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

DIVISION OF
CORPORATION FINANCE

March 21, 2024

Timothy W. Gregg
Maynard Nexsen PC

Re: Encompass Health Corporation (the "Company")
Incoming letter dated January 12, 2024

Dear Timothy W. Gregg:

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

The Proposal states the Company will make healthful, plant-based meals the default option in all food service settings, other than for patients who have special dietary exclusions.

There appears to be some basis for your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, the Proposal seeks to micromanage the Company. Accordingly, we will not recommend enforcement action to the Commission if the Company omits the Proposal from its proxy materials in reliance on Rule 14a-8(i)(7). In reaching this position, we have not found it necessary to address the alternative bases for omission upon which the Company relies.

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/2023-2024-shareholder-proposals-no-action.

Sincerely,

Rule 14a-8 Review Team

cc: Mark Kennedy
Physicians Committee for Responsible Medicine

Timothy W. Gregg
Direct: 205-254-1212
tgregg@maynardnexsen.com

Rule 14a-8(i)(1)
Rule 14a-8(i)(2)
Rule 14a-8(i)(7)
Rule 14a-8(i)(10)

January 12, 2024

VIA ELECTRONIC SUBMISSION

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

Re: Stockholder Proposal of the Physicians Committee for Responsible Medicine Submitted to Encompass Health Corporation

Ladies and Gentlemen,

On behalf of Encompass Health Corporation (the "Company"), we are respectfully submitting this letter pursuant to Rule 14a-8(j) promulgated under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), to notify the Securities and Exchange Commission (the "Commission") of the Company's intention to exclude from its proxy statement and form of proxy for its 2024 annual meeting of stockholders (the "2024 Annual Meeting," and such materials, the "2024 Proxy Materials") a stockholder proposal (the "Proposal") and statements in support thereof (the "Supporting Statement") submitted to the Company by the Physicians Committee for Responsible Medicine (the "Proponent"). We also request confirmation that the staff of the Division of Corporation Finance (the "Staff") will not recommend to the Commission that enforcement action be taken if the Company omits the Proposal from its 2024 Proxy Materials pursuant to Exchange Act:

i. Rule 14a-8(i)(7), on the basis that the Proposal relates to, and does not transcend, the Company's ordinary business operations;
ii. Rule 14a-8(i)(10), on the basis that the Company has already substantially implemented the Proposal;
iii. Rule 14a-8(i)(2), on the basis that the Proposal, if implemented, would cause the Company to violate Delaware law; and
iv. Rule 14a-8(i)(1), on the basis that the Proposal is not a proper subject for action by stockholders under Delaware law.

In accordance with the Staff Announcement on the New Intake System for Rule 14a-8 Submissions and Related Correspondence (Nov. 7, 2023), we are submitting this letter and the exhibits attached hereto electronically to the Staff through the online shareholder proposal form, no later than eighty (80) calendar days before the Company intends to file its definitive 2024 Proxy Materials with the Commission. In accordance with Exchange Act Rule 14a-8(j), we are simultaneously sending a copy of this letter and the exhibits hereto to the Proponent as notice of the Company's intent to omit the Proposal from the 2024 Proxy Materials. Likewise, we take this opportunity to inform the Proponent that if the Proponent elects to submit

any correspondence to the Commission or the Staff with respect to the Proposal, a copy of that correspondence should be provided concurrently to the undersigned on behalf of the Company pursuant to Exchange Act Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008).

THE PROPOSAL

The Proposal sets forth the following resolution and supporting statement, which the Company received on December 26, 2023, following the Proponent's revision of the original language of the Proposal upon the Company's delivery of a notice of deficiency on December 14, 2023:

> **RESOLVED:**
> Encompass Health Corporation will make healthful, plant-based meals the default option in all food service settings, other than for patients who have special dietary exclusions.
>
> **SUPPORTING STATEMENT:**
> In 2017, the American Medical Association adopted a policy, H-150.949: Healthful Food Options in Health Care Facilities, calling on U.S. hospitals to improve the health of patients, staff, and visitors by providing a variety of healthful food, including plant-based meals and meals that are low in fat, sodium, and added sugars; eliminating processed meats from menus; and providing and promoting healthful beverages. These healthful changes enjoy strong support from patients.
>
> Subsequently, NYC Health + Hospitals—the nation's largest municipal healthcare system, treating more than one million patients per year—began offering plant-based dishes as the default lunch and dinner option for inpatients at all of its 11 public hospitals. Patient satisfaction has been greater than 90%, staff satisfaction has been similarly high, and costs have dropped by approximately 60 cents per food tray. Media coverage has been strongly favorable, greatly boosting the system's image.
>
> Plant-based diets offer patients a variety of health benefits, including lower risks of cardiovascular disease, type 2 diabetes, obesity, certain cancers, and even severe COVID-19. They can also be effective for weight management, treatment of hypertension and hyperlipidemia, and reduced stroke risk. Patients who eat plant-based meals have a higher intake of antioxidants and anti-inflammatory nutrients, leading to smoother recovery after surgery and possibly reducing readmission rates. Serving healthful food helps patients get well and stay well over the long term, creating a teachable moment in which patients learn which foods help treat and prevent chronic disease.
>
> Recent research shows that plant-based foods present, on average, a 16% revenue savings. When scaled to an institutional level, these savings increase exponentially. Additional potential savings will accrue to the extent that patients with congestive heart failure or renal disease remain out of the hospital for longer periods (recurrent hospitalizations lead to financial penalties).
>
> Employee health improves and absenteeism decreases when the food environment is improved. A multicenter study for GEICO employees found that providing

> plant-based food offerings and simple educational messages improved employee health and reduced health-related productivity impairments by 40-46%. With improved employee health, Encompass may lower healthcare costs, increase productivity, and increase revenue.
>
> Encompass aims "to provide a better way to care that elevates expectations and outcomes." In the interest of improving patient health and satisfaction, achieving significant revenues savings, boosting employee health, reducing absenteeism, and enhancing Encompass's image as a healthcare leader, we respectfully urge shareholders to support this resolution.

A full copy of the Proposal and relevant correspondence between the Company and the Proponent is attached hereto as Exhibit A.

BASES FOR EXCLUSION

As discussed more fully below, the Company believes it may properly omit the Proposal from its 2024 Proxy Materials pursuant to:

i. Rule 14a-8(i)(7);
ii. Rule 14a-8(i)(10);
iii. Rule 14a-8(i)(2); and
iv. Rule 14a-8(i)(1).

I. The Proposal May Be Excluded Pursuant to Rule 14a-8(i)(7) Because It Deals with Matters Relating to the Company's Ordinary Business Operations.

A. Background of the Ordinary Business Exclusion.

Rule 14a-8(i)(7) permits a company to exclude a stockholder proposal from the company's proxy materials if the proposal "deals with a matter relating to the company's ordinary business operations." According to the Commission's release accompanying the 1998 amendments to Rule 14a-8, the term "ordinary business" refers to matters that are not necessarily "ordinary" in the common meaning of the word, but instead the term "is rooted in the corporate law concept [of] providing management with flexibility in directing certain core matters involving the company's business and operations." Exchange Act Release No. 34-40018 (May 21, 1998) (the "1998 Release"). The Staff stated in the 1998 Release that the underlying policy of the ordinary business exclusion is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting," and that this underlying policy rests on two central considerations that form the basis of the Commission's application of the ordinary business exclusion.

The first consideration relates to the subject matter of a proposal. The 1998 Release recognizes that "[c]ertain 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 of such tasks cited by the Staff in the 1998 Release include "management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers."

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." The Staff explained in Staff Legal Bulletin No. 14L (Nov. 3, 2021) ("SLB 14L") that it "focuses on the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management." The Staff continued that this approach is "consistent with the Commission's views on the ordinary business exclusion, which is designed to preserve management's discretion on ordinary business matters but not prevent shareholders from providing high-level direction on large strategic corporate matters."

Notwithstanding these considerations, the Staff explained in the 1998 Release that a proposal relating to a company's ordinary business operations is nonetheless generally not excludable if the proposal focuses on "sufficiently significant social policy issues (e.g., significant discrimination matters)" that "transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote." In determining whether a proposal presents a policy issue that transcends the ordinary business of the company, the Staff noted in SLB 14L that it will focus on "whether the proposal raises issues with a broad societal impact" and on the related "social policy significance," regardless of whether a nexus exists between the policy issue and the company.

As discussed below, the Proposal implicates both of the central considerations underlying the ordinary business exclusion. The subject matter of the Proposal deals with issues that are "fundamental to management's ability to run the company on a day-to-day basis," and the Proposal seeks to micromanage the Company by limiting its discretion with respect to complex, day-to-day operations. Furthermore, the Proposal does not focus on sufficiently significant social policy issues that transcend day-to-day business matters. Accordingly, the Proposal relates to, and does not transcend, the Company's ordinary business operations and therefore may be excluded from the 2024 Proxy Materials pursuant to Rule 14a-8(i)(7).

B. The Subject Matter of the Proposal Relates to the Company's Ordinary Business Operations.

The Proposal states that the Company "will make healthful, plant-based meals the default option in all food service settings, other than for patients who have special dietary exclusions." In the Supporting Statement of the Proposal, the Proponent refers to a policy adopted by the American Medical Association, H-150.949, calling on hospitals to make certain types of food and beverages available to patients, and a practice of NYC Health + Hospitals of offering plant-based dishes as the default lunch and dinner option for inpatients at its public hospitals. As described below, and in accordance with historical Staff decisions on the excludability of similar proposals, decisions with respect to such matters are "fundamental to management's ability to run [the Company] on a day-to-day basis," and they are not appropriate for submission to direct stockholder oversight.

The Staff has repeatedly concurred with companies intending to exclude proposals that would direct management's decision-making with respect to menu items and food options because the proposals relate to ordinary business operations. In 2023, three healthcare companies relied on Rule 14a-8(i)(7) in seeking to exclude proposals requesting that the companies' boards "require their hospitals to provide plant-based food options to patients at every meal, within vending machines and in the cafeterias used by outpatients, staff and visitors," and the Staff concurred with the companies in each case. See *UnitedHealth Group Incorporated* (Mar. 16, 2023), *HCA Healthcare, Inc.* (Mar. 6, 2023) and *Elevance Health, Inc.* (Mar. 6, 2023). These companies emphasized that decisions with respect to the food and drink options offered to individual patients at their facilities are the sort of highly detailed and complex decisions that are not appropriately subjected to direct stockholder oversight. *Id.*

More broadly, the Staff has recognized that decisions relating to the products and services offered by a company, including decisions about the development of certain products, are part of a company's ordinary business operations. In *Papa John's International Inc.* (Feb. 13, 2015), the Staff concurred with the exclusion of a proposal requesting the company's board "have Papa John's expand its menu offerings to include vegan cheeses and vegan meats." The supporting statement cited studies purporting to show that vegetarians and vegans "enjoy a lower risk of death from ischemic heart disease, lower blood cholesterol levels, lower blood pressure, lower rates of hypertension and type 2 diabetes, and a lower body mass index as well as lower overall cancer rates" and that "[a]nimal agriculture is a leading contributor to climate change." Nonetheless, the Staff concurred with the proposal's exclusion under Rule 14a-8(i)(7), stating that "the proposal relates to the products offered for sale by the company and does not focus on a significant policy issue." The Staff has reached similar conclusions with respect to numerous proposals concerning the sale of particular products and services, as decisions on such matters are within the management function of a company and too detailed to be delegated to stockholders. See *The TJX Companies* (Apr. 16, 2018); *The Home Depot, Inc.* (Mar. 21, 2018); *Wal-Mart Stores, Inc.* (Mar. 24, 2008); *PetSmart, Inc.* (Apr. 16, 2006); and *McDonald's Corp*. (Mar. 24, 1992) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting that the company "offer [a low-fat] burger, switch to an all-vegetable cooking oil and offer salads . . . in keeping with enlightened medical research findings and nutritional practice").

Here, the Proposal's attempt to direct the Company to provide, or not provide, specific types of healthful food and drink to patients, employees and visitors would be an inappropriate delegation of authority to the stockholders with respect to a matter relating to the Company's ordinary business operations. The Company owns and operates 161 inpatient rehabilitation hospitals in 37 states and Puerto Rico. The Company manages the food and beverage offerings available to patients, employees, and visitors at 147 of those hospitals. Many decisions regarding food and beverage service operations and individual patient food and beverage menu choices are made at the hospital level by local nutrition service managers and dieticians with direction and input from physicians and other clinicians in many cases. Ultimately, menu options are tailored at the hospital level to meet the energy and nutrition needs of the Company's patients who must complete intensive therapy during their stay. On an individual patient level, the specific health conditions presented may dictate the meal choices available to that patient at any given time. It is also standard practice to present a number of menu options to patients for each meal, subject to clinically dictated dietary instructions. Likewise, the cafeterias operated by the Company, which serve employees, visitors, and patients, provide varied menus developed by registered dieticians, often with input from employees. Those menus always offer plant-based entrée options. The Company also develops menu options consistent with applicable standards of The Joint Commission, the Academy of Nutrition and Dietetics and state and local regulatory agencies.

The hospital-level decision-making behind the food and beverage operations includes conducting nutritional screenings, creating patient-specific care plans, consulting with medical staff, addressing patient nutritional concerns, and assessing drug–nutrient interaction risks. This level of individualized care can only be effectively managed at the hospital level and cannot feasibly be dictated by stockholders. Each hospital is optimally equipped to provide food that is safe, nutritious, of high quality and tailored to each patient's unique needs, because food plays a crucial role in the recovery process. For instance, patients relearning how to eat and swallow require a dedicated dietary team and specific types and consistencies of food, determined on an individual and daily basis. A new food policy could limit food recovery options for patients struggling with eating, potentially hindering their recovery. Daily meticulous planning is required to accommodate the diet prescriptions ordered by physicians as well as patient food, cultural and religious preferences so that meals are healthy, safe and appealing to the patients. Furthermore, the management's ability to adapt food services to changing patient needs, regulatory guidelines, and

operational circumstances is crucial for the smooth running of the Company's hospitals and daily operations. The needs of each hospital can vary as well depending on patient population.

Additionally, the Company's menus are affected from time to time by changing supply chain and sourcing issues that must be resolved by management on a timely basis. Assessing these and the many other factors that influence nutrition and purchasing decisions for the Company's hospitals requires the real-time judgment of the management and employees at the corporate, regional, and hospital levels, who, unlike the Company's stockholders, are well-positioned, and have the necessary knowledge, information and resources, including knowledge of the dietary needs of patients and local preferences, to make informed decisions on such nutritional and operational matters. Handling the operation of the food and beverage options available to patients, employees and visitors, including decisions relating to the menus offered at the Company's hospitals across the country, is "so fundamental to management's ability to run a company on a day-to-day basis that [it] could not, as a practical matter, be subject to direct shareholder oversight." 1998 Release.

Thus, consistent with Staff precedent, the Proposal, by focusing on the food products and options that the Company must offer and how they must be offered, addresses issues that are ordinary business matters for the Company and is properly excludable under Rule 14a-8(i)(7).

C. The Proposal Would Permit Stockholders to Micromanage the Company's Ordinary Business Operations.

The Proposal, like those addressed in the letters cited above, seeks to "prob[e] too deeply into matters of a complex nature" that are not appropriate for stockholder determination. 1998 Release. Many complex factors requiring analysis of constantly changing information to which the Company's stockholders do not have access are considered by corporate, regional and hospital management in connection with their respective decisions about food operations and menu options. These factors include, in addition to those noted in the discussion above, cost, supply, demand, and other dietary restrictions.

Additionally, instead of "providing high-level direction on large strategic corporate matters," the Proposal would "inappropriately limit[] discretion of the board or management" in overseeing and executing the day-to-day decision-making process involved in planning and establishing meal options available in all food service settings; handling employee issues, such as employee health and safety, absenteeism, and productivity; and addressing issues of patient satisfaction and supply chain and vendor management. Further, decisions regarding "enhancing [the Company's] image as a healthcare leader" and deciding on activities that generate "strongly favorable" media coverage while "boosting the [Company]'s image" are day-to-day business operations that involve a number of considerations on a market specific basis.

The ability of the Company's hospitals to adapt to constantly changing circumstances, which the Company's stockholders may not be aware of, related to individual dietary needs and preferences of their unique hospital populations or to the Company's supply chain or vendor management; to address the varying and transient needs and demands of their patients, staff and visitors; and to manage the perception of the Company among its referral sources and the general public, is fundamental to the Company's ordinary business operations. Therefore, decisions with respect to such complex matters cannot properly be submitted to stockholders to micromanage.

D. The Proposal Does Not Focus on Any Significant Social Policy Issue That Transcends the Company's Ordinary Business Operations.

The 1998 Release distinguishes proposals pertaining to ordinary business matters from those involving "significant social policy issues." Specifically, the Staff noted that focusing on such significant social policy issues "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 stockholder vote." 1998 Release. In this regard, when assessing proposals under Rule 14a-8(i)(7), the Staff considers "both the proposal and the supporting statement as a whole." Staff Legal Bulletin No. 14C (June 28, 2005).

The Proposal, however, fails to focus on a sufficiently significant social policy issue that transcends the ordinary business of the Company. See, e.g., *UnitedHealth Group Inc.* (Mar. 16, 2023), *HCA Healthcare, Inc.* (Mar. 6, 2023) and *Elevance Health, Inc.* (Mar. 6, 2023) (in each case, permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting that the company's board of directors require the company's hospitals to provide plant-based food options to patients, staff and visitors, "[g]iven the impact of nutrition on a patient's recovery process and overall health"); *McDonald's Corp.* (Mar. 24, 1992) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting that the company "offer [a low-fat] burger, switch to an all-vegetable cooking oil and offer salads . . . in keeping with enlightened medical research findings and nutritional practice"); *Papa John's International Inc.* (Feb. 13, 2015) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting that the company offer vegan meats and cheeses to expand the company's healthier options).

The Supporting Statement's references to health benefits of plant-based diets and meals do not elevate the Proposal above the ordinary day-to-day management of the Company. Positive health outcomes are a fundamental objective of the Company's day-to-day business. And even as the Supporting Statement asserts potential health benefits of the Proposal, it is fundamentally concerned with economic considerations related to the Company's ordinary business operations. The Supporting Statement reflects the Proponent's belief that implementation of the Proposal will aid the Company in "improving patient health and satisfaction, achieving significant revenue savings, boosting employee health, reducing absenteeism, and enhancing [the Company's] image as a healthcare leader." The Supporting Statement further states that the Company "may lower healthcare costs, increase productivity, and increase revenue" by implementing the Proposal. The Supporting Statement also indicates that when the NYC Health + Hospitals system implemented a program to offer plant-based dishes as default food options, certain operational outcomes were observed with respect to "[p]atient satisfaction," "staff satisfaction," "costs . . . per food tray," and [m]edia coverage." But each of these potential outcomes is specific to the Company's ordinary business operations, and managerial efforts to achieve such goals do not transcend such operations in service of a significant social policy issue. See *UnitedHealth Group Inc.* (Mar. 16, 2023); *HCA Healthcare, Inc.* (Mar. 6, 2023); and *Elevance Health, Inc.* (Mar. 6, 2023). Even to the extent that health benefits are referenced, they are not broad societal impacts; nor are they directly attributed to the mere availability of default menu options.

The Staff has long distinguished between proposals that focus on a significant social policy issue and those that contain references to a significant social policy issue but are actually directed at a company's ordinary business matters. Proposals with references to topics that might raise significant social policy issues—but that do not focus on or that have only tangential implications for such issues—are not transformed from ordinary business proposals into ones transcending ordinary business, and as such, they remain excludable under Rule 14a-8(i)(7). See, e.g., *UnitedHealth Group Inc.* (Mar. 16, 2023); *HCA Healthcare, Inc.* (Mar. 6, 2023); *Elevance Health, Inc.* (Mar. 6, 2023) (in each case, permitting exclusion

under Rule 14a-8(i)(7) of a proposal requesting that the company's board of directors require the company's hospitals to provide plant-based food options to patients, staff and visitors, despite the proponent's references to health and educational benefits realizable from healthful food options and habits); *Amazon.com, Inc.* (Apr. 8, 2022) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting reports concerning the distribution of stock-based incentives to employees and related EEO-1 employee classification data, despite the proponent's assertion that the proposal focused on wealth inequality and other equity issues); and *Amazon.com, Inc.* (Apr. 7, 2022) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting a report on risks to the company related to staffing of its business and operations, despite the proponent's assertion that the proposal focused on human capital management).

Accordingly, the Proposal may be excluded under Rule 14a-8(i)(7) as it is directly related to the Company's ordinary business operations and does not transcend ordinary business operations, consistent with the precedents discussed above.

II. The Proposal May Be Excluded Pursuant to Rule 14a-8(i)(10) Because the Company Has Substantially Implemented the Actions Requested to Be Taken.

A. Background of the Substantially Implemented Exclusion.

Rule 14a-8(i)(10) permits a company to exclude a shareholder proposal if "the company has already substantially implemented the proposal." Under the "substantially implemented" standard, a company may exclude a stockholder proposal when the company's actions address the stockholder proposal's underlying concerns, even if the company does not implement every aspect of the stockholder proposal. *Masco Corporation* (Mar. 29, 1999) (permitting exclusion under Rule 14a-8(i)(10) where the company adopted a version of the proposal with slight modification and clarification as to one of its terms); see also *Starbucks Corp.* (Jan. 19, 2022) (permitting exclusion under Rule 14a-8(i)(10) of a proposal requesting public disclosure of the company's non-discrimination and civil rights reports and training manuals where the company had already made some reports public and publicly disclosed certain information regarding employee training efforts); *AutoZone, Inc.* (Oct. 9, 2019) (permitting exclusion under Rule 14a-8(i)(10) of a proposal requesting that the board issue a report on sustainability to stockholders taking into consideration certain SASB standards where existing public disclosures align with the guidelines of the proposal); *WD-40 Company* (September 27, 2016) (permitting exclusion under Rule 14a-8(i)(10) of a proposal requesting that the company adopt a proxy access bylaw provision and identifying certain "essential elements for substantial implementation" because the company represented that "the board has adopted a proxy access bylaw that addresses the proposal's essential objective," even though a number of the company's provisions differed from the proposal's terms); *MGM Resorts International* (Feb. 28, 2012) (permitting exclusion under Rule 14a-8(i)(10) of a proposal requesting a report on the company's sustainability policies and performance, including multiple objective statistical indicators, where the company published an annual sustainability report); *Exxon Mobil Corp. (Rossi)* (Mar. 19, 2010) (permitting exclusion under Rule 14a-8(i)(10) despite differences between a company's actions and a stockholder proposal so long as the company's actions satisfactorily address the proposal's essential objectives); *Texaco, Inc.* (Mar. 28, 1991) ("a determination that the company has substantially implemented the proposal depends upon whether [the company's] particular policies, practices and procedures compare favorably with the guidelines of the proposal").

Ultimately, the actions taken by the company must have addressed the proposal's "essential objective." See, e.g., *Freeport-McMoRan Copper & Gold, Inc.* (Mar. 5, 2003) (permitting exclusion under Rule 14a-8(i)(10) where the company had already implemented a human rights policy, even though the specific elements of the policy did not meet the stockholder proponent's objectives). The purpose of

Rule 14a-8(i)(10) is to "avoid the possibility of shareholders having to consider matters which have already been favorably acted upon by management." Exchange Act Release No. 34-12598 (July 7, 1976) (discussing Rule 14a-8(c)(10), the predecessor to Rule 14a-8(i)(10)); see also Exchange Act Release No. 34-20091 (August 16, 1983).

B. The Company Has Substantially Implemented the Proposal Because the Company's Food Service Operations Satisfy the Proposal's Underlying Concern and Essential Objective.

The Proposal requires that the Company "will make healthful, plant-based meals the default option in all food service settings, other than for patients who have special dietary exclusions." The Staff has interpreted substantial implementation under Rule 14a-8(i)(10) to require a company to have satisfactorily addressed both the underlying concern and the essential objective of a stockholder proposal, not implement its every aspect. Here, the Proposal's underlying concern is promoting the availability and accessibility of healthful, plant-based meals at the Company's hospitals, and its essential objective is for the Company to make plant-based meals the default option in all food service settings, other than for patients who have special dietary exclusions.

The Company has satisfactorily addressed the Proposal's underlying concern because all of the food service operations managed by the Company's hospitals offer plant-based menu options for each meal. The Company maintains an online menu program which allows the corporate and regional management to monitor various aspects of nutrition services, including hospital menu compositions. The Company's hospitals customarily only have two food service settings, patient room delivery and cafeteria service, both of which offer a variety of plant-based menu options. With respect to patient room delivery, in the ordinary course, Company nutrition ambassadors visit patient rooms daily and present food and beverage options for upcoming meals, and those options include plant-based foods in all cases. The meals selected by the patients are then delivered to their rooms. In the Company's cafeterias, the Company's employees and visitors, and in some cases patients, order from posted menus, which likewise include plant-based food options in all cases.

The Proposal specifically requires the Company to make plant-based meals the "default option" in all food service settings (other than for patients who have special dietary exclusions). While the Proposal does not indicate how the Company should implement this essential objective, in the context of in-room meal delivery to patients, the term "default" suggests that the Company will automatically select a particular plant-based menu option where the patient fails to select a menu option for a particular meal. In only limited circumstances, such as a newly admitted patient's meal service occurring prior to the visit of the nutrition ambassador, would one expect a "default option" to have any meaning. Otherwise, patients will always have the option, subject to clinically dictated dietary instructions, to choose from the menus, which include plant-based food options in all cases. The "default option" would be wholly inapplicable in the context of the Company's cafeterias, as employees, visitors and patients must necessarily make a food selection from the posted menu in such circumstances. Nevertheless, as previously described, the Company's hospitals include plant-based food options in all of the cafeterias it operates. Accordingly, the Company has implemented the essential objective of the Proposal, which is that plant-based meals be made the default option in all food service settings.

In summary, by making plant-based meal options available and accessible in the ordinary course for each meal at its hospitals, the Company has promoted the availability and accessibility of plant-based meals to its patients, employees, and visitors in all food settings. Therefore, the Company has satisfactorily addressed the Proposal's underlying concern and satisfactorily achieved the Proposal's essential objective such that the Proposal may be excluded from the 2024 Proxy Materials pursuant to Rule 14a-8(i)(10).

III. The Proposal May Be Excluded Pursuant to Rule 14a-8(i)(2) Because, If Implemented, It Would Require the Company to Violate Delaware Law.

Rule 14a-8(i)(2) permits a company to exclude a proposal if its implementation would cause the company to violate state, federal or foreign law applicable to the company. The Staff has consistently permitted exclusion under Rule 14a-8(i)(2) of proposals that would prevent a board from discharging its duty to manage the business and affairs of a company. See, e.g., *WMIH Corp.* (Mar. 9, 2017) (concurring in the exclusion of a proposal under Rule 14a-8(i)(2) where the company argued, among other things, that the proposal would cause the directors to violate applicable law by requiring the board to take specific actions even if the board determined that it was not in the best interests of the company and its shareholders to do so); *Vail Resorts, Inc.* (Sept. 16, 2011) (same); *Citigroup Inc.* (Feb. 22, 2012) (same); *Monsanto Co.* (Nov. 7, 2008) (same); *GenCorp Inc.* (Dec. 20, 2004) (same).

The Company is incorporated under the laws of the State of Delaware. As explained in the legal opinion regarding Delaware law from Richards, Layton & Finger, P.A., attached to this letter as Exhibit B (the "Delaware Law Opinion"), the Proposal would, if adopted and implemented, cause the Company to violate Delaware law because it would impermissibly impinge upon the Board's power and authority to manage the business of the Company, which power and authority includes making business decisions on behalf of the Company and establishing a management structure to make business decisions on behalf of the Company. Specifically, the Proposal, if implemented, would impinge upon and supplant the Board's decision-making authority by requiring that the Company make material changes to its business (with respect to meal options and food service operations) solely as a result of a stockholder vote. Because the implementation of the Proposal would require the Board to violate Delaware law, it may be excluded pursuant to Rule 14a-8(i)(2).

IV. The Proposal May Be Excluded Pursuant to Rule 14a-8(i)(1) Because It Is Not a Proper Subject for Action by Stockholders Under Delaware Law.

Rule 14a-8(i)(1) permits a company to exclude a stockholder proposal "[i]f the proposal is not a proper subject for action by stockholders under the laws of the jurisdiction of the company's organization." For the reasons set forth below and in the Delaware Law Opinion, the Company believes the Proposal is excludable under Rule 14a-8(i)(1) because the Proposal is not a proper subject for action by stockholders under the General Corporation Law of the State of Delaware.

The Commission has stated that "proposals by security holders that mandate or direct the board to take certain action may constitute an unlawful intrusion on the board's discretionary authority under the typical statute. On the other hand, however, proposals that merely recommend or request that the board take certain action would not appear to be contrary to the typical state statute, since such proposals . . . would not be binding on the board even if adopted by a majority of the security holders." Exchange Act Release No. 34-12999 (Nov. 22, 1976). The Note to Rule 14a-8(i)(1) further provides, in relevant part, that "some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders."

The Staff has consistently concurred with the view that a stockholder proposal that mandates or directs a company to take certain action is inconsistent with the authority granted to a board of directors. For example, the Staff previously concurred in the excludability, under Rule 14a-8(i)(1), of stockholder proposals requiring a board to "review and if necessary amend and amplify a company's code of conduct and statements of ethical criteria" for certain military contracts and to "report the results of this process to shareholders," subject to a seven-day period during which the proponent was afforded the opportunity to

recast the proposal as a recommendation or request. *The Boeing Company* (Jan. 29, 2010); *General Electric Corporation* (Jan. 31, 2007); see also *International Paper Co.* (Mar. 1, 2004) (a proposal requiring that none of the five highest paid executives and any non-employee directors receive future stock options was excludable under Rule 14a-8(i)(1) if the proponent did not recast the proposal as a recommendation or request); *Phillips Petroleum Co.* (Mar. 13, 2002) (a mandatory proposal relating to an increase of 3% of the annual base salary of the company's chairman and other officers was excludable under Rule 14a-8(i)(1) as an improper subject for stockholder action if the proponent did not recast the proposal as a recommendation or request).

The Proposal is not cast as a recommendation or request. Instead, it requires that the Company "will make healthful, plant-based meals the default option in all food service settings, other than for patients who have special dietary exclusions." Therefore, under the wording of the Proposal, the Company would be required to take action to implement the requirements of the Proposal. Because stockholders lack authority to require action on the part of the Company with respect to such matters, as discussed in the Delaware Law Opinion, the Proposal is improper under state law and may be excluded pursuant to Rule 14a-8(i)(1).

CONCLUSION

Based upon the foregoing analysis, the Company intends to exclude the Proposal from its 2024 Proxy Materials, and we respectfully request that the Staff concur that the Proposal may be excluded under Rule 14a-8.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to tgregg@maynardnexsen.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (205) 254-1212.

Sincerely,

Timothy W. Gregg

Enclosures

cc: Anna Herby, RD, Physicians Committee for Responsible Medicine
Mark Kennedy, Physicians Committee for Responsible Medicine
Patrick Darby, Encompass Health Corporation
Stephen D. Leasure, Encompass Health Corporation

Exhibit A

The Proposal and Relevant Correspondence

PhysiciansCommittee
for Responsible Medicine
PCRM.ORG
5100 Wisconsin Ave. NW, Suite 400 • Washington, DC 20016 • Tel: 202-686-2210 • Fax: 202-686-2216 • pcrm@pcrm.org

December 26, 2023

Via Email ([redacted]@EncompassHealth.com)
Encompass Health Corporation
9001 Liberty Parkway
Birmingham, Al 35242
Attn: Corporate Secretary

Re: Shareholder Proposal for Inclusion in the 2024 Proxy Statement

Dear Mr. Leasure:

In response to your letter dated December 14, 2023, attached is a revised shareholder proposal submitted by the Physicians Committee for Responsible Medicine (PCRM) for inclusion in the proxy statement for the 2024 annual meeting. PCRM confirms that it has not aggregated shares of Company common stock with those of another shareholder or group of shareholders to meet the relevant ownership threshold under Rule 14a-8(b)(l)(i) to be eligible to submit a proposal.

Sincerely,

Mark Kennedy
Senior Vice President of Legal Affairs

Shareholder Resolution for Improved Health and Revenue Savings

RESOLVED:
Encompass Health Corporation will make healthful, plant-based meals the default option in all food service settings, other than for patients who have special dietary exclusions.

SUPPORTING STATEMENT:
In 2017, the American Medical Association adopted a policy, *H-150.949: Healthful Food Options in Health Care Facilities*, calling on U.S. hospitals to improve the health of patients, staff, and visitors by providing a variety of healthful food, including plant-based meals and meals that are low in fat, sodium, and added sugars; eliminating processed meats from menus; and providing and promoting healthful beverages. These healthful changes enjoy strong support from patients.

Subsequently, NYC Health + Hospitals—the nation's largest municipal healthcare system, treating more than one million patients per year—began offering plant-based dishes as the default lunch and dinner option for inpatients at all of its 11 public hospitals. Patient satisfaction has been greater than 90%, staff satisfaction has been similarly high, and costs have dropped by approximately 60 cents per food tray. Media coverage has been strongly favorable, greatly boosting the system's image.

Plant-based diets offer patients a variety of health benefits, including lower risks of cardiovascular disease, type 2 diabetes, obesity, certain cancers, and even severe COVID-19. They can also be effective for weight management, treatment of hypertension and hyperlipidemia, and reduced stroke risk. Patients who eat plant-based meals have a higher intake of antioxidants and anti-inflammatory nutrients, leading to smoother recovery after surgery and possibly reducing readmission rates. Serving healthful food helps patients get well and stay well over the long term, creating a teachable moment in which patients learn which foods help treat and prevent chronic disease.

Recent research shows that plant-based foods present, on average, a 16% revenue savings. When scaled to an institutional level, these savings increase exponentially. Additional potential savings will accrue to the extent that patients with congestive heart failure or renal disease remain out of the hospital for longer periods (recurrent hospitalizations lead to financial penalties).

Employee health improves and absenteeism decreases when the food environment is improved. A multicenter study for GEICO employees found that providing plant-based food offerings and simple educational messages improved employee health and reduced health-related productivity impairments by 40–46%. With improved employee health, Encompass may lower healthcare costs, increase productivity, and increase revenue.

Encompass aims "to provide a better way to care that elevates expectations and outcomes." In the interest of improving patient health and satisfaction, achieving significant revenues savings, boosting employee health, reducing absenteeism, and enhancing Encompass's image as a healthcare leader, we respectfully urge shareholders to support this resolution.

Stephen D. Leasure
Deputy General Counsel
900 Liberty Parkway
Birmingham, AL 35242
[redacted]
[redacted]@encompasshealth.com

December 14, 2023

VIA UPS OVERNIGHT DELIVERY & EMAIL

Ms. Anna Herby, RD
Physicians Committee for Responsible Medicine
5100 Wisconsin Avenue Northwest, Suite 400
Washington, D.C. 20016
[redacted]@pcrm.org

Dear Ms. Herby,

I am writing on behalf of Encompass Health Corporation (the "Company"), which on December 1, 2023 received from the Physicians Committee for Responsible Medicine (the "Proponent") a purported stockholder proposal (the "Submission") to be included in the Company's proxy statement (the "Proxy Statement") to be sent to the Company's stockholders in connection with the Company's 2024 annual meeting of stockholders (the "Annual Meeting"). We are currently reviewing the Submission to determine if it is eligible for inclusion as a shareholder proposal in the Proxy Statement; however, in accordance with Rule 14a-8 ("Rule 14a-8") promulgated under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and in particular Rule 14a-8(f), the purpose of this letter is to notify you that the Submission is procedurally deficient with respect to the requirements of Rules 14a-8(a) and (b) described below.

The Submission Is Not a Proposal

Under Rule 14a-8(a), a shareholder "proposal" is a shareholder proponent's "recommendation or requirement that the company and/or its board of directors take action, which [the shareholder proponent] intend[s] to present at a meeting of the company's shareholders." Rule 14a-8(a) further provides that a shareholder proposal "should state as clearly as possible the course of action that [the shareholder proponent] believe[s] the company should follow." The Staff (the "Staff") of the Securities and Exchange Commission (the "SEC"), in proposing amendments to the proxy rules that included changes to Rule 14a-8(a), stated that this definition "reflects [the Staff's] belief that a proposal that seeks no specific action, but merely purports to express shareholders' views, is inconsistent with the purposes of Rule 14a-8 and may be excluded from companies' proxy materials."[1]

The Submission, as written, is not a proposal, as it does not recommend or request that the Company or its Board of Directors take a specific action. Rather, the Submission appears to us to represent a declaratory statement and aspirational view that the Company shall achieve five objectives if it adopts the "American Medical Association policy for healthful foods" and implements a program developed by the NYC Health + Hospitals system, for which no specific citation is provided in the Submission and which we have been unable to identify with specificity. In order for the Submission to constitute a proposal for purposes of Rule 14a-8(a), its wording should be revised to state "as clearly as possible the course of action that [the Proponent] believe[s] the [C]ompany should follow."

[1] Proposing Release, *Amendments to Rules on Shareholder Proposals*, Exchange Act Release No. 34-39093 (Sept. 18, 1997). The definition of "proposal" proposed in Exchange Act Release No. 34-39093 was adopted in Exchange Act Release No. 34-40018 (May 28, 1998).

No Aggregation of Holdings

In accordance with Rule 14a-8(b)(1)(vi), a proponent may not aggregate its holdings with those of another shareholder or group of shareholders to meet the requisite amount of securities necessary to be eligible to submit a proposal. Accordingly, please provide us with a written statement confirming that you have not aggregated your shares of Company common stock with those of another shareholder or group of shareholders to meet the relevant ownership threshold under Rule 14a-8(b)(1)(i) to be eligible to submit a proposal. We have no record of receiving this confirmation.

Supplemental Information and Response

Enclosed for your reference please find (i) a copy of Rule 14a-8 and (ii) guidance from the staff of the Securities and Exchange Commission ("SEC") regarding, among other things, brokers, banks and other securities intermediaries that constitute "record" holders under Rule 14a-8(b)(2)(ii)(A) for purposes of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8, and common errors shareholders can avoid when submitting proof of ownership and revised proposals to companies. Please note, however, that the enclosed guidance is not authoritative and has in some cases been superseded by recent amendments to Rule 14a-8, which amendments are summarized in the enclosed compliance guide prepared by the staff of the SEC.

Rule 14a-8(f) provides that your response, including the required proof of eligibility described above, must be postmarked or transmitted electronically no later than fourteen (14) calendar days from the date you receive this notice of defects. If you do not adequately cure the defects within the stipulated timeframe, Rule 14a-8(f) allows the Company to exclude the Proponent's Submission from the Proxy Statement. Please address any response to me at Encompass Health Corporation, 9001 Liberty Parkway, Birmingham, Alabama 35242, Attention: Corporate Secretary. Alternatively, you may e-mail your response to me at [redacted]@EncompassHealth.com. Finally, please note that in addition to the eligibility deficiencies cited above, the Company reserves the right in the future to raise any further bases upon which the Submission may be properly excluded under Rule 14a-8 of the Exchange Act.

Sincerely,

Stephen D. Leasure
Deputy General Counsel and Assistant Secretary

Enclosures:

Rule 14a-8 of the Securities Exchange Act of 1934

Division of Corporation Finance Staff Bulletin No. 14F

Division of Corporation Finance Staff Bulletin No. 14G

Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8: A Small Entity Compliance Guide

From: Mark Kennedy <[redacted]@pcrm.org>
Sent: Tuesday, December 12, 2023 11:54 PM
To: Leasure, Stephen <[redacted]@encompasshealth.com>
Subject: RE: Letter from PCRM dated November 30, 2023

[redacted]

For NYC H+H, https://www.nytimes.com/2023/08/31/climate/new-york-hospitals-vegan-meals.html outlines the system's carbon emission reductions and mentions the 59-cent cost reduction per tray, and https://www.nychealthandhospitals.org/services/patient-meals/ lists menu items and recipes. Additionally, https://videosolutions.mediasite.com/mediasite/Play/3623b8318cd44b7093fb8a5bcce944341d is a very informative presentation from this summer by two NYC H+H representatives. It is about 42 minutes long, but you can adjust the speed to 2x. They discuss a variety of subjects, including equipment, meal selection, patient and employee engagement, and results (the last appearing around the 28-minute mark).

Mark Kennedy, Senior Vice President of Legal Affairs
Physicians Committee for Responsible Medicine
O: [redacted] | *Facebook* *Twitter* *Instagram*

From: Leasure, Stephen <[redacted]@encompasshealth.com>
Sent: Tuesday, December 12, 2023 2:29 PM
To: Mark Kennedy <[redacted]@pcrm.org>
Subject: RE: Letter from PCRM dated November 30, 2023

Thanks. [redacted]

From: Mark Kennedy <[redacted]@pcrm.org>
Sent: Tuesday, December 12, 2023 1:23 PM
To: Leasure, Stephen <[redacted]@encompasshealth.com>
Subject: RE: Letter from PCRM dated November 30, 2023

Hi Steve,

[redacted]

You are correct about the AMA policy, which is available at https://policysearch.ama-assn.org/policyfinder/detail/Healthy%20Food%20Options%20in%20Hospitals%20H-150.949?uri=%2FAMADoc%2FHOD.xml-0-627.xml

I am gathering some information on the NYC Health + Hospitals program and will send it shortly.

Mark Kennedy, Vice President of Legal Affairs

Physicians Committee for Responsible Medicine
O: [redacted] | *Facebook* *Twitter* *Instagram*

From: Leasure, Stephen <[redacted]@encompasshealth.com>
Sent: Monday, December 11, 2023 4:33 PM
To: Mark Kennedy <[redacted]@pcrm.org>
Subject: RE: Letter from PCRM dated November 30, 2023

Mark,

Thank you for following up. [redacted]

As to PCRM's letter, I think as a first step we just want to make sure we understand the specifics of the PCRM ask. I cannot locate a copy of the NYC Health + Hospitals program referenced. I see a recent press release that announces "Plant-Based Meals As Primary Dinner Option," but I'm unclear on whether there are other aspects of the program. I believe AMA policy H-150.949 is the one being referenced, but I would also like to confirm that as well.

It is my understanding that all of our hospitals offer planted-based food offerings at every meal. Our patients are presented with the options available and are able to choose their meal. Likewise, our cafeterias always provide plant-based options, including salad bars, for our employees. We provide health beverage options and food options low in saturated fat, sodium and added sugars and limit processed meats in our menus. I would assume what we are doing substantially implements what PCRM would like to see.

Best regards,
Steve
Stephen D. Leasure
Vice President, Assistant Secretary & Deputy General Counsel*
Encompass Health Corporation
9001 Liberty Parkway
Birmingham, AL 35242
O [redacted] | **F** [redacted]
[redacted]@encompasshealth.com

* Authorized House Counsel licensed to practice
law only in North Carolina, not in Alabama.

From: Mark Kennedy <[redacted]@pcrm.org>
Sent: Monday, December 11, 2023 11:05 AM
To: Leasure, Stephen <[redacted]@encompasshealth.com>
Subject: RE: Letter from PCRM dated November 30, 2023

Dear Mr. Leasure,

Ms. Herby forwarded me your message, and I apologize for not responding sooner. The Physicians Committee has on-staff nutrition experts, including Ms. Herby, who can speak in detail about the proposal. But their message might be most effectively conveyed if their counterparts at Encompass participate in the conversation. Could you tell me more about what you have in mind for a meeting? Thank you.

Mark Kennedy, Senior Vice President of Legal Affairs
Physicians Committee for Responsible Medicine
O: [redacted] | *Facebook* *Twitter* *Instagram*

From: Leasure, Stephen <[redacted]@encompasshealth.com>
Sent: Friday, December 8, 2023 11:52 AM
To: Anna Herby <[redacted]@pcrm.org>
Subject: Letter from PCRM dated November 30, 2023

Ms. Herby,

I am in receipt of the attached letter. Are you available to speak next week? I'd like to get a better understanding of what PCRM is recommending for our nutrition program. I am generally available either Tuesday or Wednesday, so let me know what time works best for you.
Best regards,
Steve

Stephen D. Leasure
Vice President, Assistant Secretary & Deputy General Counsel*
Encompass Health Corporation
9001 Liberty Parkway
Birmingham, AL 35242
O [redacted] | **F** [redacted]
[redacted]@encompasshealth.com

* Authorized House Counsel licensed to practice law only in North Carolina, not in Alabama.

PhysiciansCommittee
for Responsible Medicine
PCRM.ORG
5100 Wisconsin Ave. NW, Suite 400 • Washington, DC 20016 • Tel: 202-686-2210 • Fax: 202-686-2216 • pcrm@pcrm.org

November 30, 2023

Via FedEx Express
Corporate Secretary
Encompass Health Corporation
9001 Liberty Parkway
Birmingham, Al 35242

Re: Shareholder Proposal for Inclusion in the 2024 Proxy Statement

Dear Mr. Darby:

Enclosed with this letter is a shareholder proposal submitted by the Physicians Committee for Responsible Medicine (PCRM) for inclusion in the proxy statement for the 2024 annual meeting. Also enclosed is a letter from RBC Wealth Management, PCRM's brokerage firm, confirming PCRM's beneficial ownership of 730 common stock shares, acquired at least one year ago. PCRM has held at least $25,000 worth of such shares continuously since acquisition and intends to hold at least this amount through and including the date of the 2024 shareholders meeting.

If there are any issues with this proposal being included in the proxy statement, or if you need any further information, please contact PCRM's designated representative, Anna Herby, RD, at 5100 Wisconsin Ave., NW, Suite 400, Washington, DC 20016, [redacted], or [redacted]@pcrm.org. Ms. Herby, who will appear at the annual meeting to present this proposal, is available to meet via teleconference Mondays, Wednesdays, Thursdays, and Fridays—including during the regulatory period of "no less than 10 calendar days, nor more than 30 calendar days, after submission of the shareholder proposal"—during the hours of 11 a.m. through 2:00 p.m. CT.

Sincerely,

Mark Kennedy
Senior Vice President of Legal Affairs

Enclosures: Shareholder Resolution
RBC Wealth Management letter

Shareholder Resolution for Revenue Savings and Improved Health

RESOLVED:
Encompass Health Corporation shall achieve significant revenue savings, improve patient satisfaction, improve employee health, reduce absenteeism, and enhance its image as a healthcare leader by adopting the American Medical Association policy for healthful foods for healthcare facilities and implementing the innovative program for healthful hospital food developed by the NYC Health + Hospitals system.

SUPPORTING STATEMENT:
In 2017, the American Medical Association adopted a policy calling on U.S. hospitals to improve the health of patients, staff, and visitors by providing a variety of healthful food, including plant-based meals and meals that are low in fat, sodium, and added sugars; eliminating processed meats from menus; and providing and promoting healthful beverages. These healthful changes enjoy strong support from patients. Subsequently, the NYC Health + Hospitals system implemented a program following these guidelines and improving upon them in certain ways. Patient satisfaction has been greater than 90%, staff satisfaction has been similarly high, and costs have dropped by approximately 60 cents per food tray. Media coverage has been strongly favorable, greatly boosting the system's image.

Failure to adopt such a program would mean forfeiting millions of dollars in cost savings and the opportunity to improve patient health and our corporate image. By enhancing the health of patients and staff, this approach addresses the significant social issue of public health and transcends ordinary matters of business, while also reducing food costs and potentially reducing medical costs and absenteeism among employees.

Recent research shows that plant-based foods present, on average, a 16% revenue savings. When scaled to an institution level, these savings increase exponentially. Employee health improves and absenteeism decreases when the food environment is improved. A multicenter study for GEICO employees found that providing plant-based food offerings and simple educational messages improved employee health and reduced health-related productivity impairments by 40-46%. With improved employee health, Encompass may lower healthcare costs, increase productivity, and significantly increase revenue.

Encompass aims "to provide a better way to care that elevates expectations and outcomes." When we achieve revenue savings, improve patient satisfaction, and boost employee health and morale with inexpensive healthful foods, everyone wins, most of all the shareholders who invest in the company's future.

In light of the marked financial benefits, the potential improvements in employee health, and the enhanced prestige that will result from these initiatives, we respectfully ask shareholders to support this resolution.

Exhibit B

Delaware Law Opinion

RICHARDS LAYTON & FINGER

Attorneys at Law

January 12, 2024

Encompass Health Corporation
9001 Liberty Parkway
Birmingham, Alabama 35242

Re: Stockholder Proposal on behalf of Physicians Committee for Responsible Medicine

Ladies and Gentlemen:

We have acted as special Delaware counsel to Encompass Health Corporation, a Delaware corporation (the "Company"), in connection with a stockholder proposal, dated December 26, 2023 (the "Proposal"), submitted to the Company by the Physicians Committee for Responsible Medicine (the "Proponent") for inclusion in the Company's proxy statement for the 2024 annual meeting of stockholders of the Company (the "Annual Meeting"). In this connection, you have requested our opinion as to certain matters under the laws of the State of Delaware.

For the purpose of rendering our opinion as expressed herein, we have been furnished with and have reviewed the following documents: (i) the Amended and Restated Certificate of Incorporation of the Company as filed with the Secretary of State of the State of Delaware (the "Secretary of State") on October 20, 2017, as amended by the Certificate of Change of Registered Agent and/or Registered Office as filed with the Secretary of State on March 16, 2023 (together, the "Certificate of Incorporation"); (ii) the Amended and Restated Bylaws of the Company, amended as of December 8, 2022 (the "Bylaws"); and (iii) the Proposal.

With respect to the foregoing documents, we have assumed: (i) the authenticity of all documents submitted to us as originals; (ii) the conformity to authentic originals of all documents submitted to us as copies; (iii) the genuineness of all signatures and the legal capacity of natural persons; and (iv) that the foregoing documents, in the forms thereof submitted to us for our review, have not been and will not be altered or amended in any respect material to our opinion as expressed herein. We have not reviewed any document other than the documents listed above for purposes of rendering this opinion, and we assume that there exists no provision of any such other document that bears upon or is inconsistent with our opinion as expressed herein. In addition, we have conducted no independent factual investigation of our own but rather have relied solely on the foregoing documents, the statements and information set forth therein and the additional factual matters recited or assumed herein, all of which we assume to be true, complete and accurate in all material respects.

THE PROPOSAL

The Proposal states the following:

> **RESOLVED:**
> Encompass Health Corporation will make healthful, plant-based meals the default option in all food service settings, other than for patients who have special dietary exclusions.

We have been advised that the Company is considering excluding the Proposal from the Company's proxy statement for the Annual Meeting under, among other reasons, Rule 14a-8(i)(2) and Rule 14a-8(i)(1) promulgated under the Securities Exchange Act of 1934, as amended. Rule 14a-8(i)(2) provides that a registrant may omit a proposal from its proxy statement when "the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject." Rule 14a-8(i)(1) provides that a registrant may omit a stockholder proposal "[i]f the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization." In this connection, you have requested our opinion as to whether, under Delaware law, (i) the implementation of the Proposal, if adopted by the Company's stockholders, would violate Delaware law and (ii) the Proposal is a proper subject for action by the Company's stockholders.

DISCUSSION

I. The Proposal would violate Delaware law if implemented.

The Proposal mandates that the Company make certain business decisions with respect to its food services by requiring that plant-based meals be set as the default option in all food service settings other than for patients with special dietary needs. For the reasons set forth below, in our opinion, because the Proposal, if implemented, would impinge upon the Board's power and authority to manage the business of the Company under Section 141(a) of the General Corporation Law of the State of Delaware (the "General Corporation Law") which power and authority includes, without limitation, making business decisions on behalf of the Company and establishing a management structure that is appropriate for the Company to make business decisions on behalf of the Company, the Proposal violates Delaware law.

Section 141(a) of the General Corporation Law provides that the "business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." 8 *Del. C.* § 141(a). Significantly, if there is to be any variation from the mandate of Section 141(a), it can only be as "otherwise provided in this chapter or in its certificate of incorporation." *See, e.g.*, *Lehrman v. Cohen*, 222 A.2d 800, 808 (Del. 1966). The Certificate of Incorporation does not provide for management of the Company by persons other than directors and Section 3.1 of Article III of the Bylaws confirms that "[t]he property, business and affairs of the Corporation shall be managed by or under the direction of a Board of Directors." Thus, the

Board possesses the full power and authority to manage the business and affairs of the Company. *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984); *see also CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 232 (Del. 2008) ("it is well-established that stockholders of a corporation subject to the [General Corporation Law] may not directly manage the business and affairs of the corporation, at least without specific authorization in either the statute or the certificate of incorporation'"); *In re CNX Gas Corp. S'holders Litig.*, 2010 WL 2705147, at *10 (Del. Ch. July 5, 2010) ("the premise of board-centrism animates the General Corporation Law"); *McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2000) ("One of the fundamental principles of the Delaware General Corporation Law statute is that the business affairs of a corporation are managed by or under the direction of its board of directors.") (citing 8 *Del. C.* § 141(a)); *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1291 (Del. 1998) ("One of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation.") (footnote omitted). Such full power and authority to manage the Company includes broad discretion in establishing a management structure that is appropriate for the Company, including delegation of certain authority to officers of the Company as the Board determines to be appropriate. *Grimes v. Donald*, 1995 WL 54441, at *9 (Del. Ch. Jan. 11, 1995), *aff'd*, 673 A.2d 1207 (Del. 1996). In making business decisions, directors owe duties of care and loyalty to the corporation and all of its stockholders which requires them to base their decisions on what they reasonably believe to be in the best interests of the corporation and its stockholders. *Mills Acq. Co. v. Macmillan, Inc.*, 559 A.2d 1261,1280 (Del. 1989).

Under Delaware law, stockholders cannot "commit the board of directors to a course of action that would preclude them from fully discharging their fiduciary duties to the corporation and its shareholders." *See, e.g. CA, Inc.*, 953 A.2d at 238. The Delaware courts have consistently applied this principle which is derived from Section 141(a) of the General Corporation Law, to prevent attempts to dictate future conduct or decisions by directors, whether by contract, bylaw, stockholder resolution or otherwise. *See, e.g.*, *id.* at 239 (holding that neither the board nor stockholders could adopt a bylaw requiring future boards to reimburse the reasonable expenses of stockholders incurred in connection with a proxy contest since it would impermissibly "prevent the directors from exercising their full managerial power in circumstances where their fiduciary duties would otherwise require them to deny reimbursement to a dissident slate"); *Quickturn Design Sys., Inc.* 721 A.2d at 1291 (invalidating a provision of a stockholder rights plan preventing any newly elected board from redeeming the rights plan for six months because the provision would "impermissibly deprive any newly elected board of both its statutory authority to manage the corporation [under the General Corporation Law] and its concomitant fiduciary duty pursuant to that statutory mandate"). Indeed, in *Abercrombie v. Davis*, the Delaware Court of Chancery applied this principle to invalidate an agreement vesting stockholders with the power to initiate, maintain or discontinue corporate policies because "it tend[ed] to limit in a substantial way the freedom of director decisions on matters of management policy [and] violate[d] the duty of each director to exercise his own best judgment on matters coming before the board." 123 A.2d 893, 899 (Del. Ch. 1956).

The Board's power and authority to manage the business and affairs of the Company includes the establishment and maintenance of a management structure for making

business decisions on behalf of the Company. *Grimes*, 1995 WL 54441, at *1; *Abercrombie*, 123 A.2d at 898 (holding that, under Section 141(a), "there can be no doubt that in certain areas the directors rather than the stockholders or others are granted the power by the state to deal with questions of management policy"); *Cahall v. Lofland*, 114 A. 224, 229 (Del. Ch. 1921) ("The duties of directors are administrative, and relate to supervision, direction and control."), *aff'd* 118 A.1 (Del. 1922). In this connection, the Delaware Court of Chancery has stated that:

> Absent specific restriction in the certificate of incorporation, the board of directors certainly has very broad discretion in fashioning a managerial structure appropriate, in its judgment, to moving the corporation towards the achievement of corporate goals and purposes. In designing and implementing such a structure, the board of course may delegate such powers to the officers of the company as in the board's good faith, informed judgment are appropriate.

Grimes, 1995 WL 54441, at *9; *see also Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 943 (Del. 1985) (observing that Section 141(a)'s reference to the corporation being managed "under the direction" of the board reflects that "[t]he realities of modern corporate life are such that directors cannot be expected to manage the day-to-day activities of a company"); *Canal Capital Corp. v. French*, 1992 WL 159008, at *3 (Del. Ch. July 2, 1992) ("[T]he details of the business may be delegated to inferior officers, agents and employees.") (*quoting Cahall*, 114 A. at 229). In addition, Delaware case law is clear that directors have "the duty to establish or approve the long-term strategic, financial and organizational goals of the corporation; to approve formal or informal plans for the achievement of these goals; to monitor corporate performance; and to act, when in the good faith, informed judgment of the board it is appropriate to act." *See Grimes*, 1995 WL 54441, at *1.

Decisions regarding the management of the Company's business (including with respect to food services) are reserved by statute to the discretion of the Board. The Proposal, if implemented, would effectively supplant the Board's decision-making authority by requiring that the Company make material changes to its business solely as a result of a stockholder vote. Under Delaware law, such a business decision cannot be made by the stockholders on behalf of the Company absent a specific provision in the certificate of incorporation providing otherwise, which, as noted above, the Company's Certificate of Incorporation does not contain. Thus, it is within the authority of the Board (and not the Company's stockholders) to determine, in the exercise of its fiduciary duties, whether making material changes to the Company's business plan (such as those proposed by the Proposal) would be in the best interests of the Company and all of its stockholders. Because the Proposal seeks to impose a particular business change on the Company, it leaves no room for the Board's decision-making authority, and if implemented in accordance with its express terms, the Proposal would therefore violate Section 141(a) of the General Corporation Law.

II. The Proposal is not a proper matter for stockholder action under Delaware law.

The Proposal seeks to mandate that the Company make material changes to its business solely as a result of a stockholder vote, but, as set forth in Section I above, decisions regarding the management of the Company's business are within the authority of the Board and not the Company's stockholders. In addition and as discussed in Section I above, the Proposal, if implemented, would violate Delaware law. Accordingly, the Proposal, in our opinion, is not a proper subject for stockholder action under Delaware law.

CONCLUSION

Based upon and subject to the foregoing and subject to the limitations stated herein, it is our opinion that the Proposal, if implemented, would violate Delaware law and the Proposal is not a proper subject for action by the stockholders of the Company under Delaware law.

The foregoing opinion is limited to the laws of the State of Delaware. We have not considered and express no opinion on the laws of any other state or jurisdiction, including federal laws regulating securities or any other federal laws, or the rules and regulations of stock exchanges or of any other regulatory body.

The foregoing opinion is rendered solely for your benefit in connection with the matters addressed herein. We understand that you may furnish a copy of this opinion letter to the Securities and Exchange Commission and to the Proponent in connection with the matters addressed herein, and we consent to your doing so. Except as stated in this paragraph, this opinion letter may not be furnished or quoted to, nor may the foregoing opinion be relied upon by, any other person or entity for any purpose without our prior written consent.

Very truly yours,

Richards, Layton & Finger, P.A.

NS/JJV

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February 2, 2024

VIA ONLINE SHAREHOLDER PROPOSAL FORM
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Reference Number 487581: No-Action Request by Encompass Health Corporation

Dear Staff:

I write on behalf of the Physicians Committee for Responsible Medicine ("Physicians Committee") pursuant to Rule 14a-8(k) in response to a request by Encompass Health Corporation ("Company") that the Staff of the Division of Corporation Finance ("Division") concur with its view that it may exclude the Physicians Committee's shareholder resolution and supporting statement (collectively "Proposal") from the proxy materials to be distributed in connection with the Company's 2024 annual meeting of shareholders ("No-Action Request"). The Company seeks to exclude the Proposal pursuant to Rule 14a-8(i) subsections (1), (2), (7), and (10). For the reasons set forth below, the Physicians Committee urges the Staff to decline the Company's No-Action Request. Pursuant to Rule 14a-8(k) and *Announcement: New Intake System for Rule 14a-8 Submissions and Related Correspondence* (Nov. 7, 2023), the Physicians Committee submits this letter electronically and is concurrently submitting a copy to the Company.

I. The Proposal

The Proposal's proposed resolution states,

> **RESOLVED:**
> Encompass Health Corporation will make healthful, plant-based meals the default option in all food service settings, other than for patients who have special dietary exclusions.

The Proposal's supporting statement describes the public health benefits that the resolution would effectuate, as described below.

II. Because the Proposal Focuses on a Significant Social Policy Issue, the Company May Not Exclude the Proposal Pursuant to Rule 14a-8(i)(7)

Rule 14a-8(i)(7) provides that a company may exclude a proposal "[i]f the proposal deals with a matter relating to the company's ordinary business operations." Only "business matters that are mundane in nature and do not involve any substantial policy or other considerations" may be omitted under this provision. 41 Fed. Reg. 52,994, 52,998 (Dec. 3, 1976).

A proposal relating to a company's ordinary business operations is not excludable if the proposal focuses on "sufficiently significant social policy issues" that "transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote." Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 40018 (May 21, 1998). "In determining whether the focus of these proposals is a significant social policy issue, [Staff] consider both the proposal and the supporting statement as a whole." Staff Legal Bulletin No. 14C, part D.2 (June 28, 2005). "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." Staff Legal Bulletin No. 14L, part B.2 (Nov. 3, 2021).

To the extent that the Proposal touches on the Company's ordinary business operations, the Proposal may not be excluded because it focuses on "sufficiently significant social policy issues"—namely public health—that "transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote."

In Staff Legal Bulletin No. 14C, the Division considered proposals related to the environment and public health, which it had previously found to be significant policy considerations, and advised that "[t]o the extent that a proposal and supporting statement focus on the company minimizing or eliminating operations that may adversely affect the environment or the public's health, we do not concur with the company's view that there is a basis for it to exclude the proposal under rule 14a-8(i)(7)." Staff Legal Bulletin No. 14C, part D.2 (June 28, 2005). Thus, there is no question that public health is an issue that has a "broad societal impact."

The American Medical Association ("AMA") is the nation's largest professional association of physicians. Founded in 1847, its mission is "to promote the art and science of medicine and the betterment of public health." AMA, *About*, https://www.ama-assn.org/about (last accessed Feb. 2, 2024). To achieve this mission, the AMA's House of Delegates periodically issues policy statements to serve as guidance for physicians on healthcare issues. These "policies are based on professional principles, scientific standards and the experience of practicing physicians." AMA, *Developing AMA Policies*, https://www.ama-assn.org/house-delegates/ama-policies/developing-ama-policies (last accessed Feb. 2, 2024).

As summarized in the Proposal, in 2017, the AMA updated policy *H-150.949: Healthful Food Options in Health Care Facilities* by inserting additional text that "calls on all health care facilities to improve the health of patients, staff, and visitors by: (a) providing a variety of healthy food, including plant-based meals, and meals that are low in saturated and trans fat, sodium, and added sugars; (b) eliminating processed meats from menus; and (c) providing and promoting healthy beverages." AMA, *Healthful Food Options in Health Care Facilities H-*

150.949, https://policysearch.ama-assn.org/policyfinder/detail/H-150.949?uri=%2FAMADoc%2FHOD.xml-0-627.xml (last accessed Feb. 2, 2024).

As stated in the Proposal, NYC Health + Hospitals ("NYCHH") thereafter "began offering plant-based dishes as the default lunch and dinner option for inpatients at all of its 11 public hospitals." NYCHH is the nation's largest municipal healthcare system, treating more than one million patients per year. NYCHH, *NYC Health + Hospitals Now Serving Culturally-Diverse Plant-Based Meals As Primary Dinner Option for Inpatients at All of Its 11 Public Hospitals* (Jan. 9, 2023) (hereinafter "*Press Release*"), https://www.nychealthandhospitals.org/pressrelease/nyc-health-hospitals-now-serving-plant-based-meals-as-primary-dinner-option-for-inpatients-at-all-of-its-11-public-hospitals/.

It is well-established that plant-based dietary patterns are particularly effective in the prevention[1,2,3] and treatment of overweight and obesity,[4,5] as well as body weight maintenance,[6] and reduce the risk of cardiovascular disease[7,8,9] and type 2 diabetes[10,11] at the same time. These benefits have been repeatedly demonstrated in large prospective cohort studies, such as the EPIC study (European Prospective Investigation into Cancer and Nutrition),[12,13] the Adventist-Health Study,[9,10] the Nurses' Health Study,[14,15] and the Health Professionals Follow-Up Study.[16,17]

For type 2 diabetes in particular, the 2020 American Association of Clinical Endocrinologists and American College of Endocrinology's consensus statement on type 2 diabetes management recommends a plant-based diet.[18] A study published in the *International Journal of Cancer* found that vegetarians have reduced breast cancer risk, compared to meat-eaters, most likely due to the abundance of healthful foods and avoidance of meat throughout their lives.[19]

Evidence suggests that the amount of animal-derived foods consumed is an independent risk factor for being overweight, and limiting their consumption is an effective strategy for weight loss and a healthy body composition, as well as for body weight maintenance. Vegetarians typically have lower body mass index values, compared with nonvegetarians.[1] Body mass index values tend to increase with increasing frequency of animal product consumption. In the Adventist Health Study-2, body mass index values were lowest among vegans (23.6 $kg.m^{-2}$), higher in lacto-ovo-vegetarians (25.7 $kg.m^{-2}$), and highest in nonvegetarians (28.8. $kg.m^{-2}$).[2,3,10] The average individual yearly weight gain is reduced when people limit consumption of animal foods.[20]

In 2015, the World Health Organization's International Agency for Research on Cancer ("IARC") classified processed meat—which includes bacon, deli slices, sausage, hot dogs, and other meat products preserved with additives or otherwise manipulated to alter color, taste, and durability—as carcinogenic to humans.[21] IARC made this determination after assessing more than 800 epidemiological studies investigating the association of cancer with consumption of red meat or processed meat in many countries, from several continents, with diverse ethnicities and diets. Group 1 is the agency's highest evidentiary classification; other Group 1 carcinogens include tobacco smoking, secondhand tobacco smoke, and asbestos.[22]

Investigators in the EPIC study, which followed 448,568 men and women, discovered an 11 percent increased risk of dying from cancer with the consumption of 50 grams of processed meat

per day.[12] In contrast, substitution studies have found that replacing one serving of processed meat per day with nuts decreased risk for disease by 19 percent and replacement with legumes decreased risk by 10 percent.[23]

In announcing NYCHH's program, president and CEO Mitchell Katz, MD, stressed "the importance of a healthy diet and how it can help fend off or treat chronic conditions like type 2 diabetes, high blood pressure, and heart disease. … Our new meal program is rooted in evidence for health benefits[.]" Fiona Holland, *Plant-based Food to Become the Default Meals in New York City's Public Hospitals*, Food Matters Live, Dec. 10, 2022, https://foodmatterslive.com/article/plant-based-meals-default-at-new-york-city-public-hospital.

This overwhelming body of scientific consensus similarly underlies the Proposal. As noted in the Proposal's supporting statement, "Plant-based diets offer patients a variety of health benefits, including lower risks of cardiovascular disease, type 2 diabetes, obesity, certain cancers, and even severe COVID-19. They can also be effective for weight management, treatment of hypertension and hyperlipidemia, and reduced stroke risk."

The Proposal continues, "Patients who eat plant-based meals have a higher intake of antioxidants and anti-inflammatory nutrients, leading to smoother recovery after surgery and possibly reducing readmission rates. Serving healthful food helps patients get well and stay well over the long term, creating a teachable moment in which patients learn which foods help treat and prevent chronic disease." The Proposal also notes that serving plant-based meals would similarly benefit the Company's staff via "improved employee health and reduced health-related productivity impairments."

The No-Action Request argues that the Staff have allowed exclusion of social policy proposals submitted to food establishments, *see McDonald's Corp.* (Mar. 12, 2019); *Papa John's International, Inc.* (Feb. 13, 2015), *McDonald's Corp.* (Mar. 24, 1992); *McDonald's Corp.* (Mar. 9, 1990), and retailers, *see The TJX Companies* (Apr. 16, 2018); *The Home Depot, Inc.* (Mar. 21, 2018); *Wal-Mart Stores, Inc.* (Mar. 24, 2008); *PetSmart, Inc.* (Apr. 14, 2006). But the Company is neither a fast-food restaurant chain nor a superstore. To the extent that it engages in the sale of and marketing of products, such activities are not integral to its operations.

The No-Action Request also repeatedly cites three instances in which the Staff allowed exclusion of a proposal to require company hospitals to provide plant-based food options. *See UnitedHealth Group Inc.* (Mar. 16, 2023); *Elevance Health, Inc.* (Mar. 6, 2023); *HCA Healthcare, Inc.* (Mar. 6, 2023). However, in all three instances, the proponent, Beyond Investing LLC, opted not to respond to the companies' no-action requests, depriving the Staff of the opportunity to consider whether significant social policy issues were involved.

III. Because the Company has not Substantially Implemented the Proposal, the Company May Not Exclude the Proposal Pursuant to Rule 14a-8(i)(10)

Rule 14a-8(i)(10) permits a company to exclude a shareholder proposal if "the company has already substantially implemented the proposal." "This provision is designed to avoid the possibility of shareholders having to consider matters which already have been favorably acted

upon by the management and would be applicable, for instances, whenever the management agrees prior to a meeting of security holders to implement a proponent's proposal in its entirety." 41 Fed. Reg. 29,982, 29,985 (July 20, 1976) (discussing the "Moot Proposals" predecessor to the current "substantially implemented" provision).

The determination whether a proposal that is not "fully effected" has been "substantially implemented" necessarily involves "subjectivity." *See* 48 Fed. Reg. 38,218, 38,221 (Aug. 23, 1983). "In the staff's view, a determination that the Company has substantially implemented the proposal depends upon whether its particular policies, practices and procedures compare favorably with the guidelines of the proposal." *Texaco, Inc.* (Mar. 28, 1991). "In other words, substantial implementation under Rule 14a-8(i)(10) requires a company's actions to have addressed the proposal's essential objective satisfactorily." *Intel Corporation* (Mar. 11, 2010).

The Company has not satisfactorily addressed the Proposal's essential objective. As recognized in the No-Action Request, the essential objective "is for the Company to make plant-based meals the default option in all food service settings, other than for patients who have special dietary exclusions." The Company does not do this. The No-Action Request instead states that "patients will always have the option … to choose from the menus, which include plant-based food options in all cases." The No-Action Request also states that "the Company's hospitals include plant-based food options in all of the cafeterias it operates." From this, the No-Action Request inexplicably concludes that "the Company has implemented the essential objective of the Proposal, which is that plant-based meals be made the default option in all food service settings." Merely making an offer is a far cry from the Proposal's request for a robust, care-based food service program that capitalizes on the proven benefits of plant-based meals in a clinical setting.

Despite arguing extensively that the Proposal already amounts to micromanagement, the No-Action Request nevertheless faults the Proposal for "not indicat[ing] how the Company should implement this essential objective." It goes without saying that implementation could take different forms, at the Company's discretion. In the NYCHH system, for example, "Food Service Associates meet with patients to educate them about the benefits of a plant-based diet and encourage them to choose the new meals as part of their healing and recovery plan of care." NYCHH, *Press Release*, *supra*. The Associate then offers the patient a plant-based "chef's recommendation" that the patient may decline, after which declination the Associate offers a second plant-based meal option.[24] If the patient declines this second option, the patient may choose a meal that is not plant-based. *Id.* Substantial implementation of the Proposal could presumably incorporate some of these steps, none of which the Company undertakes at this time.

IV. The Company May Not Exclude the Proposal Pursuant to Rule 14a-8(i)(1) or Rule 14a-8(i)(2) Solely on the Basis of the Word "Will" Appearing in the Proposal

Rule 14a-8(i)(1) permits exclusion "[i]f the proposal is not a proper subject for action by stockholders under the laws of the jurisdiction of the company's organization." The provision's note explains,

> Depending on the subject matter, some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders. In

> our experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state law. Accordingly, we will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise.

Id. Rule 14a-8(i)(2) permits exclusion if "the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject."

The Company's argument for exclusion pursuant to Rule 14a-8(1) is summarized by the following paragraph in the No-Request Letter:

> The Proposal is not cast as a recommendation or request. Instead, it requires that the Company "will make healthful, plant-based meals the default option in all food service settings, other than for patients who have special dietary exclusions." Therefore, under the wording of the Proposal, the Company would be required to take action to implement the requirements of the Proposal. Because stockholders lack authority to require action on the part of the Company with respect to such matters, as discussed in the Delaware Law Opinion, the Proposal is improper under state law and may be excluded pursuant to Rule 14a-8(i)(1).

Citing Rule 14a-8(i)(2), the No-Action Letter similarly argues that

> the Proposal would, if adopted and implemented, cause the Company to violate Delaware law because it would impermissibly impinge upon the Board's power and authority to manage the business of the Company .... Specifically, the Proposal, if implemented, would impinge upon and supplant the Board's decision-making authority by requiring that the Company make material changes to its business (with respect to meal options and food service operations) solely as a result of a stockholder vote.

The Company's absolutist view should be rejected. Notably, the Proposal does not use the traditional mandatory term "shall." Instead, the Proposal uses the aspirational word "will." The U.S. Supreme Court has recognized that words have different meanings based on their context and that even "shall"—which does not appear in the Proposal—can mean something less than mandatory, such as "will." In *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 n.9 (1995) (emphasis in original), the Court stated,

> Though "shall" generally means "must," legal writers sometimes use, or misuse, "shall" to mean "should," "will," or even "may." See D. Mellinkoff, Mellinkoff's Dictionary of American Legal Usage 402-403 (1992) ("shall" and "may" are "frequently treated as synonyms" and their meaning depends on context); B. Garner, Dictionary of Modern Legal Usage 939 (2d ed. 1995) ("Courts in virtually every English-speaking jurisdiction have held--by necessity--that *shall* means *may* in some contexts, and vice versa."). For example, certain of the Federal Rules use the word "shall" to authorize, but not to require, judicial action.

It would be extraordinary for the Staff to allow exclusion of this Proposal, as well as wholesale exclusion of countless future Proposals by other proponents, solely due to the appearance of a word that has multiple meanings. Exclusion on such a ground would undermine the purpose of Rule 14a-8. The Supreme Court recognizes that "will" is not the same as "must" and that certain words have both mandatory and precatory uses. The Staff should too.

V. Conclusion

The Physicians Committee respectfully requests that the Staff decline to issue a no-action response and inform the Company that it may not exclude the Proposal in reliance on Rule 14a-8(i). Should the Staff need any additional information in reaching a decision, please contact me at your earliest convenience.

Sincerely,

Mark Kennedy
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February 7, 2024

VIA ELECTRONIC SUBMISSION

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

Re: Reference Number 487581: Stockholder Proposal of the Physicians Committee for Responsible Medicine Submitted to Encompass Health Corporation

Ladies and Gentlemen,

On behalf of Encompass Health Corporation (the "Company"), reference is made to our letter dated January 12, 2024 (the "No-Action Request"), by which we requested that the Staff of the Division of Corporation Finance (the "Staff") of the Securities and Exchange Commission (the "Commission" or the "SEC") concur with our view that the stockholder proposal and supporting statement (the "Proposal") submitted by the Physicians Committee for Responsible Medicine (the "Proponent") may be excluded from the proxy materials (the "2024 Proxy Materials") for the Company's 2024 Annual Meeting of Stockholders (the "2024 Annual Meeting").

On February 2, 2024, the Proponent submitted a response (the "Proponent Letter") to the Commission regarding the No-Action Request. We are submitting this letter in response to the Proponent Letter to reiterate our request for confirmation that the Staff will not recommend that enforcement action be taken by the Commission if the Company excludes the Proposal from the 2024 Proxy Materials for the reasons set forth below, which supplement the reasons set forth in the No-Action Request.

RESPONSE TO PROPONENT LETTER

The Proposal states that the Company "will make healthful, plant-based meals the default option in all food service settings, other than for patients who have special dietary exclusions." For the reasons set forth in the No-Action Request, as supplemented by the reasons stated herein, we believe the Proposal may be excluded from the 2024 Proxy Materials.

I. The Proposal May Be Excluded Pursuant to Rule 14a-8(i)(7) Because It Deals with Matters Relating to the Company's Ordinary Business Operations.

In the Proponent Letter, the Proponent argues that the Proposal is not excludable under Rule 14a-8(i)(7) as related to the ordinary business operations of the Company because it relates to a sufficiently significant social policy issue, public health. However, the Proposal is directly concerned with core matters of the Company's business—the health of the Company's patients—and therefore does not transcend the Company's day-to-day business operations.

A. The Proposal relates to ordinary business operations and would amount to micromanagement of management functions.

As described in Parts I.A. through I.C. of the No-Action Request, we believe that the Proposal relates to ordinary business operations of the Company and therefore may be excluded from the 2024 Proxy Materials under Rule 14a-8(i)(7).

The Proponent asserts that the Company's providing food to patients, employees, and visitors is "not integral to [the Company's] operations." Proponent Letter at 4. This assertion is at odds with the Proponent's own emphasis on nutrition as integral to individuals' health. As a healthcare service provider, the Company's fundamental goal is to achieve positive health outcomes for its patients, and an important component of its efforts to achieve this goal is providing meals that meet the energy and nutrient demands of the Company's patient population. Though the Company is indeed "neither a fast-food restaurant chain nor a superstore," Proponent Letter at 4, inpatient healthcare facilities, such as the Company's, must nonetheless provide meals to patients, employees, and visitors on a daily basis, and these meals are an important part of the services for which the Company is reimbursed. To that end, the Company has developed and maintains an operational process to identify, plan for, procure, and provide meals to these populations. Accordingly, the no-action letters cited in the fourth full paragraph on page 4 of the Proponent Letter (also cited in the No-Action Request) are still instructive with respect to the excludability of the Proposal. This process is an ordinary business matter that is not properly delegated to shareholders due to the complex and constantly changing considerations necessary to effective decision making, as described in Part I.B. of the No-Action Request.

Furthermore, the Proposal would amount to shareholder micromanagement of decisions relating to the Company's menu options. Such decisions necessitate daily meticulous planning on the part of Company staff across multiple levels of management and with input from clinicians working with individual patients. And though the vagueness of the Proposal arguably does leave room for Company management to exercise discretion, that discretion would be inappropriately limited by the Proposal's requirements.

B. The Proposal does not focus on a sufficiently significant social policy issue such that it transcends the ordinary business operations of the Company.

The Proponent Letter asserts that the Proposal implicates a sufficiently significant social policy concern such that it transcends the ordinary business operations of the Company. This assertion, however, is based on a misapplication of the ordinary business operations exclusion provided under Rule 14a-8(i)(7).

The Proponent Letter incorrectly applies Staff guidance concerning the 14a-8(i)(7) exclusion to the interaction of the Proposal and the Company's operations. In particular, the Proponent quotes Staff Legal Bulletin No. 14C (June 28, 2005) ("SLB 14C") for the guidance that proposals that "focus on the company's minimizing or eliminating operations that may adversely affect the environment or the public's health" are not excludable under Rule 14a-8(i)(7). But this guidance does not directly apply with respect to the Proposal vis-à-vis the Company's operations. The Proposal does not seek to "minimiz[e] or eliminat[e] operations that may adversely affect … the public's health." Instead, the Proposal seeks to implement new and different operational measures at the Company that may affect the health of the Company's patients, employees and visitors. Further, the Proponent does not identify which of the Company's operations are adversely affecting the public's health; it merely suggests that plant-based diets would be a preferable alternative. Even if the Proposal's requirements would result in an incremental increase in the positive health outcomes of the Company's patients, selecting between alternative courses of action is an ordinary business decision.

Moreover, SLB 14C establishes that a proposal may not be excluded only if it would minimize or eliminate negative externalities created by a company's operations. The example given in SLB 14C of a proposal not excludable under the Staff's application of Rule 14a-8(i)(7) was a proposal by which "shareholders request[ed] … a report … on the potential environmental damage that would result from the company drilling for oil and gas in protected areas." In this example, the Staff did not concur with exclusion of the proposal because the proposal was focused on limiting the negative externality of environmental damage. By contrast, the Proposal at issue here does not seek to limit externalities (negative or otherwise) but rather focuses on measures central to the everyday operations and objectives of the Company. And instead of minimizing or eliminating a negative impact, the Proposal seeks only to dictate the means by which the Company achieves a primary operational goal—positive patient health outcomes. In doing so, the Proposal would limit management's "flexibility in directing certain core matters involving the [C]ompany's business and operations," Exchange Act Release No. 34-40018 (May 21, 1998), and, therefore, decision-making with respect to its subject matter is not properly delegated to stockholders.

The Proponent also supports its claim with citations to a number of scientific studies demonstrating the health benefits of plant-based diets. But the action demanded by the Proposal would not provide the benefits reaped by persons who "[avoid] meat throughout their lives." Proponent Letter at 3. The Company cannot control the lifelong diets of its patients, visitors, and employees, who eat only a portion of their meals, and, with respect to patients and visitors, for a very limited period of time, at the Company's facilities. The average length of patient stay at one of the Company's facilities in 2023 was 12.4 days, and the average age of all patients was 71. Nothing about the Proposal would ensure that any of these populations would alter their diets with respect to meals eaten at our hospitals or elsewhere. It is notable that the Proposal only seeks to provide patients, employees and visitors with a choice—a choice they already have regardless of whether the Proponent wants to label it a "default" option. Providing adult individuals with a choice, which is the same choice they face in every meal decision they make during their lifetimes, is inconsistent with the plain meaning of "broad societal impact" as referenced in Staff Legal Bulletin No. 14L (Nov. 3, 2021) ("SLB 14L"). The benefits of lifelong diets are too tenuously related to the actions that would be taken under the Proposal to elevate the Proposal above the ordinary business affairs of the company.

Finally, the Proponent asserts that the Staff was "deprived…of the opportunity to consider whether significant social policy issues were involved" in three stockholder proposals submitted to healthcare companies during the 2023 proxy season that would have required the subject companies to provide plant-based food options. Proponent Letter at 4. However, this assertion assumes that the Staff ignored the directives of SLB 14L, which states that the Staff "will … focus on the social policy significance of the issue that is the subject of the shareholder proposal." SLB 14L at B.2. This guidance applies regardless of whether a proponent responds to a no-action request. Additionally, the proposals at issue in *UnitedHealth Group Inc.* (Mar. 16, 2023), *Elevance Health Inc.* (Mar 6, 2023), and *HCA Healthcare, Inc.* (Mar. 6, 2023) included supporting statements arguing for the importance of plant-based meals. Because of this, we believe it is reasonable to conclude that when the Staff issued these no-action letters, it had considered the social policy issue implicated by the proposals—which the Proponent Letter seems to accept as similar to the policy issue implicated here—and determined that it was not significant enough to transcend ordinary business matters.

Therefore, because the Proposal relates to the Company's ordinary business operations and does not focus on a sufficiently significant social policy issue that transcends day-to-day matters, it may be excluded from the 2024 Proxy Materials pursuant to Rule 14a-8(i)(7).

II. The Proposal May Be Excluded Pursuant to Rule 14a-8(i)(10) Because the Company Has Substantially Implemented the Actions Requested to Be Taken.

The Proponent asserts that the Proposal is not excludable under Rule 14a-8(i)(10) because the Company has not satisfactorily addressed the Proposal's essential objective. Yet the Proponent offers contradictory descriptions of what a satisfactory program would entail. Though the Proposal, by its terms, calls only for the Company to "make healthful, plant-based meals the default option in all food service settings, other than for patients who have special dietary exclusions," the Proponent Letter describes the Proposal as "request[ing] a robust, care-based food service program that capitalizes on the proven benefits of plant-based meals in a clinical setting," which program is a "far cry" from "[m]erely making an offer" of plant-based meals to patients, employees, and visitors. Proponent Letter at 5. But in the very next paragraph, the Proponent Letter indicates that the NYCHH system's apparently satisfactory approach, in part, as follows: "The [Food Service] Associate then *offers* the patient a plant-based 'chef's recommendation' that the patient may decline, after which declination the Associate *offers* a second plant-based meal option." Proponent Letter at 5 (emphasis added). For the NYCHH, then, mere offers seem to be sufficient. The AMA policy H-150.949 cited by the Proponent does not demand that health care facilities offer plant-based foods as the "default option"; instead, with respect to plant-based food, the AMA policy just calls on health care facilities to "provid[e] a variety of healthy food, including plant-based meals." Therefore, the Company's current operations, by which all of the food service operations managed by the Company offer plant-based menu options for each meal, compare favorably with the Proposal's guidelines.

The Proponent Letter also suggests that "meet[ing] with patients to educate them about the benefits of a plant-based diet and encourage them to choose" plant-based meals should be a part of a program implemented in response to the Proposal. Proponent Letter at 5. But the Proposal itself does not contain an educational component beyond a reference in the Supporting Statement to one study that "found that providing plant-based food *offerings* and simple educational messages improved employee health and reduced health-related productivity impairments." Supporting Statement (emphasis added).

The Proponent Letter also fails to address the Company's discussion of the inapplicability of the concept of a "default option" in many of its food service settings, including its cafeteria settings where patients, employees, and visitors select meals from a published menu. No-Action Request at 9. Taken together, the Proponent's statements and omissions leave the Company unsure of how the Proponent expects the Company to implement a "default option" concept in "all food service settings" in its hospitals.

To acknowledge the imprecision of the Proposal does not contradict the Company's belief that the Proposal seeks to micromanage its ordinary business operations. Stockholders' adoption of the Proposal would infringe on management's discretion with respect to the detailed planning that supports its meal service operations. And recognition of the vagueness of the "default option" concept is also consistent with the Company's view that it has substantially implemented the Proposal, because a "default option" may be implemented in different ways at different meal service settings, as the Company has done.

III. The Proposal May Be Excluded Pursuant to Rule 14a-8(i)(2) Because, If Implemented, It Would Require the Company to Violate Delaware Law, and Pursuant to Rule 14a-8(i)(1), Because It Is Not a Proper Subject for Action by Stockholders Under Delaware Law.

The Proponent argues that the Proposal is not excludable under Rule 14a-8(i)(1) or (2) because "the Proposal does not use the traditional mandatory term 'shall.' Instead, the Proposal uses the aspirational word 'will.'" Proponent Letter at 6.

The Company accepts that "words have different meanings based on their context." Proponent Letter at 6. In fact, in its December 14, 2023 letter to the Proponent, the Company referred to the wording of the Proponent's initial submission[1] as reflecting an "aspirational view" despite its use of the word "shall," because in the context of achieving uncertain outcomes, the word "shall" could not reasonably have been read in a mandatory sense.

By contrast, the Proposal's final form reflects a mandatory usage of the word "will" in a declarative future-tense sentence indicating what, should the Proposal be adopted by shareholders, the Company *will* do. And contrary to the Proponent's assertion that the word "will" is less mandatory than the word "shall," at least one legal usage authority has recommended using the word "will" instead of "shall" when attempting to convey a mandatory meaning. See BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE 140 (2d ed. 2002) (explaining "that it's easier simply to cut all your *shalls*. Those that are mandatory you can consistently replace with *must* or (in contracts) *will* or *agrees to*.")

Moreover, the Proponent Letter does not address the Delaware Law Opinion provided by Richards, Layton & Finger, P.A. in connection with the No-Action Request. The Delaware Law Opinion was issued in part because the Proposal would impermissibly "commit the Board of Directors to a course of action." Delaware Law Opinion at 3 (citing *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 238 (Del. 2008)). For the reasons stated therein and in Parts III and IV of the No-Action Request, we believe the Proposal is excludable from the 2024 Proxy Materials under Rules 14a-8(i)(1) and (2).

CONCLUSION

For the foregoing reasons and those set forth in the No-Action Request, the Company requests your confirmation that the Staff will not recommend any enforcement action to the Commission if the Proposal is omitted from the 2024 Proxy Materials.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to tgregg@maynardnexsen.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (205) 254-1212.

Sincerely,

Timothy W. Gregg

Enclosures
cc: Anna Herby, RD, Physicians Committee for Responsible Medicine
Mark Kennedy, Physicians Committee for Responsible Medicine
Patrick Darby, Encompass Health Corporation
Stephen D. Leasure, Encompass Health Corporation

[1] The Proponent's first submission to the Company contained the following language: "RESOLVED: Encompass Health Corporation **shall** achieve significant revenue savings, improve patient satisfaction, improve employee health, reduce absenteeism, and enhance its image as a healthcare leader by adopting the American Medical Association policy for healthful foods for healthcare facilities and implementing the innovative program for healthful hospital food developed by the NYC Health + Hospitals system." (emphasis added).

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February 12, 2024

VIA ONLINE SHAREHOLDER PROPOSAL FORM
Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Reference Number 487581: No-Action Request by Encompass Health Corporation

Dear Staff:

I write on behalf of the Physicians Committee for Responsible Medicine ("Physicians Committee") pursuant to Rule 14a-8(k) in response to correspondence ("Letter") dated February 7, 2024, submitted by Encompass Health Corporation ("Company") in support of its view ("No-Action Request") that it may exclude the Physicians Committee's shareholder resolution and supporting statement (collectively "Proposal") from the proxy materials to be distributed in connection with the Company's 2024 annual meeting of shareholders. Pursuant to Rule 14a-8(k) and *Announcement: New Intake System for Rule 14a-8 Submissions and Related Correspondence* (Nov. 7, 2023), the Physicians Committee submits this letter electronically and is concurrently submitting a copy to the Company.

The Company argues that "the Proposal would amount to shareholder micromanagement of decisions relating to the Company's menu options" and is therefore excludable pursuant to Rule 14a-8(i)(7). Letter at 2. Two sentences later, however, the Company concedes that the "vagueness of the Proposal arguably does leave room for Company management to exercise discretion[.]" *Id.* In any event, to the extent that the Proposal touches on the Company's ordinary business operations, the Proposal may not be excluded because it focuses on public health, a social policy issue that has a broad societal impact and transcends the ordinary business of the Company.

The Company seems to argue that the Proposal pertains not to "the public's health" but to the "health of the Company's patients, employees and visitors." *See id.* Yet "patients, employees, and visitors" are literally all of the people who set foot in the Company's 157 hospitals across more than three dozen U.S. states. The Company's business is public health.

The Company argues that "[n]othing about the Proposal would ensure that any of these populations would alter their diets with respect to meals eaten at our hospitals or elsewhere. … The benefits of lifelong diets are too tenuously related to the actions that would be taken under the Proposal to elevate the Proposal above the ordinary business affairs of the company." *Id.* at 3.

This defeatist assertion is at odds with the Company's earlier statement that "the Company's fundamental goal is to achieve positive health outcomes for its patients." *See id*. As noted in the Proposal, "[s]erving healthful food helps patients get well and stay well over the long term, creating a teachable moment in which patients learn which foods help treat and prevent chronic disease." The studies cited by the Physicians Committee in prior correspondence support this.

Regarding Rule 14a-8(i)(10), the Company has done nothing in the way of implementing the Proposal. As noted previously, the nation's largest municipal healthcare system implements its "default option" for patients by having designated personnel discuss the benefits of plant-based nutrition and then recommend plant-based meals that comport with the patient's care plan. Only in the context of a third-tier option may a patient vary from this default. In contrast, the Company's mere publication of a menu is what actually demonstrates an intent to do nothing other than "[p]roviding adult individuals with a choice." *See* Letter at 3.

The Company baselessly insists on an "inapplicability of the concept of a 'default option' in many of its food service settings, including its cafeteria settings." *See id.* at 4. But in the very next paragraph, the Company contradicts itself by acknowledging that "a 'default option' may be implemented in different ways at different meal service settings[.]" *Id*. The Physicians Committee agrees with the latter and is certain that "Company staff across multiple levels of management and with input from clinicians," *see id.* at 2, are capable of exercising their discretion to make a good faith effort in this regard.

Regarding Rules 14a-8(i)(1) and (2), the Physicians Committee previously cited the U.S. Supreme Court's recognition, in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 n.9 (1995), that "shall," which is not used in the Proposal, can mean something less than mandatory, such as "will," which is used in the Proposal. The Company cites Bryan A. Garner for a different conclusion, *see* Letter at 5, but Mr. Garner's words are not binding precedent that justifies the exclusion of all Proposals that use the word "will."

The Company asserts that the Physicians Committee did "not address the Delaware Law Opinion provided by Richards, Layton & Finger, P.A. in connection with the No-Action Request." *Id.* at 5. The law firm premised the entirety of its opinion on the mistaken notion, noted above and addressed in the Physicians Committee's prior correspondence, that "will" a mandatory term. The Supreme Court rejects this premise.

The Physicians Committee therefore respectfully requests that the Staff decline to issue a no-action response and inform the Company that it may not exclude the Proposal.

Sincerely,

Mark Kennedy
Senior Vice President of Legal Affairs
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