[5] *Lovenheim* involved a motion for a preliminary injunction, and the court found that a proposal seeking a study on the company's sale of pâté de foie gras and animal cruelty was not likely to be found to be excludable under Rule 14a-8(i)(5) because of its social significance, even though sales of the product represented only $79,000 of the company's $141 million in revenue and $34,000 of a total of $78 million in assets.

2. The Proposal should not be excluded under Rule 14a-8(i)(7)

A. The broad significant policy issue: shareholder primacy and cost externalization

The Company's decision to continue to prominently feature and market unhealthful foods is embedded within the policy issue raised by shareholder primacy, which encourages business practices that enhance corporate financial returns to shareholders but harm social and environmental systems. Below, we explain how this issue has become a central feature of the policy landscape in the United States and beyond.

i. Corporate law and shareholder primacy

The directors of U.S. corporations have long focused their efforts on improving the financial return of their corporations to their shareholders. While there has been a fierce ongoing debate as to whether corporations should in fact be managed for the benefit of only shareholders or for a broader group of stakeholders,[6] the concept of shareholder primacy has dominated corporate law. This doctrine eschews consideration of the external costs of a business unless those costs affect the corporation's own financial return to its shareholders. A series of Delaware court decisions cemented shareholder primacy's place in the United States.[7]

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[5] 618 F. Supp. 554 (D.D.C. 1985).

[6] Frederick Alexander, BENEFIT CORPORATION LAW AND GOVERNANCE: PURSUING PROFIT WITH PURPOSE (2018) at 21-26.

[7] *See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc*., 506 A.2d 173 (Del. 1986) (holding that when a corporation is to be sold in a cash-out merger, the directors' duty is to maximize the cash value to shareholders, regardless of other constituencies' interests, because there is no long term for the shareholders); *Katz v. Oak Indus. Inc*., 508 A.2d 873, 879 (Del. Ch. 1986) ("It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders; that they may sometimes do so 'at the expense' of others [*e.g*., debtholders]… does not… constitute a breach of duty."); Leo E. Strine, Jr., *The Social Responsibility of Boards of Directors and Stockholders in Change of Control Transactions: Is There Any "There" There?*, 75 S. Cal. L. Rev. 1169, 1170 (2002) ("The predominant academic answer is that corporations exist primarily to generate stockholder wealth, and that the interests of other constituencies are incidental and subordinate to that primary concern.") Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 Seattle Univ. L. Rev. 611, 613 (2017) ("Delaware decisional law is arguably particularly unfriendly to for-profit corporate boards that fail to place shareholder financial wealth maximization first in every decision they make.")

eBay Domestic Holdings, Inc. v. Newmark[8] is a recent example of the judicial focus on shareholder wealth maximization. The court embraced shareholder primacy, finding it was a violation of the directors' fiduciary duties to make decisions primarily for the benefit of users of the corporation's platform:

> *Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form.* ***Those standards include acting to promote the value of the corporation for the benefit of its stockholders****. The "Inc." after the company name has to mean at least that. Thus,* ***I cannot accept as valid . . . a corporate policy that specifically, clearly, and admittedly seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders****.*[9]

The former Chief Justice of the Delaware Supreme Court has explained that the law clearly favors shareholders, stating, "a clear-eyed look at the law of corporations in Delaware reveals that, within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare."[10] Toward the end of the twentieth century, many jurisdictions in the United States adopted "constituency statutes," fully or partially opting out of shareholder primacy.[11] None of those states mandates consideration of stakeholder interests, however.[12] Delaware, the jurisdiction in which the Company is incorporated, has not adopted such a statute.

Delaware's common-law commitment to shareholder primacy has led to a reaction regarding the risk it poses to stakeholders and the public.[13] Legislatures have responded by creating an alternative: beginning in 2010, U.S. jurisdictions began to adopt benefit corporation provisions, which created a corporate form that required directors to consider other stakeholder interests. Legislatures have acted in 39 U.S. jurisdictions (including Delaware), the Canadian province of British Columbia, and the countries of Italy, Colombia, and Ecuador over the last decade to make this new form available. In addition, legislation was introduced in both houses of the U.S. Congress that would have imposed benefit corporation duties on all billion-dollar companies' directors.[14] The issue even surfaced in the most recent U.S. presidential election,

[8] 16 A.3d 1 (Del. Ch. 2010) (emphasis added).

[9] *Id*. at 34-35 (referring to corporate justification for shareholder rights plan meant to forestall a change in control that might threaten platform users' interests).

[10] Leo Strine, *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law* 50 WAKE FOREST LAW REVIEW 761 (2015).

[11] Alexander, *supra n.* 3, at 135–148.

[12] *Id.*

[13] *See generally,* Lynn Stout, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS AND THE PUBLIC (2012).

[14] Copies of the legislation are available here: https://www.congress.gov/bill/116th-congress/senate-bill/3215?q=%7B%22search%22%3A%5B%22accountable+capitalism+act%22%5D%7D&s=1&r=1 (Senate) and here: https://www.congress.gov/bill/116th-congress/house-bill/6056?q=%7B%22search%22%3A%5B%22accountable+capitalism+act%22%5D%7D&s=2&r=2 (House)

as one candidate decried "the era of shareholder capitalism."[15] In response, critics argued that favoring shareholders was the best recipe for a successful economy:

> *In reality, corporations do enormous social good precisely by seeking to generate returns for shareholders.*[16]

For the first time, BlackRock, the world's largest asset manager with $10 trillion in assets under management, recently announced it would support companies that wanted to convert to benefit corporations.[17]

ii. Unwinding shareholder primacy protects shareholders

Benefit corporation statutes, along with first generation constituency statutes, are a legislative expression of the need to provide corporations with a basis to account for non-shareholder interests with a priority equal to that given to shareholder interests. But there is also a strong argument that shareholders themselves are better served if a corporation deprioritizes its own financial returns. Lynn Stout, a leading academic opponent of shareholder primacy, explains that evolving arguments against shareholder primacy do not rely on a zero-sum calculus that protects stakeholders to the detriment of shareholders; instead, she explains that these arguments "focus not on how shareholder primacy hurts stakeholders or society *per* se, but on how shareholder primacy can hurt *shareholders*, both individually and immediately, and collectively and over time."[18]

> *Specifically, because most shareholders hold diversified investment portfolios, the maximization of value of any individual company in their portfolio may be detrimental to their interests when that maximization has a wider social cost:*
>
> *[F]or widely held public corporations, most shareholders are broadly diversified investors who are dependent on a stable society and environment to support all of their investments and would be financially injured if some corporations create extra profits by externalizing social and environmental costs.*[19]

This recognition that diversified shareholders' interests converge with broad social interests when it comes to corporate cost externalization explains the need for the report the Proposal requests. As

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[15] *Biden says investors 'don't need me,' calls for end of 'era of shareholder capitalism,'* (CNBC) (July 9, 2020), available at https://www.cnbc.com/2020/07/09/biden-says-investors-dont-need-me-calls-for-end-of-era-of-shareholder-capitalism.html.
[16] Andy Pudzer, *Biden's Assault on 'Shareholder Capitalism,* (Wall Street Journal) (August 17, 2020), available at https://www.wsj.com/articles/bidens-assault-on-shareholder-capitalism-11597705153.
[17] BlackRock, *Investment Stewardship 2022 Policies Updates Summary,* available at https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-engprinciples-global-summary.pdf
[18] *See* n.13 at 59.
[19] Frederick Alexander, *How to Leverage Benefit Governance*, in Katayun Jaffari and Stephen Pike, ESG IN THE BOARDROOM: A GUIDEBOOK FOR DIRECTORS (American Bar Association, forthcoming).

detailed in the next subsection, policymakers have begun to incorporate this convergence into the rules that govern investment fiduciaries.

iii. Trust law

This policy issue has also appeared in recent regulatory and legislative activity relating to retirement plan trustees and other investment advisors. The Department of Labor recently proposed a Rule that would have made it more difficult for trustees to account for environmental and social costs but, after receiving public comments, revised the final rule in a manner that gives trustees the ability to address corporate activity that imposes external costs when the trustees believe those costs would affect their diversified portfolios—exactly the type of costs on which the Proposal seeks a report:

> *In addition, Final Rules should also permit stewardship that discourages portfolio companies from engaging in behaviour that harms society and the environment, and consequently the value of shareholders' diversified portfolios (For example, plan fiduciaries might vote to encourage all companies to lower their carbon footprint, not because it will necessarily increase return at each and every company, but because it will promote a strong economy and thus increase the return of their diversified portfolio).*[20]

Further evidencing the widespread debate around this issue, the President of the United States suspended those Final Rules by Executive Order on Inauguration Day[21] and put a new set of Proposed Rules in their place.[22]

Moreover, in 2020, a bill was introduced in the U.S. House of Representatives that included an express finding that plan fiduciaries should consider the costs that corporations in their portfolios impose on the financial system:

> *The Congress finds the following:*
>
> *Fiduciaries for retirement plans should…*
>
> *(D) consider the impact of plan investments on the stability and resilience of the financial system; …*[23]

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[20] Frederick Alexander, *The Final DOL Rules Confirm That Fiduciary Duty Includes 'Beta Activism,'* RESPONSIBLE INVESTOR (December 15, 2020) available at https://www.responsible-investor.com/articles/the-final-dol-rules-confirm-that-fiduciary-duty-includes-beta-activism.
[21] *Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis*, (January 20, 2021), available at https://www.federalregister.gov/documents/2021/01/25/2021-01765/protecting-public-health-and-the-environment-and-restoring-science-to-tackle-the-climate-crisis
[22] Proposed Rule RIN 1210-AC03, 85 FR 57272 (2021).
[23] H.R. 8959 (116th): Retirees Sustainable Investment Policies Act of 2020

While the bill related to costs to the financial system, rather than public health, it was clearly focused on the same policy concern: costs that a company's profit-seeking activities impose on stakeholders.[24]

iv. The Business Roundtable (BRT) Statement

In addition to the activity noted in the prior sections regarding political and legislative activity around the external cost issue, the business community—including CVS Health itself—has noted the importance of considering interests beyond those of shareholders. In August of 2019, the CEOs of 181 of the largest corporations in the United States signed onto the Statement on the Purpose of a Corporation[25] (the "Statement"), emphasizing that companies should not prioritize only their own financial returns to shareholders, but also should consider the interests of other stakeholders:

> ***Americans*** *deserve an economy that allows each person to succeed through hard work and creativity and to lead a life of meaning and dignity. We believe the free-market system is the best means of generating good jobs, a strong and sustainable economy, innovation, a healthy environment and economic opportunity for all…*
>
> *While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders. We commit to:*
>
> *Delivering value to our* ***customers****. We will further the tradition of American companies leading the way in meeting or exceeding customer expectations…*
>
> *Supporting the communities in which we work. We respect the* ***people in our communities*** *and protect the environment by embracing sustainable practices across our businesses…*
>
> *Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and* ***our country****.*[26]

Thus, the Statement, *which the Company's own CEO signed,* emphasizes the policy question embedded in the Proposal, which asks the Company to report on the social costs of its promotion and sale of unhealthful snacks and beverages, which fall upon "Americans," "customers," "people in our community," and "our country," the very stakeholders the Company publicly committed to less than two years ago.

[24] *See also* Frederick Alexander, Holly Ensign-Barstow, Lenore Palladino, and Andrew Kassoy, *From Shareholder Primacy to Stakeholder Capitalism: A Policy Agenda for Systems Change* (arguing that fiduciary duties of trustees should incorporate external costs of individual companies that harm portfolios).
[25] https://opportunity.businessroundtable.org/ourcommitment/
[26] *Ibid* (emphasis added).

The reaction to the Statement's issuance (as well as the number of companies signing on) in August 2019 demonstrated the policy significance of addressing external costs. One dubious commentator noted, "For many of the BRT signatories, truly internalizing the meaning of their words would require rethinking their whole business."[27] Others noted the importance of the change, but also that it was meaningless without ending shareholder primacy:

> *Ensuring that our capitalist system is designed to create a shared and durable prosperity for all requires this culture shift. But it also requires corporations, and the investors who own them, to go beyond words and take action to upend the self-defeating doctrine of shareholder primacy.*[28]

Other commentators were worried the Statement went too far:

> *Asking corporate managers to focus more on improving society and less on making profits may sound like a good strategy. But it's a blueprint for ineffective and counterproductive public policy on the one hand, and blame-shifting and lack of accountability on the other. This is a truth Milton Friedman recognized nearly five decades ago — and one that all corporate stakeholders ignore today at their peril.*[29]

Another writer agreed, linking the issue to the same essay by Milton Friedman:

> *The issue of which constituency – or "stakeholder" – has the highest priority has long been a classic corporate governance conundrum. Still, the prevailing consensus, as espoused by Milton Friedman in his September 13, 1970 New York Times Magazine article, has been corporate executives work for their owners (i.e., shareholders) and have a responsibility to do what those owners desire, which is to make as much money as (legally) possible. That all changed on August 19, 2019.*[30]

While exploring the commitments to corporate social responsibility, the latter two articles each returned to Friedman's famous article, which stated:

> *[T]he doctrine of 'social responsibility' taken seriously would extend the scope of the political mechanism to every human activity. It does not differ in philosophy from the most explicitly collectivist doctrine. It differs only by professing to believe that collectivist ends can be attained without collectivist means. That is why, in my book Capitalism and Freedom, I*

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[27] Andrew Winston, *Is the Business Roundtable Statement Just Empty Rhetoric?* HARVARD BUSINESS REVIEW (August 30, 2019).
[28] Jay Coen-Gilbert, Andrew Kassoy and Bart Houlihan, *Don't Believe the Business Roundtable Until It's CEO's Actions Match Their Words,* FAST COMPANY (August 22, 2019).
[29] Karl Smith *Corporations Can Shun Shareholders, But Not Profits,* BLOOMBERG OPINION (August 27, 2019).
[30] Christopher Carosa *Did Business Roundtable Just Break A Fiduciary Oath?*, FiduciaryNews.com. August 27, 2019 available at http://fiduciarynews.com/2019/08/did-business-roundtable-just-break-a-fiduciary-oath/.

> *have called it a 'fundamentally subversive doctrine' in a free society, and have said that in such a society, 'there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.*[31]

Showing that the controversy is long-lived, the 50th anniversary of the essay in 2020 set off another round of commentary.[32]

B. The Proposal addresses the policy issue of shareholder primacy and corporate cost externalization in pursuit of financial return

The outpouring of legislative activity around benefit corporations, regulatory and legislative activity around trustee obligations to consider external corporate costs, and commentary around the Statement raises a critical policy issue: should corporations continue to prioritize financial return or should they, at least in some instances, sacrifice financial return to reduce the social costs they would otherwise externalize?

The Proposal asks CVS Health to begin to address this question by identifying the costs it externalizes through its choice to continue selling junk food while inviting customers into its stores to improve their health. An understanding of the nature of these costs, even if imperfect, can begin the process of addressing whether and where excessive external costs are being generated, and whether there are remedies the Company could apply unilaterally or through industry coalitions or public/private partnerships. Moreover, by linking the external costs to harm to the Company's diversified shareholder base, the proposal also raises the possibility that there are remedies in which the interests of Company shareholders and other stakeholders converge, which may lead to decisions not to optimize financial return at CVS Health.

Such reports are not unprecedented. In the 2021 proxy season, YUM! Brands ("YUM"), a restaurant company, received a similar proposal regarding the presence of excessive antibiotics in its supply chain, and agreed to prepare a report regarding costs it externalized in the form of increased antimicrobial resistance of pathogens that threaten human and animal health.[33] YUM agreed to prepare a report (the "YUM Report") that, when ultimately issued, explained the areas where competitive pressures limited its

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[31] Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits* N.Y. TIMES, Sept. 13, 1970 (magazine).
[32] See, e.g., *Friedman 50 Years later,* PROMARKET (collecting 27 essays about Friedman's article and its legacy) (Stigler Center for the Study of the Economy and the State).
[33] https://www.prnewswire.com/news-releases/the-shareholder-commons-announces-withdrawal-of-shareholder-proposal-after-yum-brands-commits-to-disclose-systemic-costs-of-antibiotic-use-301239878.html. Specifically, the withdrawn proposal read as follows:

> *RESOLVED, shareholders ask that the board commission and disclose a study on the external environmental and public health costs created by the use of antibiotics in the supply chain of our company (the "Company") and the manner in which such costs affect the vast majority of its shareholders who rely on a healthy stock market.*

ability to reduce the social costs created by the continued use of antibiotics in its supply chain. In other words, the report identified areas where financial return was being prioritized over public health and economic growth. The report went on to suggest the need for greater public/private cooperation:

> *The challenge of individual costs and widely distributed societal benefits, a situation common in many sustainability issues, plays a key role in antimicrobial resistance. This may make it difficult to pursue AMR mitigation while remaining competitive on costs and highlights the need for strong collaboration between both the public and private sectors.*[34]

This was a tremendously important statement for a restaurant company to put on the public record as a step toward addressing the problem of companies feeling pressure to prioritize their own finances over the public good.

While the YUM Report did not put specific numbers on the costs it externalized, financial analysts have begun to quantify the broad societal impact of various forms of externalized social costs. In a recent study (the "Schroders Report"), a leading asset manager determined that publicly listed companies imposed social and environmental costs on the economy with a value of $2.2 trillion annually—more than 2.5 percent of global GDP and more than half of the profits those companies earned.[35] These costs have many sources, including pollution, water withdrawal, climate change, and obesity. The study shows exactly the areas where corporations are likely to ignore stakeholder interests to the detriment of the global economy. The social costs arising from promoting candy and potato chips to customers entering CVS Health Stores to improve their own health fall directly within this problematic paradigm.

The Proposal seeks to address the issue by leveraging areas in which the Company's diversified shareholders' interests converge with broad social interests in reducing CVS Health's cost externalization. As described above in subparagraph ii, the convergence arises from the fact that when a corporation prioritizes its financial returns above all stakeholder concerns, it can harm its own diversified shareholders, who often constitute the vast majority of a public company's shareholders.[36] Such shareholders and their beneficial owners suffer when companies follow the shareholder primacy model and impose costs on the economy that lower GDP, which reduces overall equity value.[37] Accordingly, Company shareholders (along with the world's population and economy) could benefit from a better

[34] https://www.yum.com/wps/wcm/connect/yumbrands/41a69d9d-5f66-4a68-bdee-e60d138bd741/Antimicrobial+Resistance+Report+2021+11-4+-+final.pdf?MOD=AJPERES&CVID=nPMkceo

[35] https://www.schroders.com/en/sysglobalassets/digital/insights/2019/pdfs/sustainability/sustainex/sustainex-short.pdf

[36] Indeed, the top three holders of Company shares are mutual fund companies Vanguard, State Street and BlackRock, whose clients are generally indexed or otherwise broadly diversified investors. https://finance.yahoo.com/quote/CVS/holders?p=CVS

[37] See Richard Mattison et el., *Universal Ownership: Why environmental externalities matter to institutional investors,* UNEP Finance Initiative and PRI (2011), available at https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf; https://www.advisorperspectives.com/dshort/updates/2020/11/05/market-cap-to-gdp-an-updated-look-at-the-buffett-valuation-indicator (total market capitalization to GDP "is probably the best single measure of where valuations stand at any given moment") (quoting Warren Buffet).

understanding of whether the Company's financial interests were being prioritized over the social costs generated by CVS Health using its platform as a health company to sell unhealthful products.

The Proposal will address this issue by asking the CVS Health to describe the external costs created by its sale and promotion of unhealthful products, providing context to its shareholders, and permitting them to understand whether the value proposition of CVS Health is truly sustainable, or whether its profits rely on exploiting vulnerable people who come into its stores seeking to fill prescriptions, buy over-the-counter medicines, or perhaps be vaccinated against COVID-19.

Thus, the Proposal's request for a report on how CVS Health externalizes certain social costs and risks addresses the significant policy issue of whether corporations should account for stakeholder interests and is therefore not excludable for purposes of Rule 14a-8(i)(7).

C. The sale of unhealthful foods also constitutes a significant policy issue

As discussed above, the Company's externalization of costs to optimize financial returns implicates the significant policy issue of shareholder primacy. In addition, the particular manner of cost externalization the Proposal raises is itself a significant policy issue that meets the test of "broad societal impact." As two observers put it:

> *Obesity is a grave public health threat, more serious even than the opioid epidemic. It is linked to chronic diseases including type 2 diabetes, hyperlipidemia, high blood pressure, cardiovascular disease, and cancer. Obesity accounts for 18 percent of deaths among Americans ages 40 to 85, according to a 2013 study challenging the prevailing wisdom among scientists, which had placed the rate at around 5 percent. This means obesity is comparable to cigarette smoking as a public health hazard; smoking kills one of five Americans and is the leading preventable cause of death in the United States.*[38]

The World Health Organization provides the following salient facts with respect to the crisis:

- *Worldwide obesity has nearly tripled since 1975.*
- *In 2016, more than 1.9 billion adults, 18 years and older, were overweight. Of these over 650 million were obese.*
- *39% of adults aged 18 years and over were overweight in 2016, and 13% were obese.*
- *Most of the world's population live in countries where overweight*

[38] David Blumenthal and Shanoor Seervai, *Rising Obesity in the United States Is a Public Health Crisis,* The Commonwealth Fund (April 24, 2018) available at https://www.commonwealthfund.org/blog/2018/rising-obesity-united-states-public-health-crisis

and obesity kills more people than underweight.

- *39 million children under the age of 5 were overweight or obese in 2020.*
- *Over 340 million children and adolescents aged 5-19 were overweight or obese in 2016.*
- *Obesity is preventable.*[39]

Numerous studies link the crisis to diet,[40] and a wave of new science has emerged on the role of sugar in disease causation.

Scientific understanding of these risks has grown exponentially during the last decade. From 2009 to 2012, Robert Lustig, a pediatric endocrinologist at the University of California, was virtually the only scientific voice propounding the toxicity of sugar in modern diets. In 2012, he appeared on the CBS News show 60 Minutes and brought the idea of sugar's toxicity to a mainstream audience. From there, the concerns began to echo within the medical and scientific community.

Soon, a breakthrough study in 2014 by George A. Bray and Barry M. Popkin of the American Diabetes Association reported on fructose consumption through calorie-sweetened beverages over a decade. They showed that consumption "continued to increase and plays a role in the epidemic of obesity, the metabolic syndrome, and fatty liver disease."[41]

Additional science in support of that proposition emerged soon thereafter. A 2015 study funded by the National Institutes of Health showed that consuming sugar in the high quantities found in a Western diet "may increase the risk of breast cancer and metastasis to the lungs."[42] Also in 2015, Dr. Lustig found that changes in overall health, including a reduction in liver fat, resulted in children after only nine days of reducing their dietary sugar to 10 percent of their daily calories.[43]

In 2016, the theme of sugar as an addictive substance also drew scientific support, as Dr. David Samadi wrote about how consuming sugar leads to an "overstimulation of the reward centers" and "causes us to become addicted to it."[44] In this way, Dr. Samadi explained, sugar acts similarly to "heroin and cocaine." Sugar addiction is of particular concern given its harmful nature. An additional scientific spotlight has focused on the similarities between sugar and alcohol in causing liver damage.[45]

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[39] World Health Organization, *Obesity and Overweight*, (June 9, 2021) available at https://www.who.int/news-room/fact-sheets/detail/obesity-and-overweight.
[40] *See* Harvard School of Medicine, *Food and Diet: Beyond Willpower: Diet Quality and Quantity Matter,* available at https://www.hsph.harvard.edu/obesity-prevention-source/obesity-causes/diet-and-weight/
[41] http://care.diabetesjournals.org/content/37/4/950
[42] https://www.mdanderson.org/newsroom/sugar-in-western-diets.h00-158992968.html
[43] http://time.com/4087775/sugar-is-definitely-toxic-a-new-study-says/
[44] https://www.huffpost.com/entry/sugar-is-not-only-a-drug-but-a-poison-too_b_8918630
[45] http://sugarscience.ucsf.edu/the-toxic-truth/#.XBqAGM9Kjm0

The volume of scientific evidence linking added sugar to serious health problems such as diabetes, heart disease, and liver disease is so great that the University of California, San Francisco (UCSF) created a research center (SugarScience) focused on sugar's negative health impacts. SugarScience synthesizes data from more than 8,000 published scientific papers. It focuses on sugar-sweetened beverages because they are the leading single source of sugar in the American diet, and because growing scientific evidence shows liquid is the most dangerous form of sugar consumption.[46]

Disease diagnoses have trended upward in tandem with rising sugar consumption. Dean Schillinger, MD highlights the societal shift toward increased sugar consumption as a major contributor to diabetes incidence tripling since 1970.[47] Dr. Laura Schmidt, a professor of public health policy and the lead investigator at UCSF's SugarScience initiative, explains that fructose is the main culprit in a "cluster of metabolic issues known collectively as metabolic syndrome (MetS) that raises people's risk of developing chronic diseases. These issues include insulin resistance, elevated blood sugar, high blood fats (triglycerides), high cholesterol, high blood pressure, and a condition known as "sugar belly," which is linked to heart disease.[48] Schmidt goes on to describe the urgency surrounding this public health concern, explaining that "we are sitting on a ticking time bomb" as millions nationwide are at risk of developing full-blown diabetes.[49]

All of this makes it clear that the promotion and sale of unhealthful food, including candy and sugar-sweetened beverages to customers seeking health assistance relates to a policy issue with broad societal impact—the grave threat of increasing obesity and overconsumption of sugar—as well as to the larger policy issue of corporate cost externalization.

D. The Proposal concerns a significant policy issue and should not be excluded because it implicates the sale of particular products

The Company Letter argues for an exclusion under Rule 14a-8(i)(7) because the Proposal addresses products offered to customers. Where the focus of the Proposal is clearly on a significant policy issue, the fact that it may touch on issues related to products and services does not cause it to be excludable. Staff Legal Bulletin 14H, October 22, 2015, made this clear:

> *[T]he Commission has stated that proposals focusing on a significant policy issue are not excludable under the ordinary business exception "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." [Release No. 34-40018] Thus*, ***a proposal may transcend a company's ordinary business operations even if the significant policy issue relates to the "nitty-gritty of its core business****."*

[46] http://sugarscience.ucsf.edu/
[47] https://www.ucsf.edu/news/2018/12/412916/sugars-sick-secrets-how-industry-forces-have-manipulated-science-downplay-harm
[48] *Ibid*
[49] *Ibid*

[emphasis added]

SLB L further emphasized that proposals that addressed significant policy issues and that included a level of granularity consistent with shareholders' capacity to understand and deliberate would not be excluded because they constituted "micromanagement." This was part of a realignment, in which the Staff emphasized a focus on the question of whether a proposal had "broad societal impact" as essential in deciding whether a proposal that otherwise related to ordinary business could be included in a company's proxy material under the social policy rule. The Proposal's level of detail—seeking a report on the nature of public-health costs imposed through the sale of certain products—meets that test.

Even before such realignment, the Staff recognized the issue of corporate externalized costs that damage diversified portfolios satisfies the significant policy exception under Rule 14a-8(i)(7). *See PepsiCo, Inc,* (March 12, 2021) (Staff declined to concur in exclusion under Rule 14a-8(i)(7) when proposal requested a study of public-health costs associated with the company's business and the manner in which such costs affect diversified shareholders who rely on overall market returns); *CVS Health Corp.*, recon. denied (Mar.30, 2021) ("a proposal related to the external public health costs… may raise a significant policy issue that transcends a company's ordinary business operations.")

The proposals made in *PepsiCo* and *CVS* addressed the same issue as the Proposal. The Staff declined to exclude the proposal at PepsiCo but not at CVS Health, and the only difference in the two situations was that the proposal related to almost all of PepsiCo's sales, but less than 5 percent of CVS's. The Staff did not concur in exclusion of the proposal at PepsiCo because it addressed a significant policy issue; the only distinguishing fact at CVS Health would have been the nexus requirement, which has been eliminated.

In *JPMorgan Chase & Co. (March 26, 2021),* the Staff permitted exclusion of a proposal that asked a company to report on the same question of externalizing social costs to increase financial returns; the proposal in *JPMorgan 2021* focused on the company's choice to continue underwriting certain securities that could undermine the economic system by reducing corporate accountability. The Staff relied on a lack of nexus in excluding the proposal, stating that it could be excluded "because it was not a **significant policy issue for the Company."** *JPMorgan 2021 (emphasis added).* As discussed above, *SLB L* explicitly establishes that this will no longer be a reason for exclusion. A recent essay on the *SLB L* explains that the exclusion in *JPMorgan 2021* was precisely the type of exclusion the Staff meant to end because it was counter to the Rule's purpose:

> *Instead, the Staff exclusion appears to have focused only on the direct economic importance to JP Morgan, rather than other issues of proper concern to shareholders, namely the systemic impact of the company on its industry, society, and capitalism at large.*[50]

[50] Sanford Lewis, *SEC Resets the Shareholder Proposal Process,* Harvard Law School Forum on Corporate Governance (December 23, 2021).

Here, the Proposal clearly focuses on "the systemic impact of the company on… society," and should thus should not be excluded under Rule 14a-8(i)(7). In short, there is no basis for an assertion that a proposal is excludable simply because it touches upon product mix. As prior Staff decisions and recent guidance demonstrate, the key question is whether the subject matter requiring a focus on products is related to a significant policy issue. The Proposal is compliant and therefore not excludable under Rule 14a-8(i)(7).

3. The Proposal should not be excluded under Rule 14a-8(i)(5)

A. The Proposal must have a meaningful relation to the CVS Health business

As *SLB L* clarifies, proposals that raise a significant policy issue for the purposes of Rule 14a-8(i)(7) will not be excluded under Rule 14a-8(i)(5) if they bear any relation to the company, even when, as was the case in *Lovenheim,* the matter involves a quantitatively small aspect of the company's business. As *SLB L* shows, it is the social or ethical concern that creates the relevance, not the amount of sales or assets:

> *proposals that raise issues of broad social or ethical concern related to the company's business may not be excluded, even if the relevant business falls below the economic thresholds of Rule 14a-8(i)(5).*

Prior to the application of the relevance test set forth in *Staff Legal Bulletin 14I* (rescinded by *SBL L*), Staff decisions made it clear that ethical and social issues posed by a company's operations would make a proposal relevant.

The standard does not make an abstract ethical or social issue relevant to every company, because it must have a relationship to the company. In *Lovenheim,* the court noted that the ethical or social issue must not be "significant in the abstract," however, but must have a "meaningful relationship to the business of the company in question.[51] For a company like CVS that has positioned itself as a health-oriented company, aggressive promotion of unhealthful products has, by its very nature, a meaningful relationship to the business.

Applying the "meaningful relationship" standard, the Staff has historically found that an array of proposals were otherwise significantly related to a company's business even though they may not have met the economic relevance test of the rule. In *The Gap* (March 14, 2012), the Division denied no-action relief as to a proposal that sought an end to the company's trade partnership in Sri Lanka until the government ceased its human rights violations. The Gap was one of the largest apparel manufacturers in Sri Lanka, and its presence there raised issues about whether the company was endorsing the government and its practices. Similarly, in *Exxon Corp.* (Jan. 30, 1995), the Division allowed a proposal seeking a report on the human, social, and environmental consequences of the company's mining operations in a given country. In *Synagro Technologies, Inc.* (March 28, 2006), pollution issues were found to make the issue "otherwise related" despite less than 5 percent financial connection.

Numerous other instances have involved proposals that might not have met the numerical thresholds of Rule 14a-8(i)(5), but which were nevertheless deemed to be non-excludable under the rule because the

[51] *Lovenheim, supra,* n.5 at 561 n.16.

issues involved had a potential impact on the company's reputation. *See Devon Energy Corp.* (March 27, 2012) (annual report on lobbying); *BJ Services Company* (December 10, 2003) (land procurement policy that incorporates social and environmental factors); *Halliburton Co.* (March 14, 2003) (review of company operations in Iran, with reference to financial and reputational risks associated with those activities); *Corning Incorporated* (Feb. 11, 2015), (Staff denied no-action relief for a proposal seeking adoption of equal employment opportunity principles to govern its Israel workforce, where operations in Israel accounted for less than 1 percent each of the company's total assets, net earnings, and gross sales, on the basis that avoidance of discrimination across its operations was otherwise significantly related to the Company's business).

B. The public-health costs of unhealthful food sales are meaningfully related to CVS Health's business

The Proposal meets the test announced in *SBL L,* as the sale of unhealthful products to boost financial returns has a clear connection to CVS Health because (1) the Company positions itself as a health-oriented business and (2) CVS Health showcases and promotes unhealthful products within its stores, in direct contravention of its health orientation.

The Company's Code of Conduct emphasizes health's importance to its purpose, mission, and values:

> ***Our Purpose***
>
> *Helping people on their path to better health*
>
> ***Our Strategy***
>
> *Creating unmatched human connections to transform the health care experience*
>
> ***Our Values***
>
> *Innovation, Collaboration, Caring, Integrity, Accountability*
>
> ***What We Stand For***
>
> *Every one of us at CVS Health shares a single, clear purpose: helping people on their path to better health.*
>
> *Whether in our pharmacies or through our health services and plans, we are pioneering a bold new approach to total health. Making quality care more affordable, accessible, simple and seamless. Creating innovations that not only help people get well, but help them stay well in body, mind and spirit.*
>
> *By unlocking the power of data and opening our hearts to the needs of each person, we're creating unmatched human connections to transform*

> *the health care experience: welcoming moments of 1-on-1 care, millions of times each day.*
>
> *We bring expertise and care to communities around the corner and across the country, deliver essential products and prescriptions right to people's doorsteps, provide vital services in their homes, and put a wealth of resources at their fingertips.*
>
> *Working together across our disciplines, we surround those we serve with personal support that matches their unique circumstances.*
>
> *This is health with heart: our promise that no matter where someone is on their path to better health, we'll be with them all the way.*[52]

The description of CVS Health's business is also centered around health:

> *CVS Health Corporation ("CVS Health"), together with its subsidiaries (collectively, the "Company," "we," "our" or "us"), is a diversified health services company united around a common purpose of helping people on their path to better health. In an increasingly connected and digital world, we are meeting people wherever they are and changing health care to meet their needs. The Company has more than 9,900 retail locations, approximately 1,100 walk-in medical clinics, a leading pharmacy benefits manager with approximately 105 million plan members, a dedicated senior pharmacy care business serving more than one million patients per year and expanding specialty pharmacy services. We also serve an estimated 34 million people through traditional, voluntary and consumer-directed health insurance products and related services, including expanding Medicare Advantage offerings and a leading standalone Medicare Part D prescription drug plan ("PDP"). The Company believes its innovative health care model increases access to quality care, delivers better health outcomes and lowers overall health care costs.*[53]

The Company's CEO emphasized the centrality of health to its business in a recent interview:

> *I stepped back and said, "What is our true purpose of the company?" What I want to do is make sure that people have access to high-quality, affordable health care, and that we as a company can help people navigate the health care system. Because we're so central in people's lives, we have the ability to be even more central in people's lives.* ***That's***

[52] *Code of Conduct*, available at https://s2.q4cdn.com/447711729/files/doc_downloads/cvs-health-code-of-conduct.pdf
[53] Company Report on Form 10-K for 2019, available athttps://www.sec.gov/ix?doc=/Archives/edgar/data/64803/000006480321000011/cvs-20201231.htm#ic31760c417ad433094d37b2420225748_13

> ***the mark I really want to make, is to be part of someone's everyday life where if they're healthy, they're engaging with us to stay healthy. If they have health issues, they're engaging with us so that we can help manage and navigate that.***[54]

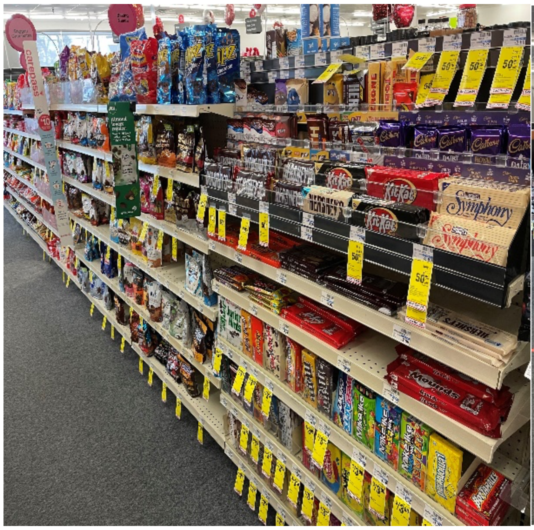
While CVS Health's business has many aspects, the importance of its 9,900 retail outlets to public perceptions of the Company's commitment to health cannot be denied. Indeed, in 2014 CVS Health boldly and admirably removed tobacco from its stores and the CEO issued the following statement:

> *Ending the sale of cigarettes and tobacco products at CVS Pharmacy is simply the right thing to do for the good of our customers and our company. The sale of tobacco products is inconsistent with our purpose – helping people on their path to better health.*[55]

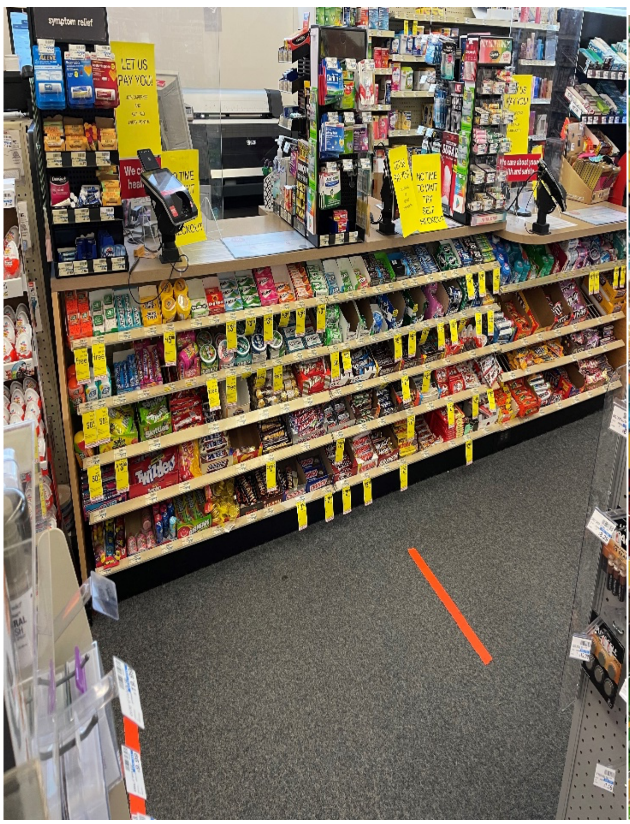
As a peer-reviewed study showed, this commitment to stakeholders' health did not simply shift tobacco sales to other retailers—it actually led to less purchasing of tobacco.[56] This decision contributed to the Company's credibility as a leader in the health industry by reducing public-health costs. This is more than a matter of reputation: the Company's entire identity is wrapped up in the promotion of health, and that identity is at odds with CVS Health's promotion of products that have a negative effect on health.

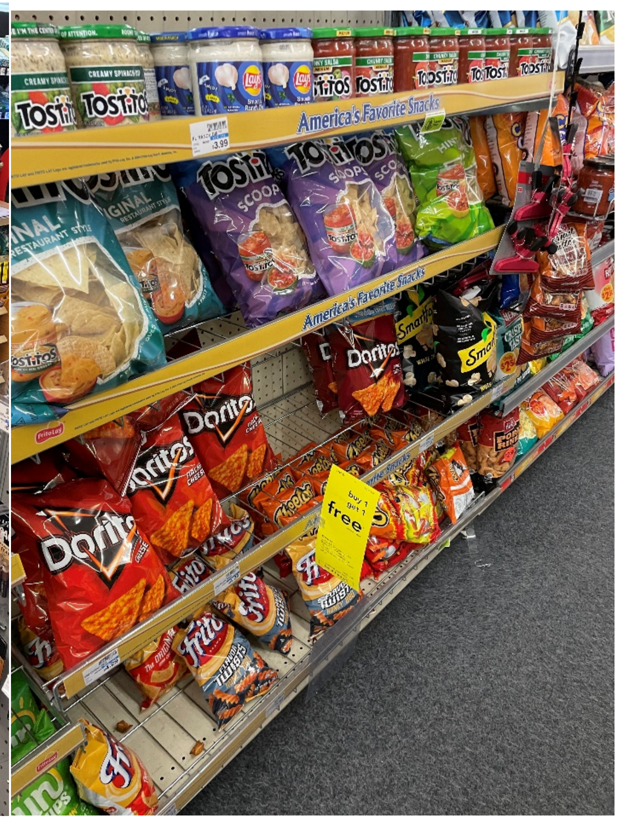
A visit to a typical Company store in late 2020 revealed a pattern of retailing that is entirely at odds with the Company's public profile promoting health.[57] The front of the store is devoted to decidedly unhealthful food: soda, candy, chips, ice cream, and "energy drinks," with "buy one, get one free" and similar promotions. Single-serving candy items dominated the front counter:

[54] David Gelles, *Envisioning One-Stop Health Care Stores,* New York Times print edition (January 23, 2022) (emphasis added).
[55] Company website, available at https://cvshealth.com/thought-leadership/message-from-larry-merlo-president-and-ceo
[56] *After CVS Stopped Cigarette Sales, Smokers Stopped Buying Elsewhere, Too,* Forbes (February 2017) available at https://www.forbes.com/sites/brucejapsen/2017/02/20/after-cvs-stopped-cigarette-sales-smokers-stopped-buying-elsewhere-too/?sh=6a8c5cd1c8f5
[57] This description is based on a visit to the store located at 4020 Concord Pike, Wilmington, DE 19803 on February 6, 2020.


Symphony
KitKat


Swedish Fish


LET US PAY YOU


America's Favorite Snacks
Tostitos
Doritos
free


carepass


Pringles
Pringles
Pringles
Pringles
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SCORCHIN'
3/5 00

These pictures from the front of a store bear a clear relation to the Company's business—although not a positive one, to be sure—in light of the CEO's statement that she wants CVS Health "to be part of someone's everyday life where if they're healthy, they're engaging with us to stay healthy [and if] they have health issues, they're engaging with us so that we can help manage and navigate that."

The high visibility and promotion of items that have negative health implications could have an extremely detrimental effect on the Company's core strategy of delivering health. This effect is not necessarily just a product of volume, as the 9,900 CVS outlets deliver a "BUY ME ON IMPULSE" message with single-serving, price-promoted brands all around. Why should a customer with Type 2 diabetes or hypertension be forced to run a gauntlet of sugar and salt to obtain her prescriptions, to say nothing of wine and beer? Understanding the external public-health costs that come from pushing high-sugar and otherwise unhealthful products in a retail environment designed to improve the health of the people most at risk from those products is critical to the business model of CVS Health, even if such sales constitute a low percentage of its business.

Thus, the Proposal, which seeks a report on the public health costs the Company is externalizing by its continued promotion and sale of unhealthful products to customers seeking to improve their health, clearly relates to the Company's business, as contemplated in recent Staff guidance on the application of Rule 14a-8(i)(5).

CONCLUSION

The Proposal addresses a double-edged significant policy issue that relates to the Company's business: the cost of the Company's continuing to promote and sell unhealthful products to maximize financial returns, even if doing so creates public-health costs that the economy and diversified shareholders absorb.

As such, we respectfully request that the Staff deny the Company's no-action letter request. If you have any questions, please contact me at rick@theshareholdercommons.com or 302-485-0497. We note the Company's request to confer with the Staff in the event there is a determination not to concur with their request. We request to be included in any such conference.

Sincerely,

Rick Alexander
CEO

cc: Thomas S. Moffatt
James McRitchie

THE PROPOSAL

Report on Effect of Junk Food Sales on Diversified Portfolios

RESOLVED, shareholders ask that the board commission and publish a report on (1) the link between the public-health costs created by the Company's food, beverage, and candy business and its prioritization of financial returns over its healthcare purpose and (2) whether such prioritization threatens the returns of diversified shareholders who rely on a productive economy to support their investment portfolios.

Supporting Statement:

The Company's website emphasizes health:

Our purpose:

Helping people on their path to better health.

This purpose is belied by the unhealthful foods, beverages, and candy that feature prominently on the Company's store shelves,[58] which are among the top culprits in the obesity epidemic.[59] In its quest for sales, the Company is willing to force customers with type-two diabetes or hypertension to run a gauntlet of sugar and salt to obtain their prescriptions.

The World Health Organization assesses the unpriced social burdens of obesity as almost three percent of global GDP.[60] Yet the Company does not disclose any methodology to address the public-health costs of its "front-store" business, which promotes consumption of chips, soda, cookies, and candy. This is a good strategy for growing profits: on a recent earnings call, the CEO highlighted strong revenue growth in the category that includes these items: "Front store sales [showed] revenue growth of 13%. . . . with . . . volume increases across most front store categories."[61]

But it is a bad strategy for putting people on a better path to health:

> *The point of purchase is the setting where people are challenged to either follow through on their long-term goals to stay healthy or are tempted to buy and consume foods that will increase the risk of weight gain, hypertension, diabetes, and cancer.*[62]

Promoting junk food isn't only bad for customers—it hurts most of the Company's owners as well because a gain in revenue that comes at the expense of public health is a bad trade for most Company shareholders, who are diversified and rely on broad economic growth to achieve their financial objectives. A strategy that increases Company financial returns but that contributes to obesity runs counter to the

[58] https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/youngcvs032221-14a8.pdf
[59] https://www.hsph.harvard.edu/nutritionsource/healthy-drinks/sugary-drinks/
[60] https://www.schroders.com/en/sysglobalassets/digital/insights/2019/pdfs/sustainability/sustainex/sustainex-short.pdf
[61] https://www.fool.com/earnings/call-transcripts/2021/11/03/cvs-health-cvs-q3-2021-earnings-call-transcript/
[62] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5406228/

interests of most Company shareholders: a reduction in GDP created by public-health costs reduces diversified portfolio returns over the long term.[63]

This proposal asks the Board to commission a report that analyzes the trade-offs the Company makes by prioritizing its financial returns over public-health risks and the global economy, taking the perspective of its diversified shareholders, whose portfolios are at risk from public-health threats.

The report will help shareholders determine whether Company policies serve their best interests and whether the Company should prioritize certain public-health issues over financial returns.

Please vote for: Report on Effect of Junk Food Sales on Diversified Portfolios

[63] https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf

CVSHealth

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February 8, 2022

VIA E-MAIL (shareholderproposals@sec.gov)

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

Re: CVS Health Corporation
Stockholder Proposal by The Shareholder Commons on behalf of Myra K. Young
Securities Exchange Act of 1934 – Rule 14a-8

Ladies and Gentlemen:

This letter relates to the response letter (the "**Response Letter**") submitted by The Shareholder Commons on behalf of Myra K. Young (the "**Proponent**"), dated February 1, 2022, in response to the no-action request (the "**No-Action Request**") submitted by CVS Health Corporation, a Delaware corporation (the "**Company**" or "**CVS Health**"), to the Staff of the Division of Corporation Finance (the "**Staff**") of the U.S. Securities and Exchange Commission (the "**Commission**") on January 7, 2022. The No-Action Request pertains to the Proponent's request to include a stockholder proposal in the Company's 2022 proxy materials (the "**Proxy Materials**") that the Board of Directors (the "**Board**") of the Company commission and publish a report on (1) the link between the public-health costs created by the Company's food, beverage, and candy business and its prioritization of financial returns over its health care purpose and (2) whether such prioritization threatens the returns of diversified shareholders who rely on a productive economy to support their investment portfolios (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 Proponent's Response Letter Asserts that the Significant Policy Issue raised by the Proposal is Shareholder Primacy, which was not included as part of the Proposal.

In its Response Letter, the Proponent argues that that the Proposal should not be excluded under Rule 14a-8(i)(7) as being related to the Company's ordinary business operations because the Proposal raises the broad significant policy issue of shareholder primacy. Nowhere in the

Proposal does the Proponent identify shareholder primacy as the broad significant policy raised. Rather, the plain text of the Proposal indicates that the policy issue raised was one of public health costs associated with the consumption of unhealthy foods, which the Company has directly addressed in its No-Action Request by explaining that it is not primarily engaged in the business of selling food and, specifically, the types of unhealthy food and beverages identified in the Proposal, nor is it a meaningful contributor to such policy issue. If the broad significant policy issue raised by the Proposal is, in fact, shareholder primacy, that issue should have been directly asserted through a shareholder primacy proposal and not a proposal on public health costs from certain food and beverage items that the Company chooses to offer in its retail stores. In addition, should the Proponent have raised a shareholder primacy issue for consideration, it should have presented such issue by actually referencing shareholder primacy as the core issue related to the Proposal. Shareholders reading the Proposal are not looking at a request for a report on public health costs from the sale of certain of the Company's food and beverage items as being connected to shareholder primacy.

The Proponent devotes nine out of thirteen pages of its Rule 14a-8(i)(7) argument in the Response Letter to emphasize that the broad significant policy issue raised by the Proposal is shareholder primacy. The Proponent includes a lengthy discussion about the "fierce ongoing debate as to whether corporations should in fact be managed for the benefit of only shareholders or for a broader group of stakeholders," and cites to related court decisions, actions by state legislatures, both houses of the U.S. Congress and leading academics to demonstrate how the discussion has evolved from a strict shareholder primacy doctrine to creating a new corporate form that requires consideration of other stakeholder interests. In addition, the Proponent goes so far as to draw examples from trust law that proposed rules for retirement plan trustees and other investment advisors to account for environmental and social costs of their diversified portfolios, and the Business Roundtable Statement where companies have noted the importance of considering interests beyond those of shareholders.

The Proponent has strongly advocated for importance of shareholder primacy, but the Proponent has not made the case as to why this Proposal, supposedly related to shareholder primacy, belongs in a proxy statement to be presented to the stockholders of the Company. Shareholder primacy can certainly be discussed and debated in legislatures and courts and even in law schools, but it is not an issue to be addressed through a stockholder proposal that requests a report on public health costs related to certain food and beverage items that the Company chooses to offer to its customers as a small part of its ordinary business operations.

II. The Proponent's Response Letter includes baseless arguments that the Company "aggressively" or "prominently" features or "promotes" unhealthful foods without giving due consideration to meaningful efforts taken by the Company to increase healthy food alternatives that promote good health and a balanced diet.

The Proponent repeatedly states in its Response Letter that the Company "aggressively" or "prominently" features or "promotes" unhealthful foods in its retail store locations. The support provided for such argument is based on the Proponent's one-time visit to a CVS Health retail store located in Wilmington, Delaware on February 6, 2020, during which photographs were taken exclusively of shelves that included "soda, candy, chips... with buy one, get one free and similar promotions." See pages 20-23 of the Response Letter. These photographs are taken out of context and only feature unhealthy food items to give an impression that such products dominate the food and beverage selection offered by the Company when, in fact, such foods are a small proportion of the products offered by the Company at its retail pharmacy locations.

A more balanced and accurate representation of a Company's retail pharmacy locations would show that food and beverage products do not cover the entire store, and that the Company has taken meaningful efforts to increase food alternatives that promote good health and has extensive promotions and services directed at encouraging healthy living. As noted in the Company's No-Action Request, the categories of products that the Company considers as part of its "Consumables" category include a wide range of healthy foods and beverages, such as water, teas, juices, milk, eggs, grocery items, bread, fruits, nuts and nutrition bars. (To say nothing of the large portions of the Company's stores devoted to vitamins, home health care, baby and child products, first aid, cough and cold, household products and health and beauty aids, to name just a few categories.) Contrary to the Proponent's argument, in the Consumables category the Company has continued to add healthier alternatives and prominently displays them for easier access. In particular, the Company's Gold Emblem® and Gold Emblem Abound® brands offer wider and more varied selections of healthy food alternatives and prominently display their nutritional benefits in bold labeling so that they are quickly and easily identifiable to customers. "Buy one get one free" promotions are certainly not limited to chips and candy, but are also applied to healthy food and beverage items, as well as non-food items that promote healthy living, such as vitamins and certain medications. The Proponent has ignored the Company's efforts to increase healthy food alternatives that promote good health and a balanced diet as a complement to the Company's primary business purpose, which is to use its retail drugstore locations to serve the health needs of its customers by providing access to its prescription services and to use the Company's vast retail footprint to increase access to health care in the areas where it operates and, most importantly, in the communities that need access to health care the most.

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. If the Staff has any questions regarding this request or requires additional information, please contact me at (401) 770-5409 or Thomas.Moffatt@CVSHealth.com.

Respectfully yours,

Thomas S. Moffatt
Vice President, Assistant Secretary and Senior Legal Counsel

cc: The Shareholder Commons, on behalf of Myra K. Young

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

Lona Nallengara, Shearman & Sterling LLP

Frederick H. Alexander
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February 14, 2022

Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

RE: *Shareholder proposal of Myra Young to CVS Health Corporation regarding externalized public-health costs*

Division of Corporate Finance Staff Members:

Myra Young (the "Proponent") is beneficial owner of CVS Health Corporation (the "Company" or "CVS Health") common stock and has submitted a shareholder proposal (the "Proposal") to the Company. The Proponent has asked me to respond to the letter dated February 8, 2022 (the "Company Reply") that Thomas Moffat ("Company Counsel") sent to the Securities and Exchange Commission (the "SEC"). The Company Reply was written in response to the undersigned's letter dated February 1, 2022 (the "Proponent's Response"), which in turn responded to the Company's original no-action request regarding the Proposal (the "Company Letter.") A copy of the Proposal is attached to this letter.

We write to address the two points the Company Reply raised.

1. ***The Company argues that the significant policy issue of shareholder primacy was not "included as part of the Proposal"***

This claim is incorrect, as demonstrated by the following quotes from the Proposal and supporting statement:

- The text of the Proposal refers to the Company's "<u>prioritization of financial returns</u> over its healthcare purpose."
- The supporting statement discusses the concern that "a <u>gain in revenue that comes at the expense of public health</u> is a bad trade."
- The supporting statement argues that "A strategy that <u>increases Company financial returns but that contributes to obesity</u> runs counter to the interests of most Company shareholders."

- In describing the Proposal, the supporting statement refers to "the trade-offs the Company makes by prioritizing its financial returns over public-health risks and the global economy."

- Finally, the supporting statement explains that the report will help shareholders determine "whether the Company should prioritize certain public-health issues over financial returns."

Each of these quotes addresses the prioritization of the Company's financial returns over a social cost. This is entirely consistent with the definition of shareholder primacy provided in the Proponent's Response: a doctrine that "encourages business practices that enhance corporate financial returns to shareholders but harm social and environmental systems." Thus, the Proposal sits squarely within that issue. If a proposal raises a significant public policy issue, there is not a requirement that the proposal use any special words to describe the issue.

2. The Company claims that the arguments in the Proponent's Response regarding the Company's promotion of junk food are baseless and do not acknowledge that the Company also sells more healthful foods

The Proponent's Response included pictures that showed multiple Company store shelves dominated by junk food and promotional material for that junk food, including "buy one get one free" promotions. The Company argues that these pictures are "out of context," because the Company also sells and promotes healthful products.

This misses the point. The pictures were included to counter the Company's argument that the Proposal could be excluded under Rule 14a-8(i)(5) as unrelated to the Company's business. As such, the Proponent's Response emphasized context. The Company is not a grocery concern. It has the word "health" in its name and purpose, and encourages people to come into its stores to address their health needs, including those related to obesity, a growing health crisis. As noted in the Proponent's Response, the Company's CEO recently reiterated this:

> *I stepped back and said, "What is our true purpose of the company?" What I want to do is make sure that people have access to high-quality, affordable health care, and that we as a company can help people navigate the health care system. Because we're so central in people's lives, we have the ability to be even more central in people's lives. That's the mark I really want to make, is to be part of someone's everyday life where if they're healthy, they're engaging with us to stay healthy. If they have health issues, they're engaging with us so that we can help manage and navigate that.*

This is the critical context for the pictures from the Proponent's Response: the CEO recognizes that the Company is "central in people's lives and [has] the ability to be even more central." She also recognizes that customers are engaging with the Company "to stay healthy" and so that the Company "can help manage and navigate" their health issues. Given this context, the promotion of junk food is highly relevant to the Company's business, whether or not it also sells and promotes healthier products.

We thus stand by the argument that the pictures contained in the Proponent's Response to the Company's argument under Rule 14a-8(i)(5) are illustrative of the relevance of the Proposal to the Company's business.

The Company's Reply does not address the gist of either argument made in the Proponents' Response: the Proposal raises a significant policy issue and is relevant to the Company's business. As such, we respectfully request that the Staff deny the Company's no-action letter request. If you have any questions, please contact me at rick@theshareholdercommons.com or 302-485-0497.

Sincerely,

Rick Alexander
CEO

cc: Thomas S. Moffatt
James McRitchie

THE PROPOSAL

Report on Effect of Junk Food Sales on Diversified Portfolios

RESOLVED, shareholders ask that the board commission and publish a report on (1) the link between the public-health costs created by the Company's food, beverage, and candy business and its prioritization of financial returns over its healthcare purpose and (2) whether such prioritization threatens the returns of diversified shareholders who rely on a productive economy to support their investment portfolios.

Supporting Statement:

The Company's website emphasizes health:

Our purpose:

Helping people on their path to better health.

This purpose is belied by the unhealthful foods, beverages, and candy that feature prominently on the Company's store shelves,[1] which are among the top culprits in the obesity epidemic.[2] In its quest for sales, the Company is willing to force customers with type-two diabetes or hypertension to run a gauntlet of sugar and salt to obtain their prescriptions.

The World Health Organization assesses the unpriced social burdens of obesity as almost three percent of global GDP.[3] Yet the Company does not disclose any methodology to address the public-health costs of its "front-store" business, which promotes consumption of chips, soda, cookies, and candy. This is a good strategy for growing profits: on a recent earnings call, the CEO highlighted strong revenue growth in the category that includes these items: "Front store sales [showed] revenue growth of 13%. . . . with . . . volume increases across most front store categories."[4]

But it is a bad strategy for putting people on a better path to health:

> *The point of purchase is the setting where people are challenged to either follow through on their long-term goals to stay healthy or are tempted to buy and consume foods that will increase the risk of weight gain, hypertension, diabetes, and cancer.*[5]

Promoting junk food isn't only bad for customers—it hurts most of the Company's owners as well because a gain in revenue that comes at the expense of public health is a bad trade for most Company shareholders, who are diversified and rely on broad economic growth to achieve their financial objectives. A strategy that increases Company financial returns but that contributes to obesity runs counter to the

[1] https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/youngcvs032221-14a8.pdf
[2] https://www.hsph.harvard.edu/nutritionsource/healthy-drinks/sugary-drinks/
[3] https://www.schroders.com/en/sysglobalassets/digital/insights/2019/pdfs/sustainability/sustainex/sustainex-short.pdf
[4] https://www.fool.com/earnings/call-transcripts/2021/11/03/cvs-health-cvs-q3-2021-earnings-call-transcript/
[5] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5406228/

interests of most Company shareholders: a reduction in GDP created by public-health costs reduces diversified portfolio returns over the long term.[6]

This proposal asks the Board to commission a report that analyzes the trade-offs the Company makes by prioritizing its financial returns over public-health risks and the global economy, taking the perspective of its diversified shareholders, whose portfolios are at risk from public-health threats.

The report will help shareholders determine whether Company policies serve their best interests and whether the Company should prioritize certain public-health issues over financial returns.

Please vote for: Report on Effect of Junk Food Sales on Diversified Portfolios

[6] https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf