

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

1440 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-2111

TEL: (202) 371-7000

FAX: (202) 393-5760

www.skadden.com

DIRECT DIAL
202-371-7233
DIRECT FAX
202-661-8280
EMAIL ADDRESS
marc.gerber@skadden.com

FIRM/AFFILIATE OFFICES

BOSTON
CHICAGO
HOUSTON
LOS ANGELES
NEW YORK
PALO ALTO
WILMINGTON

BEIJING
BRUSSELS
FRANKFURT
HONG KONG
LONDON
MOSCOW
MUNICH
PARIS
SAO PAULO
SEOUL
SHANGHAI
SINGAPORE
TOKYO
TORONTO

BY EMAIL (shareholderproposals@sec.gov)

December 11, 2018

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

RE: Johnson & Johnson – 2019 Annual Meeting
Omission of Shareholder Proposal of The
Doris Behr 2012 Irrevocable Trust

Ladies and Gentlemen:

Pursuant to Rule 14a-8(j) promulgated under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), we are writing on behalf of our client, Johnson & Johnson, a New Jersey corporation, to request that the Staff of the Division of Corporation Finance (the “Staff”) of the U.S. Securities and Exchange Commission (the “Commission”) concur with Johnson & Johnson’s view that, for the reasons stated below, it may exclude the shareholder proposal and supporting statement (the “Proposal”) submitted by The Doris Behr 2012 Irrevocable Trust (the “Proponent”) from the proxy materials to be distributed by Johnson & Johnson in connection with its 2019 annual meeting of shareholders (the “2019 proxy materials”).

In accordance with Section C of Staff Legal Bulletin No. 14D (Nov. 7, 2008) (“SLB 14D”), we are emailing this letter and its attachments to the Staff at shareholderproposals@sec.gov. In accordance with Rule 14a-8(j), we are simultaneously sending a copy of this letter and its attachments to the Proponent as

notice of Johnson & Johnson's intent to omit the Proposal from the 2019 proxy materials.

Rule 14a-8(k) and Section E of SLB 14D provide that shareholder proponents are required to send companies a copy of any correspondence that the shareholder proponents elect to submit to the Commission or the Staff. Accordingly, we are taking this opportunity to remind the Proponent that if the Proponent submits correspondence to the Commission or the Staff with respect to the Proposal, a copy of that correspondence should concurrently be furnished to Johnson & Johnson.

I. The Proposal

The text of the resolution in the Proposal is set forth below:

Resolved: The shareholders of Johnson & Johnson request the Board of Directors take all practicable steps to adopt a mandatory arbitration bylaw that provides:

- for disputes between a stockholder and the Corporation and/or its directors, officers or controlling persons relating to claims under federal securities laws in connection with the purchase or sale of any securities issued by the Corporation to be exclusively and finally settled by arbitration under the Commercial Rules of the American Arbitration Association (AAA), as supplemented by the Securities Arbitration Supplementary Procedures;
- that any disputes subject to arbitration may not be brought as a class and may not be consolidated or joined;
- an express submission to arbitration (which shall be treated as a written arbitration agreement) by each stockholder, the Corporation and its directors, officers, controlling persons and third parties consenting to be bound;
- unless the claim is determined by the arbitrator(s) to be frivolous, the Corporation shall pay the fees of the AAA and the arbitrator(s), and if the stockholder party is successful, the fees of its counsel;
- a waiver of any right under the laws of any jurisdiction to apply to any court of law or other judicial authority to determine any matter or to appeal or otherwise challenge the award, ruling or decision of the arbitrator(s);

- that governing law is federal law; and
- for a five-year sunset provision, unless holders of a majority of Corporation shares vote for an extension and the duration of any extension.

II. Basis for Exclusion

We hereby respectfully request that the Staff concur in Johnson & Johnson's view that it may exclude the Proposal from the 2019 proxy materials pursuant to Rule 14a-8(i)(2) because implementation of the Proposal would cause Johnson & Johnson to violate federal law.

III. Background

On November 12, 2018, Johnson & Johnson received the Proposal, accompanied by a cover letter from the Proponent dated November 9, 2018, and a letter from Fifth Third Bank dated November 9, 2018, verifying the Proponent's stock ownership as of such date (the "Broker Letter"). Copies of the Proposal, the cover letter and the Broker Letter are attached hereto as Exhibit A.

IV. The Proposal May be Excluded Pursuant to Rule 14a-8(i)(2) Because Implementation of the Proposal Would Cause Johnson & Johnson to Violate Federal Law.

Rule 14a-8(i)(2) permits a company to exclude a shareholder proposal if implementation of the proposal would cause the company to violate any state, federal or foreign law to which it is subject. For the reasons discussed below, Johnson & Johnson believes that adoption of a bylaw amendment as described in the Proposal would be contrary to the public policy interests underlying the federal securities laws and would cause Johnson & Johnson to violate federal law. Accordingly, the Proposal is excludable under Rule 14a-8(i)(2) as a violation of law.

Johnson & Johnson believes that adoption of a bylaw amendment as described in the Proposal would be in violation of Section 29(a) of the Exchange Act. Section 29(a) of the Exchange Act broadly states that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void." In the context of arbitration, the U.S. Supreme Court has limited the broad scope of Section 29(a) of the Exchange Act to prohibit only waivers of the substantive obligations imposed by the Exchange Act and has concluded that in the narrow circumstance where the prescribed procedures are

subject to the oversight authority of the Commission, an agreement to arbitrate does not constitute a waiver of the protections of the Exchange Act. *Shearson/Am. Exp. Inc. v. McMahon*, 482 U.S. 220, 228–29, 234 (1987). The Staff has previously concurred with the exclusion, pursuant to Rule 14a-8(i)(2), of a shareholder proposal relating to a bylaw amendment where the company argued that the bylaw amendment would, if implemented, cause the company to violate Section 29(a) of the Exchange Act. *See, e.g., Gannett Co., Inc.* (Feb. 22, 2012) (shareholder proposal requesting that the company adopt a bylaw amendment to provide that certain controversies or claims, including those arising under the federal securities laws, shall be settled by arbitration); *Pfizer Inc.* (Feb. 22, 2012) (same); *see also Alaska Air Group, Inc.* (Mar. 11, 2011) (shareholder proposal requesting that the company initiate the appropriate process to amend its charter to provide for a partial waiver of the “fraud-on-the-market” presumption of reliance excludable pursuant to Rule 14a-8(i)(2) because the proposed charter amendment would violate Section 29(a) of the Exchange Act).

As in the precedent described above, adoption of a bylaw amendment as requested by the Proposal would weaken the ability of investors in Johnson & Johnson’s securities to pursue a private right of action under Exchange Act Section 10(b) and Rule 10b-5. In particular, Section (e) of the bylaw amendment contained in the proposal in *Gannett* and *Pfizer* would have prevented any shareholder who had a claim subject to arbitration from bringing a claim in a representative capacity on behalf of a class of Gannett or Pfizer shareholders, effectively waiving shareholders’ abilities to bring claims under Exchange Act Section 10(b) and Rule 10b-5. Similarly, in this instance, the second bullet point of the Proposal seeks to prevent any shareholder who has a claim subject to arbitration from bringing the claim on behalf of a class of Johnson & Johnson shareholders or by consolidation or joinder in order to resolve the dispute. In addition, the fifth bullet point of the Proposal provides a waiver of any right under the laws of any jurisdiction to apply to any court of law or other judicial authority to determine any matter or to appeal or otherwise challenge the award, ruling or decision of the arbitrator(s), thus effectively waiving shareholders’ abilities to bring claims under Exchange Act Section 10(b) and Rule 10b-5. The expression in the supporting statement that “[the Proponent] believe[s] arbitration is an effective alternative to class actions” further emphasizes the Proposal’s request for mandatory arbitration of certain claims and the prevention of shareholders from maintaining an arbitration in a representative capacity on behalf of similarly situated shareholders. Moreover, claims arbitrated under the bylaw amendment as described in the Proposal will be governed by the Commercial Rules of the American Arbitration Association, as supplemented by the Securities Arbitration Supplementary Procedures, none of which are subject to the Commission’s oversight. Given the substantial similarities between the Proposal and

the proposal in *Gannett* and *Pfizer*, including, the lack of any meaningful distinction between the two proposals with respect to the ability of investors to recover damages in a dispute alleging a violation of Exchange Act Rule 10b-5, it is clear that the Proposal should be excludable under Rule 14a-8(i)(2) because implementation of the Proposal would cause Johnson & Johnson to violate the federal securities laws.

The Staff has long taken the view that including arbitration clauses in the governing documents of U.S. public companies is contrary to public policy. *See* Thomas L. Riesenberg, *Arbitration and Corporate Governance: A Reply to Carl Schneider*, 4 *Insights* 8 (1990). Mr. Riesenberg, then Assistant General Counsel of the Commission, outlined his views that mandatory pre-dispute arbitration of shareholder claims would “be contrary to the public interest to require investors who want to participate in the nation’s equity markets to waive access to a judicial forum for vindication of federal or state law rights, where such a waiver is made through a corporate charter rather than through an individual investor’s decision.” In addition, the U.S. Supreme Court “has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 308 (2007).

Furthermore, no indication has been given that this policy position has changed since 1990. In fact, in an April 24, 2018 response letter to Congresswomen Carolyn B. Maloney, Commission Chairman Jay Clayton provided a detailed account of his views on the idea of mandatory arbitration of shareholder claims, stating that the matter is “complex” and involves important issues under federal securities laws and state corporate laws, as well as “many public policy considerations.”¹ Although Chairman Clayton noted that the U.S. Supreme Court has “affirmed the strong federal interest in promoting the arbitration of claims under federal laws,” he expressed recognition that “[t]he federal securities laws provide a basis for private rights of action by investors” and that “[t]here is a long history of claims of this type” in federal and state courts, “including as class actions.” Ultimately, Chairman Clayton explained that in his view a number of pressing and significant matters other than the inclusion of mandatory arbitration clauses in the governing documents of U.S. public companies more urgently require the Commission’s limited rulemaking and other related resources. Accordingly, in light of the Staff’s historical view and the various legal and policy considerations,

¹ Letter from Chairman Jay Clayton to The Honorable Carolyn B. Maloney (Apr. 24, 2018) is available at <https://maloney.house.gov/sites/maloney.house.gov/files/MALONEY%20ET%20AL%20-%20FORCED%20ARBITRATION%20-%20ES156546%20Response.pdf>.

Chairman Clayton stated that any review of a mandatory arbitration clause in the context of a U.S. company's initial public offering registration statement under the Securities Act of 1933, as amended, for example, "should be conducted in a measured and deliberative manner" and "the decision about whether to declare the filing effective should be made by the Commission, not the Division of Corporation Finance by delegated authority." Similar to Chairman Clayton's views with respect to an initial public offering of a U.S. company, Johnson & Johnson believes that its 2019 annual meeting proxy statement and the Staff's Rule 14a-8 no-action letter process is not the right forum to address the issue and instead believes the appropriate course of action is for the issue to be analyzed, debated and decided by Congress, through an amendment to the Exchange Act, or by the Commission, through the appropriate notice and comment rulemaking process.

Accordingly, consistent with the precedent described above, the Proposal should be excluded from Johnson & Johnson's 2019 proxy materials pursuant to Rule 14a-8(i)(2) because implementation of the Proposal would cause Johnson & Johnson to violate federal law.

V. Conclusion

Based upon the foregoing analysis, Johnson & Johnson respectfully requests that the Staff concur that it will take no action if Johnson & Johnson excludes the Proposal from its 2019 proxy materials.

Should the Staff disagree with the conclusions set forth in this letter, or should any additional information be desired in support of Johnson & Johnson's position, we would appreciate the opportunity to confer with the Staff concerning these matters prior to the issuance of the Staff's response. Please do not hesitate to contact the undersigned at (202) 371-7233.

Very truly yours,



Marc S. Gerber

Office of Chief Counsel
December 11, 2018
Page 7

Enclosures

cc: Thomas J. Spellman III
Assistant General Counsel and Corporate Secretary
Johnson & Johnson

Hal Scott
Trustee
The Doris Behr 2012 Irrevocable Trust

EXHIBIT A

(see attached)

Resolved: The shareholders of Johnson & Johnson request the Board of Directors take all practicable steps to adopt a mandatory arbitration bylaw that provides:

- for disputes between a stockholder and the Corporation and/or its directors, officers or controlling persons relating to claims under federal securities laws in connection with the purchase or sale of any securities issued by the Corporation to be exclusively and finally settled by arbitration under the Commercial Rules of the American Arbitration Association (AAA), as supplemented by the Securities Arbitration Supplementary Procedures;
- that any disputes subject to arbitration may not be brought as a class and may not be consolidated or joined;
- an express submission to arbitration (which shall be treated as a written arbitration agreement) by each stockholder, the Corporation and its directors, officers, controlling persons and third parties consenting to be bound;
- unless the claim is determined by the arbitrator(s) to be frivolous, the Corporation shall pay the fees of the AAA and the arbitrator(s), and if the stockholder party is successful, the fees of its counsel;
- a waiver of any right under the laws of any jurisdiction to apply to any court of law or other judicial authority to determine any matter or to appeal or otherwise challenge the award, ruling or decision of the arbitrator(s);
- that governing law is federal law; and
- for a five-year sunset provision, unless holders of a majority of Corporation shares vote for an extension and the duration of any extension.

Supporting Statement

The United States is the only developed country in which stockholders of public companies can form a class and sue their own company for violations of securities laws. As a result, U.S. public companies are exposed to litigation risk that, in aggregate, can cost billions of dollars annually. The costs (in dollars and management time) of defending and settling these lawsuits are borne by stockholders. Across the corporate landscape, this effectively recirculates money within the same investor base, minus substantial attorneys' fees. Lawsuits are commonly filed soon after merger or acquisition announcements, or stock price changes, based on little more than their happening.

We believe arbitration is an effective alternative to class actions. It can balance the interests and rights of plaintiffs to bring federal securities law claims, with cost-effective protections for the corporation and its stockholders.

The Supreme Court has held that mandatory individual arbitration provisions are not in conflict with any provision of the federal securities laws, and the SEC has no basis to prohibit mandatory

arbitration provisions that apply to federal securities law claims. Furthermore, New Jersey law establishes that the bylaws of a corporation are to be interpreted as a contract between the corporation and its stockholders.

A bylaw providing for mandatory individual arbitration of federal securities law claims would permit stockholders and corporations to opt-out of a flawed system that often seems more about the lawyers than the claimants and invariably wastes stockholder funds on expensive litigation costs.

The Doris Behr 2012 Irrevocable Trust
Hal Scott, Trustee
Harvard Law School, Lewis 339, 1557 Massachusetts Ave, Cambridge, MA 02138

November 9, 2018

Mr. Thomas J. Spellman III
Assistant General Counsel and Corporate Secretary
Johnson & Johnson
One Johnson & Johnson Plaza
New Brunswick, NJ 08933

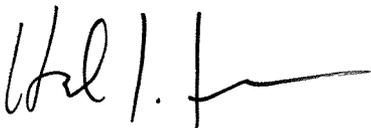
Dear Mr. Spellman:

The undersigned, as trustee of The Doris Behr 2012 Irrevocable Trust (the "Stockholder"), is providing this notice in accordance with Rule 14a-8 of the Securities Exchange Act of 1934, as amended ("Rule 14a-8"). The Stockholder offers the attached proposal (the "Proposal") for the consideration and vote of shareholders at the 2019 annual meeting of shareholders (the "Annual Meeting") of Johnson & Johnson (the "Company"). The Stockholder requests that the Company include the Proposal in the Company's proxy statement for the Annual Meeting.

Letters from the Stockholder's custodian and sub-custodian documenting the Stockholder's continuous ownership of the requisite amount of the Company's stock for at least one year prior to the date of this letter are attached. The Stockholder intends to continue its ownership of at least the minimum number of shares required by Rule 14a-8 through the date of the Annual Meeting.

I represent that the Stockholder or its agent intends to appear in person or by proxy at the Annual Meeting to present the attached Proposal.

Very truly yours,

A handwritten signature in black ink, appearing to read "Hal Scott", with a long horizontal flourish extending to the right.

Hal Scott
Trustee

Enclosures: Shareholder Proposal
Custodian and Sub-Custodian Letters

November 9, 2018

To whom it may concern:

Goulstorrs & Co., Inc., which is wholly owned by Goulston & Storrs LLP, is the custodian for the Doris Behr 2012 Irrevocable Trust and holds shares on behalf of the Doris Behr 2012 Irrevocable Trust in our account at Fifth Third Bank. This letter is in response to a request by the Doris Behr 2012 Irrevocable Trust and verifies that the Doris Behr 2012 Irrevocable Trust has been a beneficial owner of 1,050 shares of Johnson and Johnson (CUSIP 478160104) continuously for at least one year as of and including November 9, 2018. Verification of this ownership from a DTC participating bank (Number 2116), Fifth Third Bank, is enclosed.

Sincerely,



Michelle M. Porter
Assistant Secretary
Goulstorrs & Co., Inc.



November 9, 2018

To whom it may concern:

Fifth Third Bank is the sub-custodian for Goulstorrs & Co., Inc., which in turn is the custodian for the Doris Behr 2012 Irrevocable Trust. This letter is in response to a request by the Doris Behr 2012 Irrevocable Trust regarding confirmation from Fifth Third Bank as sub-custodian. Per statement provided by Goulstorrs & Co, Inc., Doris Behr 2012 Irrevocable Trust has been a beneficial owner of 1,050 shares of Johnson and Johnson (CUSIP 478160104) stock continuously for at least one year as of and including November 9, 2018.

We verify, as custodian for Goulstorrs & Co, Inc., that as of November 9, 2018, the Doris Behr 2012 Irrevocable Trust held, and has continuously held for at least one year, 1,050 shares of Johnson and Johnson. Fifth Third Bank is a DTC participant 2116.

Sincerely,

A handwritten signature in black ink, appearing to read 'Anoop McKim', written in a cursive style.

Anoop McKim
Senior Relationship Manager
Fifth Third Institutional Services